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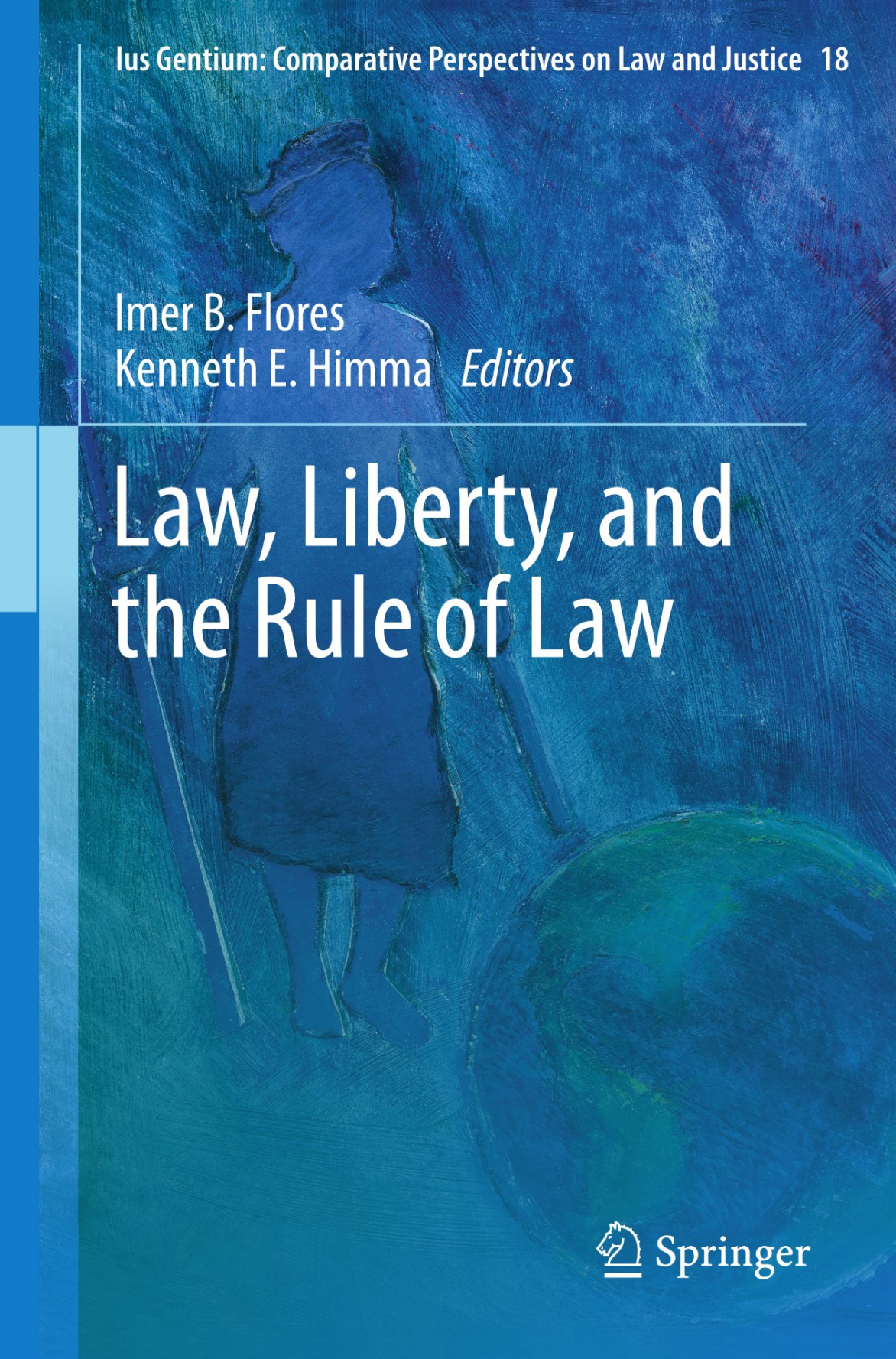
Law, Liberty, and the Rule of Law



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Chapter 3
Plato and the Rule of Law

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3.1 Introduction

My primary aim in this essay is to identify some possible avenues of discussion about Plato's legal philosophy and the modern concept of the rule of law. The notion of the rule of law is important to legal philosophy in all its forms and not only where topics of general jurisprudence are considered. Legal punishment, for instance, can be justified (or criticized) more straightforwardly without reference to its legal character: one could simply offer a moral justification (or criticism) of punishment in general. But to do only that would be to risk overlooking the characteristics of *legal* punishment, whose *institutional character* is a complicating factor in our moral analysis of it. Criminal punishment in our society has an official place within and is legitimately effectuated only by officials authorized by law, who themselves rely upon other officials to react to, discover, and prosecute perceived violations of criminal law. The entire legal system is thus implicated in the process of punishing crime, and *the* fundamental principle of legal systems is "the rule of law." Furthering our understanding of the rule of law will thereby sharpen our understanding of criminal law as a whole and criminal punishment in particular.

The example of criminal punishment highlights the relevance of the rule of law to this particular problem in legal philosophy. The issue of punishment also brings forth the appreciable value of Plato's philosophical reflections and arguments about law. Another aim of this essay is to elucidate some of the reasons for the fact that, in general, Plato is an underrated legal philosopher. It cannot be denied that Plato's work on *particular* legal problems and issues is worthy of serious consideration, yet it is perhaps contestable whether Plato's philosophy of law is, taken more

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broadly, of relevance to twenty-first century legal philosophy in the grand sense of "general jurisprudence." You would be hard-pressed to find, for instance, any current discussions of "the concept of law" where Plato is given a voice. His absence is, I think, an oversight on our part, one that acts to the detriment of our understanding of law, including the concept of law, and in particular the rule of law.

I have said that my primary aim is to identify the relevance of what Plato has to say about the rule of law. A secondary and related aim is to argue for Plato's relevance to contemporary legal philosophy more broadly. I now warn you of a consequence of these two goals: much will be said about the methodology of legal philosophy before anything is said about the rule of law as Plato understands it. Having done much work myself on methodological questions in legal theory, I can sincerely empathize with those of you who cannot help but bemoan their appearance in my discussion. Nevertheless, putting ourselves in a position to appreciate Plato's thoughts on the rule of law requires some consideration of the methodological suppositions whence Plato's legal philosophy develops itself. Plato has much to say about particular problems in legal philosophy, such as the justification of punishment, as well as much to say about more general or abstract issues, such as the rule of law – yet he generally connects these analyses together, and this characteristic refusal to confine his discussions to one level of analysis is worthy of consideration in its own right. So some methodological discussion is unavoidable.

My discussion will proceed, initially, by showing that the relative lack of Plato's direct influence on contemporary legal and philosophy is due in large part to contestable claims or presuppositions about his legal philosophy. While many of the accusations of irrelevance which have been made against Plato's political philosophy have been shown to be overstated, Plato's relevance to legal philosophy is still not fully recognized. This is a sad state of affairs, especially since Plato is perhaps most underrated by a group of legal philosophers whose own methodological disputes are leading them towards conclusions which Plato had long ago arrived at. In the second section of my discussion I shall move on to consider the rule of law itself.

3.2 The Place of Plato in Modern Legal Philosophy

While Simon Blackburn correctly notes that much of the western philosophical tradition "contains vehement rejections of Plato, rather than footnotes to him" (Blackburn 2008, 4), that is not the case with present-day legal philosophy, where Plato's work is, with a few notable exceptions, now largely relegated to footnotes. In a very recent compilation of essays on Plato's relevance to modern law, Richard Brooks, the editor, observes that "[t]o treat Plato seriously today seems audacious, since many of his political, epistemological and metaphysical views seem at worst outrageous and at best quaint" (2007, xiii fn). We need not consider a detailed

genealogy of the waxing and waning of Plato's influence in legal philosophy to take note of a few claims against Plato's contemporary relevance:

1. Plato's legal philosophy, like all of his philosophical work, depends upon dubious metaphysical notions (*v.gr.* the theory of the forms);
2. The context of Plato's discussions renders his conclusions anachronistic; and
3. Plato is simply not a legal philosopher in the present-day sense.

A brief consideration will show that each of these claims can be contested. In some cases, they have less import than might first appear; in other cases, they are simply misleading or wholly incorrect.

3.2.1 Metaphysics

Does Plato's metaphysics require us to devalue his contributions to legal philosophy? In particular, does his theory of the forms force us to choose between, on the one hand, accepting his legal theory as one imbued with (to our modern eyes) empirically indefensible transcendental concepts or, on the other hand, as Plato-lite, "to be read regardless of our attitude to the heavy-duty metaphysics" (Blackburn 2008, 15)?[1] Fortunately, the claim that Plato's metaphysics renders his legal philosophy unpalatable is one of the easiest of the claims to set aside, for we are no longer bound to Neo-Platonist interpretations of Plato's legal and political philosophy.

Almost 25 years ago R.F. Stalley observed: "So far as logic, metaphysics and epistemology are concerned, the traditional *Republic*-centred view of Plato is now extinct, at least among English-speaking scholars" (1983, 2).[2] I suggest, then, that we can proceed apace with some degree of confidence that, with regard to Plato's legal philosophy, or at least the positions he sets forth in the *Laws,* it is not unwarranted to assume a considerable degree of relative freedom from the spectre of the Neo-Platonists' emphasis on the forms. Making that assumption, however, does raise some problems which we should at least take note of. First, it might commit us to the developmentalist camp of the developmentalist/unitarian divide in the interpretation of Plato's work as a whole.[3] Secondly, it might inadvertently lead us to inappropriately de-emphasize what I call Plato's *integrative approach* to legal philosophy.

[1] Blackburn is referring specifically to the *Republic*, but his turn of phrase seems equally applicable to the project of "lite-ifying" Plato's legal philosophy.

[2] Stalley (1983, 2) goes on to say: "Those trained in the analytic tradition of philosophy have found that they can learn as much, if not more, from late dialogues such as the *Sophist* as they can from those of the middle period. As yet there has been no corresponding change with regard to political philosophy… a re-evaluation of the *Laws* is overdue."

[3] *Vid*. *v.gr.* Melissa Lane's discussion of the chronology of Plato's dialogues (Lane 2005, 160).

The second problem is easy enough to avoid, but at this point I must admit to accepting the widely but not universally held belief that the *Laws* appeared in Plato's so-called late period. There is also a third problem that arises in particular from my emphasis on the *Laws*: I may be taking what was arguably meant to be a popular work to be more philosophical than it really is. Malcolm Schofield suggests that the *Laws* "offers an account of the transcendent moral and religious framework of political and social life, and the legal norms needed to sustain it, that is designed to be persuasive to citizens at large… without any particular talent for philosophy or experience of it" (2006, 18). With luck, the third section of this essay will show that, regardless of its ultimate philosophical weightiness in comparison to his other works, Plato's *Laws* provides material for consideration of Plato's legal theory which is of considerable significance to the idea of the rule of law.

3.2.2 Anachronisms

While Plato's metaphysics need not be a barrier to our understanding of his legal philosophy, it can be difficult to reconcile some of our own fundamental beliefs and considered moral conclusions with those held by Plato. Consider that, while Richard Brooks is clearly sympathetic to the notion that Plato *is* relevant to modern law, he himself finds it necessary to abstract away Plato's more "egregious beliefs" (Brooks 2007, xv):

> Of course, we moderns are not ready to simply adopt Plato's conclusions, partly because the conclusions he offers seem so offensive to modern thought… His acceptance of slavery, of the inequality of classes and peoples and of the rule over the producing classes, as well as his crude and radical proposals on eugenics and on the radical sharing of property, is unacceptable…

Such egregious moral conclusions are problematic not only because they are, to us, morally indefensible, but also because they suggest that the social, political, and institutional context which Plato is writing about is so different from our own modern context as to make his political and legal philosophy wholly anachronistic and so, for us, wholly unhelpful for understanding law. Yet we need not defend Plato's moral conclusions or beliefs, and in fact the tensions we encounter – between, for instance, what he has to say about law, the moral values he attributes to legal practices, and the moral presuppositions or conclusions he himself makes – may be helpful in critically assessing his legal philosophy.

There is course the danger of misrepresenting Plato's legal philosophy (or his political philosophy or any other aspect of his thought) by artificially separating it from his moral philosophy – but to do that would be to do wilful violence to his philosophical methodology rather than to disagree with his moral conclusions. We can disagree with Plato on matters of morality without resorting to charges of anachronism. Perhaps a more plausible version of the charge of anachronism (hence general irrelevance) would highlight the fact that the *institutional* structures of ancient

Greece are hardly identical with our own, and that, despite considerable historical, ideological, and rhetorical influence, the difference between Athenian legal institutions and our modern legal institutions is too extreme to permit any heuristic application of, for instance, Plato's conception of the rule of law to the rule of law as it is *for us*. By emphasizing the institutional differences a critic could argue that while Plato might have something to contribute to some debates in applied legal philosophy, such as the justification of criminal punishment, he cannot contribute to other debates, such as the role of the rule of law, because in the former instances the problem surfaces in the same way in all legal systems, while in the latter cases the institutional features of the particular legal system make comparison impossible.

The charge of institutional (rather than moral) anachronism is, it seems to me, a relatively insignificant one, at least as regards the rule of law. It relies on the presupposition that differences in institutional arrangements between legal systems reflect differences in the values and principles those legal systems instantiate. But in fact different institutional or practical arrangements sometimes instantiate the same principles or values, while at other times nearly identical institutional or practical arrangements instantiate different principles or values. This is clear with regard to the scope of criminal penalties. The existence of the death penalty in a legal system seems to have little to do with its structure and institutional arrangements. Canada and the United States have very similar institutions and practices as regards criminal law, but in one nation the most severe penalty for premeditated homicide is life imprisonment, while in the other convicted murders can be executed. Contrariwise, in American courts evidence obtained illegally is much more likely to be excluded in a trial, while in Canadian courts illegally obtained evidence is often usable in a prosecution.[4] Even at the most general level of political organization, institutional arrangements do not track principled commitments. Canada and the United Kingdom are parliamentary democracies, yet in the one judicial review is a pronounced feature of the legal and legislative system while in the other the principle of parliamentary supremacy carries much greater weight. While in the actual world principles of punishment and the degree of legislative authority do vary widely from place to place and time to time, that variance is not due to a simple correlation between, on the one hand, the content of those principles and, on the other hand, institutional structures and practices.

Plato's legal philosophy is not obviously susceptible to charges of anachronism and it ought not to be relegated to the history of ideas on that basis. Nonetheless, issues of historical interpretation and retrospective analyses arise whenever we attempt to learn from long-past philosophical work. We should be particularly careful not to induce anachronisms by attributing to Plato concepts or ideas he did not hold and methodologies he did not use. Malcolm Schofield, for instance, points out the

[4] The use of illegally obtained evidence is permitted by Canadian courts if its exclusion would "bring the administration of justice into disrepute", and it is not at all uncommon in a serious case for a Canadian court to make use of that clause.

while modern concept of the state is useful for the historical analysis it is not a concept which fully corresponds to what Plato and Aristotle had in mind when using the term *polis* (2006, 34). We should be equally careful, then, to recognize when historical contexts are relevant and to recognize when ideas and institutions, which might initially appear similar to our ideas and institutions, in fact turn out to be very different. Athenian democracy, to give just one example, is very different from modern representative democracy. To conflate the two types of political organization together is to invite significant misunderstanding and, importantly, to miss out on opportunities to engage with thinkers from the past. Thomas Brooks asks that we "recognize that Plato's critique of 'democracy' is a critique of 'Athenian democracy' and not democracy as we understand it today"; armed with that distinction, Brooks argues that "most, if not all, of his criticisms of democracy do not create specific problems for modern democracy precisely for this reason" (Brooks 2008, 2).

3.2.3 Plato and General Jurisprudence

The disparity between Plato's moral beliefs (*v.gr.* that slavery is justifiable) and our own fundamental moral beliefs does not prevent us from taking Plato seriously when he talks about politics or law; nor do the obvious dissimilarities between ancient Greek and modern political and institutional arrangements prevent us from engaging with Plato's claims and criticisms about very particular issues such as criminal punishment as well as very general projects such as the constitutional structure of a society. Yet one thing might stand in the way of a fuller appreciation of Plato's significance to modern legal philosophy: his contributions to general jurisprudence.

Modern legal philosophy, like most other subdivisions within philosophy, suffers from an overemphasis on specialization and compartmentalization. We have also, as philosophers have always done, struggled with the classification of various substantive, theoretical, and methodological philosophical positions. Intensive specialization within the modern academy can lead us to consider Plato when we address particular problems, such as the justification of criminal punishment, but ignore him when we pay philosophical attention to legal systems as a whole. Plato's absence from debates in general jurisprudence – debates about such things as the concept of law and the nature of legal authority – is especially lamentable because Plato himself prefigured an integrative practice of legal philosophy that is rapidly becoming, if it has not already become, the preferred methodological approach in general jurisprudence. Present-day legal philosophers cover a lot of ground. The wide scope and varied working materials of philosophical inquiry into law leads some legal philosophers to prefer the term "legal theory" since that label readily encompasses a multitude of scholarly disciplines, including sociology, economics, history, psychology, and anthropology, among many others.

It is not only the case, however, that we can investigate law from many descriptive and critical perspectives; it is also the case that we can consider law at many different

levels. Some legal philosophers are concerned with problems at the level of individual legal subjects and their actions – the possible justifications for judicial punishment, for instance, or the character of legal reasons in terms of action theory. Other legal philosophers survey legal phenomena from a different perspective, aiming to understand its institutional characteristics, or to explicate its relation to modern democratic societies. Regardless of whether a legal philosopher is considering the relation of a particular kind of law or legal action to a particular kind of rational subject, or instead is concerned with the relation of legal systems to different constitutional structures, the complexity of law allows for very fine-grained legal-philosophical forays to complement and in turn to be enlightened by large-scale analyses of law in its grander modes. In large part, it is the breadth of philosophical inquiry into law which makes it so rich.

Given the current trend towards a very liberal view as to what constitutes legal philosophy and legal theory, it is peculiar that Plato is not a more prominent figure. His writings on law exhibit concerns which identifiably fall within the larger scope of legal theory. At no time does Plato consider law from a narrow perspective, unless it is to move on to a broader one; nor does he engage with issues of law's institutionality without relating them to particular legal subjects. Plato presents a rich and complicated picture of law, legal systems, and constitutions, and he connects all these to the individual as well as to society. If we apply the distinction between legal philosophy and legal theory, surely we must classify Plato as a legal theorist, which is to say that his philosophy of law makes reference to and use of sociological, psychological, historical, and other types of analyses. Of course, Plato himself would not use our twenty-first century vocabulary and topology of scholarly inquiry. He would likely see it as invidious and counter-productive to philosophical understanding. As capable as he was at distinguishing different types of "science", from his perspective philosophy could comprehend them all, and accordingly his philosophical disposition – indeed his philosophical conviction – aimed to integrate his analyses into a comprehensive whole. In this regard, at least, it seems undeniable that Plato is a general legal theorist *par excellence*.

3.3 The Rule of Law

In the previous section, I argued that Plato's legal philosophy is not undermined by his more egregious moral beliefs that from our perspective it is not anachronistic, and that in fact Plato's integrative approach is remarkably similar to that exhibited by modern analytical legal philosophers who aim to develop a general jurisprudence. If I am correct in arguing that Plato deserves as great a place in modern legal philosophy's more abstract debates as he has earned in their discussions of very particular problems – if Plato has merit as a legal theorist concerned with general jurisprudence – then we can expect that his legal philosophy will be of use in those debates. Let us, then, move on to consider the rule of law itself.

With regard to usage and plain meaning, the phrase "rule of law" is very much underdetermined. In the context of the history of legal and political philosophy, its emergence can be attributed (on grounds of influence if not originality) to Aristotle. Though Aristotle discusses issues related to the rule of law in much of his work, and there are many fine distinctions and nuances in those discussions well beyond the scope of this essay, the most general meaning and arguably most influential element of his account of the rule of law is reflected in Brian Bix's *A Dictionary of Legal Theory,* where Bix's entry on the rule of law identifies it as "a complex and contested ideal which can be traced back at least to Aristotle, under which citizens are to be 'ruled by law, not men'." (2004, 190). The belief that it is both possible and desirable to have a set system of enduring social organization – a constitution – where the ruling power comes from law rather than from individuals is the foundation of the modern rule of law in all its practical variants.[5]

In contemporary legal theory, the concept of the "rule of law" can refer to:

(1) An *existence condition* for an actual legal system…:

  (1a) that is used by legal theorists to identify actual legal systems and distinguish them from non-legal systems, and/or…;
  (1b) that is appealed to by the subjects of that system to justify the imposition of a legal system;

(2) A *practical constraint* on a legal system;
(3) A *procedural principle* (or set of procedural principles)…:

  (3a) used by legal theorists to *identify* legal systems, and/or…;
  (3b) used by legal theorists to *prescribe* the necessary practices of a legal system, and/or…;
  (3c) used by legal theorists to *evaluate*, from a critical moral perspective, the moral worth of a particular legal system;

(4) An *object-level practice* (*i.e.* a practice carried out by the officials of a particular legal system) whereby laws are *enforced* and enforcement is *justified* by reference to an implicit or explicit legal principle avowing the rule of law.

I shall call (1–4) *elements* of the rule of law because, on the one hand, any actual, real-world example of the rule of the law may incorporate some or all of the elements, and, on the other hand, any theoretical concept of the rule of law may incorporate some or all of the elements. In the following subsections, I shall proceed by first briefly discussing each of the elements of the rule of law and, where I am able, I shall identify whether that element is present in Plato's legal theory. I hasten to add that my aim is to identify possible avenues for future discussion rather than to make authoritative pronouncements about Plato's philosophical positions!

[5] That the desirability of the rule of law can be contested is, however, less obvious to us modern egalitarians than it is to Plato and Aristotle. Nonetheless, there are debates even within contemporary legal theory as to whether an iniquitous legal system is better than no legal system at all – that is, debates about the rule of law being necessarily superior to rule by any other means.

3.3.1 The Rule of Law as an Existence Condition qua Descriptive Label (1a)

As a theoretical matter, classifying a particular society as a legal society involves an implicit or explicit apprehension of the rule of law as an operative principle of organization in that society. Thus (1a): the rule of law is a *descriptive label* applied by legal theorists to particular societies so as to distinguish legal from non-legal societies. Thus the fundamental division in H.L.A. Hart's taxonomy of social organization is between so-called "primitive" societies "without a legislature, courts, or officials of any kind" where "the only means of social control is that general attitude of the group towards its own standard modes of behaviour" (Hart 1994, 91).[6] Where social control takes the form of explicit rules rather than general attitudes, and where those rules (according to Hart) are elaborated to include, besides primary rules of obligation, secondary rules of various types, we can identify a transition from "the regime of primary rules into what is indisputably a legal system" (Hart 1994, 94). So (1a) can be understood as the identifying mark of a community with a legal system. Communities lacking the rule of law in that sense are communities lacking a legal system.

Does Plato have his own version of (1a)? To my knowledge of Plato's *Laws*, nowhere does he distinguish between communities with legal systems and communities without legal systems in the way that Hart and other modern legal theorists do. It is important to note, here, that the sort of codified rules Hart and most all modern theorists have in mind are law in the narrow sense, *positive law*, rather than law construed more broadly, which might include divine law or objective moral law or any number of ideal *sources* of positive law which are not themselves to be considered (by positivists) to be law solely on account of not being set-out or posited as such. Nevertheless, Plato, like Hart, does seem to recognize that societies can exist without positive law. Consider the following passage from the *Laws*, where the Athenian stranger raises the problem of requiring knowledge of what good rule is in order to identify which communities are ruled well (Plato 1988, I, 639c):

> Take any community for which there is by nature a ruler, and which is beneficial when that ruler is present: what would we say about someone who praised it or blamed it without ever having seen it operating in a correct communal way under its ruler, but had always seen such social intercourse without a ruler or under bad rulers? Do we believe onlookers like these will ever have any worthwhile praise or blame for such communities?

The key phrase here is "social intercourse without a ruler." The Athenian stranger is comparing the evaluative perspective of someone who did not know how a

[6] Note that Hart does not consider "social control" to be the only means of control. Rather, social control is what we might think of as the "diffuse social pressure" that causes individuals to feel obligated to behave or refrain from behaving in certain ways. There are, clearly, more direct ways to direct behaviour, such as by means of force exerted by a tyrant, but that is not (for Hart) an instance of "social control." Note also that by "primitive" Hart does *not* mean morally deficient or in any sense inferior, except in regard to the (potentially but not necessarily better) development of more complex systems of social control involving rules, *v.gr.* legal systems.

particular activity could be instantiated as a beneficial communal activity – in this case the activity is that of holding drinking parties – because the evaluator had no experience of that activity "operating in a correct communal way." Such a person, lacking experience and knowledge of a well-ruled drinking party and a community in which such parties played a proper role, would not be competent to determine the true worth of drinking parties, any more than an evaluator ignorant of military knowledge who set out to evaluate the worth of an army whose general who lacked the art of generalship could arrive at a correct evaluation of armies. If we can understand "social intercourse without a ruler" to refer not only to human rulers but the absence of particular rules entirely (including, then, posited laws), and understand the "communal way" of social practices of that non-legal type as instances of what Hart calls pre-legal societies where there is no rule by law, but rather only diffuse social pressure acting to standardize behaviour, then we might identify in Plato an implicit distinction between legal and pre-legal or "primitive" societies.

Does it matter whether Plato's legal theory makes use of the distinction made by (1a)? Perhaps here we are either going to great lengths to inadvertently transform Plato's legal theory into a kind of legal positivism, which would be anachronistic and silly, or are making much of a small point. What certainly does matter is that a legal theory is able to distinguish between communal "custom" and positive law.[7] On that point Plato's legal theory is on safe ground, for even merely on the evidence of the passage cited above we can see that he was well aware of the possibility of both customary social norms and the imposition of positive law (whether by a good or a bad ruler).[8]

3.3.2 The Rule of Law as an Existence Condition qua Justification (1b)

(1b) is the element of the concept of the rule of law that is appealed to by the subjects of a legal system to *justify* the imposition of the legal system itself. Whereas (1a) was a descriptive label allowing for the classification of forms of social organization, (1b) invokes a moral claim. Note that (1b) is distinct from (4): the former is used to justify the imposition of a legal *system* with the counterfactual possibility in mind (*i.e.* that there could be a state of affairs where the system did not exist) while the latter is used to justify the imposition of the consequences of disobeying legal prohibitions or failing to obey legal duties on the grounds that the already existing legal system requires it.

(1b) amounts to an answer to the question "Is a legal system a moral necessity for our society?" So far as I am aware, whenever that question has arisen in a judicial or political context within a modern democratic state, the answer has been affirmative.

[7] I place scare quotes around "custom" because, as Hart observes, the term "often implies that the customary rules are very old and supported with less social pressure than other rules" (1994, 91).

[8] *Vid*. also Richard Kraut's discussion of the Greek word *nomos* (1984, 105–6).

Modern democratic states generally presuppose that a legal system is a necessary condition for their existence and also presuppose that the adoption of a legal system is at least morally justified if not a moral requirement. Unlike the practice of justifying the enforcement of particular laws, which is a practice that every prosecutor and judge in a modern legal system will eventually have to engage in, the need to justify the legal system itself is rarely encountered.

In Canada, however, legislative incompetence led to a constitutional crisis in which the Supreme Court of Canada did in fact have to assert that the rule of law – in the sense of (1b), namely the imposition of a legal system upon Canadian society – was not only a practical necessity but a morally good state of affairs. The crises came about when the Province of Manitoba failed to abide by the legal requirement that it publish its laws in both English and French. This requirement was absolutely fundamental to the validity of Manitoba's law, for the relevant section of the act which brought the province into existence "entrenches a mandatory requirement to enact, print and publish all Acts of the Legislature in both official languages and, thus, establishes a constitutional duty on the Manitoba Legislature with respect to the manner and form of enactment of legislation."[9] Unfortunately, the Manitoba Legislature wholly failed to publish its laws in any language but English for more than a hundred years, leaving the Supreme Court of Canada with no legal choice but to declare all those purported laws all to be "of no force and effect", which is the Canadian judicial system's way of saying that they were not and never had been law at all.

The consequences of the Supreme Court's ruling on the validity of more than a century's worth of Manitoba law could not be understated, and to its credit the Court put the matter very clearly and forcefully: "The conclusion that all unilingual Acts of the Legislature of Manitoba are invalid and of no force or effect means that the positive legal order which has purportedly regulated the affairs of the citizens of Manitoba since 1890 is destroyed and the rights, obligations and any other effects arising under these laws are invalid and unenforceable."[10] Faced with "a legal vacuum" the Supreme Court decided "to deem temporarily valid and effective" the clearly invalid decrees, and it justified this decision on legal grounds by noting that "[t]he constitutional principle of the rule of law would be violated by these consequences." This principle, as the Court saw it, "requires the creation and maintenance of an actual order of positive laws to govern society." Moreover, just in case the legal arguments were insufficient, the Court went on to appeal to practical necessity ("[l]aw and order are indispensable elements of civilized life"), quoted both John Locke and Joseph Raz, and rather testily pointed out that the preamble to the Canadian *Constitution Act (1982)* states in its very first paragraph that the principle

[9] *Reference re Manitoba Language Rights,* [1985] 1 S.C.R. 721.

[10] At another point in its decision the Court again stressed the severity and extent of a dire situation: "The situation of the various institutions of provincial government would be as follows: the courts, administrative tribunals, public officials, municipal corporations, school boards, professional governing bodies, and all other bodies created by law, to the extent that they derive their existence from or purport to exercise powers conferred by Manitoba laws enacted since 1890 in English only, would be acting without legal authority."

of the rule of law is one of only two ultimate principles presupposed by that Act, which is itself the explicitly recognized "supreme law" of Canada.[11]

In a nutshell: the Supreme Court of Canada, faced with the threat of a legal vacuum within an entire Canadian province, argued that under the circumstances it had a legal and moral obligation to impose the rule of law. Without the rule of law, Canada would have no constitution ("a purposive ordering of social relations"), and without that and the legal authority it provides, it would have no legal system ("an actual order of positive laws"). In the court's view, the alternative would be a morally unacceptable state of "chaos and anarchy."

Does Plato avow (1b) in his legal philosophy? Does he hold the position that without positive law, there would be anarchy and chaos, and so even a bad legal system is better than no legal system at all? That question brings forth the vexing problem of distinguishing between the ideal state and the practically achievable state. Consider the following passage in the *Statesman,* spoken by the Stranger and following from the point that the pure form of the art of government, if it should be actual at all, "will be found in the possession of one or two, or, at most, of a select few" (Plato 1983b, 293a3–4) of truly knowledgeable leaders (1983b, 293c5–d2, emphasis added):

> Then the constitution par excellence, the only constitution worthy of the name, must be the one in which the rulers are not men making a show of political cleverness but men really possessed of scientific understanding of the art of government. Then we must not take into consideration on any sound principle of judgment whether their rule be by laws or without them over willing or unwilling subjects or whether they themselves be rich men of poor men.

On this account, the true constitution ruled by true rulers with true authority has no requirement for rule by positive law, nor for the consent of the ruled. The Stranger's interlocutor, young Socrates, remarks that "the saying about ruling without laws is a hard saying for us to hear" (1983b, 293e6–7) and the Stranger characterizes the next stage of their discussion as dealing with "this question whether a good governor can govern without laws." (1983b, 294a4–5) Here the Stranger prefaces the discussion by seemingly acknowledging the practical necessity for positive law while disputing its claim to authority (1983b, 294a9–10):

> In one sense it is evident that the art of kingship does include the art of lawmaking. But the political ideal is not full authority for laws but rather full authority for a man who understands the art of kingship and has kingly ability.

Some of the objections Plato raises against supreme authority for positive law are clearly recognizable in modern legal philosophy (though in the *Laws* he advocates what Stalley calls the doctrine of the sovereignty of law). Positive laws, for instance, must be general, and the requirement of generality diminishes its worth in particular circumstances: "Law can never issue an injunction binding on all which really embodies what is best for each." (1983b, 294a13–b1) Modern legal theorists, not to

[11] The other principle, interestingly, is "the supremacy of God."

mention judges and legislators, freely admit that in many circumstances a *decree* or set of decrees suited to the particularities of a given situation (or very similar but not necessarily identical situation types) would be morally preferable to a generally applicable *law* (so long as we are considering only that particular situation or type of situation).

I shall say more about the modern view on the merits and demerits of the generality of positive law later and of its general or universal enforcement later, when discussing (4), where I bring forth a feature of modern legal systems which Plato would find to be utterly reprehensible: institutionalized discretion in the enforcement of existing law. At this juncture, however, I wish to focus our attention to the question of whether Plato would justify the imposition of a legal system on the grounds that a community is morally better-off with one than without one.

The simplistic answer is that Plato's political philosophy admits of an ideal about which his legal philosophy has nothing to say. The ideal city with true rulers and a true constitution does not require a positive legal order, so it follows (on the simplistic answer) that Plato would not avow (1b): the ideal city would have no absolute requirement for positive law because it is ruled by the best statesman or (small) group of statesmen. The more nuanced, and I think unavoidable, answer is that Plato may or may not see (1b) as a morally sound claim. Our reconstruction of his position, it seems to me, will depend on the weight we give to the *Statesman* and the *Laws* in comparison to the *Republic.* Does the *Republic* espouse a position which Plato later rejects, or can we interpret the *Republic* in light of its focus on an ideal which Plato saw as impossible to instantiate in actuality and/or saw as serving to mark our proper aspirations as opposed to our actual abilities? Perhaps (1b), which implies that a community with a legal order will always be in a morally better position than it could be without a legal order, could serve as a useful question with regard to the larger issue of developmentalism in Plato's philosophy.

I also note that all of what the Supreme Court of Canada said about the moral need to uphold a legal order in a society threatened by a "legal vacuum", and the moral necessity to avoid "chaos and anarchy" by instantiating a legal order where one is absent, is premised on the link between a free and democratic society and the rule of law. It is virtually inconceivable in modern political philosophy to have a democratic society without the rule of law, and so the value of a democratic constitution is closely tied to the value an efficacious legal order. In modern legal and political philosophy, arguments about the supposedly intrinsic value of the rule of law seem strained when placed within the context of a democratic society (where the principle of the rule of law seems to be a given) and yet seem wildly hypothetical when placed in another context (where the spectre of tyranny overshadows a careful understanding of the principle of the rule of law). Plato, though well aware of tyranny and democracy, did not carry the same historical baggage as we do. A closer consideration of his evaluation of non-democratic legal orders might be helpful for us when we consider (1b) more critically. In the *Laws* the doctrine of the sovereignty of law is applied more to constrain the democracy (the tyranny of the many) than to ensure the freedom we associate with a democratic constitution.

3.3.3 The Rule of Law as a Practical Constraint on a Legal System (2)

H.L.A. Hart's suggestion that *The Concept of Law* could be read as "an essay in descriptive sociology" incited considerable controversy among philosophers and sociologists. It began the movement, in analytical legal philosophy at least, towards legal theory rather than purely conceptually oriented legal philosophy.[12] It is fair to say that sociologists as a group did not take Hart's assertion as seriously as he might have liked, though there are exceptions. By discussing (2) my aim is to draw out some of the sociological or anthropological aspects of legal theory and to consider their relevance to both modern legal philosophy and Plato's legal philosophy.

The strongest tack to take in defending Hart's sociological aspirations is to highlight how, in *The Concept of Law,* Hart describes the move from a pre-legal society to a legal society, and why on Hart's account that transition entails the rule of law as a practical constraint on every such society and every associated legal system. Hart sees the rule of law as a practical requirement of a legal society and thus of a legal system insofar as: (i) the actual circumstances of human communities make a regime of positive law practically unavoidable if a community's customary norms are insufficient to keep order; (ii) most all human communities are too complex to be governed by customary norms alone; and (iii) the degree of social complexity which makes customary norms insufficient for an orderly, enduring society practically entails *laws about other laws* (or what Hart calls "secondary rules").

I am too inexpert to summarize what Plato has to say about (i) and (ii). It is possible that his wide knowledge of Greek and foreign cities and their constitutions, of which there were an astounding variety and each of which to modern eyes may appear in many respects far more vigorous than those that exist today, would allow us to gather useful anthropological data and further our sociological models of human communities. More likely, a careful analysis of the data available to Plato, of his presentation and interpretation of that data, and of the conclusions he draws from it all might give us some insight into the methodology of ancient anthropology and sociology.

Regardless, what is particularly interesting from the perspective of modern legal philosophy is Plato's apparent denial of (iii). The city he describes in the *Laws* is one of considerable complexity: its explicitly specified constitution comprises a set of elements no less complex than modern states, and the laws Plato provides for the city are many and varied, going into remarkable (to modern eyes) depth of detail. And yet *the entire system is effectively static as regards the laws themselves.* Plato does not appear to provide very little leeway for rules of change, nor does he explicitly specify any. As Stalley notes, Plato "makes legislative change so difficult as to be

[12] Others would trace the origins of this movement to the legal realists, both American and Scandinavian, but that movement had stalled long before Hart came on the scene. In any case, it is not as important to determine responsibility for the growth of legal theory as it is to recognize its contemporary significance.

virtually impossible" (Stalley 1983, 84). Though generally appreciative of Plato as a legal philosopher, Glen Morrow proffers a very severe criticism of Plato's legal philosophy because of the static character of law: "Another respect in which Plato's conception of the rule of law fails to meet a requirement regarded as axiomatic today is the absence of any theory or process of legislation" (Morrow 1941, 124). Setting aside Plato's more egregious moral beliefs, if there is anything in his legal philosophy that renders it truly anachronistic it is the comparative absence of what Hart calls rules of change – laws providing for the introduction of new laws, the withdrawal of old ones, and the change of portions of existing law. While the *Laws* provides for a hierarchical system of courts, and so enables the judicial review of lower-court judicial decisions, there is nothing like a conception of the judicial review of legislative decisions (though the role of the Nocturnal Council may be more pertinent to this matter than I have been able to discern).

In any event, if a descriptively accurate conception of the rule of law as it exists in modern societies should be coincident with an actual capacity on the part of every legal system to modify its laws *according to and by means of law* – a feature which most modern legal theorists do consider necessary and most actual modern legal systems seem to evince – then Plato's legal philosophy is, as Morrow claims, lacking an axiomatic element. If so, then my assertion that Plato has a credible claim to offering a legal theory capable at the level of a general jurisprudence is simply false, for it is evident that modern legal systems exhibit legislative change to a considerable degree. I am hesitant, however, to give up so easily, and I wonder whether there might be some corrective in Plato's philosophical views as a whole which allows for at least an implicit theory of legislative change. Legal positivists, following Hart, find some satisfaction in the facts of language's inescapable "open texture" and of the inevitability of unforeseen circumstances, two practical constraints on legislation which give rise to a constant need for the interpretation and "precisification" of law. I know nothing of Plato's philosophy of language, but I wonder whether it contains something capable of addressing the problem of legislative change.

3.3.4 The Rule of Law as a Procedural Principle or Set of Procedural Principles (3)

The distinction between so-called natural-law theories and all other types of legal theories, especially legal positivist theories, was, until recently, a distinction of considerable import in general jurisprudence. Of late, however, it is a distinction that is increasingly deemed to be misleading or irrelevant to the methodological positions upon which a modern philosophy of law might be founded.[13] It is not unfair to say

[13] As just one example of the irrelevance, sublimation, or transcendence of the distinction, consider Neil MacCormick (2007).

that for much of the previous century, many of the central debates in legal philosophy were sidetracked by arguments about the demarcation or boundary between natural-law theories and, usually, legal positivist theories. Legal theory progressed apace, however, despite the caricature of natural-law theories and the (often inapposite) accusation, directed by one legal theorist to another, that the other was a simple-minded natural-lawyer who insisted on a descriptively false (though perhaps, arguably, normatively preferable) connection between law and morality.[14]

One advance was the result of Ronald Dworkin's insistence that the legal practice of interpreting laws must be understood as making use of both rules and principles. That point, though not so radical a criticism as Dworkin and others held it out to be,[15] was fundamental to Dworkin's far more important claim that every legal system must, though "constructive interpretation", aspire to present itself in the best moral light possible – law must make itself the (morally) best it can be. Dworkin attributes to all legal systems a particular procedure for the internal practice of understanding and interpreting law, and in that sense uses this (supposedly) necessary function of legal systems to: identify their existence (3a); prescribe, as a practical matter, the necessary incorporation of this particular practice within all legal systems (3b); and so posit *within legal systems themselves* a constant practice of moral evaluation (3c).

Of course, not all legal philosophers agreed with the idea that the practice of interpretation, integral to every legal system, must necessarily aspire to moral perfection. Legal positivists have been especially critical of that view, for it seems clear that moral progress is far from a necessary result of the existence of a legal system. But Dworkin's idea does usefully highlight the *self-perception of a legal system* and the constraints on a legal system's existence which may arise from its *perception (in the sense of moral evaluation) by its subjects.*

Consider a fundamental claim made by Joseph Raz's legal theory: every legal system must sincerely claim authority (1979). It is important to note that Raz does not claim that every extant legal system is *justified* in its sincere claim to authority, nor for that matter does he claim that any actual legal system can correctly claim it. Rather, Raz sees the claim to authority as reflecting the fact that legal systems are creatures of a sort that must be at least capable in principle of being practical authorities. A rich literature has arisen from Raz's controversial accounts of authority in which various types of authority have been distinguished (*v.gr. practical* and *epistemic* authorities). Analyses of the relation of authority to reasons for action have further contributed to our understanding of legal systems as a result of the

[14] I eschew any discussion of that connection here except insofar as it has a direct bearing on Plato's legal philosophy.

[15] Suffice it to say that Hart, who was the primary target of Dworkin's avowal of the importance of the distinction between rules and principles, did not deny the distinction, nor modify his legal theory to take account of it in any significant way. In fairness to Dworkin, however, it must be said that his attacks on Hart had the salutary effect of intensifying legal positivists' understanding of legal positivism itself, and in that regard Dworkin is one of the influences for the development of "post-positivism."

efforts of Raz, his critics, and his defenders. Here I wish only to point out that Plato's philosophy can contribute to our understanding of the nature of reasons and of human authorities (*vid.* Hatzistavrou 2005); and, conversely, the fine-grained Razian contributions to action theory may yet further our understanding of Plato's accounts of knowledge, expertise, and in particular the role of knowledge and expertise within legal practices (both ideal and actual).

The second important advance resulting from the positivist–natural law debates in recent legal philosophy involves both the notion of an aspirational theory of law and the question of the extent to which human nature determines *a priori* the necessary features of a legal system. Here I am thinking of Lon Fuller's work on "the internal morality of law" (1969) and John Finnis' weighty tome *Natural Law and Natural Rights* (1980). For the sake of brevity, I shall confine my remarks here to Fuller's identification of a kind of "morality" and purposive activity with law, but a notable fact is that both Fuller and Finnis draw upon the social sciences to elaborate their views on law, thus recognizing that law is a topic whose philosophical consideration can be furthered by inquiry on a broad rather than narrow front.

Even those legal theorists who insist upon the potential for a wide and deep-ranging capacity on the part of legal systems for evil, and who accordingly deny that the rule of law is necessarily preferable to the "chaos and anarchy" so dreaded by the Supreme Court of Canada, nonetheless envision legal systems as subject to certain internal constraints. A legal system is not merely a bundle of decrees, but a complex rule system with some degree of internal logic. The pertinent question with regard to (3) – the element of the concept rule of law presented as a set of procedural principles – is the moral status of that internal logic.

Fuller offers a description of that internal logic which is premised on the distinction between what he calls the "morality of duty" and "the morality of aspiration." He identifies the aspirational morality as the one "most plainly exemplified in Greek philosophy" where it "is the morality of the Good Life, of excellence, of the fullest realization of human powers". The morality of duty, however, does not aim for human excellence; it simply "lays down the basic rules without which an ordered society is impossible, or without which an ordered society directed toward certain specific goals must fail of its mark" (1969, 5) Hence we can find "the closest cousin" of the morality of duty in the law, which must only secure the minimum conditions for human co-existence. Fuller's "procedural version of natural law" (1969, 97) met with considerable criticism, and in the long run most of his insights were either absorbed or explicated by more powerful legal theories that were readily able to accommodate them (*vid*. Hart 1994, 193–200).

One of Fuller's replies to his critics, however, has been taken aboard only relatively recently. Fuller inveighed against "the assumption that law should be viewed not as the product of an interplay or purposive orientations between the citizen and his government but as a one-way projection of authority, originating with government and imposing itself upon the citizen" (1969, 204). It is, I think, a profound failing of modern legal philosophy that we often inadvertently overlook or underplay the important fact that legal systems instantiate *reciprocal relationships* between the subjects of the system and those who legislate, adjudicate, or enforce it.

The import of the purposive character of that type of relationship is contestable, of course, but the mere fact of the existence of reciprocal relationships within legal systems is vitally important. Fuller and Finnis were heavily influenced by Plato and Aristotle – perhaps we can turn to ancient legal philosophy to retrace our steps so as to determine when and why law took on or appeared to take on a unidirectional character.

3.3.5 The Rule of Law as an Object-Level Practice of Enforcing and Justifying the Law (4)

The enforcement of the law on everyone and the associated practice of finding legal authority alone to be sufficient justification for such enforcement is the simplest and most readily identifiable element of the modern concept of the rule of law. When reference is commonly made to the rule of law without further specification, something like (4) is understood an actual or desirable practice on the part of the officials of a legal system. As the Supreme Court of Canada puts it, "law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power." What Stalley calls the doctrine of the sovereignty of law is clearly stated by the Athenian in the *Laws* (Plato 1988, 715d1–9):

> I have now applied the term "servants of the laws" to the men usually said to be rulers, not for the sake of an innovation in names but because I hold that it is this above all that determines whether the city survives or undergoes the opposite. Where the law is itself ruled over and lacks sovereign authority, I see destruction at hand for such a place. But where it is despot over the rulers and the rulers are slaves of the law, there I foresee safety and all the good things which the gods have given to cities.

Morrow sees in the doctrine of the sovereignty of law a clear continuity with Plato's legal theory and modern legal practice: "Plato adheres very closely to that conception of the rule of law which is a cherished part of our political heritage. All the persons in his state, whatever their rank or condition, are subject to the ordinary laws of the state and are amenable to the jurisdiction of the ordinary courts" (Morrow 1941, 123).

There is, however, a quite startling difference between the letter and the rule as regards actual practice of the rule of law in most modern legal systems, one which makes Plato's doctrine of the sovereignty of law appear to be quite severe indeed. As a practical matter, in modern legal systems police and prosecutorial *discretion* largely alleviates a felt need to recognize that occasionally it is (morally) better to eschew legal enforcement. The public expect a degree of (what it takes to be) sensible discretion and the police officer or prosecutor who insists upon universal and strict application of each and every law is liable to cause considerable discontent among a citizenry otherwise supportive of the rule of law.

While the expectation of discretion in the enforcement of the law is commonplace in modern democratic populations, the popularity of that expectation may speak only to the degree to which we moderns have been become unruly, hence more in

need of the doctrine of the sovereignty of the law than ever before. But discretion in the enforcement of the law can go beyond common expectations and become an explicit and authorized institutional feature of a modern legal system. For instance, in Canada it is a criminal offence to advocate or promote genocide. That offence exists despite the existence of the fundamental freedom of expression specified in the *Canadian Charter of Rights and Freedoms,* a constitutional document. The *legal existence* of the Canadian Criminal Code provision against inciting advocating or promoting is dependent on another section of the Charter which permits fundamental freedoms to be restricted by "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Yet the *political palatability* of the law prohibiting the advocation of genocide, in a modern democratic society where freedom of expression takes pride of place, can be fairly described as due to the institutionalization of prosecutorial discretion, insofar as the Criminal Code provision specifies that "No proceeding for an offence under this section [prohibiting advocating or promoting genocide] shall be instituted without the consent of the Attorney General." Here, then, we have an instance of explicit prosecutorial discretion of a type that would be anathema to Plato. What does this say about freedom of expression, modern democracies, and the applicability of Plato's legal theory?

3.4 A Final Topic for Discussion: Education

In conclusion, I want to draw attention to a feature of Plato's legal theory that has the potential to further our understanding of a function of law most modern legal philosophers pay no attention to whatsoever. One of the most complex problems in positivist legal theory is the status of moral criteria for legal validity. Some legal positivists, following Joseph Raz, hold that the existence of a law cannot depend on its substantive moral merits. Others, following Wilfrid Waluchow, argue that the specification of moral criteria for legal validity can be a feature of a legal system itself (rather than the permission for judges to exert an extra-legal power). The debate centres on the existence of explicitly posited moral-political rights such as the right to freedom of expression and equality before and under the law, and the contrary positions of exclusive and inclusive positivism in characterizing such rights as legal rights or as permissions for extra-legal reasoning are wholly at odds with each other. The way in which we resolve that opposition will go a long way to determining our view of the limits and power of positive law.

It seems to me that Plato has something to say about this debate, despite the fact that his legal theory is far removed from positivist theories of law. One of the main concerns of Plato's legal philosophy is the *educative function* of law and legal systems. This is a feature of his thought that permeates all his work; it is not confined to the *Laws* alone. In the *Crito,* for instance, Plato invokes the laws of Athens in personified form, and the personified Laws opine that "all our orders are in the form of proposals, not of savage commands, and we give him [the citizen] the choice of either persuading us or doing what we say" (1983a, 52a1–3). Laws, in short, have

the capacity to *persuade* us. But what form does such persuasion take? Is it rational persuasion or merely a rhetorical appeal to irrational sentiments? Or, is it neither, but instead something in between, namely a moral exhortation to do what the law says?

It seems to me possible that in Plato's legal theory laws may do more than appeal to our emotions or exhort us to be better. In the *Laws,* the importance of the role prescribed for the Minister for Education, and the considerable amount of discussion Plato engages in to describe the merits of legal preludes, suggest that one of the primary functions of a legal system is to educate its subjects so as to make them better individuals and thus work towards the maintenance of a good society or the improvement of the already existing one. Education, for Plato, is not merely a matter of inculturation and habit – it is a rational activity directed towards becoming a better person.

If a legal system must be capable of educating its citizens (rather than simply indoctrinating or habituating them), as Plato's legal theory seems to require, then that requirement entails something about moral criteria for legal validity irrespective of Plato's belief in objective morality, for a legal system must be capable at least in principle of educating its subjects, and that process requires something beyond persuasion in the limited sense of securing agreement – it requires rational consideration and a rational dialogue within the legal system about the fundamental values of the state. The notion of law as facilitating a dialogue between legislators and courts has become a part of Canadian constitutional jurisprudence. The dialogue model is often used to describe and make sense of the give-and-take between legislators, whose laws are expected to respect and further the moral-political rights of Canadians recognized in the *Charter*, and courts, whose decisions are expected to further democratic decision-making while constraining it, again in light of the relevant moral-political constitutional rights. On that model, Canadian legislators and courts educate each other by furthering each others' understanding of what Fuller would call the requirements of the morality of aspiration, rather than merely the requirements of the morality of duty. But explicit within the legal dialogue in Canada is the understanding of the particulars of the morality of aspiration – the correct interpretation of the fundamental values of the state – is uncertain. Moreover, legislative acts and judicial decision often evince the kind of moral exhortation (perhaps even attempts at rational persuasion) we find in the form of the preludes in the *Laws.* The analogy may not hold, for several reasons,[16] but Plato's careful attention to the relation between law and education may have much to say about the presence of moral argumentation and discussion in modern democratic states where moral-political rights are entrenched in their constitution.

[16] *V.gr.* The preludes may be merely a form of unidirectional moral exhortation rather than a practice for inducing rational evaluation of the laws; the fact that the fundamental values of Canadian constitutional law are recognized to be uncertain may render them, from the perspective of Plato's legal theory, incapable of doing the work that Plato thinks laws must do; citizens may simply ignore the *Charter's* attempt to establish a legal-political context for the realization and specification of fundamental values through legal discourse, in which case the legal system does not educate its regular subjects however much its officials may contribute to their own collective intellectual progress.

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