

INDIANA LAW JOURNAL

Volume 31

WINTER 1956

Number 2

PLATO'S LEGAL PHILOSOPHY

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Introduction

A salient influence in Plato's life was that he experienced a series of political crises.¹ He saw his native Athens, the proud seat of a great empire, humbled and all but destroyed. He witnessed violent class conflict in which his relatives and friends, members of the reactionary Thirty Tyrants, indulged in such brutal persecution that conventional participation in politics became repulsive. Complete disillusionment set in when that harsh regime was succeeded by a disorderly "democracy" which put to death "the best man" in Athens, his beloved idol, Socrates.² Plato's vast energies and ambitions sought deeper, more satisfying expression than political leadership could provide. The most important practical result was his Academy where many future leaders were trained in legislation and the drafting of legal codes.³ The enduring product, which has lived for almost 2500 years as the most brilliant achievement in the entire history of human thought, is the philosophy of Plato, which laid the foundation of political theory and jurisprudence.⁴

Law is the central, unifying subject of Plato's philosophy;⁵ and Plato's attitude towards law in the early dialogues is vigorously affirmed. In the *Apology* Socrates reports two historic instances when, at great peril to himself, he insisted on adherence to the law. In the trial of cer-

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1. See Boas, *Fact and Legend in the Biography of Plato*, LVII PHILOS. REV. 439 (1948).

2. Plato, *Ep.* VII, 325a-326a.

3. PLUTARCH, *MORALS*, v. 32, 381-82 (Goodwin ed., 1878).

4. "One of the studies most ardently pursued in the Academy was Jurisprudence, of which he [Plato] is the real founder." BURNET, *ESSAYS AND ADDRESSES* 224 (1930).

5. "[T]he problem of law, its source, criterion, and aim, is at the very heart of Plato's philosophy. . . ." Maguire, *Plato's Theory of Natural Law*, X YALE CLASSICAL STUDIES 151, 152 (1947).

tain generals for not recovering the bodies of dead soldiers (which made it impossible to perform the customary religious rites) Socrates was the only judge "who was opposed to the illegality" of trying the officers. The trial, he said, was "contrary to law." (*Apol.* 32b). And when, in the reign of the Thirty Tyrants, he was ordered to arrest Leon of Salamis, Socrates refused to obey, though he courted death in doing so. By positivist criteria the Tyrants were Sovereign and their orders were law. But Socrates said: "This was a specimen of the sort of commands [note he did not say "law"] which they were always giving [T]he strong arm of that oppressive power did not frighten me into doing wrong." (*Apol.* 32cd). After his own conviction Socrates severely criticized the "unjust judgment" (*Apol.* 41b), and this has been interpreted as opposition to law. But Socrates' criticism of the *decision* and of unjust *judgments* must be set against his uniform praise of *law* and his conspicuous conformity to law in the most trying circumstances.

The distinction between law and the administration of law, between law and the verdict, law and the decision or judgment, provides the principal clue to the thesis of *Crito*. Neither there nor in the *Apology* does Socrates criticize the law on irreligion or the law on corruption of the youth or any other law. On the contrary, Socrates affirms that he "might justly be arraigned in court" if he denied the existence of the gods.⁶ The least implication of Socrates' remarks in the *Apology* is his approval of Athenian law.⁷ And in the *Crito* we read a eulogy of law which removes any doubt regarding Plato's attitude as expressed in these early dialogues. This is dramatized in a vivid personification of the laws whose final words summarize the meaning of *Crito*: "Now you depart in innocence . . . a victim, *not of the laws but of men.*"⁸ The distinction between the decision or judgment and the law governing the case was not original with Plato. Indeed, in fourth century Athens it was to be expected, for there was no system of legal precedent despite a pleader's reference to recent trials.⁹ "Law," for the Athenians, meant primarily the codes of Draco, Solon, and Cleisthenes, revised and amended.¹⁰

6. *Apol.* 29a. Certain cases of impiety were made capital offenses by Plato in *Laws* 910cd. The quotations from the dialogues are from Jowett's translation (1892) unless otherwise specified.

7. Cf. "The men who condemned Socrates . . . were dimly aware that Socrates' mission pointed to a subversion of all existing institutions." CORNFORD, *THE UNWRITTEN PHILOSOPHY AND OTHER ESSAYS* 60 (1950). Cf. "Far from being in conflict with the institutions of laws and morals, Socrates is rather the one who undertook to prove their reasonableness and thereby their claim to universal validity." WINDELBAND, *HISTORY OF PHILOSOPHY* 81 (Tufts transl. 1926).

8. *Crito* 54bc. (Italics added.)

9. Dorjahn, *Legal Precedent in Athenian Courts*, VII *PHILOL. QUART.* 375 (1928).

10. See note 45 *infra*.

The gist of Socrates' position comes then to this: Athenian law is right law. But the specific application of such law to human affairs, the administration of law, the decisions and sentences are sometimes erroneous and, therefore, unjust. But since laws can be applied only in particular decisions, those judgments must be obeyed even if they are unjust. Any other view leads to anarchy. Here, in Plato's separation of law from decisions is the origin of the theory, rejected in recent thinking, though not without important modern support,¹¹ that law exists apart from specific decisions, indeed, that law pre-exists in complete sufficiency.

Had Plato been content to rest his views on the common sense level exemplified in the early dialogues, there would have been no cavalier dismissals of his philosophy by modern scholars. But when the philosopher emerges from his early period of affirmation and common sense proof to engage in metaphysical inquiries, his speculation becomes, for many modern thinkers, incomprehensible, distasteful, and even dangerous.

To analyze Plato's legal philosophy adequately, one must consider the questions which engaged his most imaginative efforts and ask why he pursued his inquiries into the airy realms of metaphysics and whether other philosophers have provided sounder answers. Everyone agrees that science is important and this implies the existence of a certain kind of knowledge. But what is knowledge, and can there be any knowledge without ideas? Almost everyone agrees that communication is a fact, and this implies that many persons know "the same things." But how is communication possible? What is there in the world or in the brains or minds of men that permits common understanding to exist? How explain the complex structures of modern science and the uniform responses of scientists to them?

11. Cf. "Having said this much concerning law in the abstract, and concerning its silent and unobtrusive benefactions, we shall not shrink from a consideration of the law as it manifests itself in its administration. Here we shall admit, as indeed we have done already, that doubts, difficulties and uncertainties come in, and that sometimes the instrumentalities of the law become the subject of just reproach. It does not follow, however, that the law itself is subject to reproach. However certain, positive and clear the law may be, it must of necessity, for administration, be committed to agencies and subjected to influences that lack all these qualities, and are at once unmanageable and doubtful. The law has then to deal with uncertain facts, with untrustworthy or mistaken witnesses, with obscure or false documents, with ignorant or prejudiced jurors, with fallible judges; in short, the law for construction and application is then delivered over to fallible human beings, sometimes under circumstances when it would seem that nothing short of Supreme Wisdom could possibly determine what ought to be the proper conclusion." Cooley, *The Uncertainty of the Law*, Fourth Annual Mtg. Report, Ga. Bar Assn. 122, Aug. 3 and 4, 1887 (pub. 1888).

"Decisions of the courts are not the law; they are the evidence of the law. Where decisions correctly present the law they should be followed and if they do not correctly present the law they should not be followed." *In re Bair*, 49 F.Supp. 59-60 (M.D. Pa. 1943).

A principal obstacle to the solution of these problems in Ancient Greece was the positivistic bias of the sophisticates of Plato's day. These "real aborigines . . . obstinately asserted that nothing is which they are not able to squeeze in their hands."¹² They "will not allow that action or generation or anything invisible can have real existence." (*Theaet.* 155e). To be sure, acknowledged Plato, "without bones and muscles . . . I cannot execute my purposes. But to say that I do as I do because of them . . . and not from the choice of the best . . . [shows] that they cannot distinguish the cause from the condition. . . ." (*Phaedo* 99b).

Related to these "uninitiated" ones were the extreme relativists who, applying their dogma to law, asserted that what is just, honorable, or holy varies from state to state, *i.e.*, they are merely "such as the state thinks and makes lawful . . ." (*Theaet.* 172a). There is nothing "in nature" that determines the quality of these things. "[T]he standard of morals varies, and what is honourable to some men is dishonourable to others." (*Eryx.* 400c). At most, it is merely a matter of agreement, convention.¹³ Nonetheless, observes Plato, "the followers of Protagoras will not deny that in determining what is or is not expedient for the community one state is wiser and one counsellor better than another—they will scarcely venture to maintain, that what a city enacts in the belief that it is expedient will always be really expedient." (*Theaet.* 172a, 177cd). But this implies standards of appraisal and decisions that are defensible on rational grounds. Thus was the issue joined. It ultimately involved the relevance and validity of metaphysics, and its ramifications were unified, as will appear, in the significance of positive law.

In opposition to the current positivism, Plato sought to establish the necessity of "the intellectual principle which . . . can be attained only by philosophy . . ." (*Phaedo* 81b). Since the senses cannot apprehend what things "have in common" (*Theaet.* 185b), Plato insisted that that and other "immaterial things . . . are shown only in thought and idea, and in no other way. . . ." (*States.* 286a). Plato tried to discover "what that nature is which is common to both the corporeal and incorporeal, and which they [people] have in their mind's eye . . ." (*Soph.* 247d). In more prosaic language, what is involved in relationships, *e.g.*, of cause and effect, equal or unequal, opposites, correlatives, parent-child,

12. *Soph.* 247d. They believe "that the truth only exists in a bodily form, which a man may touch and see and taste. . . ." (*Phaedo* 81b).

13. "Each man was strong only in the conviction that nothing was secure. . . ." THUCYDIDES, Book iii, 83 (Jowett transl. 1881).

and so on? What of order, structure, system, regularity, law?¹⁴ Surely, these terms do not represent mere sounds or physical things? Equally certain is it that in some way they "exist." Yet these "things" obviously are not tangible, nor do they exist in space. Plato held that they are incorporeal entities, "forms" or "ideas," which are apprehended in mental processes. He laid the enduring foundation of external, real ideas and ideals—a value cosmos—and thus, as will appear, of traditional natural law philosophy. The journey from his initial insight concerning ideas to the metaphysics of his mature, most creative period was a long one. In the course of pursuing it Plato formulated problems and developed theories which have become the perennial issues of jurisprudence and political science.

The central thesis of his philosophy of law is expressed in the *Republic* and *Laws*, or, more precisely, in the interrelations of these great dialogues which, together, comprise the greater part of his published works. The principal difficulty which bars the way of assured interpretation is the uncertainty and divergence of critical opinion regarding the *Republic*. It is necessary to understand the purpose of that dialogue if the significance of Plato's philosophy of law is to be appreciated.

Republic

An obvious characterization is that the *Republic* is a philosophical discussion of justice; indeed, the sub-title of the dialogue is "Concerning Justice."¹⁵ Plato says, "we are seeking for justice . . ."¹⁶ He proposes "that we enquire into the nature of justice and injustice, first as they appear in the state, and secondly in the individual, proceeding from the greater to the lesser and comparing them." (369a). A more definite clue is given when Plato suggests, "now let us build up our *imaginary* state from the beginning."¹⁷ He characterizes this state as "a city of the blessed" (458e), "the perfect State" (502d), and he contrasts it with "the present evil state of governments" (492e)—"not one of them is worthy of the philosophic nature." (497b).

14. Plato also raised the following questions: "first, that nothing can become greater or less, either in number or magnitude, while remaining equal to itself—you would agree? . . . secondly, that without addition or subtraction there is no increase or diminution of anything, but only equality." (*Theaet.* 155a).

15. Barker translates the title 'polity, or concerning righteousness.' POLITICS OF ARISTOTLE 362 (Barker transl. 1946).

16. *Rep.* 336e. Some quotations from the *Republic* are from Jowett's translation; others are from Cornford's translation (1945) and will be cited as such.

17. Cornford, 369c. (Italics added.)

Despite these and many similar statements by the author of the *Republic*,¹⁸ the principal function of the dialogue has not been thoroughly grasped. For example, it is often said that the *Republic* is a "Utopia." But Plato, conceding that "the perfect State . . . was difficult of attainment" (502d) and that he cannot prove that it will be "actually founded" (Cornford, 472e), insists repeatedly that it "is not impossible" (502c), that his "scheme . . . has not been a mere day-dream" (Cornford, 540d). Thus, on the one hand, Plato was not describing any existing state nor, on the other hand, was he indulging in merely wishful thinking.

Nettleship, whose *Lectures* have influenced many students of "the subject of the book,"¹⁹ observes that although the title suggests political philosophy, "it is rather a book of moral philosophy." "It is a book about human life and the human soul or human nature, and the real question in it is, as Plato says, how to live best." That, for Plato, is "inseparable from the question, What is the best order or organization of human society?"²⁰ All of this is both relevant and valid, but it does not reveal the distinctive function of the *Republic*. Moreover, the connotation of some of Nettleship's text is anthropocentric rather than realistic in Plato's sense. For example, "the whole *Republic* . . . is really an attempt to interpret human nature psychologically" This has misled subsequent investigators.

Thus, Jaeger, acknowledging his debt to Nettleship, finds that "the ultimate interest of Plato's *Republic* is the human soul."²² A Kantian perspective is indicated in the assertion that, "what the philosopher calls justice must be based on the most inward nature of the human spirit."²³ In general, Jaeger amplifies Rousseau's interpretation that "the *Republic* is not a work on politics but the finest treatise on education that was ever written."²⁴

18. "We were enquiring into the nature of absolute justice and into the character of the perfectly just, and into injustice and the perfectly unjust, that we might have an ideal." (*Rep.* 472c). Plato sometimes states his purpose even more specifically: "[W]e have been constructing in discourse *the pattern of an ideal state.*" (Cornford, 472e) (Italics added.)

19. NETTLESHIP, *LECTURES ON THE REPUBLIC OF PLATO* 4 (1898).

20. *Id.* at 4, 5.

21. *Id.* at 68. In fairness to Nettleship it should be added that his discussion of Plato's forms (*Id.* at 191-96) and of "the Good" is very helpful. Unfortunately he did not organize his work (it was published from students' notes), and his successors have not been much influenced by his philosophical discussion of the ideas.

22. II JAEGER, *PAIDEIA* 199 (Highet transl. 1945).

23. *Id.* at 202.

24. Says Jaeger, "the positive exposition of the Platonic system of education is the real theme of the work." *Id.* at 204. Cf. "The Platonic state was accordingly to be an institution for the education of society." WINDELBAND, *HISTORY OF ANCIENT PHILOSOPHY* 213 (Cushman transl. 1910).

Barker, while recognizing that the *Republic* is an "ideal" which must be contrasted with a utopian "city in the clouds,"²⁵ and noting that the dialogue includes treatises on metaphysics, moral philosophy, education, political science, and philosophy of history, concludes that "the question which Plato set himself to answer was simply this: What is a good man, and how is a good man made?"²⁶ Finally, McIlwain, who explicitly adopts Nettleship's interpretation, asserts that the *Republic* does not delineate an ideal state, but "is a search for the fundamental principles of all human conduct. . . ."²⁷

With deference to the judgment of these distinguished scholars, it is submitted that their interpretations do not sufficiently take account of the distinctive purpose of the dialogue.²⁸ Among the few philosophers who have fully recognized this is Sabine. Sabine discovered the distinctiveness of the *Republic* in its delineation of a "type or model of all states."²⁹ "He was trying to show what in principle a state must be"³⁰ Even more significant is Sabine's observation that the "idealized figures" of the mathematicians and "the astronomer's types" suggested the model of Plato's *Republic*.³¹

What are the characteristics and functions of such an "ideal construct"? First, it is sufficiently within the reach of human competence to be attainable to a significant degree (499d, 502c, 540d). Second is its relation to existing facts; for example, the actual Spartan state influenced Plato's scheme. And the third characteristic of a model or ideal construct inheres in its transcendence of actuality.³² While the philosopher is immersed in his culture, he also transcends it when he presents his model—for the ideal cannot be fully explained by, it does not stand in a merely causal relation to, the contemporary culture. A point by point comparison of the model with all the existing states known to Plato

25. BARKER, GREEK POLITICAL THEORY 239 (1918).

26. *Id.* at 146.

27. McILWAIN, THE GROWTH OF POLITICAL THOUGHT IN THE WEST 33 (1932).

28. LINDSAY, *REPUBLIC*, Introduction x (1940); HOERBER, THE THEME OF PLATO'S *REPUBLIC* 3 (1944).

In his earlier work, Barker said that the *Republic* "attempts to show . . . what would be the manner of a State, in which the Idea of the Good had found its perfect expression." BARKER, POLITICAL THOUGHT OF PLATO AND ARISTOTLE 4-5 (1906).

29. SABINE, A HISTORY OF POLITICAL THEORY 46 (1950).

30. *Ibid.*

31. "In the same manner the *Republic* aims not to describe states but to find what is essential or typical in them. . . . The line of thought is substantially similar to that which caused Herbert Spencer to argue for a deductive 'Absolute Ethics,' applying to the perfectly adapted man in the completely evolved society, as an ideal standard of reference for descriptive social studies." *Id.* at 48; cites *Data of Ethics*, ch. XV.

32. "The whole of the *Republic* is an excursion into an ideal realm where change and imperfection do not exist." STENZEL, PLATO'S METHOD OF DIALECTIC x (1940).

would disclose the precise gaps between description and transcendence. An "ideal construct" or "model" is thus an exaggeration of certain facts. It is also an instrument for description, comparison, and evaluation of institutions.³³ In sum, the *Republic* is the delineation of such an ideal construct.³⁴

To appreciate the meaning and function of the *Republic*, as such a model or construct, one needs to consider it in relation to certain other dialogues, especially *Laws*. Since positive law is the principal subject of *Laws*, the question concerns the relation of the ideal of the *Republic* to positive law. However, before that basic problem can be analyzed, it is necessary to discover Plato's position regarding the "rule of law," and specifically, to consider with reference to that, the prevailing interpretation as expressed by Barker, McIlwain, and Sabine.

After emphasizing the Greeks' veneration of their law,³⁵ Barker states: "There is one Greek thinker, Plato, who departs from the Greek conception of the sovereignty of law. In the *Crito*, indeed, and again in the *Laws*, he follows that conception; but in the *Republic* and the *Politicus* [*Statesman*] he specifically rejects the sovereignty of the law."³⁶ This is the thesis which Barker advances throughout his book.³⁷ The gist of his argument is that there is a fundamental opposition between the *Republic* and *Statesman*, on the one side, and *Crito* and *Laws*, on the other, concerning "the sovereignty of the law."³⁸

The first question is, did Plato "reject the sovereignty of the law" in the *Republic*? Was he there "a rebel against the rule of law"? At the outset, it must be granted that Barker's stand is a very bold one. To hold that Plato in this extremely important work was hostile to law, that he rebelled against and rejected the sovereignty of law, is to say that Plato

33. Hempel, *Problems of Concept and Theory Formation in the Social Sciences*, in SCIENCE, LANGUAGE, AND HUMAN RIGHTS 65 (1952).

34. "[O]ur purpose was to use them as ideal patterns." (*Rep.* 472c). A recent writer in a book seen after the above was written characterizes the *Republic* as "a toy model," a "model state," a "mechanical toy model," an "engineer's model." GRENE, MAN IN HIS PRIDE 155-57, 191 (1950).

35. Barker quotes Wilamowitz: "All morality, not only civic, but also human—all the benefits of civilisation—appear as the gifts of the law, which the society recognizes as its lord." BARKER, GREEK POLITICAL THEORY 38.

36. *Id.* at 39.

37. Barker reiterated his interpretation recently in his Introduction to his translation of the POLITICS OF ARISTOTLE, *op. cit. supra* note 15 at liv.

38. BARKER, GREEK POLITICAL THEORY 39-40. Barker even doubts "whether Plato ever really returned within the limits of the law. . . . The end of the *Laws* seem to indicate that to the very last he was still a rebel against the rule of law, and still an advocate of the rule of free intelligence. On the other hand it should be added that in the *Politicus* he does not absolutely reject the rule of law. He admits that, under certain conditions, it may be a 'second best'." *Id.* at 40 n. 1.

there opposed the Greek tradition of legality and repudiated the principal achievement of the Athenian polity.³⁹

An obvious challenge to Barker's interpretation is simply to point to many statements in the *Republic* in praise of law. This is implied in the criticism of politically incompetent persons "who make only a vain show of being guardians of the laws and of the commonwealth" (Cornford, 421a). Plato extols "a law-giver worthy of the name" (Cornford, 427a), for "many states, great and small, have owed much to a good law-giver, such as Lycurgus at Sparta, Charondas in Italy and Sicily, and our own Solon." (Cornford, 599de). He holds that "the law is not concerned to make any one class especially happy, but to ensure the welfare of the commonwealth as a whole. By persuasion or constraint it will unite the citizens in harmony. . . ." (Cornford, 519e). He wishes to control the play of children lest they "never grow into law-abiding and well-conducted men," and he seeks to instill in them "reverence for law" (Cornford, 424e-425a). His most severe criticism of degenerate democracy is that the citizens "end by disregarding even the law, written or unwritten." (Cornford, 563d). And he holds that "conduct has come to be approved or disapproved by law and custom . . . according as conduct tends to subdue the brutish parts of our nature to the human—perhaps I should rather say the divine in us. . . ." (Cornford, 589d). Are these the expressions of a man who had an "aversion" to law⁴⁰ and "rebelled against" and "absolutely rejected" the rule of law?

But the interpretation of a distinguished political theorist undoubtedly rests on substantial evidence; and, indeed, there are many statements in the *Republic* which seem to support Barker's position. Expressed in many of the dialogues⁴¹ is Plato's scathing criticism of courts and lawyers, of "those tricks of special pleading in the law-court" (Cornford, 499a) and "the scurrilous battle of words that goes on in the Assembly and the law-courts. . . ." (Cornford, 549d). Indeed, Plato anticipated practically all of the subsequent criticism of the lawyer's role, the adversary method of trial, and the evils of litigation.⁴² But what does Plato's criticism of lawyers and courts signify? It is only necessary

39. *Id.* at 271.

40. *Id.* at 203.

41. *Laches* 196b; *Euthyd.* 273c; *Gorg.* 471e-472a; *Phaedrus* 272e; *Theaet.* 172c, 173a, 175cd; *Laws* 743c, 937e-938a.

42. It should be remembered, however, that Greek procedure was informal, without guidance or control by any professional judge, and that the jurors (judges) consisted of several hundred laymen. The situation was an open invitation to indulge in all the tricks of rhetoric which Plato abhorred.

to recall that in *Crito* Plato distinguished law from judgments and administration, to realize that his criticism of courts and lawyers was not criticism of law.

One must, however, take account of the important passage heavily relied on by Barker, *viz.* "about . . . the ordinary dealings between man and man . . . about insult and injury," Plato will not "condescend to legislate." (425cd). The context of this passage is in the opening pages of Book Four. Plato has been discussing a number of important principles of legislation (417b), and, just preceding this passage, unlimited license in music is criticized because it undermines "laws and constitutions." (424e). Then the point is made that properly educated youth will themselves invent "lesser rules." Socrates specifies that these rules will be confined to such matters as when to be silent before elders, how to show respect for them, how to honor parents, what clothes to wear, in short, "deportment and manners in general." (425b). These are matters which the most rigorous modern *Rechtsstaats* omit from their legislation because they are unimportant or are not amenable to legal control.⁴³ Thus, the context of this important passage does not support the claim that the passage expresses opposition to the rule of law.

The passage itself and its relation to *Laws* must be more fully examined. The complete statement is:

Well, and about the business of the agora, and the ordinary dealings between man and man, or again about agreements with artisans; about insult and injury, or the commencement of actions, and the appointments of juries, what would you say? there may also arise questions about any impositions and exactions of market and harbour dues which may be required, and in general about the regulations of markets, police, harbours, and the like. But, oh heavens! shall we condescend to legislate on any of these particulars?

I think, he said, that there is no need to impose laws about them on good men; what regulations are necessary they will find out soon enough for themselves.

Yes, I said, my friend, if God will only preserve to them the laws which we have given them. (425cd).

What must be said about this passage in its fuller implications may be summarized as follows:

43. Cf. Nettleship, *op. cit. supra* note 19, at 141-42; and Pound, *Limits of Effective Legal Action*, XXVII *ETHICS* 150 (1917); 3 *A.B.A.J.* 55 (1917).

(1) As noted, just preceding this passage, Socrates had suggested the desirability of legislation to implement various principles; hence the sweeping inference drawn by Barker is not warranted.

(2) The passage includes no reference to those problems which Plato regarded as the most important ones, *e.g.*, religion, education, the family, and criminal behavior, all of which are made the subjects of considerable legislation in *Laws*. These very significant omissions, together with the fact that the passage closely followed the discussion of "lesser rules," indicate that Plato was still discussing minor matters.

(3) The passage does refer to personal injury and to certain contracts, and these are important. In *Laws* Plato states that properly educated citizens will be able to provide the necessary legislation themselves (*Laws* 846c), and that dialogue does include considerable legislation on these matters.⁴⁴ All of this indicates that Plato omitted in the *Republic* to legislate regarding them not because he was then opposed to the rule of law, but because actual legislation was not a necessary or even a coherent part of his "model," that is, a theory of legislation, an analysis of principles.

(4) The passage emphasizes "regulations"—that is the term Plato uses—rather than "law" which, for Plato, signified legal codes.⁴⁵ And Plato concludes the passage by asking, "shall we condescend to legislate on any of these particulars?"⁴⁶ The last phrase, as well as the other references to regulations, reinforces the view that Plato was here primarily concerned with problems of administration.⁴⁷ Thus, in sum, the above passage does not reveal any opposition by Plato to the rule of law.

A third direction to be taken in appraising Barker's thesis is found in the passages eulogizing education, where Plato asserts that it supplants the need for law. As Barker states, "there it was argued that when education has given a living knowledge, law has become unnecessary. . . .

44. In *Laws* there is legislation for assault and battery (882), for breach of contract (920-921), and for regulation of retail trade (917d-918c), coins, measures, and weights (746e-747a). But even in *Laws* manners are excluded from legal control (730b) and petty matters are also ignored since the habit of violating the law "in small matters" would undermine respect for law (788b).

45. The Greeks also distinguished laws from decrees. Sophocles, *Antigone* 450-460; PERROT, *DROIT PUBLICQUE D'ATHÈNES* 175-79 (1867).

46. Italics added.

47. Aristotle's comments on the *Republic* support the above interpretation. Thus, that Plato in the above passage was referring to regulations, and not to law, as then understood, see *POLITICS OF ARISTOTLE*, *op. cit. supra* note 15, at 1264a § 21. Aristotle also notes that the *Republic* "fails to throw any light on other questions . . . such as . . . the character of the laws they [the farmers] are to observe." *Id.* 1264a § 23. This implies that Aristotle did not interpret the *Republic* as a rejection of law, but only as omitting to deal with legislation. Finally, "no one disputes the fact that laws will be the best ruler and judge on the issues on which it is competent." *Id.* 1287b § 10.

When the citizen becomes a law to himself, State-made law is supererogatory. . . ."⁴⁸ Plato affirms that doctrine many times (*e.g.*, 405ab, 590de). But does this imply rejection of the rule of law?

That it does not is shown in the equal emphasis Plato gives law in his discussion of education. For example, he says, "it is better for everyone, we believe, to be subject to a power of godlike wisdom residing within himself, or, failing that, imposed from without, in order that all of us, being under one guidance, may be so far as possible equal and united. This, moreover, is plainly the intention of the law in lending its support to every member of the community, and also of the government of children. . . ." (Cornford, 590de).⁴⁹ This position is similar to that of the leading representatives of eighteenth and nineteenth century liberalism. There is, in short, no incompatibility between rigorous adherence to the rule of law and rigorous restriction of the scope of law. The scope of law is one thing and the value of law where it is admittedly necessary is quite another. To assert, in effect, that Plato opposed the rule of law because he preferred rational self-control is a *non sequitur*.

Our final inquiry regarding Barker's thesis leads to the heart of the problem of the *Republic*, reflected in Plato's unqualified approval of the "philosopher-king" who must not be fettered by positive law but who, instead, in Barker's words, represents "perfect knowledge freed from the impediment of law."⁵⁰ The required first step is to recall Sabine's interpretation of the *Republic* as a "type or model" and the writer's amplification of that.⁵¹ If the *Republic* is the delineation of an ideal construct while *Laws* is a legal treatise, we have a ready explanation for Plato's omission in the *Republic* to bind the "philosopher-king" by positive laws. For "philosopher-king" is a symbol of perfect wisdom. It is the principle of intelligence, not any external thing or actual person; hence it cannot be limited by positive law. In other words, a theory of legislation is not a book of statutes.

"Legislation" includes both the theory of legislation and enactment⁵²—knowledge of what is important and necessary for sound legislation and the application of that knowledge in the enactment of laws. The

48. BARKER, GREEK POLITICAL THEORY 278.

49. *E.g.*, "[I]n this matter the good are a law to themselves, and the coarser sort of lovers ought to be restrained by force. . . ." (*Symp.* 181e).

50. BARKER, GREEK POLITICAL THEORY 290. "[T]he philosophic rulers," writes Barker, "are absolute—absolute in the sense that they are untrammelled by any written law. Here Plato . . . comes near to the adoption of tyranny, the form of rule in which the sovereignty of law disappeared, and a personal rule usurped its place." *Id.* at 205.

51. See p. 177 *supra*.

52. The preambles in *Laws* include (1) references to the principles which supply the rational basis of the enactment and (2) exhortation to obey the law.

dramatis personae of the dialogues symbolize this twofold process. In Plato's scheme, the perfect ruler, the philosopher-king and the Athenian Stranger represent God, perfect knowledge, justice, the ideal, the Good, and, as will appear, Natural Law. And, on the other side, are more or less imperfect human beings—the actual rulers or legislators and their subjects. In modern terms one is apt to speak simply of the legislator's discovery of the better solutions or the science of legislation, and of legislation. Thus, (a) theoretical knowledge, especially of desirable ends, (b) practical restatement and adaptation of that knowledge to the immediate needs of legislation, and (c) legislation, including constitution-making and the drafting of codes and regulations, must be distinguished.

Some doubts regarding this interpretation may be resolved by observing Plato's use of certain words in the *Republic*. In an important, typical passage, Socrates says, "you remember how, when we first began to establish our commonwealth and several times since, we have laid down, as a universal principle, that everyone ought to perform the one function in the community for which his nature best suited him. Well, I believe that that principle, or some form of it, is justice." (Cornford, 433ab). Socrates is here addressing Glaucon, but since Glaucon merely asks occasional questions while Socrates does most of the talking, "we" means Socrates; and "we" lay down "a universal principle" (the division of labor) which is clearly not a positive law, but a ratio of legislation. Thus "we" represents the "philosopher-king," the Good, the Ideal, "true laws" or principles, God, or Nature.⁵³ Nextly, "ruler," used in the singular, is equivalent to "we"; it, too, means reason, true law, the Ideal, the philosopher-king. But when used in the plural, "rulers" means officials who are actual human beings; and though they may be very wise men, they are more or less imperfect. They are certainly not philosopher-kings.⁵⁴ Plato says "all are agreed that reason should be ruler." (Cornford, 442d). But positive legal duties are to be imposed on rulers,⁵⁵ e.g., "the judging of lawsuits is a duty that you will lay upon your Rulers, isn't it?" (Cornford, 433e). Plato also planned to subject "the noblest natures" to compulsory education followed by required public service. (Cornford, 519cd.

53. Cf. "[W]e can admit into our commonwealth only the poetry which celebrates the praises of the gods and of good men." (Cornford, 607a). "We shall have to prohibit such poems and tales and tell them to compose others in the contrary sense. Don't you think so?" (Cornford, 392b). "I entirely agree with your principles, he said, and I would have them observed as laws." (Cornford, 383c).

54. An important passage definitely shows that "we" and rulers are quite different persons: "Now, said I, can we devise something in the way of those convenient fictions we spoke of earlier, a single bold flight of invention, which we may induce the community in general, and if possible the Rulers themselves, to accept?" (Cornford, 414bc).

55. See *Rep.* 458c.

Cf. 423c and 534d). These passages provide additional evidence that Plato did not intend to leave the rulers of any actual state "unfettered by law."⁵⁶

To summarize: (1) Plato's criticism of courts and litigants, (2) the omission of legislation, (3) his preference for self-rule by educated persons, (4) the philosopher-king's freedom from legal control, (5) the meaning of certain key terms, and, of course, (6) the passages in praise of positive law do not support the thesis that in the *Republic* Plato rejected the rule of law.⁵⁷

Statesman

Written (ca. 360) some years after the *Republic* (ca. 380-370) and not long before *Laws* (ca. 355-348), the *Statesman* represents the transition from the zenith of Plato's most creative period to the practicality of his declining years. Although Plato had not rebelled against the rule of law in the *Republic* and certainly did not reject it, he had made it clear that self-rule, the practical expression of wisdom, is better than any external control. This insight prepared Plato for the great discovery of the *Statesman* regarding a basic limitation of positive law—the limitation inherent in the *generality* of law (295a). Plato's theory, representing the first formulation of a perennial problem of political science and jurisprudence,⁵⁸ became Aristotle's "*aequitas*," an essential concept of Roman law and of modern legal systems.

Barker insists that "in the *Politicus* [*Statesman*] law is still regarded as an evil. . . ."⁵⁹ but he mitigates this judgment by admitting that "above all a new attitude to law—still hostile, but much less uncompro-

56. Cf. "The rulers of his *Republic* . . . have won their place by a long novitiate of unswerving obedience to law. . . . One of the chief criteria in the election of the guardians is their life-long obedience to law." Shorey, *Plato's "Laws" and the Unity of Plato's Thought*, IX CLASS. PHILOL. 345, 357, 358 (1914).

57. That Plato held laws "necessary without doubt" but left the provision of them to citizens loyal to the fundamental constitution traced in the *Republic*, see DARESTE, LA SCIENCE DU DROIT EN GRÈCE 18 (1893). See also BURLE, NOTION DE DROIT NATUREL DANS L'ANTIQUITÉ GRÈCQUE 311 (1908), who, however, thinks Plato preferred the power of enlightened officials to the authority of the laws. *Id.* at 316. Hildenbrand thought that in the *Republic* Plato was interested only in setting up a constitution, not in the legal order of his State. I GESCHICHTE UND SYSTEM DER RECHTS—UND STAATSPHILOSOPHIE (1860).

58. "Almost all of the problems of jurisprudence come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates." POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 111 (1922).

59. BARKER, GREEK POLITICAL THEORY 278.

misisingly hostile—is one of its prominent features.”⁶⁰ Some explanation of this estimate of Plato’s attitude would seem to be all the more required because, unlike his discourse in the *Republic* or, indeed, in any other dialogue, Plato does make very disparaging remarks about law in the *Statesman*. There is, for example, that famous passage in which Plato compares law to “an obstinate and ignorant tyrant, who will not allow anything to be done contrary to his appointment, or any question to be asked. . . .” (294bc), which alone persuaded some commentators that Plato abhorred law. Of course, it is easy to set against such passages others in which law is highly praised. For example, it is suggested that “ruling without laws . . . has a harsh sound” (293e); and “no citizen should do anything contrary to the laws. . . .” (297c). But any such clipping of passages from their contexts does not solve the problem; it only indicates its complexity.

If the relevant passages in *Statesman* are examined (293-306), it is clear that Plato espouses a “true form of government” guided by political science, the “royal power”; hence, he argues, such a government must be composed of a very few persons, qualified to rule “on some scientific principle.” This is his ultimate norm and axiom; all other standards are subordinated to it, including “whether they rule according to law or without law.” (293c). But it is equally important to observe that his interrogator immediately demurred because “ruling without laws . . . has a harsh sound.” (293e). Plato, granting that “legislation is in a manner the business of a king,” insists that “the best thing of all is not that the law should rule, but that a man should rule supposing him to have wisdom and royal power.” (294a). There is no escape from the fact that “the law does not perfectly comprehend what is noblest and most just for all and therefore cannot enforce what is best. The differences of men and actions, and the endless irregular movements of human things, do not admit of any universal and simple rule. And no art whatsoever can lay down a rule which will last for all time.” (294ab).

Plato then confronts the crucial question: “[I]f the law is not the perfection of right, [note that this is far from implying that it is an evil] why are we compelled to make laws at all?” (294c). The answer is—necessity. It is impossible for any legislator “to provide exactly what is suitable for each particular case . . . for how can he sit at every man’s

60. *Id.* at 271. At least once Barker acknowledged the difficulty of his position: “Yet if there is change, there is also consistency. The two ideals [philosopher-king and guardian of the law] are not opposites: they are complements.” *Id.* at 295. This recognition is, however, merely an after-thought in Barker’s analysis and it is patently opposed to his general thesis.

side all through his life, prescribing for him the exact particulars of his duty?" (295ab).

Although Plato holds that positive law cannot be perfect, he never says, like Bentham, that law is an evil. On the contrary, he insists that, so far as it goes, law, founded on science, is good, useful, and necessary. And he returns, after having carried his scientific axiom to its logical end, to his approval of law as "very right and good when regarded as the second best thing, if you set aside the first, of which I was just now speaking." (297cd). The surface inconsistencies dissolve in Plato's insistence that the best *actual* state is always a *Rechtsstaat*. He supports this by emphasizing the practical limitations of his axiom, the difficulties in the way of putting political science into actual operation. Thus he severely criticizes the malevolent physician who puts his patient "out of the way" and the unscrupulous pilots who "are guilty of numberless evil deeds." In the same class is the official who exercises "absolute control." (298b). Then follows the passage which, itself, makes it abundantly clear that the *Statesman* preferred the rule of law to any other kind of government: "To go against the laws, which are based upon long experience, and the wisdom of counsellors who have graciously recommended them and persuaded the multitude to pass them, would be a far greater and more ruinous error than any adherence to written law?" (300b). This implies that "the nearest approach which these lower forms of government can ever make to the true government of the one scientific ruler, is to do nothing contrary to their own written laws and national customs as the State is not like a beehive, and has no natural head who is at once recognized to be the superior both in body and in mind, mankind are obliged to meet and make laws, and endeavour to approach as nearly as they can to the true form of government." (300e-301a, 301e).

In Plato's classification of existing states, the principal criterion is not political science but the rule of law (and the number of rulers). (302e). Thus, among actual states, Plato holds that monarchy "when bound by good prescriptions or laws, is the best of all the six," and lawless tyranny is the worst. (*Id*). But, immediately, Plato again holds up the ideal of the "true Statesman," who "will do many things within his own sphere of action by his art without regard to the laws. . . ." (300cd). It should now be clear that such passages cannot be interpreted as anti-legalism.⁶¹ To do that reveals a failure to apprehend Plato's distinction

61. "If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and

between perfection and any actual institution which necessarily falls short of it.⁶²

In view of the fact that Barker's thesis rests, in part, on alleged biographical data (Plato's disappointing political experience, his conservatism and willingness to compromise in old age), it is pertinent to add the evidence of the *Seventh Letter*.⁶³ There, writing of his disciple, Dion, Plato states that if he had retained political power "he would next have arrayed the citizens, so far as he was able, with laws that were suitable and best." (*Seventh Letter* 336a). He repeatedly and vigorously urges that victors in war should themselves obey the laws they establish (337a); indeed "everything depends upon this: if the victors show themselves more ready than the vanquished to submit to the laws, there will be every hope of salvation and happiness . . . otherwise do not invite me or anyone else to help in dealing with him who does not agree to what I have now prescribed." (337d).

Laws

To complete the analysis of the *Republic* and the problems discussed above, Plato's last, and in many ways his greatest, dialogue, *Laws*, must be considered. Aristotle observed that "in the *Laws* there is hardly anything but laws."⁶⁴ And Taylor, characterizing *Laws* as "severely practical," describes the custom of providing Greek colonies with codes of law and the service of the Academy in filling this need. "Hence," he writes, "it was eminently desirable that men contemplating the probability of being called on to 'legislate,' should be provided with an example of the way in which the work should be gone about, and the *Laws* is meant to furnish just such an example."⁶⁵ Plato, himself, was invited to draft legal codes, and it seems that the Academy and its students contributed much to legal codification.⁶⁶ But much more than the draft of a legal code is presented in *Laws*.

The practical objective of *Laws*—to provide a code of laws for a planned colony—is announced at the outset. That *Laws* is directed to-

in the next place, oblige it to control itself." THE FEDERALIST, No. 51, at 323 (Lodge ed. 1904) (Hamilton).

62. For a similar interpretation of *Statesman*, see Field, *Plato's Political Thought and its Value Today*, XVI PHILOS. 240 (1941).

63. *Seventh Letter*, in BLUCK, PLATO'S LIFE AND THOUGHT 169 (1949). See also *Ep. VIII* 354c, 355e.

64. ARISTOTLE, POLITICS 1265a (Jowett transl. 1921). Barker's translation of Aristotle's text is: "The great bulk of the *Laws* is concerned with legislation." POLITICS OF ARISTOTLE, *op. cit. supra* note 15, at 1265a § 4. Cf. Jowett, "As Aristotle says in the *Politics*, 'The greater part consists of laws.'" Plato's Dialogues V, xiv (3rd ed.).

65. TAYLOR, PLATO, THE MAN AND HIS WORK 463, 464 (1936).

66. I BURNET, GREEK PHILOSOPHY 219, 224 (1914).

wards the organization of an actual state is further indicated in Book Four, where questions of the physical environment, location, and economic resources of the colony are discussed in detail. It is also noteworthy that the introductory books of *Laws* are on an intermediate level of abstraction, lying between theory (e.g., *Republic* and *Theaetetus*) and practical application (the legal code of the *Laws*). Thus, the discussion of pleasure and good in Book Two is not an analysis of principles. It is assumed that pleasure and good are different and that the good ought to be pursued (as was established, e.g., in *Gorgias* and *Republic*). The remarks in Book Three point to that as already proved, and go on to formulate a practical guide for legislators, for example, the cultivation of self-control by subjecting citizens to the temptations of pleasure.

When we turn to the "greater bulk" of the *Laws*, it is immediately evident that the discussion differs markedly from that of the *Republic*. From 774 of Book Six to 960 (the middle of Book Twelve) the discourse is mostly concerned with specific legislation. It is this part of *Laws* which has suggested the common observation that the dialogue is a "code of law." But it is certainly not a code in the modern sense. There are, to be sure, many specific rules of law, both substantive and procedural. At 774a, e.g., is a law penalizing bachelors older than 35 and specifying the levy of annual fines. A similarly graduated scale penalizes the expenditure of more than fixed sums for marriage garments. Divorce is permissible after ten years of childless marriage (784b). Compensatory and punitive damages must be paid for removal of landmarks (843b). For taking possession of a neighbor's swarm of bees, for carelessly firing one's wood so as to endanger a neighbor's property (843de), and for diversion of water, compensation, injunction, and punitive damages are likewise provided (844cd). Fines for premature gathering of grapes are specified, and slaves who commit such an act shall be beaten (844e-845a). Book Nine concerns the more serious crimes: The robber of temples ("the greatest of crimes") shall be executed (854e); thieves must pay double the amount stolen (857a); insane persons are liable in damages for their torts, but they are not to be punished (864de); homicides are classified on lines that are still observed in modern criminal law, and the penalties are similarly graduated (867c-869e). The proposed legislation ends with regulation of expenditures for funerals (959d).

Although there are a goodly number of such legal rules in *Laws*, they comprise, in all, but a small portion of the dialogue. An additional part of the text might be placed in what is now called the "general part" of legal codes, e.g., the provisions concerning insanity, drunkenness, and

criminal attempts. Many regulations are formulated, and a bureaucracy is established with detailed directions regarding administration.⁶⁷ Procedural rules to govern trials and hearings are also included. Much of the text consists of commentaries and preambles which recite the rationale of the laws, and there are many exhortations to obey the laws and much emphasis on rewards and honors, which find no place in modern legal systems. Many privileges are set forth, demarking areas that are to be left free from legal control.

What, in sum, this portion of *Laws* incompletely comprises is (1) a rough draft of a constitution creating offices and imposing legal duties, (2) a partial code of substantive civil and criminal law, (3) administrative regulations, (4) rules of procedure, (5) doctrines, and (6) a treatise on the proposed laws. It is in this critical explication of laws that the "Athenian Stranger" sometimes repeats principles which Socrates analyzed in the *Republic*. The theory of legislation expounded in the *Republic* is restated in practical terms. The gist of it is that the legislator's function is to educate the citizens by persuading or coercing them to live a good life. This requires the legislator, first, to understand the relevant empirical and moral knowledge. Secondly, the legislator must look from the model to the clay; he must use his knowledge in drafting laws to direct the conduct of the citizens towards right ends. Finally, it should be added that the legislator is himself a member of the political community; unlike the "philosopher-king," he is only an erring mortal, subjected to law like other citizens.⁶⁸

Legislation is the heart of Plato's practical philosophy. It is expressed in his repeated identification of the purpose of legislation with that of gymnastics, and his contrasting these with the judicial process and the practice of medicine. Medicine is, for him, a practical science used to restore the balance of health, whereas gymnastics habituates the body to the development and maintenance of health. Only when that is disturbed is the physician summoned. So, too, legislation disciplines human nature and habituates it to a rational integration of the components of the soul—the condition of justice. Only when the dominance of reason is upset by

67. Book Six, *Laws*, virtually comprises a treatise on administration. In addition to magistrates of various sorts, including guardians or curators of the laws, there are to be superintendents, treasurers and wardens, *e.g.*, of streets, houses, harbors, the marketplace, religious shrines and temples. The minister of education is among the highest officials. The provisions regarding adulteration of any goods, including those for inspection, investigation ["The wardens of the agora and the guardians of the law shall obtain information from experienced persons about the rogueries and adulterations of the sellers. . . ." (917e)], regulation, and publication of the rules are a fair index of Plato's thinking on this phase of government.

68. See FOSTER, *THE POLITICAL PHILOSOPHIES OF PLATO AND HEGEL* 17-18 (1935).

ignorance or passion is recourse to the law-courts necessary. Coercive sanctions are used just as doctors administer bitter drugs. In short, legislation is a constructive, educational process, implementing the ideal pattern, whereas adjudication is only remedial.

Plato's *Statesman*, also distinguishing legislation from adjudication, limited amendment and divergence to the former. Judging, he held, was not an exercise of "the royal power";⁶⁹ therefore the judges, that is, the laymen Plato despised, must adhere strictly to existing law.⁷⁰ This eliminates from the scope of Plato's axiom on the primacy of political science all the discretion in the area that is paramount in the modern tradition of rule of law, namely litigated cases. Plato's uniform position regarding positive law is shown in *Laws*, where he often reaffirms his preference for rational self-control and also emphasizes the necessity of law in any actual state.⁷¹

It was in connection with the problem of sanctions that Plato considered the judicial process. In the context of his proposed enactments on assault and battery (875d-876a), after specifying variations in kinds of wounds, by whom and on whom inflicted, where, how, and when, he argues that the individual differences in fact and harms committed are too great for detailed legislative prescription of the sanctions. "[S]omething must be left to the discretion of the courts, but not everything; there are things which the law must itself regulate." (Taylor, 876a). The principle for determination of the respective allocation of functions between legislature and judiciary (*i.e.*, rule and discretion) is the competence of the courts (that of the legislator is assumed). Where courts are incompetent the legislator "is compelled to restrict the court's discretion to assess penalties to cases of the most insignificant kind and to do most of the work himself by express statute. . . ." (Taylor, 876b). But if judges are competent it is "entirely right and fitting that such courts

69. "Does he do anything but decide the dealings of men with one another to be just or unjust in accordance with the standard which he receives from the king and legislator,—showing his own peculiar virtue only in this, that he is not perverted by gifts, or fears, or pity, or by any sort of favour or enmity, into deciding the suits of men with one another contrary to the appointment of the legislator?" (*States.* 305b). See also *Apol.* 35c.

70. Plato did not even envisage a judiciary or a profession of judges. Morrow, *Plato and the Rule of Law*, *L. PHILOS. REV.* 105, 124 (1941).

71. See *Laws* 875cd; 698ab; "justice according to law" 871c; "he who is most obedient to the laws of the state, he shall win the palm [*i.e.*, of office]. . . ." 715c; "for that state in which the law is subject and has no authority, I perceive to be on the highway to ruin; but I see that the state in which the law is above the rulers, and the rulers are the inferiors of the law, has salvation, and every blessing which the Gods can confer." 715cd. Taylor's translation (1934) of the last clause is: "where it [law] is sovereign over the authorities and they its humble servants. . . ."

should be allowed a wide discretion in assessing the fines or other penalties of offenders." (Taylor, 876c). Even then, however, Plato insists that the judges are bound to act within the law and "samples of penalties should be set before the judges as a model to keep them from an infringement of the bounds of right." (Taylor, 876e).

The crux of the more difficult question concerning the interrelations of the *Republic* and *Laws* lies in the meaning of Plato's "best" and "second best" states. If he is talking in the same level of discourse in both dialogues, if he is comparing the same kind of object (*e.g.*, two political states), there is no escaping the conclusion that Plato either opposed reason to positive law or that he took an inconsistent position in regard to them. I have tried to show that Plato did neither of these. The first step toward solution of this important problem is recognition of the fact that Plato, when he wrote the *Republic* and *Laws*, was thinking in two distinct, but compatible levels: the ideal and the actual. What is the relation of the one to the other in Plato's theory? The ideal and the actual are not in the same sphere of discourse, and they therefore cannot be contradictory. Nor can it be maintained that the twain shall never meet. For we have seen in the *Republic* that we cannot dispose of the difficulties of interpretation by dismissing Plato's ideal as irrelevant to existing political communities.

That the relation of the *Republic* to *Laws* is not a simple one of ideal to fact is clearly shown in many passages in *Laws* which indicate that its state actually embodies many ideals. The Spartan organization for war is rejected because it was directed toward "the least part of virtue" (631a); instead, the laws of the planned state must be made "for the sake of the best" (628c) and with "regard to the greatest virtue." (630bc). There is the exclusion of seafaring trade (704e-705a) to prevent contact with trouble-making merchants and foreigners; the insistence on a population of 5040 citizens—the correct number for a just distribution of the land and for self-defense; the prohibition of dowries and interest on loans (742bc); and the subordination of the accumulation of wealth to higher values. (*Id.*) Finally, in the provision for a "divine assembly" (969b), there is explicit reiteration of the proposal in the *Republic*. In sum, while the *Republic* is the ideal, *Laws* presents an actual state which exhibits a partial realization of the ideal.

Stated in terms of later jurisprudence—in a perfect society everyone understands and conforms to the Natural Law. Since the *Republic* is an ideal state, all citizens are perfect. They are at least the equals of those wise persons whom Plato often characterizes as able to rule themselves.

For these persons, positive laws are not only unnecessary, it would be superfluous, indeed, indefensible, to attempt to subject them to such laws. Accordingly, Plato's omission in the *Republic* to pay much attention to positive laws is not the slightest evidence of the repudiation of the sovereignty of law.

The Ideal State of the *Republic* (true law, perfect wisdom) is best "ultimately" or "absolutely." Any actual state is "second best" only when compared with the ultimate or absolute ideal. Among actual states, the "second best" is the best. And, without doubt, the best actual state is always and necessarily a *Rechtsstaat*. To describe it as "second best" is merely to assert that it is not perfect. But far from being *opposed* to the Ideal State, the "second best" state more than any other actual state achieves the Ideal. For reason is not opposed to sound positive law; on the contrary, such law embodies reason, though it does so imperfectly. Plato holds quite consistently that the rule of law is the best means toward, indeed, the essential condition of, the actualization of values. There can, therefore, be no conflict between the *Republic* and *Laws*, but only a gap between them; and there was no change in Plato's position.⁷²

It may be suggested, finally, that two major difficulties have been responsible for questionable interpretations of Plato's legal-political philosophy. The first is reading Plato from the viewpoint, or under the influence, of legal positivism, which is evident, for example, in Barker's opposition of reason and law. This has even led to attributing that restrictive view of law to Plato, *e.g.*, McIlwain refers to Plato's position in terms of "the straight-jacket of the law."⁷³ We have seen how ill-founded is such an interpretation of Plato's theory of law. Plato was anything but a legal positivist, and to read his philosophy in terms of the positivist dichotomy is simply to impose an alien theory on him.

The other principal difficulty has resulted from the assumption that the *Republic* and *Laws* are autonomous and independent works presenting two "states." Even Sabine, when he comes to consider the relation of the *Republic* to *Laws*, asserts that "the theory of the state contained in the *Republic* must be regarded as having made a false start."⁷⁴ Although he recognized that the *Republic* represents an "ideal state," no consistent use of that insight was made to relate that dialogue to *Laws*. The stum-

72. Cf. "[A]bandoning the State of pure Justice with its 'perfect Guardians,' he advocates the law-state with its Guardians of the Law." BARKER, GREEK POLITICAL THEORY 117. See also III JAEGER, PAIDEIA 214, 336 n. 6, 337 n. 9.

73. McILWAIN, *op. cit. supra* note 27, at 27.

74. SABINE, *op. cit. supra* note 29, at 85. Cf. SHOREY, THE IDEA OF THE GOOD IN PLATO'S REPUBLIC (1895).

bling block was that Plato excluded positive law from the *Republic*. Sabine felt constrained to criticize Plato on that account because "the law contains . . . an accumulation of the results of applying intelligence to concrete cases and also an ideal of equitable treatment of like cases."⁷⁵ This defense of law against a non-existent opposition to it is both irrelevant and misleading. More serious yet, it raises a major obstacle to the sound interrelation of the *Republic* and *Laws*. Plato's enduring interest was the best possible actual state and, accordingly, a consistent interpretation of both dialogues is attainable. Thus, the *Republic* may be viewed as the first part of a treatise which includes *Laws*.⁷⁶ The former represents the ultimate ideal, the distant, ever-beckoning goal. *Laws* is a half-way house, an actual point in a never-ending effort to attain perfection.

The problems which Plato discussed in these legal-political dialogues comprise the major issues of modern social science. I refer particularly to the polemics regarding the place of values in the social disciplines and to the relevant questions of theory and research which confront modern scholars. Plato contributed greatly to the solution of these problems, most notably, perhaps, in his presentation of social facts as normative. This is the meaning of *Laws* when that dialogue is viewed in relation to the *Republic*. Any actual state can be understood only when it is recognized as normative fact, as on-going processes which embody ideal elements and are also directed toward their greater realization. This applies to the subject matter of all the social disciplines.

For example, consider the recent debates on the Is and Ought of positive law. The polemics were confused by failure to define the problems precisely, *e.g.*, the definition of law, so that it was left uncertain whether one was discussing legal ideas or actual processes. Plato's dialectical method would have resolved the frustrating ambiguities. His analysis also discloses that the problem concerning the Is and Ought of law includes two principal questions: the nature of law viewed as functional or institutional, and the criticism of law. Plato's implied answer to questions concerning the first problem has been stated—such law is a normative fact. It is an actuality that is, in part, ideal. It includes ends already realized and continuing efforts to incorporate those values more fully, as well as to achieve other ideals. What needs emphasis is that the normative aspect of laws (or of any other social facts) does not preclude description of them. It determines the kind of description that is most

75. SABINE, *op. cit. supra* note 29, at 65; see also 68.

76. To this effect see HILDENBRAND, *op. cit. supra* note 57, at 201.

significant, in contrast to descriptions of physical processes. The most significant, though not sufficient, description of a social fact like law is a description of the represented efforts to attain certain ends and of the partial realization of them. That is the Is of law. It is description of actual goal-seeking and goal-realization.

Secondly, criticism of law means evaluating the relevant normative facts in relation to a standard.⁷⁷ The Ought of law, understood in terms of such criticism of law, implies the possibility of fuller realization of the accepted ends, or that better goals can and should be sought. Criticism in terms of Ought sets against the accepted goals, other, better goals, and against present efforts, greater ones. Thus both in defining important problems of social research and in his suggestiveness regarding their solution, Plato made very important contributions.

THE AMPLITUDE OF PLATO'S PHILOSOPHY OF LAW

Discussions of Plato's philosophy of law are apt to exhibit considerable oversimplification. Plato said many things about law. The tendency to generalize may be checked if the various contexts of his discourse are held in view. Accordingly, it can be shown that Plato's discussions of positive law are expressions of four perspectives—the evaluative, ideological, practical, and scientific. These are often difficult to separate. For example, when Socrates in the *Apology* spoke of the "command" of the Thirty Tyrants to arrest Leon of Salamis as a specimen of that "oppressive power," he was both evaluating their power norms and indulging in ideology.

The evaluative perspective, free of involvement in ideology, is clearest in critical analysis and in conversation with friends who represent different points of view. The probing of grounds of policy and the search for desirable ends, conducted dispassionately and critically, are the earmarks of objective evaluation of law; and this is frequently Plato's perspective. The ideological perspective⁷⁸ is prominent in sharp debates on political obligation, where one is apt to characterize rules for the purpose of winning an argument, or in bitter opposition to a government, as when Antigone contrasted the law of Zeus with the mere "decrees" of

77. "We are enquiring into the nature of absolute justice and into the character of the perfectly just, and into injustice and the perfectly unjust, that we might have an ideal. We were to look at these in order that we might judge of our own happiness and unhappiness according to the standard which they exhibited and the degree in which we resembled them. . . ." (*Rep.* 472cd). This problem is more fully discussed in HALL, *THEFT, LAW AND SOCIETY, Introduction* (2nd ed. 1952).

78. The ideological perspective may, of course, be regarded as simply unsound evaluation.

the rulers.⁷⁹ The third perspective is the practical one of the potential litigant. Here one is interested in the formal aspect of rules, in the commands of the state, in "lawyer's law." Finally, there are some passages where Plato looks at law from a scientific perspective. He is apt here, also, to evaluate the norms under inspection, but his purpose goes beyond that, extending to considerations that are important in political-legal science, analytical and empirical.

The formal phase of Plato's science of law is quickly discovered: Plato clearly recognized that aspect of law as a normative proposition and, also, its enforcement by "the ruling power in each state." (*Rep.* 338d). To the illustrations, noted elsewhere by the writer,⁸⁰ may be added many of Plato's proposed enactments in *Laws*, which are expressed in the form of conditional judgments, joining a described set of circumstances to a sanction by use of the verb "shall" or "must" or an equivalent.⁸¹ His awareness of the structure of laws is indicated in his formula: "Do this, avoid that—and then holding the penalty in terrorem. . . ." (*Laws* 719e). He often uses the word "prescribe" (*Rep.* 525b) and writes of the legislator's "command, that is to say the law." (*Laws* 723a). The sanctions include a large array of "evils," but they occasionally specify the grant of rewards (*Laws* 834a), though this, like "praise [of those] . . . obedient to the law" (*Laws* 775b, 921e), is usually not part of the rule itself, but is an extra-legal sanction.

It is true that Plato did not construct a system of basic legal conceptions, and the dialogues include nothing like the detailed analysis of Austin or Hohfeld. But almost all the notions employed by those writers are found in Plato, such as, correlatives (*Rep.* 478c; "two correlative terms, if one is qualified, the other must always be qualified too. . . ." Cornford, 438b); opposites and "pairs of opposites,"⁸² and privilege ("they alone shall be free . . . but the rest of the world shall not have this liberty").⁸³ He employed the term "hurt" to mean legally forbidden harm (*Laws* 861e), and the concepts of contract, crime, intention, negligence, accident, fraud and coercion, necessity, voluntary and involuntary, as well as many specific legal harms, are discussed. But it would be

79. Sophocles, *Antigone*, 450-460. That the distinction between laws and decrees was current among the Greeks, see FERROT, *op. cit. supra* note 45.

80. HALL, *LIVING LAW OF DEMOCRATIC SOCIETY* 19-20 (1949). For discussion of the thesis that the Greeks anticipated modern Legal Positivism see Professor Calhoun's essay summarized therein.

81. Plato even made the required procedure part of the circumstance clause: "And if any one disobeys this regulation, and is brought into court and convicted, he shall be punished with death, and his property shall be confiscated." (*Laws* 915c).

82. *Phaedo* 71a, 71c; *Laws* 901a.

83. *Laws* 829d. Cf. *Rep.* 389b.

difficult to establish definite, historical connections between Plato and the modern legal positivists.⁸⁴

The polemics of Platonists and Aristotelians and the modern pre-occupation with facts have combined to obscure Plato's importance in the history of science, including that of law and politics. Yet Plato's life-long quest for the "one in the many" represents the most characteristic and enduring feature of the scientific mind. Although it is true that Aristotle engaged in much more factual investigation than his teacher, Plato did not lack interest in empirical research.⁸⁵ He was certainly concerned with empirical political science, for example, his interest in the origin of the political community. He was among the first to hold that patriarchal rule was the primitive form of government. In the pre-literate era, he suggested, there were no lawgivers in the Greek sense but rather the first families "lived by habit and the customs of their ancestors. . . ."⁸⁶ Any association, he held, could legislate for its own members, and the statutes would be recognized by the state so far as they were not in conflict with its laws.⁸⁷ This is significant with regard to an important theory of modern legal sociology concerning the law of sub-groups.

The search for valid empirical generalizations was directed persistently. Plato wanted to study many political communities over a long period of time "and observe the changes which take place in them. . . ." (*Laws* 676a). He emphasized "the cause of these changes; for that will probably explain the first origin and development of forms of government." (*Laws* 676c). He sought not only to "analyze the causes of their [statesmen and legislators] failure" but also to "find out what else might have been done." (*Laws* 693ab).

In formulating these inquiries he entertained many hypotheses as instruments of scientific method. Social research was to be guided by such generalizations as the effect of a "spirit of license" upon manners and customs, thence on contracts, and finally on "laws and constitutions" (*Rep.* 424de), and "that the plays of childhood have a great deal to do with the permanence or want of permanence in legislation." (*Laws* 797a). An instance of a more precise hypothesis is that "when modes of music change, the fundamental laws of the State always change with them." (*Rep.* 424c). It is noteworthy that Plato's investigations were to be

84. The connecting link would, of course, be Roman law and jurisprudence; Austin studied these subjects in Germany. But it is a moot question whether the Romans were directly influenced by Greek philosophy, *e.g.*, via Cicero, or whether, like the English common law judges, they developed their law without benefit of philosophy.

85. FIELD, *THE PHILOSOPHY OF PLATO* (1949).

86. *Laws* 680ab. Cf. MACIVER, *SOCIETY: A TEXTBOOK OF SOCIOLOGY* 332-33 (1937).

87. Wilamowitz, quoted by BARKER, *GREEK POLITICAL THEORY* 43 & n.3.

projected from both the viewpoint of social control, *i.e.*, that of the manipulator, and also, as just indicated, from the viewpoint of the objective researcher, the scientific observer. Plato's interest in the former was expressed in terms of "the art of rearing man collectively" (*States.* 267d) and "the management and control of living beings" (*States.* 261d); and he thought a tyrant "can change the manners of a state." (*Laws* 711b).

But it is the other side of Plato's social science, revealed in his discussion of the conditions of political community (*Laws* 709de) and of the interactions of law with environment, physical and social, that is especially significant. For example, in *Laws*, the Spartan defends his institutions by reference to "the character" of his country (*Laws* 625cd). Plato develops the idea, suggesting "that man never legislates, but accidents of all sorts legislate for us in all sorts of ways." War and poverty "are constantly overturning governments and changing laws." So too, disease, pestilence, and bad seasons affect law and government (*Laws* 709a). Related to this attitude toward the political process is Plato's thesis that legislation must be adapted to many kinds of conditions, including even "diverse winds and violent heats," water, and the food which affects both body and personality. "To all these matters the legislator, if he have any sense in him, will attend as far as man can, and frame his laws accordingly." (*Laws* 747e). Plato's scientific interest was also expressed in practical proposals, *e.g.*, to appoint official social scientists, "spectators," who were to travel abroad and report periodically on any possible improvements in law and government suggested by their investigations.⁸⁸

These contributions to a science of law and politics, and Plato's familiarity with various types of "authoritative materials" must be taken into account in determining his use of the term "law." The most important question in this regard concerns the thesis that Plato held value to be an essential element of positive law, that there is no such thing as "an unjust law."

Certain passages seem to support this thesis, *e.g.*, (1) "right reason, which the law affirms" (*Laws* 659cd); (2) "meaning by the very term 'law' the distribution of mind" (*Laws* 714a); (3) "virtue and justice and institutions and laws being the best things among men" (*Crito* 53c); (4) "the beauty of institutions and laws" (*Symp.* 210c); and (5) "the sacred and golden cord of reason, called by us the common [public] law

88. Especially were they to report "about kinds of knowledge which may appear to be of use . . . or of which the want will make the subject of laws dark and uncertain. . . ." (*Laws* 952a).

of the State." (*Laws* 645a). The contexts of these passages show that in (1) Plato, speaking as the Athenian Stranger in *Laws*, is proposing censorship of music and the theatre. In (2) the context is the perfect law of Cronos in a mythical past. The use of "law" in that context is also ambiguous, and Plato may have intended to identify "true law" with positive law. In any case, he was certainly not discussing any existing positive law. In (3) the context is a discussion of the Athenian state, whose laws Socrates approved. The statement in (4) is from Diotima's eulogy of Eros, and she was speaking of the education of young men so that instead of being bound by a restrictive notion of beauty, they would see it in many places—"the beauty of them all is of one family." In (5), the context is the inner conflict between vice and reason, and the quoted phrase is merely incidental to the discussion. Moreover, the Athenian Stranger is proposing legislation for a new colony: "*the State*" may well refer to that planned city, where the norms called law "by us" are quite different from the positive laws of actual states. "[L]aws generally *should* look to one thing only . . . virtue."⁸⁹

When it is clear that Plato is discussing existing positive laws, he almost invariably evaluates them as most modern critics would. They are good or bad, hence, we "praise and blame the laws. . . ." (*Laws* 770e). He criticizes Cretan laws because they were designed only for war (*Laws* 705de). He speaks of "a city which has good laws" (*Laws* 656c), and he reserves his highest praise for "the knowledge of good laws. . . ." (*Laws* 957c). At the beginning of *Laws*, it is admitted that "one of us may have to censure the [existing] laws of the others" (*Laws* 634c). The Stranger's (*i.e.*, Plato's) criticism is so sharp that his interlocutor demurs (*Laws* 667a). In referring to certain colonies, Plato comments on "the badness of their own laws." (*Laws* 708c). He observes that "some laws are better and others worse" (*Crat.* 429b), and he even goes so far as to assert that some "laws are . . . the destruction of cities." (*Laws* 683b). He criticizes "laws . . . passed for the good of particular classes [in oligarchies] . . . States which have such laws are not polities but parties. . . ."⁹⁰

If we keep these and similar passages in mind we will avoid over-

89. *Laws* 963a. (Italics added.)

90. *Laws* 715b. Professor Morrow, after noting that there was "a tendency" in the Academy to identify positive with ideal law, adds, "doubtless these Academics continued to speak with the vulgar and to apply the term *nomos* also to the legal and moral rules that were currently regarded as binding, however defective they might be from the point of view of the ideal. Such a way of speaking would be confusing on occasion. . . . Now this confusion is present in Plato's *Laws*. . . ." MORROW, *Plato and the Law of Nature*, in *ESSAYS IN POLITICAL THEORY* 17, 40 (Konvitz and Murphy ed. 1948).

simplification of Plato's philosophy of law. We will refrain from out-of-context emphasis on sentences which have sometimes been heavily relied upon to support the thesis that Plato's theory is identical with that of Stoic and medieval legal philosophies.

Minos bears directly on this question, since Socrates is alleged to have said, "an evil decree cannot be [positive] law." Here, indeed, is an extremely valuable record of an important discussion conducted in an atmosphere of objective inquiry. The opening sentence of the dialogue—"What is law?"—indicates the relevance of the discourse. But *Minos* raises no problem so far as Plato's theory is concerned, because it was not written by Plato. It is a pseudo-Platonic dialogue written about 250 B.C. and is probably of Stoic origin.⁹¹ It represents a new ideological position, dictated by the political subservience of Athens and the cosmopolitan character of its intellectual élite.

There remains only *Hippias Major* where Socrates is alleged to have said, "then when those who make the laws miss the good, they have missed the lawful and the law." (284e). And the authority of Sir David Ross has recently been added to support the genuineness of that dialogue, although he recognizes that many scholars regard it as spurious.⁹² But even if *Hippias Major* was written by Plato it must still be recognized that the frequently quoted passages amount to mere fragments in comparison with the bulk of Plato's discourse on law. Is it likely that the author of *Apology*, *Crito*, *Statesman*, and *Laws*, which, together, comprise almost half of his published work, would have discussed the most fundamental of all jurisprudential issues in so casual a manner? Accordingly, even if Plato did write *Hippias Major*, it cannot be regarded as a radical revision of his legal-political treatises.

This does not, of course, imply that Plato was unsympathetic to the views expressed in the *Minos*, much less that he did not suggest its principal argument. The identification of law with morality was a popular notion, a Greek tradition, formulated by Heraclitus⁹³ and harking back to ancient myth and belief in the divine origin of positive law. It is this belief which gave priority to law over justice, reversing the modern standpoint and standard of evaluation. Ancient law, emanating from the

91. HEIDEL, PSEUDO-PLATONICA 15, 43 (1896). Similar is Jaeger's view. See his *Praise of Law*, in INTERPRETATIONS OF MODERN LEGAL PHILOSOPHIES 369 (Sayre ed. 1947). Heidel says *Minos* 315a "is identical in meaning with *Hipp. Maj.* 284d." And "the genuineness of that dialogue is still debated." SHOREY, WHAT PLATO SAID 91 (1934). So, too, TARRANT, THE HIPPIAS MAJOR xi (1928). But cf. ROSS, PLATO'S THEORY OF IDEAS 3, 4 (1951).

92. ROSS, *op. cit. supra* note 91.

93. I JAEGER, PAIDEIA 181, 184.

gods, was, of course, perfect rule, and justice was a reflection or consequence of it. This was a frequent theme of the poets and pre-Socratic philosophers. Thus, from the very beginning, positive law embodied value. Xenophon attributed that belief to Socrates,⁹⁴ and Plato undoubtedly supported the tradition. But approval of a tradition is quite different from the explication of a theory of law.

Plato's philosophy of law opposes certain modern theories, *e.g.*, that "law is concerned with external behavior and not with the inner life of man."⁹⁵ This has been the chief point emphasized by many modern writers in differentiating law and ethics. Some of them also assert that ethical principles are autonomous while law is heteronomous, that ethics involves only the individual while law is bilateral. Finally, there is the insistence of legal positivists that ethical principles are not sanctioned while laws are sanctioned.

The validity of these theories of law is challenged by Plato's philosophy. His insistence that justice involves the "inward self" must be set against the restrictive view that law is concerned solely with external action. Deliberately doing a right act implies a correct inward "movement" or state of mind. If the motive is bad, the plenitude of morality is obviously lacking. But, at the same time, the mental state is surely and significantly different from that of a person who intentionally harms someone and from that of one who fails to do a right act. For there is recognition of the external act as required (and also, often, as ethical) and a voluntary movement, however reluctant, to do the act, which is ethically significant. Only on the premise that law may require harmful actions can the current thesis be defended. With reference to the alleged autonomous nature of ethics, it is only necessary to refer to the thoroughgoing social character of Plato's ethics to refute the notion that ethics are not interpersonal.

Finally, Plato held that ethical principles, no less than rules of law, are sanctioned. That violators of the "true laws," those objectively real forms which positive laws only imperfectly express, are punished in heaven is frequently reiterated in the dialogues, *e.g.*, the dramatic myth of Er details both the rewards of the good and the suffering of wrongdoers (*Rep.* 614b-621d). Admittedly, there are differences as regards the time and certainty of enforcement. But, in addition to the certain post-mortem sanctions, there are self-imposed sanctions, social disap-

94. "Do you say, Socrates, that to be conformable to the laws, and to be just, is the same thing?" "I do indeed." XENOPHON, MEMORABILIA, Book iv, 4, 12.

95. West Virginia State Bd. of Education v. Barnette, 319 U.S. 624, 655 (1943) (dissenting opinion).

proval, and that "natural" compensation which transforms wrongdoers into godless, wretched persons resembling the evil deeds they perpetrate (*Theaet.* 177a). The variety of positive laws, as Plato viewed them,⁹⁶ requires correspondingly different sanctions.

We may now recognize as anomalous, the strange fact that in the Anglo-American histories of Natural Law philosophy, Plato is almost completely ignored,⁹⁷ as, for example, in the two most influential essays on the subject, those by Pollock and Bryce.⁹⁸ The cause of this curious neglect appears to be an accident of language, as is indicated in Pollock's opening sentence: "The term 'Law of Nature,' or natural law, has been in use in various applications ever since the time of the later Roman Republic." He notes that its "ultimate principle" is fully recognized in the common law as "reason, reasonableness, or sometimes natural justice . . . but the difference of terminology has tended to conceal the real similarity from English lawyers during the last century or more."⁹⁹ This difference has also concealed the origin of Natural Law philosophy. For when Pollock proceeds "to give a summary view of the origin and development of the doctrine" he starts with Aristotle's famous passage in Book Five, *Ethics*. There is not a word about Plato. Pollock merely acknowledges that "the distinction was not altogether new in Aristotle's time."¹⁰⁰

Bryce did pay some attention to pre-Aristotelians, quoting Sophocles' *Antigone*, referring to Homer, to Heraclitus' observation on divine law, and to Xenophon's report of Socrates' comparison of positive laws with unwritten laws that are the same in all countries.¹⁰¹ Bryce also recognized that Plato has a place in the Natural Law tradition: "Similar passages," he said, "occur in Plato, who contrasts abstract justice and rightful laws with the actual laws and customs that prevail in political communities."¹⁰² Bryce then summarizes Aristotle and the Stoics briefly, and devotes the

96. See note 43 *supra*. The extent to which Plato would go in sanctioning ethical duties is shown in *Laws* 788 where he refrains from detailed legislation on family affairs only because the wrongs are too frequent and too trivial. And it is only fear of ridicule and wholesale violation that keeps him from legislating regarding the exercises of pregnant women (789d-790a).

97. But see WILD, *PLATO'S MODERN ENEMIES AND THE THEORY OF NATURAL LAW* (1953), and CAIRNS, *LEGAL PHILOSOPHY FROM PLATO TO HEGEL* 29, 46 (1949).

98. POLLOCK, *ESSAYS IN THE LAW* 31-79 (1922); II BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 112-71 (1901). Both were apparently written at the same time, 1900, though Pollock's essay was published first. See Bryce, *op. cit. supra* 127-28 n. 2.

99. Pollock, *op. cit. supra* note 98, at 31. (Italics added.) Cf. "The term 'Natural Law' is not Platonic. . . ." Maguire, *supra* note 5, at 151.

100. Pollock, *op. cit. supra* note 98, at 32.

101. Cf. XENOPHON, *MEMORABILIA*, Book iv, 4, 19.

102. Bryce, *op. cit. supra* note 98, at 125.

bulk of his essay to the Romans. That is the account of the origin of Natural Law philosophy which, until very recently, represented the Anglo-American history of the subject.¹⁰³

The usage which long retarded the recognition of Plato's place in the tradition of Natural Law philosophy concerns the term *physis* (Nature). Recent philological studies¹⁰⁴ have traced the linguistic evolution of *physis* from that of the Milesian physicists to Plato's interpretation of "Nature" as a regulative principle. The other, equally important phase of Plato's contribution was to refute the argument that law (*nomos*) was only conventional, and to show, instead, that it was natural in the normative sense.

These are the conclusions reached, but a full exploration of the problem would be very difficult even for specialists in Greek philology. If our purpose required us to distinguish all the meanings of "nature," it would be a sufficient deterrent to note that for the ancient Greeks, nature meant no less than "Substance, Life, Power, Soul, and God."¹⁰⁵ Many treatises have been written about each of these and they do not exhaust the meaning of "Nature." Professor Lovejoy assures us that "nearly all of the great catchwords have been equivocal—or rather, multivocal. . . . The supreme example of this is, of course, to be seen in the most potent, pervasive, and persistent of all catchwords—'nature'."¹⁰⁶ Fortunately, in the present inquiry we need concentrate only upon the distinction between physical nature and nature as a value cosmos. The trend in ancient Greece was from a usage, confusing or, at least, not distinguishing these meanings to Plato's effort to give "Nature" a normative meaning, and thence to the firm acceptance of that definition of nature, among other normative meanings of it, in Aristotle's writing. A mechanistic view of nature had been achieved by the "physical investigators" of the four basic elements.¹⁰⁷ A related meaning is nature viewed as the source

103. Several recent essays provide important corrections to the history of natural law philosophy, especially SOLMSEN, *PLATO'S THEOLOGY* 167 (1942); Maguire, *supra* note 5; MORROW, *Plato and the Law of Nature*, in *ESSAYS IN POLITICAL THEORY* 17. See also, MAYER, *POLITICAL THOUGHT* 32 (1939); JAEGER, *PAIDEIA, e.g.*, III, 241, and his *Praise of Law, supra* note 91, at 352; HILDENBRAND, *op. cit. supra* note 57; and Gurvitch, *Natural Law*, XI *ENCYC. SOC. SCI.* 286 (1933). An excellent summary is presented by Adams, *The Law of Nature in Greco-Roman Thought*, XXV *J. RELIG.* 97 (1945). And see WILD, *op. cit. supra* note 97 and CAIRNS, *op. cit. supra* note 97.

104. MORROW, *Plato and the Law of Nature*, in *ESSAYS IN POLITICAL THEORY* 17, 42.

105. McClure, *The Greek Conception of Nature*, XLIII *PHILOS. REV.* 109, 115 (1934).

106. LOVEJOY, *ESSAYS IN THE HISTORY OF IDEAS* xv (1948). Some 60 meanings of "nature" are given in this book. See especially c. 5 and 16.

107. *Laws* 891c. There was probably always a prescriptive element included. See JAEGER, *THE THEOLOGY OF THE EARLY GREEK PHILOSOPHERS* 71 (1947).

of bodily sensations (*Theaet.* 186b). Plato also uses "nature" to mean original aptitude or native endowment as opposed to nurture (*Rep.* 423d) and, again, as fitting or suited to the exercise of certain functions (*Crat.* 387a), and also as "normal" in the sense that "an animal produces after his kind." (*Crat.* 393bc).

The relevant jurisprudential issue was dramatically presented in *Gorgias*. It will be recalled that Callicles argued that "convention and nature are generally at variance with one another." (*Gorg.* 482e ff.). Indeed, laws are "agreements contrary to nature" (*Gorg.* 492c), which the naturally superior man "would trample underfoot." (*Gorg.* 484a). Xerxes and all other great conquerors acted "according to nature . . . and according to the law of nature: not, perhaps, according to that artificial law, which we invent and impose upon our fellows. . . ." (*Gorg.* 483e). For Callicles, nature was not mechanistic, and he finally admits that the "superior," who are "the better and the wiser" (*Gorg.* 490a), should rule and satisfy their desires without inhibition (*Gorg.* 483d, 488ab). "And this," said he, "I affirm to be natural justice. . . ." (*Gorg.* 492a). Hippias also argued that nature is opposed to positive law; indeed, "law is the tyrant of mankind, and often compels us to do many things which are against nature." (*Prot.* 337d). That these views were not original with Plato's opponents is evidenced in a fifth century essay by the Sophist, Antiphon. Legal precepts, argued Antiphon, "are adventitious, whereas those of nature are necessary." So too, rules of law are merely agreements or conventions; "those of nature are the product of growth." One should, therefore, always obey nature, even when he was unobserved, while conformity to law is solely a matter of expediency. For violation of Nature's laws is always injurious because they rest on fact, whereas law is merely opinion.¹⁰⁸ The distinction drawn by Antiphon between nature and convention had been applied long before by Parmenides and others.¹⁰⁹

In this context the significance of Plato's revival of "the older Greek view of nature as a moral, purposeful, rational, divine order"¹¹⁰ is evident. Nature is thus viewed as an ideal to which rational beings should conform. For example, "the true ruler is not meant by nature to regard his own interest, but that of his subjects. . . ." (*Rep.* 347d). So too, the rulers of the *Republic* should be the most competent persons regardless of their class origin and in order to assure that "nature orders a transposition of ranks. . . ." (*Rep.* 415c). This implies that "a mis-

108. See BARKER, GREEK POLITICAL THEORY 66-69, 83-85.

109. JAEGER, THE THEOLOGY OF THE EARLY GREEK PHILOSOPHERS 185.

110. McClure, *supra* note 105.

take . . . [is] not according to nature." (*Laws* 686d). Thus, nature, as the principle of reason, has priority over biological forces.¹¹¹

Finally, although one does not find the specific Stoic exhortation to live "in conformity with nature,"¹¹² Plato's dialogues repeat Heraclitus' aphorism and add equivalent expressions of it. Thus, in the *Republic*, Plato argued that justice is "real and natural and not merely conventional. . . ." (*Rep.* 367c). Coming closer to the subsequent usage, he said "the individual, attaining to right reason . . . should live according to its rule; while the city, receiving the same from some god or from one who has knowledge of these things, should embody it in a law. . . ." (*Laws* 645b). And "that the wise should lead and command . . . surely is not contrary to nature, but according to nature. . . ." (*Laws* 690b). In the *Republic*, he said "the law which we then enacted was agreeable to nature. . . ." (*Rep.* 456c). In *Laws*, after he had challenged the still current naturalistic meaning of *physis* (690b-d, 892bc), he uttered words which later philosophers adopted almost verbatim—"our view of law will be more in accordance with nature" (858c); and "a legislator who has anything in him . . . ought to support the law and also art, and acknowledge that both alike exist by nature, and no less than nature, if they are the creations of mind in accordance with right reason. . . ." (890d). At the very end of his career, Plato asked, "and may not the same be said of all good things—that the true guardians of the laws ought to know the truth about them, and to be able to interpret them in words, and carry them out in action, judging of what is and of what is not well, according to nature?"¹¹³

The final categorical imperative is to copy the "divine pattern,"¹¹⁴ a perfect "unchangeable pattern" (*Tim.* 28b, 48e), an "eternal nature." (*Tim.* 39d). The philosopher-king will "shape the pattern of public and private life into conformity with his vision of the ideal. . . . [for] happiness can only come to a state when its lineaments are traced by an artist working after the divine pattern."

Thus Plato closed the circle from the affirmations of Socrates in the *Apology* to the natural theology of *Laws* X, which lives today in the

111. "[N]ature orders the soul to rule. . . ." (*Phaedo* 80a).

112. Cf. "[T]he noblest and greatest of harmonies may be truly said to be the greatest wisdom; and of this he is a partaker who lives according to reason. . . ." (*Laws* 689d).

113. *Laws* 966b. "[I]t was but a short step from the 'natural justice' which occurs so often in Plato's pages to 'natural law'; and thus the way was fully prepared for the Stoic phrase." MORROW, *Plato and the Law of Nature*, in *ESSAYS IN POLITICAL THEORY* 17, 42.

114. *Theaet.* 176b; *Rep.* 352b, 612e; *Phileb.* 39e; *Laws* 716d, 728ab.

Western religious tradition. Even though one disagrees with Plato on many points, it is impossible to remain insensitive to the sweep of his imagination. Centering on law and the political community, he created a world-picture in which every important phase of human experience found an intelligible place in significant interrelations to all the other major components of the cosmos. From the beginning, he saw his problems as legal-political issues, involving the legitimacy of government and questions of political obligation.

In the early dialogues, Plato took a definite moral stand regarding the solution of these problems, affirming it in *Apology*, dramatizing it in *Crito*, and exploring it dialectically in *Gorgias*. In his maturity, the quest led to the metaphysical foundation of ethics and to the relevance of religion. And, in his old age, he turned to the detailed application of his theories and to the systematic development of his theology.

Plato's "master science" is especially relevant to our own problems because of his theory of the rule of law. This, indeed everything Plato wrote, implies that what is important for legal and political science is thinking and the consequent valid solution of problems; hence, any discipline which assiduously avoids the rational aspect of political experience cannot possibly suffice. An adequate political science will take full account of the intelligible side of political conduct, and that is primarily and most definitely expressed in the legal experience of the race.¹¹⁵ That is why Plato concentrated on law.

In each step of his progress from *Apology* through *Laws*, the law of the political community, positive law, was given paramount significance. For Plato, it represented the socially most important act of reason as well as abiding evidence of the order and harmony which links man to society and both to the universal Logos. A detailed analysis of all the dialogues would, in the writer's opinion, support the thesis that positive law is the central thread which unifies Plato's philosophy. That, in turn, would raise many interesting questions. Is the legal-political perspective, thus achieved, only one among several equally tenable world hypotheses, or is it, in a defensible sense, more fundamental and inclusive than any other one? The question concerns the relation of legal-political philosophy to philosophy "in general," and the conclusions reached in this essay suggest a sharp revision of accepted classifications, which would place legal-political theory in the basic position and assign what now

115. Hall, *Unification of Political and Legal Theory*, 69 POL. SCI. QUART. 15 (1954).

passes so frequently as "philosophy" to the realm of specialities. Many other answers to perennial problems are suggested by Plato's philosophy of law. Here, however, emulating Plato, the writer leaves these inquiries suspended before the imagination, inviting the return again and ever more to the philosopher's intriguing way of life.