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# Higher Law and the Rule of Law: The Platonic Origin of an Ideal

V. Bradley Lewis\*

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The rule of law is taken by almost every thoughtful student of politics and law as an important value, even as a defining mark of legitimate political order.<sup>1</sup> The rule of law has often been defended as a way of safeguarding individual freedom by protecting rational expectations and maximizing efficiency.<sup>2</sup> But the ideal of the rule of law as an objective of legal systems goes beyond this and is now usually taken to require that laws be open, clear, coherent, prospective, and stable. Moreover, such laws should be enforced consistently by government and be subject to adjudication.<sup>3</sup> Defenses and expositions of the rule of law do not usually appeal to a higher law, whether natural or divine. Some early modern attempts, like that of Locke, do seem to root the value of the rule of law in something like the natural law,<sup>4</sup> but it is an explicitly reduced modern version of the natural law, one rooted more in very basic goods like self-

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1. For two recent examples, see FAREED ZAKARIA, *THE FUTURE OF FREEDOM: ILLIBERAL DEMOCRACY AT HOME AND ABROAD* 17, 37–38, 55, 77, 156 (2003), and LARRY DIAMOND, *THE SPIRIT OF DEMOCRACY: THE STRUGGLE TO BUILD FREE SOCIETIES THROUGHOUT THE WORLD* 21–22, 165–66 (2008).

2. See, e.g., F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 153 (1960).

3. See LON L. FULLER, *THE MORALITY OF LAW* 33–94 (rev. ed. 1969); TIMOTHY A.O. ENDICOTT, *VAGUENESS IN LAW* (2000).

4. See JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* §§ 6, 11–12, 124–26, 128–31 (1690).

preservation and not in more fulsome accounts of human flourishing.<sup>5</sup> Such a view is not unrelated to the “natural law” tradition, but it is hard to see as “higher” law.

In more recent times, Lon Fuller famously tried to defend the natural law against legal positivism by describing what he called the “internal morality of law.”<sup>6</sup> While Fuller’s account of the characteristics of the rule of law is now accepted as canonical, his larger argument has been widely adjudged a failure in two ways: First, to show that a polity enjoys the rule of law is not to show that the laws are good or even that the polity is good, and absent such a connection, Fuller’s account fails to vindicate the natural law.<sup>7</sup> Second, Fuller’s account never says much about the character of the natural law, explicitly distinguishing his view from the traditional Catholic one and suggesting at the end of his book a quite vague idea of the natural law as largely procedural in nature.<sup>8</sup> No one doubts the value of the rule of law, but does its defense necessarily entail affirmation of something like the natural law? Fuller’s account left things unclear.

This question becomes particularly important when one thinks about the alternatives to the rule of law, a question less frequently considered. Timothy Endicott has recently discussed the rule of law in the context of a study of the challenge posed to the ideal by vagueness, concluding that the rule of law is always realized in imperfect ways and that vagueness as such cannot defeat it.<sup>9</sup> In considering the alternatives to the rule of law, however, Endicott only mentions anarchy and arbitrariness.<sup>10</sup> But the classical defense of the rule of law was predicated on its inferiority to one particular alternative seldom considered by contemporary legal philosophers: the unrestricted rule of reason combined with moral virtue, what one might call for short the rule of the virtuous wise.<sup>11</sup> There are remnants of this alternative in modern and contemporary thought, most importantly in the recognition of the need for extraordinary powers during serious political

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5. See LEO STRAUSS, *NATURAL RIGHT AND HISTORY* 220–34 (1953).

6. FULLER, *supra* note 3, at 33–94.

7. See H.L.A. Hart, Book Review, 78 *HARV. L. REV.* 1281 (1965) (reviewing LON L. FULLER, *THE MORALITY OF LAW* (1964)); Ronald Dworkin, *Philosophy, Morality, and Law—Observations Prompted by Professor Fuller’s Novel Claim*, 113 *U. PA. L. REV.* 668 (1965); Marshall Cohen, *Law, Morality, and Purpose*, 10 *VILL. L. REV.* 640 (1965); Joseph Raz, *The Rule of Law and Its Virtue*, 93 *LAW Q. REV.* 195 (1977).

8. See FULLER, *supra* note 3, at 18–19, 96–98, 184–86; cf. Lon L. Fuller, *Positivism and Fidelity to Law: A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 660 (1958).

9. See ENDICOTT, *supra* note 3, at 185–203.

10. *Id.* at 186–87.

11. See E.A. Goerner, *Letter and Spirit: The Political Ethics of the Rule of Law Versus the Political Ethics of the Rule of the Virtuous*, 45 *REV. POL.* 553 (1983) (considering this alternative in a contemporary context).

crises,<sup>12</sup> the equitable jurisdiction of courts,<sup>13</sup> and the “political questions” doctrine in American constitutional jurisprudence.<sup>14</sup> These are all instances of limitations of law with respect to the variability of human affairs and the necessity for particular human judgments as distinct from settled rules.<sup>15</sup>

The theoretical argument for the rule of law has a long history in the West, and the further back one goes, the closer one gets to an explicit connection with something like “higher law.” There is an explicit connection at the very beginning of the tradition, but it entails an often overlooked aspect. While we can find the earliest arguments for the rule of law in the writings of Plato and Aristotle, it is perhaps even more striking to those of us trained in the view of the rule of law simply as a kind of ideal that the classical authors saw it as a second-best solution to a larger problem. Indeed, they are just as aware of its drawbacks as of its advantages. For the classics, the ideal is the rule of reason or intelligence, and the rule of law is a kind of necessary compromise of that. We can see this most clearly illustrated in the writings of Plato. In what follows, I try to excavate this tradition by looking at two parts of Plato’s account: his argument for the priority of the rule of the virtuous wise in the *Republic*<sup>16</sup> and his argument for the rule of law in his less often read *Laws*.<sup>17</sup> It is important that the rule of law is more complicated than often noticed. Law does not simply rule on its own but is intelligible and made possible by a context of challenges and supports. The rule of law is difficult to successfully establish and difficult to maintain absent a supporting culture. Such a culture includes opinions that back the efficacy of law and other quasi-legal practices and habits. It also requires both a disinclination to change law and a means of doing so when necessary. These are all parts of Plato’s argument in the *Laws*, and they reveal frequently overlooked aspects of what is often taken to be something

12. See, e.g., LOCKE, *supra* note 5, at §§ 156–68; JEAN-JACQUES ROUSSEAU, *DU CONTRAT SOCIAL* bk. 4, ch. 6 (1762); see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 273–76 (1980) (providing a contemporary discussion).

13. I mean “equity” in the sense typically contrasted to “law,” i.e., “[t]he recourse to principles of justice to correct or supplement the law as applied to particular circumstances.” BLACK’S LAW DICTIONARY 560 (7th ed. 1999). See also Douglas Laycock, *The Triumph of Equity*, 56 *LAW & CONTEMP. PROBS.*, Summer 1993, at 53 (arguing strongly that the law–equity distinction is no longer tenable and that equity is now simply a part of law).

14. See, e.g., *Baker v. Carr*, 369 U.S. 186 (1962).

15. There are also the much controverted issues concerning the scope and limits on judicial interpretation and of discretion in adjudication. Although I am not concerned with them here, they too are relevant.

16. See *infra* Part I.

17. See *infra* Part II.

of a commonplace. It is also important throughout that the second-best standard of the rule of law retains its connection with the simply best: the rule of reason. In the concluding section, I briefly look at how the Platonic notion made its way through the thought of Aristotle to the most celebrated natural law account, that of Saint Thomas Aquinas.<sup>18</sup>

## I. THE RULE OF REASON IN THE SOCRATIC CITY

Plato famously has Socrates argue for the rule of philosophers in the *Republic*.<sup>19</sup> While the extent to which reason is to operate unfettered by law in that work is sometimes overstated, it is clear that law is secondary.<sup>20</sup> The ideal is a city in which reason is in control of the sub-rational elements of the human soul both in the lives of the rulers and, through their rule, in the life of the city as a whole. This entails a critical account of the rule of law that appears in the very first book of the *Republic* when Socrates discusses justice with the elderly Cephalus.<sup>21</sup> Cephalus notes that the best thing about being wealthy is that one need never engage in injustice, specifically cheating and lying.<sup>22</sup> Socrates responds by asking Cephalus if that is what he thinks justice itself (*dikaïosunē haplōs*) is, “the truth and giving back what a man has taken from another.”<sup>23</sup> Cephalus agrees, prompting Socrates’s famous counter-example of the man who comes in a state of madness to a friend who has borrowed from him a weapon and asks for its return.<sup>24</sup> Should we say it is just to return the weapon or to tell the truth to such a man (for example, about the whereabouts of one of his enemies when he is in that state and armed)?<sup>25</sup> At this point, a perplexed Cephalus passes the discussion on to his son, Polemarchus, and leaves the house to resume his sacrifices, leaving the reader with questions about Cephalus’s life and, more importantly, about how his definition of justice goes wrong.<sup>26</sup>

What Socrates’s objection suggests is not that justice does not (in some sense) require one to return property borrowed from another or that one tell the truth but rather that insofar as we think of justice as a virtue, and thus as good, it cannot simply be the quasi-mechanical application of rules. Rules

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18. See *infra* Part III.

19. PLATO, *THE REPUBLIC* (Allan Bloom trans., Basic Books 2d ed. 1991) [hereinafter *THE REPUBLIC*].

20. See V. Bradley Lewis, *Politeia kai Nomoi: On the Coherence of Plato’s Political Philosophy*, 31 *POLITY* 331 (1998).

21. *THE REPUBLIC*, *supra* note 19, at 328b–31d.

22. *Id.* at 331b.

23. *Id.* at 331c.

24. *Id.* at 331c–d.

25. The example has become a canonical one. See, e.g., ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* II<sup>ae</sup>, q. 57, art. 2, ad1.

26. *THE REPUBLIC*, *supra* note 19, at 331d.

never completely capture what the virtue itself requires and thus can fall short of goodness. Goodness is the real (implied) standard of conduct and what is missing from a merely legalistic account of justice.<sup>27</sup> The definition is not so much false as incomplete, and the long inquiry that it begins aims to understand its incompleteness in light of a better account of justice, one that ultimately points at a kind of life and a kind of political community ordered by reason and the good. The desirability of such a thing is justified in terms of the starkest vision of reason's priority in human affairs and in the face of man's naturally political character unified by a dubious analogy between the structure of the city and that of the human soul. It issues in the (in)famous proposal for a city ruled by a group of communist polygamist philosophers and their "auxiliaries"—in fact, soldiers—associated with the spiritedness necessary for their art. The mass of the population is associated with mere physical desire and material productivity.<sup>28</sup>

The arrangement is explained by way of the well-known "noble lie" about each person having been born with one of three types of metal in his or her soul indicating position in the city's hierarchy: gold for the philosopher—rulers, silver for the auxiliary/soldiers, and bronze for the farmer and artisan majority.<sup>29</sup> Perhaps the more important aspects of the lie, however, are first, that it ties the inhabitants of the city closely together, holding that all are children of the same mother, the earth itself, on which the city rests, thus binding them equally to the land; and second, that it indicates a natural but uneven distribution of ruling intelligence. In this sense the myth simultaneously indicates the aspirations of the city for unity as a city and the limitations on this aspiration given by human nature, and tries to effect a solution, albeit one requiring a fatal compromise of the truth.

The program is a practical impossibility, a fact revealed clearly, if indirectly, in a number of statements by Socrates, including acknowledgments that the proposals would require massive and thorough purges of the city,<sup>30</sup> as well as the incongruity of founding the best political regime on lies<sup>31</sup> and then setting up as its administrators philosophers who are explicitly said to have "no taste for falsehood."<sup>32</sup> This is similarly

27. For discussion of these issues in the context of the *Republic*, see LEO STRAUSS, *THE CITY AND MAN* 67–69 (1964), and DEVIN STAUFFER, *PLATO'S INTRODUCTION TO THE QUESTION OF JUSTICE* 19–26 (2001).

28. *THE REPUBLIC*, *supra* note 19, at 428b–33b, 442a–b.

29. *Id.* at 414b–15e.

30. *Id.* at 501a, 541a.

31. *Id.* at 376e–77b, 382a–d, 459c–d.

32. *Id.* at 485c.

indicated by the generally mocking comic tone of the fifth book, where the most outrageous innovations are mooted.<sup>33</sup> Socrates also cautions his interlocutors that the program is a “pattern in speech” (*paradeigma en logoi*) and that it is “the nature of acting to attain to less truth than speaking,” and concludes his explicit political discussion by cautioning that the city described in the dialogue is a “pattern” for a man to found in his own soul: “It doesn’t make any difference whether it is or will be somewhere.”<sup>34</sup>

The point of the *Republic* is not to propose an actual city, contrary to a conventional textbook interpretation of the dialogue. It is rather to understand the very real tensions between the life of philosophy and the city, tensions in human nature itself between man as a rational and political animal, to use formulations associated with Aristotle. The problem at the heart of the *Republic* is the problem Plato saw very concretely in the confrontation between Socrates and the Athenians. Man needs the city, the political community: it is a response in the first instance to his bodily needs, as Socrates points out,<sup>35</sup> although not limited to this, because the satisfaction of basic needs makes possible the leisured cultivation of man’s higher powers. But those powers of the soul, especially mind, come into tension with the local, bodily nature of the city, aimed as they are ultimately at knowledge of “all time and all being.”<sup>36</sup> The strength of the city requires stability and widely shared consensus rooted in the opinions of the non-philosophical majority and the loyalty of the soldiers to that order.<sup>37</sup> There is then a necessary tension between the city and the philosopher, between opinion and knowledge, between body and mind, and between deed and speech. The “beautiful city” (*kallipolis*)<sup>38</sup> of the *Republic* imagines a solution to these tensions based on the superiority and freedom of reason, but the bizarre institutions and impossible strategies required to establish the city point to the impossibility of the project. These tensions, the *Republic* suggests, cannot be resolved.

The *Republic* contains no account of the higher law as such. But its fundamental thesis is far from unconnected to the notion of a higher law, if we identify such a law with reason, because the superiority of the unconstrained rule of reason is at the heart of the *Republic*. A problem emerges when we notice that the rule of reason is indeed contrasted in various ways to the rule of law. In classical Greek thought generally, this

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33. In one section of the fifth book, variants of words for “ridiculous” (*geloios*) appear some seventeen times! *Id.* at 451a–57b. The discussion is likely meant to allude to Aristophanes’s comedy, *Assemblywomen*. See Allan Bloom, *Response to Hall*, 5 POL. THEORY 315 (1977).

34. THE REPUBLIC, *supra* note 19, at 472e–73a, 592a–b.

35. *Id.* at 369b–70a.

36. *Id.* at 486a.

37. *Id.* at 376e–83c, 429b–30c.

38. The city is referred to this way. *Id.* at 527c; cf. 543d–44a.

was rooted in the ubiquitous contrast between *nomos* and *phusis*, law or convention, and nature.<sup>39</sup>

Nature (*phusis*) indicates what is the case always and everywhere apart from human intention or intervention. Law or convention (*nomos*) indicates what is the case when agreed to by human beings.<sup>40</sup> Nature is an object of knowledge; law is a product of human art. The arts, however, take place against the backdrop of nature and cooperate with it, and so law as the product of art can follow nature. But the original insight here was one of contrast, and that contrast was clear to Socrates and Plato. This is indicated in part by the very etymology and usage of the word. *Nomos* has its origins in an Indo-European root (*nem-*) that means distribution, but one of the later meanings of the verb form, *nomizō*, can mean either “to recognize as law,” or simply, “to believe.”<sup>41</sup> Indeed, the charge against Socrates that he did not believe in the gods of the city employed this usage.<sup>42</sup>

This usage is important in the *Republic* as well. In the fifth book, Socrates makes his most radical proposals: that women train for war and ruling alongside men equally, that children be raised communally, and that the ruling class of the city be composed of philosophers.<sup>43</sup> The question then occurs: Who are the philosophers? The immediate answer is that they are lovers—lovers of wisdom, of learning, and of truth.<sup>44</sup> The truth is what is stable and permanent behind appearances and thus is the basis of real knowledge.<sup>45</sup> Knowledge is distinguished from mere opinion in that it is based on the forms or ideas and thus “always stays the same in all respects,” unlike the many appearances.<sup>46</sup> Socrates concludes: “Then we have found, as it seems, that the many beliefs [(*nomima*)] of the many about what’s fair and about the other things roll around somewhere between not-being and being purely and simply.”<sup>47</sup> The word for beliefs here, *nomima*, is the same word often used for “customs” or “conventions” and is closely related to the

39. The classic survey is FELIX HEINIMANN, *NOMOS UND PHYSIS: HERKUNFT UND BEDEUTUNG EINER ANTITHESE IM GRIECHISCHEN DENKEN DES 5. JAHRHUNDERTS* (1965).

40. See ARISTOTLE, *NICOMACHEAN ETHICS* 1134b18–27 (Terence Irwin trans., Hackett Publ’g Co. 2d ed. 1999) [hereinafter *NICOMACHEAN ETHICS*].

41. See EMMANUEL LAROCHE, *HISTOIRE DE LA RACINE NEM- EN GREC ANCIEN* (1949); PIERRE CHANTRAINE, *DICTIONNAIRE ÉTYMOLOGIQUE DE LA LANGUE GRECQUE: HISTOIRE DES MOTS* 742–44 (1974).

42. PLATO, *APOLOGY OF SOCRATES* 24b–c.

43. *THE REPUBLIC*, *supra* note 19, at 457a, 457c–d, 474c–d.

44. *Id.* at 474c, 475b–d.

45. *Id.* at 476d–77a.

46. *Id.* at 479a.

47. *Id.* at 479d.



usual word for law in the stronger sense of “statute,” *nomos*.<sup>48</sup> Law, then, as Plato indicates elsewhere, is a kind of opinion and is accepted by people as opinions are.

One of the other places where Plato indicates this is in the brief dialogue *Minos*, which is often regarded as a kind of introduction to the *Laws*.<sup>49</sup> The *Minos* considers the very basic question, “What is law?” Socrates’s interlocutor there, a nameless “companion,” defines law as the “opinion of the city.”<sup>50</sup> He and Socrates then consider what sort of opinion law could be and conclude that it must be a valuable opinion, meaning one that saves or preserves the city.<sup>51</sup> Such opinions, if they are really valuable, must be true, and thus Socrates redefines law as “wishing to be the discovery of what is.”<sup>52</sup>

There are two initial questions one might ask in reply to such a formulation. First, is the value of a political opinion simply a function of its truth? Second, to assert that law “wishes to be the discovery of what is” suggests that law aims at the same thing as philosophy. But to assert that thesis is immediately to bring to mind many ways in which it cannot be. For one thing, law is rigid and universal in form, the better to allow people to form stable plans and expectations and in order to cover a wide variety of particular cases. The point of identifying the end of law with that of philosophy seems to be that of displaying to anyone with even a modicum of knowledge of the two that they cannot *simply* share that aim and to point out the difference and tension between the two. At the same time, this formulation suggests the necessary connection between any law that can be seen as just and useful, and other truths about human affairs. One can see both the connection and the tension in the *Minos*.

It is, however, the *Republic* that shows these tensions most directly because it imagines the perfectly rational philosophical city, one that is, to the highest degree possible, without law and according to nature.<sup>53</sup> In so doing, it suggests the inadequacy of law to achieve perfect justice but also the impossibility of philosophy to rule either consistently with itself or in a way adequate to the city. What we have then is the exposition of a tension rooted in human nature between man’s rational and political capacities—

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48. *Nomos* came to have this predominant meaning by the mid-fourth century B.C. See MARTIN OSTWALD, *NOMOS AND THE BEGINNINGS OF THE ATHENIAN DEMOCRACY* (1969).

49. See V. Bradley Lewis, *Plato’s Minos: The Political and Philosophical Context of the Problem of Natural Right*, 60 *REV. METAPHYSICS* 17 (2006).

50. PLATO, *MINOS* 314b–c (translation by author).

51. *Id.* at 314c–e.

52. *Id.* at 315a (translation by author).

53. In the initial discussion of the origins of the city in the second book of the *Republic*, the word *nature* and its cognates are used frequently. See, e.g., *THE REPUBLIC*, *supra* note 19, at 370a, 370c, 374e, 375c, 375e, 376c.

between the highest human possibility and the necessary supports for man's ordinary life. If the higher law is reason, then that law both informs the heavenly paradigm of the perfectly just city and suggests its practical impossibility. The tensions cannot be eliminated. Can they be managed, and if so, how? That is the question posed by Plato's much more concretely political work, the *Laws*.

## II. PLATO'S SECOND-BEST CITY AND THE RULE OF LAW

### A. *The Project of the Laws*

In the *Laws*, Plato presents a conversation between three elderly men: a nameless Athenian, a Cretan named Kleinias, and Megillus, a Spartan.<sup>54</sup> The three are on a pilgrimage from the Cretan city of Knossos to the cave and temple of Zeus on Mount Ida, where the god is said to have instructed his son, Minos, in the art of legislation, allowing him to promulgate the best and most enduring laws—laws still used by the Cretans and imitated by the Spartans.<sup>55</sup> The pilgrimage, then, is not simply religious but intellectual, a pilgrimage to the origin of law, which is a human encounter with the divine. The theme of the dialogue is not so much law in a definitional sense, for no clear definition is ever discussed, as it is the rule of law as a kind of project.<sup>56</sup>

The dialogue falls into two obvious parts. The first three books are a kind of theoretical introduction to problems of legislation and political order, and it is here that the rule of law is introduced. At the conclusion of the third book, Kleinias reveals that he is part of a commission appointed by the Knossians to draw up a law code for a new colony.<sup>57</sup> He proposes that his two companions assist him by constructing a "city in speech."<sup>58</sup> In the remaining eight books, the project is carried out in great detail as the three discuss the laws of a model city, the people of which are referred to as Magnesians.<sup>59</sup>

54. PLATO, *THE LAWS* (Thomas L. Pangle trans., Univ. of Chi. Press 1988) [hereinafter *THE LAWS*].

55. *Id.* at 683a; cf. HERODOTUS 1.65; STRABO, *GEOGRAPHY* 10.4.17, 19; PLUTARCH, *LIFE OF LYCURGUS* 4.1–2.

56. See Lewis, *supra* note 49 (discussing the nature of law as addressed in *Minos*).

57. *THE LAWS*, *supra* note 54, at 702a–d.

58. *Id.* at 702b–e.

59. *Id.* at 848d, 860e, 919d, 946b, 969a. There was an actual city called Magnesia in Asia Minor that claimed kinship with an earlier Cretan Magnesia, long gone by the time Plato wrote the *Laws*, although it may have been something of an inspiration. See GLENN R. MORROW, *PLATO'S CRETAN*

Many have taken the *Laws* to represent a development of Plato's political ideas, indeed, a repudiation of the ideal of the *Republic*.<sup>60</sup> The two cities, Kallipolis and Magnesia, are different, but I take the differences less as a matter of doctrinal change than as representing a difference of intention. The two dialogues do different things but not in a way that need imply conflict or contradiction; they are complementary, investigating things in a mutually illuminating manner. The Athenian stranger gives the best statement of this difference in the fifth book of the *Laws*. The three men have been discussing the conditions necessary for establishing the city, specifically the distribution of land.<sup>61</sup> The Athenian refers to the city under discussion as "second-best" (*deuteros*).<sup>62</sup> A good legislator, he says, states what the best regime is and then the second, third, and so on.<sup>63</sup> The best regime would be one in which everything is common, including women, children, and property.<sup>64</sup> He goes on:

If this situation exists somewhere now, or if it should ever exist someday—if women are common, and children are common, and every sort of property is common; if every device has been employed to exclude all of what is called the "private" from all aspects of life; if, insofar as possible, a way has been devised to make common somehow the things that are by nature private, such as the eyes and the ears and the hands, so that they seem to see and hear and act in common; if, again, everyone praises and blames in unison, as much as possible delighting in the same things and feeling pain at the same things, if with all their might they delight in laws that aim at making the city come as close as possible to unity—then no one will ever set down a more correct or better definition than this of what constitutes the extreme as regards virtue.<sup>65</sup>

This could be a description of the city discussed in the *Republic*, but not exactly. For one thing, the radical communism described here is not applied to the whole city in the *Republic* but only to the class of philosopher rulers and soldier auxiliaries. Second, no mention is made in this passage of philosophy or rule by philosophers. These two differences are perhaps

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CITY: A HISTORICAL INTERPRETATION OF THE *LAWS* 30–31 (1993).

60. For bibliography and discussion of this issue, see Lewis, *supra* note 20, and V. Bradley Lewis, *The Seventh Letter and the Unity of Plato's Political Philosophy*, 38 S.J. PHIL. 231 (2000).

61. THE LAWS, *supra* note 54, at 736c–38e.

62. *Id.* at 739a, e; *cf. id.* at 807b.

63. *Id.* at 739a–b.

64. *Id.* at 739c.

65. *Id.* at 739c–d.

related in this way: Socrates suggests in the *Republic* that the rule of philosophers is a means of introducing the other necessary but radical changes that characterize Kallipolis.<sup>66</sup> He also suggests, as noted above, that the establishment of the rule of philosophy is a practical impossibility. If that is the case—and that idea is already present in the *Republic*, not an innovation from the *Laws*—then it makes sense to ignore that aspect of the plan, especially before men like Kleinias and Megillus, political men whose practical concerns are far from philosophy and who come from cities that were notably unphilosophical.<sup>67</sup>

### B. *The Need for the Rule of Law*

The discussion begins with the Athenian asking his companions who is held responsible for the Cretan and Spartan laws, “a god or some human being.”<sup>68</sup> They answer that it is in each case a god: Zeus in the case of Crete and Apollo in the case of Sparta.<sup>69</sup> The opening of the dialogue then presumes a higher law in the most literal sense, a law made by gods. The Athenian then asks what the purpose is for the Cretan laws concerning their barracks meals, gymnastic training, and weapons and tactics used in war.<sup>70</sup> Kleinias replies that the purpose of these institutions and practices is the same as that of all the Cretan laws: victory in war.<sup>71</sup> Minos saw the central truth of politics as a truth about war. He “condemned the mindlessness of the many, who do not realize that for everyone throughout the whole of life an endless war exists against all cities.”<sup>72</sup> He saw rather that “what most humans call peace . . . [is] only a name; in fact, for everyone there always exists by nature [(*kata phusin*)] an undeclared war among all cities.”<sup>73</sup> The Cretan lawgiver always legislated according to this principle because he saw

66. See DREW A. HYLAND, FINITUDE AND TRANSCENDENCE IN THE PLATONIC DIALOGUES 59–86 (1995).

67. In numerous sections, Plato suggests that Kleinias and Megillus are unphilosophical men. See, e.g., THE LAWS, *supra* note 54, at 626b, 803c–04c, 891a. The Spartans and the Dorian cities of Crete are also suggested to be unphilosophical. See, e.g., *id.* at 641c, 666e–67a, 708a; cf. PLATO, CRITO 52e–53a. It is perhaps significant for similar reasons that the philosophical aspect of Kallipolis is also ignored in Aristotle’s discussion of it in *Politics*. See ARISTOTLE, POLITICS bk. 2, chps. 2–5 (Peter L. Phillips Simpson trans., Univ. N.C. Press 1997) [hereinafter POLITICS].

68. THE LAWS, *supra* note 54, at 624a.

69. *Id.*

70. *Id.* at 625c.

71. *Id.* at 625d–e.

72. *Id.*

73. *Id.* at 626a.

that, without victory in war, all of the good things are lost to one's enemies.<sup>74</sup> What one might call the "Cretan thesis," however, goes beyond even this. The Athenian asks if it is the case that the perpetual war also exists within cities—between neighborhoods, between households, between individuals, and even *within* individuals.<sup>75</sup> Kleinias affirms this with enthusiasm, saying that the Athenian has correctly seen that "all are enemies of all in public, and in private each is an enemy of himself," so that the first and greatest victory is victory over oneself.<sup>76</sup> The thesis certainly had its contemporary analogues: within the Platonic corpus we can recognize elements in it articulated by Kallikles in the *Gorgias*<sup>77</sup> and by Thrasymachos in the *Republic*.<sup>78</sup> Something very like it is articulated by the representatives of different cities in Thucydides's *History of the Peloponnesian War*.<sup>79</sup>

It is a principle that the Athenian stranger immediately challenges. He does this by initially asking what it could mean to describe one as superior or inferior to oneself.<sup>80</sup> This is difficult to answer about an individual, but perhaps in the case of cities, it reflects whether better or worse men rule. He proposes an analogy as a means of thinking about this: imagine a large family with many brothers.<sup>81</sup> More, the Athenian suggests, would likely be unjust than just.<sup>82</sup> But now he dismisses the question of when we should call such a family superior or inferior to itself as a matter of mere words, of interest only to the many.<sup>83</sup> The present inquiry should rather concern laws, and the three elderly men should seek "whatever in them constitutes correctness and faultiness according to nature" (*phusei*).<sup>84</sup> So what begins as the discussion of divine law by now has changed into a discussion of what laws are according to nature. Can one still call this "higher" law? One might better call it *deeper* law. Nature is taken to be a standard, one that explains law but also transcends or, to stay with the sense of depth, underlies the actual written laws of the city. What happens to the notion that the gods are behind the law? That is a question to which we shall return below.

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74. *Id.* at 626b.

75. *Id.* at 626b–27a.

76. *Id.* at 626c–e.

77. See PLATO, *GORGAS* 483a–e.

78. See THE *REPUBLIC*, *supra* 19, at 338c–39a.

79. See, e.g., THUCYDIDES, *HISTORY OF THE PELOPONNESIAN WAR* 1.76.2, 4.61.5, 5.105.2; *cf. id.* at 5.89.

80. THE *LAWS*, *supra* note 54, at 626e–27a.

81. *Id.* at 627c.

82. *Id.*

83. *Id.* at 627c–d.

84. *Id.* at 627d. I have discussed Plato's views on natural right generally in V. Bradley Lewis, *La raison qui entreprend de se faire loi: nature et loi dans les Lois de Platon*, in *DROIT NATUREL: RELANCER L'HISTOIRE?* 101 (Xavier Dijon ed. & trans., 2008).

The Athenian then asks who an appropriate judge for the brothers would be and proposes three options: first, a judge who would destroy the unjust brothers and set the just up to rule themselves; second, a judge who would destroy no one but would get the unjust to agree to be ruled by the just; and third, a judge who would neither destroy anyone nor establish a permanent ruling class but one “capable of . . . reconciling them by laying down laws for them for the rest of time and thus securing their friendship for one another.”<sup>85</sup>

Notice two things about this proposal. First, the Athenian’s view is evidently grounded in nature. Nature is contrasted to mere words and thus offers a more stable and trustworthy basis. But what does nature mean in this context? For nature to be a standard it must be knowable. And that in turn points back to the experiment of the *Republic* with rule by those who know. Is that what the Athenian is aiming for here? Some initial answers are in the three options suggested, and this is the second thing to notice.

One recognizes the three proposals as possible solutions to the political problem as such. The first is a purge that attempts to eliminate injustice by eliminating the unjust and, as it were, starting fresh. It has the advantage of quite literally eliminating injustice but also the disadvantage of removing the majority of the population and so rendering the city physically weaker than it might be. The second is a kind of aristocracy and thus has the advantage accruing to that form of government in which the virtuous rule. It has the possible disadvantage of creating a permanent division in the city which could also weaken it. Moreover, the best version of this solution would presumably be the sort of city imagined in the *Republic*, and thus, the reasons that render that city practically impossible tell against this one as well. The third solution, the one chosen, has the advantage of avoiding the first two problems but also has two characteristic disadvantages: in accepting the permanent presence of the unjust, it dilutes the influence of virtue in the city, settling for a kind of moral alloy, and it is subject to the disadvantages of the rule of law—that the law is static and general in the face of the almost infinite variety and complexity of human affairs.

This problem of abstraction and generality is one that Plato notes elsewhere in the *Laws* and also in his dialogue, *Statesman*.<sup>86</sup> That dialogue—the last part of a trilogy comprised also of the *Theaetetus* and *Sophist*, and concerned generally with problems about knowledge—takes place between a mostly quiet Socrates and an Eleatic stranger. The stranger

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85. THE LAWS, *supra* note 54, at 628a.

86. PLATO, STATESMAN, in THE BEING OF THE BEAUTIFUL III.1 (Seth Benardete trans., 1984).

makes a point quite closely related to that of the Athenian stranger in the passage quoted above—that genuine ruling knowledge is very rare and not to be expected in even a small number of citizens.<sup>87</sup> He holds the best sort of rule to be that by one with knowledge “with laws or without laws” and whether the subjects are willing or not.<sup>88</sup> Socrates evinces discomfort with the idea of rule without law (leaving aside the question of the willingness of the subjects to be ruled), a discomfort the stranger indicates that he expected.<sup>89</sup> The stranger replies, “Although it’s plain enough that in a certain sense the legislative (art) belongs to the royal (art), the best thing is not for the laws but for a man—the king with intelligence—to have strength.”<sup>90</sup> Socrates asks for more of an explanation and the stranger offers the following:

[L]aw would never be capable of comprehending with precision for all simultaneously the best and the most just and enjoining the best, for the dissimilarities of human beings and of their actions and the fact that almost none of the human things is ever at rest do not allow any art whatsoever to declare in any case anything simple about all and over the entire time.<sup>91</sup>

Shortly thereafter, the same point is put more concisely: “Isn’t it impossible, then, for that which proves to be simple through all times to be in a good condition relative to things that are never simple?”<sup>92</sup> This constitutes the great and perennial criticism of the rule of law as distinct from that of free intelligence. It is essentially a thesis about the extent to which human affairs admit of certain knowledge fully adequate to practice. The problem is not so much that there is no knowledge of the good to be had but that the application of it via law-like generalizations is complicated by the fact that every individual human being constitutes a variable. Human things, therefore, are always moving targets of the mind. A living mind is able to track them, but the law is not living and therefore never fully adequate to its object.<sup>93</sup>

To return to the *Laws*, then, and the Athenian’s three possible answers to the problem of injustice, none of the solutions is ideal. The first seems impossible without concentration camps; the second is difficult and

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87. *Id.* at 292d–93a.

88. *Id.* at 293c–d.

89. *Id.* at 293e–94a.

90. *Id.* at 294a.

91. *Id.* at 294a–b.

92. *Id.* at 294c.

93. Machiavelli seems to have been so impressed by this as to eschew considerations about law altogether. See NICCOLO MACHIAVELLI, *THE PRINCE* ch. XII (1532).

potentially self-destructive; the third has the merit of realism, but necessarily entails a lower standard. It is, however, the third option that is chosen, and its choice determines the future course and character of the dialogue: it is now definitely a dialogue about law that is politically more realistic than any other Platonic treatment of politics.<sup>94</sup>

There are, then, two drawbacks to the rule of law solution adopted by the three interlocutors: first, the generality and abstractness of law compared to active reason; and second, its recognition that the regime is an alloy of the just and the unjust, the wise and the ignorant. The best regime simply would be one in which all were wise and just. The second-best regime might be one in which the wise and just had authority over the unwise and imperfectly just. The rule of law is, in fact, a kind of third-best solution.<sup>95</sup> But an account of this solution would be incomplete without noting what the Athenian takes to be its distinct advantages.

The advantages are most clearly indicated in the ninth book of the *Laws*, the book devoted to the exposition of the city's criminal code. The Athenian is discussing violent offenses and calls for a preliminary statement that emphasizes that human beings must live under laws "or they differ in no way from the beasts that are the most savage in every way."<sup>96</sup> The Athenian continues:

The cause of these things is this, that there is no one among human beings whose nature grows so as to become adequate both to know what is in the interest of human beings as regards a political regime and, knowing this, to be able and willing always to do what is best. For, in the first place, it is difficult to know that the true political art must care not for the private but the common—for the common binds cities together, while the private tears them apart—and that it is in the interest of both the common and the private that the common rather than the private, be established nobly. Secondly, even if someone should advance sufficiently in the art to know that this is the way these things are by nature, and after this should rule the city without being audited, and as an autocrat, he would never

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94. Accordingly, where the chief officials in Kallipolis are called "guardians" (*phulakes*), see THE REPUBLIC, *supra* note 19, at 374d, those in the Magnesian city are called "guardians of the laws" (*nomophulakes*), see THE LAWS, *supra* note 54, at 752e. Cf. *id.* at 715d.

95. On the Greek text, which is somewhat difficult, see 1 E.B. ENGLAND, THE LAWS OF PLATO 202–03 (1921). The interpretation has been much disputed. My account is closest to that found in LEO STRAUSS, THE ARGUMENT AND THE ACTION OF PLATO'S LAWS 5 (1975).

96. THE LAWS, *supra* note 54, at 874e–75a; cf. POLITICS, *supra* note 67, at 1253a29–37.



be able to adhere to this conviction and spend his life giving priority to nourishing what is common in the city, while nourishing the private as following after the common; mortal nature will always urge him toward getting more than his share and toward private business, irrationally fleeing pain and pursuing pleasure, and putting both of these before what is more just and better. Creating a darkness within itself, it will completely fill both itself and the whole city with everything bad.<sup>97</sup>

There are two basic problems here: a problem about knowledge and a problem about motive. There is an art of politics, a kind of expertise not possessed by most people. This assimilates the political art to others. But another aspect of politics is quite different: because politics concerns the common things, those responsible for it are in a unique position to benefit themselves, and so the Athenian holds that the need for knowledge of public things is only one desideratum. A second assumes the knowledge but then asks who, having such knowledge, could be trusted not to use it to benefit himself at the expense of the common good.

The phrase translated above as “without being audited” (*anupeuthunos*) refers to the Athenian practice (presumably also established in other Greek *poleis*) of undertaking an investigation (called a *euthuna*) of office holders at the end of their service to determine if they have done anything illicit.<sup>98</sup> Rule without an audit is rule without accountability and was considered by the Greeks, including Plato and Aristotle, as tantamount to tyranny.<sup>99</sup> Now recall that the city proposed in the *Republic* is one ruled by the wise. What guarantee is there that the philosopher-rulers would not exploit the common for their private benefit? The guarantee is in the nature of the philosophers themselves: they love truth and prefer it to honor or money. The motives of the philosophers are every bit as important as their wisdom as a qualification for rule in the *Republic*.<sup>100</sup>

That knowledge can occur without the right motive is acknowledged in the quotation above. Both are rare on their own; the two together are very rare indeed. And yet, that represents an ideal. The ideal is yet more difficult to realize for the reasons discussed above in Part I. This is the most basic explanation for the embrace of the rule of law. We have seen the

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97. THE LAWS, *supra* note 54, at 875a–c.

98. See MORROW, *supra* note 59, at 219–22; see also Marcel Piérart, *Les euthunoi athéniens*, 40 L'ANTIQUITÉ CLASSIQUE 526 (1971); S.C. TODD, THE SHAPE OF ATHENIAN LAW 112–13 (1993).

99. Cf. THE LAWS, *supra* note 54, at 691c–d, 761e; POLITICS, *supra* note 67, at 1295a20; PSEUDO-PLATONIC DEFINITIONS 415b, e.

100. THE REPUBLIC, *supra* note 19, at 519c–21b. Nowhere in the *Republic* are the philosopher-rulers said to be *anupeuthunos*, although Morrow suggests that they are. See MORROW, *supra* note 59, at 582–83.

justification for the rule of law as well as its disadvantages. It is also necessary to see that the rule of law has a context in the *Laws*—it is organically connected to other features of the Magnesian city that support and condition it. Three of these features are discussed in the next section: first, the establishment of the city itself; second, the role of persuasion and the Athenian’s introduction of the preambles to the written laws; and third, the role of practices as an example of quasi-legal institutions that support law. An additional institution, the “nightly meeting,” is discussed in Part II. D. What all of these features indicate is that the rule of law is a more complicated and contextualized instrumentality than is often thought. The rule of law does not exist on its own in isolation from other characteristics of the city but is part of a whole that conditions it.

### C. Context and Limits of the Rule of Law

In the fourth book of the *Laws*, the Athenian is discussing the details of the settlement of the new city. This leads him to what initially sounds like a very pessimistic assessment of the chances for the sort of project the three old men are discussing.<sup>101</sup> He confesses that he has sometimes thought that “no human being ever legislates anything, but that chances and accidents” are really in command.<sup>102</sup> Recovering from the fit of pessimism, he then suggests that there is a god involved in the process and also—and more importantly for present purposes—the power of art (*technē*), which can cooperate with and respond to the blind force of chance.<sup>103</sup> But chance seems to control even this, because the Athenian adds, “Along with the rest of the good luck a land needs to have befall it if it would ever dwell in happiness, there must always happen along, for such a city, a lawgiver who possesses the truth.”<sup>104</sup> What sort of city would be in the best condition to receive such a gift? Shockingly, the Athenian suggests that a tyranny, one in which the tyrant were young, possessed of a good memory, good at learning, courageous, and magnificent by nature.<sup>105</sup> Such a naturally virtuous young tyrant would most quickly and easily submit his city to the judgment of a true lawgiver, one whom the Athenian later associates with the virtues of prudence and moderation.<sup>106</sup>

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101. THE LAWS, *supra* note 54, at 704a–08e.

102. *Id.* at 709a.

103. *Id.* at 709b–c.

104. *Id.* at 709c.

105. *Id.* at 709e–10a.

106. *Id.* at 712a.

The Athenian concludes this part of his discussion, saying that “when the greatest power coincides in a human being with prudence and moderation, then occurs the natural genesis of the best regime, and laws to match; but otherwise it will never come to pass.”<sup>107</sup> It is just after this that he asks his companions what sort of regime (*politeia*) they should establish for the city.<sup>108</sup> Kleinias and Megillus are unsure how to answer, and the Athenian asks them what regime each of their cities has.<sup>109</sup> Neither is able to say with specificity, pointing to features of their regimes that seem to indicate a variety of types.<sup>110</sup> The Athenian then says that their inability to point to one type shows that their cities are “real regimes.”<sup>111</sup> The conventional regimes, democracy, oligarchy, etc., are really just administrations dominated by one faction of the city—the rich, the poor, or some other.<sup>112</sup> A real regime, the Athenian therefore suggests, is one dedicated to the good of the whole city, but human rulers as such seem incapable of this kind of rule. If one were to name the city for a ruler in this sense, it should be named for a god “who truly rules as despot over those who possess intellect.”<sup>113</sup> Kleinias asks who this god is.<sup>114</sup>

To illustrate this and point to the sort of regime the Magnesian city should have, the Athenian tells them a myth about the age of Kronos.<sup>115</sup> The god Kronos, the Athenian explains, knew that “human nature is not at all capable of regulating the human things, when it possesses autocratic authority over everything, without becoming swollen with insolence and injustice.”<sup>116</sup> He took pity on human beings and sent a race of demons to rule over them like shepherds over sheep.<sup>117</sup> The result was happiness for human beings, who enjoyed “peace and awe and good laws and unstinting justice without stint.”<sup>118</sup> The Athenian concludes:

What this present argument is saying, making use of the truth, is that there can be no rest from evils and toils for those cities in which some mortal rules rather than a god. The argument thinks that we should imitate by every device the way of life that is said to

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107. *Id.*

108. *Id.* at 712c.

109. *Id.*

110. *Id.* at 712d–e.

111. *Id.* at 712e–13a; *cf. id.* at 832c. For the emphasis, see ENGLAND, *supra* note 95, at 712e9.

112. THE LAWS, *supra* note 54, at 713a.

113. *Id.*

114. *Id.*

115. *Id.* at 713c–14a.

116. *Id.* at 713c.

117. *Id.* at 713c–d.

118. *Id.* at 713e.

have existed under Kronos; in public life and in private life—in the arrangement of our households and our cities—we should obey whatever within us partakes of immortality, giving the name “law” to the distribution ordained by intelligence.<sup>119</sup>

These texts from the fourth book both reinforce the sense in which the rule of law is a second-best approximation to the rule of intelligence and a solution to the excesses characteristic of unfettered human freedom. They also suggest a prerequisite for the project of the dialogue and for the rule of law as such. Some well-disposed rulers must come into contact with a philosopher–teacher—not a philosopher–ruler but a teacher who can assist in the drafting of laws. This is fundamentally a matter of chance (*tuchē*) and, therefore, cannot simply be produced.

The notion of a higher law, then, in the sense of divine law, also returns via the Athenian’s introduction of a myth—the myth of Kronos. This is a kind of transmutation of the original sense of divine law with which the three men began. The law codes of Crete and Sparta were said to be the issue of particular gods. The Athenian stranger never directly contradicts this. However, he very quickly suggests imperfections in those law codes and changes the ground of the discussion to what is “by nature.” Later, in the eighth book, almost off-handedly, the Athenian suggests that gods do not legislate at all.<sup>120</sup> The notion of a divine lawgiver here is discussed strictly in terms of a myth said to reflect the truth that this law code is a product of the only god that matters—intelligence. At the same time, the Athenian and his interlocutors have agreed that the city will continue to *claim* that its laws are made by gods.<sup>121</sup> One would be too quick to see this simply as an indication of impiety or cynicism. For one thing, the classical Greeks did not have a revelatory religion but rather a more natural one rooted in myths never understood literally and tied to rituals that were in many cases connected to the city itself and so a part of civic life.<sup>122</sup> It is more important simply to see that this connection between the laws and the gods is an

119. *Id.* at 713e–14a.

120. *Id.* at 835c.

121. *Id.* at 657a–b, 664a, 762e; *cf. id.* at 634d–e, 716a.

122. See WALTER BURKERT, *GREEK RELIGION* 216–75 (John Raffan trans., 1985); Christiane Sourvinou-Inwood, *What Is Polis Religion?*, in *THE GREEK CITY FROM HOMER TO ALEXANDER* 295 (Oswyn Murray & Simon Price eds., 1990). I have treated some of these matters at length in V. Bradley Lewis, *Gods for the City and Beyond: Civil Religion in Plato’s Laws*, in *CIVIL RELIGION THEN AND NOW* (John von Heyking & Ronald Weed eds., forthcoming 2009).

admission that the bonds of the law itself need reinforcement, that a sense of sacredness is a crucial support.

At the same time the laws really do have their origin in the divine in so far as the Athenian sees reason or intelligence itself as a divine thing. The passage quoted above has two quite close parallels in other works by Plato that suggest this. One is in the *Republic*:

Unless . . . the philosophers rule as kings or those now called kings and chiefs genuinely and adequately philosophize, and political power and philosophy coincide in the same place, while the many natures now making their way to either apart from the other are by necessity excluded, there is no rest from ills for the cities, my dear Glaucon, nor I think for human kind, nor will the regime we have now described in speech ever come forth from nature, insofar as possible, and see the light of the sun.<sup>123</sup>

The second passage is from Plato's autobiographical *Seventh Letter*.<sup>124</sup> The letter is intended to advise the followers of Plato's friend Dion after Dion's unsuccessful attempt to establish a reformist government in Syracuse. Plato went to Syracuse to help with this ill-starred project and uses the letter to explain his reasons, also giving information about his early life and how he came to his views about politics. Plato seems to have harbored political ambitions in Athens but abandoned them after the rough and disorderly period following the Peloponnesian War and especially after the execution (under the aegis of the restored democracy) of his friend Socrates. He states his conclusions as follows:

I was forced to say, in praise of true philosophy, that from her height alone was it possible to discern what the nature of justice is, either in the state or in the individual, and that the ills of the human race would never end until either those who are sincerely and truly lovers of wisdom come into political power, or the rulers of our cities, by the grace of God, learn true philosophy.<sup>125</sup>

Elsewhere in the *Seventh Letter*, Plato makes it clear that the best practical solution for Syracuse is a free government under the rule of law.<sup>126</sup>

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123. THE REPUBLIC, *supra* note 19, at 473c–e.

124. PLATO, SEVENTH LETTER, in PLATO: COMPLETE WORKS 1634 (Glenn R. Morrow trans., John M. Cooper ed., 1997) [hereinafter SEVENTH LETTER].

125. *Id.* at 326a–b.

126. *Id.* at 324b, 331d–e, 334c–d, 336a. I have discussed the teaching of the *Seventh Letter* in Lewis, *supra* note 60.

Shortly after the discussion of the establishment of the city, which contains an account of the rule of law just discussed, the Athenian stranger introduces one of the signature features of the *Laws*. He notes that some things the lawgiver would wish to say “cannot be presented harmoniously in the shape of law.”<sup>127</sup> This is important because the lawgiver should, to the extent possible, not simply control behavior through a rule with the threat of punishment but through persuasion.<sup>128</sup> This can be effected by the inclusion of a preamble (*prooimion*) to legal regulations that contains an argument and also encouraging rhetoric that attempts to induce voluntary compliance. The legislator who includes such preambles is compared to the best sort of physician, one who investigates an ailment “according to nature” and then “teaches” the patient, not giving orders until he has laid a groundwork of persuasion.<sup>129</sup> All the laws, the Athenian holds, should have preambles.<sup>130</sup> Indeed, as the three go through the rest of the laws that will regulate the life of the Magnesians, the Athenian usually starts with a preamble that intends to educate and persuade. In some cases, one might conclude that the rhetoric involved is not entirely rational. Indeed, in one case the Athenian suggests that the citizens may have to believe things the truth of which they cannot themselves verify.<sup>131</sup> He certainly thinks that the city’s institutions should support the laws with authoritative beliefs. The most important of these beliefs are religious, as suggested above. The tenth book of the *Laws* contains a discussion of proofs of the existence of the gods that is perhaps the lengthiest such text in classical Greek antiquity and that is said to constitute “our noblest and best prelude on behalf of all the laws.”<sup>132</sup>

In addition to persuasive preambles and a kind of civic religious orthodoxy, there are other social supports for law. Perhaps the most important is seen in a feature of the *Laws* that has been little noticed: the

127. THE LAWS, *supra* note 54, at 718b–c.

128. *Id.* at 718c–e.

129. *Id.* at 720a–e; *see id.* at 857d–59a.

130. *Id.* at 723b–c.

131. *Id.* at 660e–63a. *See* MORROW, *supra* note 59, at 557 (“Plato plainly indicates that more than reasoning is required to bring human nature under the control of the law; hence in his preambles, he often employs nonrational means of persuasion.”); *see also* André Laks, *The Laws*, in THE CAMBRIDGE HISTORY OF GREEK AND ROMAN POLITICAL THOUGHT 258, 285–90 (Christopher Rowe & Malcolm Schofield eds., 2005). Morrow’s and Lak’s views are slightly different, but both seem more defensible than that in CHRISTOPHER BOBONICH, PLATO’S UTOPIA RECAST: HIS LATER ETHICS AND POLITICS 97–119 (2002) (taking the preambles to exemplify rational persuasion in a much fuller sense).

132. *See* THE LAWS, *supra* note 54, at 887c.

notion of practices. The concept of a “practice” (*epitēdeuma*)<sup>133</sup> is central to the Athenian stranger’s dialectical investigation of the Dorian political regimes, indeed to his understanding of regimes simply, because, while most often the question of regimes and types of regimes is dealt with in terms of the distribution of power and the arrangement of ruling offices in a city, the types of practices that people value are for the Athenian more central. He begins his inquiry into the Dorian regimes not by asking who rules but rather by asking, Which practices are pursued and why? Specifically, he asks about barracks meals, physical training, and military tactics, and then puts those into the larger contexts of the goods they are thought to promote, especially those “divine goods”—the virtues. The Athenian gets around to the question of ruling offices in the fourth book but denies that those conventional classifications really describe regimes. But just what is a practice?

Inherent in the etymology of *epitēdeuma* is the notion of directedness to an end. This is in its root, *epitēdes*, which is usually defined as “according to a plan” or “ordered to an end.”<sup>134</sup> This purposive aspect is also present in related words.<sup>135</sup> While the word is not uncommon in Plato, the *Laws* clearly contains the heaviest use of it.<sup>136</sup> The Platonic use of *epitēdeuma* and its cognates can be subdivided into two more particular meanings.<sup>137</sup> The first refers to particular practices and the second to practices in general. Particular *epitēdeumata* referred to in the Platonic corpus are manifold. In the *Laws*, Kleinias lists the practices that contribute to manliness as the barracks meals, gymnastic training, hunting, fist-fighting, the “secret service” (*krupteia*),<sup>138</sup> and the distinctive Spartan religious festivals.<sup>139</sup> The

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133. For English translations of *epitēdeuma*, see H.G. LIDDELL ET AL., A GREEK–ENGLISH LEXICON, 666 (9th ed. & rev. supp. 1996) (suggesting as translations “pursuit,” “business,” and “custom”). For varying Latin equivalents, see I D. FRIEDERICH ASTIUS, LEXICON PLATONICUM 800–01 (Burt Franklin 1969) (1835) (giving *stadium*, *profession*, *ars*, and *institutum*); 14 ÉDOUARD DES PLACES, PLATON: OEUVRES COMPLÈTES, LEXIQUE DE LA LANGUE PHILOSOPHIQUE ET RELIGIEUSE DE PLATON (1964) (giving *pratique*, *exercice*, and *mœurs*); CHANTRAIN, *supra* note 41, at 361 (giving *occupation* and *genre de vie*). I have rendered as “practice” partly because it seems so well to fit the now famous account of a practice given by Alasdair MacIntyre: “[A]ny coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.” ALASDAIR MACINTYRE, AFTER VIRTUE 187 (2d ed. 1984).

134. CHANTRAIN, *supra* note 41, at 361 (*à dessein*, *à cette fin*).

135. LIDDELL ET AL, *supra* note 133, at s.v. *epitēdeios*, *epitēdeusis*, *epitēdeuein*.

136. LEONARD BRANDWOOD, A WORD INDEX TO PLATO 385 (1976) (listing fifty-seven references in the *Laws* and forty-four in the *Republic*).

137. See DES PLACES, *supra* note 133.

138. The *krupteia*, usually translated as “secret service,” was the Spartan practice of periodically assigning young warriors to terrorize the subject Helot population. See PLUTARCH, LIFE OF LYCURGUS 28.1–4.

first two are also listed as practices that contribute to the virtue of moderation.<sup>140</sup> Other activities specifically referred to as practices later include hunting and *sumposia* (drinking parties).<sup>141</sup> In the *Republic*, the ruling activity of the guardians is called a practice and so is philosophy.<sup>142</sup>

While Plato occasionally refers to bad *epitēdeumata*,<sup>143</sup> practices are usually associated with the development of excellence—moral education.<sup>144</sup> In the seventh book of the *Laws*, the Athenian stranger discusses “unwritten customs” and “ancestral laws,” which, while not strictly codified, are said to be the “bonds of every regime” (*desmoi pasēs politeias*).<sup>145</sup> Such unwritten customs “if nobly established and made habitual” provide a safeguard for the written laws and support them against various stresses.<sup>146</sup> The Athenian tells Kleinias that these things must not be neglected by the legislator, “neither the great nor the small of what are called laws, habits, or practices.”<sup>147</sup> The city, he repeats, is “bound together by all such things.”<sup>148</sup> Practices, then, are linked with education and habituation, with a view to the nature and stability of the regime as a whole.<sup>149</sup> The idea of practices is closely linked with specific virtues and the virtues generally.<sup>150</sup>

The rule of law, then, is embedded in a web of other ideas and institutions in the *Laws* that make it possible and preserve its efficacy. It is no simple thing. Moreover, in each case these supports are connected with the ultimate superiority of the rule of reason. This is especially the case with the last of these supports, one that is so important that the Athenian stranger calls it a “safeguard”<sup>151</sup> for the whole regime and does not fully discuss it until the end of the dialogue, the “nightly meeting.”

139. THE LAWS, *supra* note 54, at 633a–c.

140. *Id.* at 636a.

141. *Id.* at 637d, 763b, 823c, 640e, 646e, 653a, 673e.

142. THE REPUBLIC, *supra* note 19, at 455a–b, 455d, 487a, 487d, 489c, 491a, 494a.

143. See THE LAWS, *supra* note 54, at 918a, 919c–d, 919e; *cf. id.* at 706d, 771a, 920b; SEVENTH LETTER, *supra* note 124, at 326c.

144. For examples in other dialogues, see PLATO, LACHES 180a, 182c, 186d, 190e; PLATO, MENEXENUS 249a; PLATO, PHAEDRUS 253b; PLATO, HIPPIAS MAJOR 286b.

145. THE LAWS, *supra* note 54, at 793b.

146. *Id.* at 793b–c.

147. *Id.* at 793c–d.

148. *Id.* at 793d.

149. *Id.* at 711b–c, 770d, 791c, 796e, 808e.

150. *Id.* at 711c, 853b; *cf.* PLATO, HIPPIAS MAJOR 294c, 298b; PLATO, PHAEDRUS 253a; THE REPUBLIC, *supra* note 19, at 424d, 444e, 560b; PLATO, TIMAEUS 18b, 87b.

151. THE LAWS, *supra* note 54, at 960d.



#### D. *The Nightly Meeting and the Higher Law of Reason*

Following the passage from the ninth book on the inability of unrestrained human beings to rule justly, the Athenian adds the following:

Of course, if ever some human being who was born adequate in nature, with a divine dispensation, were able to attain these things, he wouldn't need any laws ruling over him. For no law or order is stronger than knowledge, nor is it right for intelligence to be subordinate, or a slave, to anyone, but it should be ruler over everything, if indeed it is true and really free according to nature. But now, in fact, it is so nowhere or in any way, except to a small extent. That is why one must choose what comes second, order and law—which see and look to most things, but are incapable of seeing everything.<sup>152</sup>

We see here again the superiority and natural freedom of intelligence and the limit (its restricted vision) of the rule of law, which is here said explicitly to be “second” (*to deuteron*). The true and free rule of reason is said to exist “nowhere or in any way, *except to a small extent*” (*kata brachu*).<sup>153</sup> We can read this last phrase as a kind of general hedge. The rule of intellect certainly survives in most regimes if only in a radically truncated form. A completely rule-governed or routinized arrangement would likely be too brittle to meet emergent necessities and unanticipated crises. Perhaps ancient Egypt provides an example of an attempt at such a thing, but there does not seem much appetite for it in the modern world.<sup>154</sup> But the “small extent” here may refer also to a particular feature of the regime proposed in the *Laws* itself.

The Athenian introduces in the tenth book and explains in greater detail in the twelfth a body called the “nightly meeting” (*nukterinos sullogos*).<sup>155</sup> In the twelfth book, the Athenian refers to the meeting as a “safeguard [*sotēria*] of the regime and laws.”<sup>156</sup> It is composed of the highest officials

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152. *Id.* at 875c–d.

153. *Id.* at 875d (emphasis added).

154. Consider the Athenian's remarks about Egypt. *Id.* at 656d–57d, 660c; cf. John A. Wilson, *Egypt*, in *THE INTELLECTUAL ADVENTURE OF ANCIENT MAN* 31, 62–92 (1946).

155. This body is usually rendered in English as the “nocturnal council.” Luc Brisson has argued for *Collège de veille* as a more appropriate name. Luc Brisson, *Le Collège de veille (nukterinos sullogos)*, in *PLATO'S LAWS AND ITS HISTORICAL SIGNIFICANCE: SELECTED PAPERS OF THE I INTERNATIONAL CONGRESS ON ANCIENT THOUGHT* 161 (Francisco L. Lisi ed., 2001). I have proposed and argued for the name “nightly meeting” and discussed the nature and significance of this body in greater detail in V. Bradley Lewis, *The Nocturnal Council and Platonic Political Philosophy*, 19 *HIST. POL. THOUGHT* 1 (1998).

156. *THE LAWS*, *supra* note 54, at 960d–e.

of the city and select younger men invited by the members and is said to meet in the very early morning, before dawn.<sup>157</sup> The body is charged in the tenth book with instructing public heretics. In the twelfth book, its brief is more extensive and includes consideration of improvements in the city's laws, investigation of foreign legal customs, and "whatever branches of learning [that] might seem to contribute to this inquiry."<sup>158</sup> Later these inquiries are described as more clearly philosophical: they must study the nature and unity of the virtues and arguments for the existence of the gods.<sup>159</sup> The Athenian says this meeting is to be like the intellect or mind (*nous*) of the city.<sup>160</sup>

Some have interpreted the introduction of the nightly meeting at the end of the *Laws* as a kind of repudiation of the ideal of the rule of law so clearly embodied in most of the dialogue. They see it as a kind of last minute return to the ideal of the *Republic*, with the meeting constituting a thinly veiled return of the philosopher-king.<sup>161</sup> I have argued for the consistency of the meeting with the overall aim of the *Laws* elsewhere.<sup>162</sup> The description given of the body suggests that it functions not as an official organ of the city with explicit powers but more like a body constituted for thinking and advice. Its members have specific responsibilities, and their execution of those duties could well be influenced by the body's meetings and discussions, but it does not seem to have distinctive corporate powers.<sup>163</sup> In this sense it is a return to the ideal of the *Republic*, albeit not one that contradicts the teaching of the *Laws*. It institutionalizes the presence of philosophy in the city or, at least, an image or approximation of philosophy. In so doing it aims to mitigate or manage the natural tensions between philosophy and the city, and create a space for the freedom of intelligence within a context of the rule of law.<sup>164</sup> This has two purposes that, again,

157. *Id.* at 951d.

158. *Id.* at 951e–52b.

159. *Id.* at 965d–67a.

160. *Id.* at 961d.

161. See, e.g., ERNEST BARKER, GREEK POLITICAL THEORY: PLATO AND HIS PREDECESSORS 406, 408 n.1 (1918); GEORGE H. SABINE, A HISTORY OF POLITICAL THEORY 85 (rev. ed. 1950); P.A. BRUNT, STUDIES IN GREEK HISTORY AND THOUGHT 250–51 (1993); George Klosko, *The Nocturnal Council in Plato's Laws*, 36 POL. STUD. 74 (1988).

162. See Lewis, *supra* note 155.

163. *Id.* at 19 n.62.

164. While much of the *Laws* suggests a law code that is static and unchanging, the Athenian stranger does indicate that some matters requiring regulation are left to be completed by the Guardians of the Laws themselves, and also that laws can be changed, although the procedure is sufficiently complicated so as to discourage change that isn't thought absolutely beneficial and

reflect the natural tension just mentioned. There is an explicitly political purpose, that of remedying the deficiencies that flow from the strict rule of law through inquiry and deliberation about improvements.<sup>165</sup> It is also, however, directed beyond politics and reflects the pure activity of intellect itself in philosophy.

This device is the closest Plato gets to suggesting anything like a resolution of the tensions I have noted between man's rational and political nature, a tension that was for him most immediately present in the example and fate of Socrates. The *Republic* represents a city in which philosophy rules—a city that is, as much as possible, philosophical. The *Laws* represents a city closer to those actually existing but with express provision that philosophy exist within it in such a way that it might influence political practice to some extent. If the nightly meeting did nothing else, it would be important only for this reason. I think it is this aspect that Aristotle points to in his somewhat cryptic statement about the Magnesian city in the *Politics* that “which in spite of his wish to make it more acceptable to states, he gradually brings back round to the other constitution.”<sup>166</sup>

### III. FROM PLATO TO ARISTOTLE AND BEYOND

For Plato, then, the rule of law is explicitly related as image to ideal to the rule of intelligence. For Plato, the measure of truth is a complicated question related to his doctrine of the forms or ideas, something I cannot go into here. But it is worth remarking that the Platonic idea moves through the Western philosophical tradition via Augustine's replacement of the forms into the mind of God, which in turn informs Thomas Aquinas's conception of the *lex aeterna*, rational participation in which is his definition of the *lex naturalis*, thus establishing a connection between the Platonic account of the rule of law and that of the medieval natural law tradition and of the rule of law to the higher law.

The link between Plato and Aquinas was Aristotle, whose account of the rule of law resembles his relationship with his great teacher in other respects: what Aristotle presents is a somewhat tidier account that still preserves some of the dialogical quality and philosophical open-endedness of the original. Aristotle assigns great importance to law itself, more than most moral philosophers (the great exception being Thomas Hobbes, for

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necessary. See THE LAWS, *supra* note 54, at 769d–71a, 772a, 818e, 828b, 834d–e, 835a, 846b–c, 957a–b, 968c; see also David Cohen, *Law, Autonomy, and Political Community in Plato's Laws*, 88 CLASSICAL PHILOLOGY 301 (1993).

165. Moreover, the educational effect of the activity of the nightly meeting on its participants may well inform their interpretations of the laws they must administer in virtue of their status as magistrates.

166. POLITICS, *supra* note 67, at 1265a1–4.

whom positive law *is* morality). This is largely due to the fact that for Aristotle the city is so important. The city is the condition that allows human beings to flourish, a condition *sine qua non* for the human good itself—so much so that Aristotle names the science of which moral inquiry forms a crucial part “a sort of political science.”<sup>167</sup> In the very important fifth book of the *Nicomachean Ethics*, Aristotle holds that justice in a political community “belongs to those who have law in their relations.”<sup>168</sup> Later in that fifth book, he defines the virtue of justice as lawfulness and also writes that justice is “complete virtue.”<sup>169</sup> This is because for Aristotle law has an essentially moral–educational purpose:

[T]he law instructs us to do the actions of a brave person—for instance, not to leave the battle-line, or to flee, or to throw away our weapons; of a temperate person—not to commit adultery or wanton aggression; of a mild person—not to strike or revile another; and similarly requires actions in accord with the other virtues, and prohibits actions in accord with the vices. The correctly established law does this correctly, and the less carefully framed one does this worse.<sup>170</sup>

Later, in the tenth book of the *Nicomachean Ethics*, Aristotle repeats what he said in the very first book, that one acquires the beginning of virtues through habituation and that crucial to right habituation is growing up under the right laws.<sup>171</sup> Law sets the pursuits one engages in so as to cultivate good character. This is especially important for the young, but not only the young, because Aristotle holds that such legal tutelage is necessary for the whole of one’s life.<sup>172</sup>

At the same time, Aristotle is just as aware as Plato of the law’s limitations. In the fifth book of the *Nicomachean Ethics*, Aristotle proposes the virtue of “equity” (*epieikeia*) as a remedy for the problem. Aristotle writes that “all law is universal [(*katholou*)], but in some areas no universal rule can be correct.”<sup>173</sup> Knowing this, the law chooses the rule that holds

167. NICOMACHEAN ETHICS, *supra* note 40, at 1094b11.

168. *Id.* at 1134a30.

169. *Id.* at 1129a33–29b30.

170. *Id.* at 1129b20–25.

171. *Id.* at 1179b31–32.

172. *Id.* at 1179b32–80a4.

173. *Id.* at 1137b14–15. For an exposition and defense of Aristotle’s notion related to contemporary notions of equity, see Eric G. Zahnd, *The Application of Universal Laws to Particular*

good most of the time. When such a rule meets a particular circumstance such that its application would result in injustice, the virtue of equity allows one to see that it should not be applied or that some remedy should be provided. This would be seen by and agreed to by the legislator himself were he present. Equity, then, is defined as “the rectification of law insofar as the universality of law makes it deficient.”<sup>174</sup>

The matter is discussed in the context of justice, but it has its origin in a more methodological point. In the very first book of the *Nicomachean Ethics*, Aristotle writes that the political art, under which he includes ethics, concerns the noble, just, and good things, but that opinion about these things differs so much that many people believe the good to be only a product of law or custom and not to be grounded in nature.<sup>175</sup> Aristotle, however, thinks they are rooted in nature.<sup>176</sup> The evident variability in human affairs, however, he does accept, holding that its basis is in the role of the individual’s perception of the good, itself conditioned by his upbringing and general moral formation.<sup>177</sup> There is such a wide continuum in this that differences of opinion about ethics and politics are endemic. There is another source of variation simply in the wide variety in human affairs, a variety that limits the possible specificity of generalizations, which he characterizes as “rough outlines” that hold “good usually.”<sup>178</sup> This is so much the case that Aristotle frequently declines to state any rule or generalization but simply refers to what the “prudent” or “mature” man would do.<sup>179</sup>

The relationship of Aristotle’s understanding to that of Plato in the *Republic* is most evident in the third book of the *Politics*. Aristotle asks whether it is more advantageous “to be ruled by the best man” or “the best laws.”<sup>180</sup> The rule of the best man is the only rational basis for kingship. The chief argument in its favor is that “laws speak only of the universal and do not give commands relative to the actual circumstances.”<sup>181</sup> In answering the objection, Aristotle notes that rulers must have a “reasoned account of the universal,” but unlike the law, they also “have the passionate element” (*to pathētikon*), from which law is free.<sup>182</sup> The discussion is on the whole

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*Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 LAW & CONTEMP. PROBS., Winter 1996, at 263.

174. NICOMACHEAN ETHICS, *supra* note 40, at 1137b26–27.

175. *Id.* at 1094b14–16.

176. *Id.* at 1134b24–33.

177. *Id.* at 1095b4–8, 1113a15–b2, 1114a31–b16.

178. *Id.* at 1094b20–21.

179. *See, e.g., id.* at 1106b36–07a2 (defining virtue); *see also* ERIC VOEGELIN, *What Is Right by Nature*, in ANAMNESIS 55, 61–70 (Gerhart Niemeyer ed. & trans., 1978).

180. POLITICS, *supra* note 67, at 1286a7–8.

181. *Id.* at 1286a9–11.

182. *Id.* at 1286a16–18.

dialogical in character. Its resolution, if such it can be called, is that law should rule. Indeed, Aristotle—following Plato, no doubt—holds that political officials should be called “guardians and servants of the laws.”<sup>183</sup> However, where the law fails by virtue of its universality, human judges should fill in the gap. The innovation Aristotle suggests at this point is that a more democratic regime is likely to better fulfill this need since distorting individual passions would be diluted. He also, however, expects the judge or magistrates to have already been educated by the laws in such a way as to have internalized their spirit. He concludes:

Then again, whatever the law appears unable to determine could not be discovered by a human being either. Rather the law, having educated rulers for such eventualities, hands over to them, to be managed and decided by their most just opinion, the things it leaves out. It allows them, further, to set things right wherever, as a result of experience, they deem something else to be better than the existing laws. Now, anyone who bids the law to rule seems to bid god and intellect alone to rule, but anyone who bids a human being to rule adds on also the wild beast. For desire is such a beast, and spiritedness perverts rulers even when they are the best of men. Hence law is intellect without appetite.<sup>184</sup>

Aristotle’s formulations here are quite close to those we saw earlier in Plato’s *Laws*. Intellect is compared to god and that element alone is preserved in the law free from the potential distortions of emotion and interest.

It is by way of Aristotle that this view makes its way, in a somewhat more muted form, into the thought of Aquinas, who is so influential for later natural law jurisprudence. In discussing the justification for framing human laws, Aquinas considers some objections drawn from Aristotle to the effect that the particular judgment of wise men is better than law.<sup>185</sup> He answers with three points: it is easier to find a small number of wise men to frame laws than the large number needed to continually render particular judgments; framers of law can take a long view unconstrained by the pressure to settle a particular pressing case; framers are removed from the

183. *Id.* at 1287a21–22; see 3 W.L. NEWMAN, *THE POLITICS OF ARISTOTLE* 293 (1902); MORROW, *supra* note 59, at 214.

184. *POLITICS*, *supra* note 67, at 1287a23–32.

185. See ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* IaIIae, q. 95.

objects of the laws they make and therefore less potentially affected by passion and interest.<sup>186</sup> Later, in his discussion of human law, Aquinas specifically raises the issues discussed by Aristotle in his treatment of the virtue of equity—the inadequacy of general rules to the wide variety of human particulars. He acknowledges this, holding that, in general, laws are the necessary basis but that individuals can be dispensed from them in cases where the common good would be better served.<sup>187</sup> But for Aquinas these problems are not about law as such but about the limits of human positive law. Their remedy is found by reference to the natural law, itself explicitly connected to the eternal law, which is God’s providential government of the universe and a product of God as the source and measure of reason itself.<sup>188</sup>

In Aquinas, then, the rule of law is rooted very clearly in the higher law in the fullest sense. For Aquinas, the political theologian, law, and indeed all human institutions, are placed in the context of divine reason, in the full order of providence and cannot be fully understood apart from that.<sup>189</sup> Much of this context could be assumed in a thoroughly Christian civilization. Our own considerably more secular order still values the rule of law, but absent the earlier context, one wonders how it can be best and most fully understood and effected. At the beginning of this paper I pointed to questions about various contemporary efforts in this respect. The Platonic account of the rule of law suggests a similar embeddedness of the rule of law in a different (pre-Christian) sort of context, but one that is perhaps as unfamiliar as that of Saint Thomas.

By suggesting this unfamiliarity my aim is not to doubt the efficacy of the rule of law in our time, but rather to indicate the richer theoretical context of the classical theory and thereby question whether we have lost important elements of the idea of the rule of law. The point of confronting the classical account is to return to our own ways with a broader view and new questions. This may lead us to doubt the adequacy of the modern understanding, but it need not diminish the attraction of the ideal.

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186. *See id.* at q. 95, art. 1, ad2.

187. *See id.* at q. 96, art. 6; *cf. id.* at q. 97, art. 7; *see* JOHN FINNIS, *AQUINAS: MORAL, POLITICAL, AND LEGAL THEORY* 216–17 (1998).

188. *See id.* at q. 93, art. 1.

189. *See* RUSSELL HITTINGER, *THE FIRST GRACE: REDISCOVERING NATURAL LAW IN A POST-CHRISTIAN WORLD* 3–37 (2003); STEVEN D. SMITH, *LAW’S QUANDARY* (2004).