

LAW, AUTONOMY, AND POLITICAL COMMUNITY IN PLATO'S *LAWS*

DAVID COHEN

I

ACCOUNTS OF PLATO'S political theory often emphasize the way in which Plato's vision of the state denies the value of the autonomy of the individual.¹ Typically, such discussions focus primarily upon the *Republic*, and do not take into account the distinct conception of political community that Plato develops in the *Laws*.² Such a manner of proceeding, I would argue, does not do justice to the radical break between these two texts.³ Indeed, in the *Laws* Plato explicitly rejects the famous principle enunciated in the *Republic* concerning the rule of the wisest and best, the philosopher ruler. Such a principle, he concedes, cannot be implemented because only a god would have the qualities necessary for its fulfillment. Any mortal, he argues, will necessarily be corrupted through the exercise of such virtually unlimited authority (713C–14A, 875A–D). What Plato proposes instead of the principle of the rule of the wisest is the rule of law.⁴ Only the rule of law, he maintains, can guarantee a just and stable social order.

Now, one version of such a legal order would be based upon a conception of law as an essentially coercive force that imposes obedience

1. Popper's *The Open Society and Its Enemies*, vol. 1 (Princeton, 1962) is perhaps the best known, and one of the most extreme, statements of this view. See also the recent exploration of the relation between Plato's psychology and political theory by J. Bryant, "Enlightenment Psychology and Political Reaction in Plato's Social Philosophy: An Ideological Contradiction?," *History of Political Thought* 11 (1990): 377–95.

2. J. Skemp criticizes G. Klosko's version (*The Development of Plato's Political Theory* [London, 1986]) of this "traditional view that the *Republic* is the main evidence for Plato's political theory" in a review in *JHS* 90 (1990): 227–30, 280. See also G. Browning, "The Night in which All Cows are Black: Ethical Absolutism in Plato and Hegel," *History of Political Thought* 12 (1991): 391–409, and D. Rice, "Plato on Force," *History of Political Thought* 10 (1989): 565–76. See also T. Saunders' excellent introduction to the Penguin edition of the *Laws* (London, 1986).

3. Klosko, *Plato's Theory*, p. 199, for example, regards the *Laws* as largely "... a development and extension" of the *Republic*. ... P. Friedländer, *Plato*, vol. 3 (Princeton, 1969), pp. 419–22, emphasizes the significance of the shift from the *Republic*. For an account of the different scholarly positions on the relation of the two dialogues see T. Shiell, "The Unity of Plato's Political Thought," *History of Political Thought* 12 (1991): 377–90; A. Laks, "Legislation and Demiurgy: On the Relationship between Plato's *Republic* and *Laws*," *Classical Antiquity* 9 (1990): 209–29; and A. Hentschke, *Politik und Philosophie bei Platon und Aristoteles* (Frankfurt, 1971), pp. 163–83, 284–87.

4. The standard accounts of Plato's treatment of the rule of law are G. Morrow, "Plato and the Rule of Law," *Philosophical Review* 50 (1941): 105–26; idem, *Plato's Cretan City* (Princeton, 1960), pp. 544–72; and, more superficially, R. Stalley, *An Introduction to Plato's "Laws"* (Indianapolis, 1983), pp. 81–86.

through threats and violence. Moreover, such a conception of law would fully justify the view that it denies the values of freedom and autonomy in the constitution of a political community. This is not, however, the conception of law that Plato adopts. Instead, I will argue, he explicitly rejects the practices of existing states whereby law serves solely as a mask for the maintenance of existing power relations through force. Instead, he advocates a version of the rule of law that rests upon the citizens' commitment to voluntary rather than coerced obedience. To use modern terminology, Plato's conception of political obligation rests upon a notion that the legitimate authority of the state requires consent, as embodied in its laws. The *Laws* challenges the legitimacy of any society whose system of legal order rests upon a notion of law as merely consisting of commands backed by the threat of force.⁵ Because the Anglo-American tradition, at least since Hobbes' *Leviathan*, has largely defined law as, in Austin's formulation, the command of the sovereign combined with a coercive mechanism to enforce those commands, Plato's legal theory, as developed in the *Laws*, poses a powerful challenge to positivist jurisprudence.

Before moving to substantiate these claims through an examination of the text of the *Laws*, it may be helpful first to give a brief overview of my interpretation of Plato's provisions. To meet the deficiencies that render all existing constitutional orders a mere mask for the imposition of force, Plato adopts two fundamental premises. First, no individual or group is above the law, all are equally subject to it. Second, the rule of law cannot rest upon mere coercion, but rather only upon the willing acceptance of a free citizenry. Coercion is only an option of last resort for those few who disregard civic virtue; it cannot provide the basis of a legitimate order. The key terms of these premises (e.g., "willing acceptance," "free citizens") require a good deal of elaboration. Also of crucial importance is how Plato reconciles freedom and order in realizing this vision of the rule of law. Addressing these issues will require an examination of Plato's views on the moral psychology of education and socialization and their relation to the rule of law.⁶

It is striking that the first three books of the *Laws* largely focus upon questions of education. When legislation is finally taken up, it leads (in Book 4) to a radical rethinking of the nature of statutory law as an important educational force in the state.⁷ Existing legislation, Plato argues, merely threatens. A true legislation would involve extensive preambles to both the code as a whole, as well as to individual sections and laws, so that the law will educate and persuade rather than coerce.⁸ The scheme of

5. This is also the starting point of Rousseau's critique of civil society in *The Social Contract*, on which, see section III, below.

6. See also Isocrates *Areopagiticus* 40, who argues that civic virtue is produced through proper socialization rather than through the coercive force of ever multiplying legislation.

7. See C. Bobonich, "Persuasion, Compulsion, and Freedom in Plato's *Laws*," *CQ* 41 (1991): 365–88, esp. 386–87.

8. Morrow, *Cretan City*, pp. 553–60, emphasizes the radical quality of Plato's requirement that the laws be preceded by preambles that will help citizens to understand the purposes behind the law and encourage them of the wisdom of following their precepts. Bobonich, "Persuasion," provides the fullest examination of the preambles and Plato's commitment to persuasion rather than compulsion. For another recent discussion of the preambles see Laks, "Legislation and Demurgy," pp. 223–25.

civic education developed in Books 1–3, the theory of legislation as persuasion and education, and the necessity for the citizens to adopt the constitution and code of laws for their society, together form the principal means of assuring that the rule of law will be based upon the willing acceptance of free citizens.⁹

II

At the opening of the dialogue, Clinias argues that in all existing states, "Humanity is in a state of public war of every man against every man, and private war of every man against himself" (626D–E). This formulation sets up the two levels at which the dialogue will operate: moral psychology and institutions. Hobbes focuses upon the war "of every man against every man"¹⁰ because his positivist view of law adopts a largely external perspective: given the nature of human moral psychology only the coercive power of the state provides a practical solution to the problem of order.¹¹ Plato, on the other hand, pursues the problem of order at two levels, which together constitute the true sphere of legislation.¹²

The warfare within each individual is the province of moral psychology. This kind of internal conflict must be addressed through a proper understanding of the processes of socialization and education that all societies employ to reproduce themselves. The war of all against all, on the other hand, falls within the province of institutional arrangements.¹³ Only the uncoerced rule of law over willing subjects (690C) can provide the framework within which virtuous citizens can achieve civic harmony and avoid the discord of civil strife (691A).¹⁴ In the following passage the production of this civic concord is adumbrated as the fundamental task of legislation: how to eliminate the war *within* states by producing a community that is based upon freedom, rationality, and civic amity (693B).¹⁵ The undeclared state of war in existing states merely embodies and expresses the relations of domination and exploitation enshrined in

9. W. Jaeger, *Paideia*, vol. 3 (Oxford, 1986), p. 216, emphasizes that in the *Laws*, Plato "set out to subordinate legislation to the educational principle. . . ."

10. *Leviathan* (1651; reprint ed., Oxford, 1976), p. 96. All other citations to *Leviathan* are from this edition.

11. This is the cumulative argument of chapters 1–17 of *Leviathan*. See, e.g., chap. 15 (p. 110), where Hobbes argues: "Therefore before the names of Just and Unjust can have place there must be some coercive power, to compell men equally to the performance of their Covenant; and to make good that Propriety, which by mutuall Contract men acquire, in recompence of the universall Right they abandon: and such power there is none before the erection of a Common-wealth."

12. As will appear in section III below, this is also the strategy that Rousseau follows in *The Social Contract*.

13. On the relevance of the relation of these two levels of analysis to Plato's legal theory, see Morrow, *Cretan City*, pp. 562–63.

14. See also 689A–D, 713A–14B, and 832C; and Laks, "Legislation and Demiurgy," pp. 221–22. Plato employs the musical metaphor throughout the *Laws* to express the problem of discord and harmony and the need of addressing them through "musical education." See, e.g., the explicit revelation of the purpose of this metaphor at 702A–B.

15. And see also 693C, where Clinias characterizes these qualities as ἐλευθερία, φιλία, and φρόνησις, and 701D where Plato again emphasizes the importance of these three characteristics. N. Jones, in "The Organization of the Kretan City in Plato's *Laws*," *CW* 83 (1990): 473–92, emphasizes the centrality of Plato's concern with unity by showing the way in which such concerns inform the institutional arrangements of Magnesia.

their constitutions (712E–13A, 715A–E). This is necessarily the case because in existing societies the constitution typically represents the victory of one faction of citizens over another (715A). For this reason we should not call the inhabitants of such states “citizens,” but rather “factionaries” (715B στασιώτας ἀλλ’ οὐ πολίτας τούτους φαμέν). Indeed, because their forms of government merely institutionalize and seek to legitimize naked power relations, we should also not consider existing states to be forms of constitutional government at all, nor are their enactments “true laws” (715B).¹⁶ Plato’s position here indicates the radical nature of his conceptions of “true” legislation and of the rule of law. On his view no state has yet fulfilled the conditions for constitutional government because none have managed to create a political order that does not primarily rest upon domination and coercion. Hence, the true task of legislation can be formulated as: How, through law, to create harmony out of conflict (627E–28D)?

Now one solution to this problem, and this is the solution often attributed to Plato, would be through the coerced “harmony” of an authoritarian state.¹⁷ For Plato, however, this would not be a solution for two reasons. First, as he repeatedly emphasizes, citizens must be free and their acceptance of the law must be voluntary and based upon understanding.¹⁸ Second, as seen above, true legislation substitutes the rule of law for the rule by force that occurs whenever one group uses the law to advance its own interests. On Plato’s view, in existing societies the dominant group enacts laws to serve “its own interest in the permanence of its authority” (714D). Accordingly, in a very Hobbesian formulation, if any man “contravenes these enactments the author will punish him for his violation of justice, meaning by justice these same enactments” (714D).¹⁹ Such rule of force cloaked within the legitimating garb of “law” naturally produces the discord of faction that threatens to pull existing states apart from within. The “true legislator,” on the other hand, legislates for the

16. In 832C Plato also identifies the inherent violence of existing constitutions as the central problem for legislation. Of democracy, oligarchy, and autocracy, none, he argues, represents true constitutional government (τούτων γὰρ δὴ πολιτεία μὲν οὐδεμία). Rather they all represent institutionalized forms of στάσις (στασιωτεῖται δὲ πᾶσαι λέγονται ἂν ὀρθότατα). This is because, he continues, none of them rests upon the rule of a willing sovereign over willing subjects (ἐκόντων γὰρ ἐκούσα οὐδεμία). Instead, all of them consist of the rule of a willing sovereign over unwilling subjects by means of some kind of force (ἀλλ’ ἀκόντων ἐκούσα ἄρχει σὺν αἰτινὶ βίῳ).

17. For such an interpretation of the *Laws*, see E. Wood and N. Wood, *Ideology and Ancient Political Theory* (Oxford, 1978), pp. 198–200.

18. See, e.g., 627E3, 669A–B, 670B–71B, 693B–D, 698B, 701D, 690C, 698B, 700A, and 832C. For the clearest discussion of Plato’s conception of the relation of freedom to understanding see Bobonich, “Persuasion,” pp. 386–87.

19. The view that Plato criticizes here resembles the positivist account of law and justice offered by Hobbes, where “before Just and Unjust can have place there must be some coercive power to compell” (chap. 15, p. 110). This coercive power is the sole source of law, and hence of justice, and this law consists in the command of the sovereign (chap. 16, p. 203, chap. 26, pp. 203–5). These laws, “are the Rules of Just and Unjust; nothing being reputed Unjust that is not contrary to some Law” (chap. 26, p. 204). That the sovereign’s ultimate aim will be to secure his own power follows from the principles of moral and political psychology that Hobbes has earlier developed. This is, of course, precisely the concept of law that Plato, like Rousseau, argues is merely a mask for tyranny and is, in fact, not law at all.

good of the entire citizenry so as to produce that civic concord in which all citizens feel that they share in the benefits of political community.²⁰

Plato's solution to the perennial problem of balancing liberty and order derives from the treatment of education in Books 1–2.²¹ A substantial part of this discussion concerns education about pleasures and pains.²² The importance of this subject is underscored when the Athenian Stranger claims that the pleasures and pains of communities and individuals are central to the study of legislation (636D–E, 637D). This claim at first seems puzzling to the Athenian Stranger's interlocutors, for the relation of pleasures and pains to jurisprudence is, at first, far from apparent.²³ What emerges, however, is that law may be understood as the *institutionalized judgment* of a community about proper and improper pains and pleasures.²⁴ This understanding, in turn, clearly links law to education, for education largely serves to inculcate in children community norms regarding pleasures and pains.²⁵ Thus, education leads children "to the rule that has been pronounced right by the law."²⁶

From this view arises Plato's position that education in virtue, that is, education in the proper dispositions towards pains and pleasures, is the only possible foundation for a just society meeting the three criteria for true legislations described above (harmony, freedom, and voluntary acceptance). Only the persuasion of such education can prepare individuals to exercise right judgment about proper and improper pleasures and pains (659D–E, 654A).²⁷ Further, it is such education that induces them to practice justice "willingly and without compulsion."²⁸ The just society relies upon education in virtue from childhood to produce "the perfect citizen, *knowing* when to rule and when to be ruled as justice requires" (643E ἀρχειν τε καὶ ἄρχεσθαι ἐπιστάμενον μετὰ δικῆς).²⁹

20. 715A–D, 743C, 832C, and see Morrow, *Cretan City*, pp. 562–63 (in n. 44, Morrow collects some of the many passages that refer to "true law" and the "true legislator"). See also the discussion below of justice in distribution.

21. For Plato's account of the necessity of achieving a resolution of the tension between liberty and order, see 693D–94A and 701A–E. For a recent treatment of the relationship of the theory of education to the production of consent, see S. Gastaldi, "Educazione e Consenso nelle *Leggi* di Platone," *Rivista di storia della filosofia* 3 (1984): 419–52.

22. See, e.g., 634A–B, 635B–D, 644C–45C.

23. As the Athenian Stranger later explains, the whole discussion of education, including the use of "drinking parties," has aimed at learning "how a society is best administered and how a man will best conduct his personal life" (702A–B). Like the discussion of musical education, the treatment of the educational uses of the drinking parties serves as an elaborate metaphor for the constitution of social life in a well-governed society.

24. From the *Gorgias* onward, Plato links the social good to the right understanding about pleasures and pains. In the *Laws*, at the moral psychological level individuals possess within them two counselors, pleasure and pain (644C). Further, individuals possess the capacity to exercise judgment about pleasure and pain and expectations concerning them: "When such judgment takes the form of a public decision of a political community (δόγμα πόλεως κοινόν) it is called law (νόμος)" (644D). See also 645C.

25. 643B–44B, 644E–45C, 653C, 654D, 656D, 659D–E.

26. 659D τὸν ὑπὸ τοῦ νόμου λόγον ὀρθὸν εἰρημένον.

27. Z. Planinc, *Plato's Political Philosophy* (Columbia, Missouri, 1991) attempts a full study of φρονήσις in the *Republic* and the *Laws*.

28. 663E, and cf. 670B–71B. This latter passage emphasizes the role of judgment and understanding. Planinc, *Political Philosophy*, pp. 183–88, emphasizes the willingness of the citizens to accept the legislator's provisions.

29. A formulation that Aristotle famously adapts in Book 1 of the *Politics*.

If the perfect citizen is one who does not merely submit to a law made by others, the scheme of education that Plato develops must operate not simply to condition children to obey blindly the dictates of others, but rather to produce in them understanding and the capacity for judgment.³⁰ Plato perhaps expresses this view of proper education most forcefully through the metaphor of musical training.³¹ Such education does not aim to enable citizens to mimic mindlessly the strains they hear without being able to distinguish good from bad, but rather to give them the training necessary to exercise judgment.³² Likewise the good citizen must be educated to judge which pleasures are good, which are bad, and to strike the right balance within herself.³³ Having established that within the individual such judgment involves the capacity to discern better from worse in regard to the future (644D), Plato considers law to be a common decision (κοινὸν δόγμα) of a community. The long analysis of the moral psychology of education thus provides a basis for conceptualizing law not as arising from some transcendent ideal, but rather from the capacity of communities to exercise judgment in regard to their future affairs. All citizens should be educated to develop such judgment so that they all “sing the same tune”³⁴ and, hence, instantiate civic harmony by following the community’s judgment as enunciated in its laws. This is the basis for “practicing justice freely and without compulsion.”

Plato thus does not propose a new kind of indoctrination designed to produce obedient but mindless clones. When he speaks of the “practices, eulogies, and arguments” (663C) or “songs, stories, and discourses” (664A) that all citizens will repeat in infinite variations as a kind of spell to inculcate virtue (665C), he is merely reflecting upon the practices of every human community that reproduces itself through socializing its members in its values and practices.³⁵ For Plato, it is not sufficient to produce purely habitual and mindless obedience to the norms of the community. Although, as Aristotle also recognized, habit is an indispensable starting point of socialization, it must be supplemented through that understanding of right and wrong that can alone provide the basis for the capacity for judgment essential for virtue. Plato recognized perhaps more

30. This capacity for judgment, it will be remembered, is crucial in two ways: for individuals it provides the basis for civic virtue, and for communities, exercised collectively, it provides the foundation for their laws.

31. See, e.g., 672E: “The choric art as a whole we found to be the same things as the whole of education. . . .” See also 659E.

32. See 668B–D, 669A–B, 670B–71A.

33. 645B–C, 659D. The drinking parties to which so much attention is paid in the early books of the *Laws* are another mechanism for socialization and education in virtue (671D–72A, 673E–74C).

34. 664A, 665C. For examples of the necessity for understanding the law see, e.g., 790B, 861B–C, and also φρόνησις as necessary for producing the virtuous citizen who is perfect in obedience to the laws (729D–E, 730D–E). Cf. n. 16 above.

35. Although he notes that a legislator could hardly find a better fiction than the central belief that the just and pious life is both more honorable and more pleasant, he also makes clear that since this belief is in fact true there is no need for such invention (663D–E, 664B–C). See also 653B–C, where he says that proper education of children involves disciplining them in the right understanding (and habits that are in accord with understanding) of pleasures and pains without which virtue is unattainable. Rousseau’s invention of a civic religion for similar purposes will be discussed in section III below.

clearly than any other political theorist the crucial importance of early childhood. He believed that in all societies the foundations of moral education are laid long before an individual develops the capacity for moral reflection. Thus, on Plato's view all political communities teach their children uncritically to accept the "songs, stories, and discourses" that maintain that the fatherland is good and its enemies bad, that you should respect property and not tell lies, or that you should steal the sheep of your neighbors when you get a chance and always lie to strangers about the affairs of your family. Indeed, it is precisely such conventional common beliefs that constitute a political community and differentiate it from a random aggregation of individuals.³⁶ Plato's point is that although every society educates its children, few give adequate consideration to the moral and political consequences of that education.³⁷ On his view, nothing is of greater importance for a state, because here alone lies the beginning of a solution to the problem of the warfare of all against all and each against himself (626D). Only through an education that generates the capacity for judgment essential to virtue can civic harmony be produced.

Having established the central importance of education for true constitutional government, in Book 3 Plato shifts from the moral psychological account to another perspective: speculation about how political communities historically arose. This transition will allow him to reintroduce the subject of legislation, which will again lead back to a resumption of the investigation into the importance of education. In discussing the actual historical basis of political communities in a kind of compact (as opposed to the speculations of imaginative history),³⁸ Plato comments that legislators are normally expected "only to enact such laws as will be readily accepted by the populace" (684C). This expectation, he continues, poses fundamental problems if one aims at true legislation: since wealth and poverty are principal sources of civic strife (679C–D; 736C–37B), the legislator must attempt to regulate the distribution of wealth. Most communities, however, typically resist any such attempts at fundamental reform involving redistribution of land, cancellation of debts, and so on: "When a legislator attempts a change in these matters everyone says not to meddle with things that should remain immutable" (684D–E). Here Plato poses one of the classical dilemmas of political theory, the "start-up problem," which asks how radical reform of society can be possible given the entrenched interests represented by the existing social and economic structures. Whereas one strain of modern political theory addresses this problem through the fiction of state of nature and social contract theory, Plato deals with it through another kind of hypothetical device: the foundation of a new city,

36. As Aristotle puts it, it is a partnership (*κοινωνία*) in perceptions of good and bad, and right and wrong that forms the basis for the two fundamental forms of political association, the household and the polis (*Pol.* 1253a16–18).

37. See also *Republic* 3, where he explores the moral incoherence of basic Greek educational texts like the Homeric poems and the bad examples they provide for children (e.g., adulterous, malicious, and treacherous gods).

38. 684A–B.

Magnesia, where land, at least, can be distributed *ab initio* (703C–D) and a new framework established for social and political relations.³⁹

Before dealing with the concrete problems of distribution, however, the more fundamental question of who should govern must be addressed. The Athenian Stranger considers seven entitlements to rule (690); for present purposes the sixth and seventh are most important.⁴⁰ The seventh is described as determining who should rule by lot, or democracy (690C). The sixth entitlement, on the other hand, is described as the supreme claim of all, namely, that the ignorant should follow and the wise lead (690B). Now, if this sounds reminiscent of the *Republic*, the following sentence makes it clear that there is a fundamental difference: “It is just this non-coercive rule of law over willing citizens that is according to nature” (690C). Here the rule of law replaces the philosopher ruler,⁴¹ and Plato emphasizes the lack of coercion that makes this basis of political rule “supreme” and “according to nature” (again repeatedly emphasized; 690B–C, and cf. 713D–14A).⁴² Thus, in the *Laws* Plato reinterprets the *Republic*’s answer to the question of “who should rule.” Here, the laws rule through the consent of willing citizens and that consent is produced through education in civic virtue. The citizens are “ignorant” in comparison with the wisdom embodied in the laws, but it is through education that they come to understand that this wisdom justifies the sovereignty of the law. They *understand*, then, “when to rule and be ruled as justice requires,” and it is through this understanding that Plato attempts to produce the consent to the rule of law that he hopes will avoid the plagues of faction and discord.

The vehicle that translates the rule of law into concrete political relations is the mixed constitution (693D–701E). The advantages of the mixed constitution are brought out when the Athenian Stranger explains why un-mixed sovereignties cannot realize the basic goal that a legislator should aim at: a community that is free, sane [i.e., possesses understanding], and at amity with itself (693B, and see also 701D). It is, then, only the mixed constitution that can provide the institutional framework for the fundamental problem posed above: how to create a political order that balances freedom and constraint and maintains civic harmony. On the one hand, there must be a democratic element in the constitution that guarantees

39. Contemporary theorists have developed imaginative variants of the classical contract situation: Rawls adopts the analytical device of imagining a bargaining situation (“the original position”) constrained by a “veil of ignorance” (*A Theory of Justice* [Cambridge, Mass., 1974]); and Nozick invents a modern adaptation of state of nature theory, judged from the standpoint of the anarchist who wants no part of civil society (*Anarchy, State, and Utopia* [New York, 1985]). Thus Plato’s avoidance of the practical problem of how to implement principles of justice in an unjust society stands at the beginning of a long and respectable tradition. See 736A–37B.

40. On this passage, see W. Jaeger, *Paideia*, 3:235–37.

41. See also 713C and 875A–D.

42. See also 832C, where Plato says that existing states do not have true constitutional government because in none of them are the subjects willing, but rather submit to force. Other passages that emphasize that under true constitutional government the citizens are free were discussed above. See also 746A–B and 752B–C. The importance Plato attaches to the consent of willing subjects also appears in his characterization of the better government that Athens enjoyed at the time of the Persian Wars, when, “conscience had a sovereignty among us that disposed us to willing subjection to the laws” (698B; see also 700A).

sufficient liberty to citizens, but on the other hand a monarchical principle must provide the basis for social harmony (693C–E, 697D–98B).⁴³ Book 3 closes with the determination to use the analytical device of founding a colony (that is, beginning a society from the ground up) as a way of testing these theoretical propositions (702B–D).

In taking up the problem of foundation, the Athenian Stranger claims, as does Aristotle in *Politics*, that there are as many types of law as of constitutions (714C). What does this mean? It follows from the premise that under existing types of constitution, whether democratic or oligarchic, those who rule will enact laws that express and support their rule (714C–D). Further, any act contravening these laws will be punished as an injustice, for these laws, whatever their content, represent justice (714D). This positivism is rejected by Plato in much the same terms that Rousseau later employs: such arrangements are neither “constitutional” nor “just”; they merely represent the dominance of one group over another.⁴⁴ In an anti-positivistic formulation again foreshadowing Rousseau, the Athenian Stranger concludes that any laws that are not in the common interest of the entire community are not laws at all, just as those who identify with the interests of a party are factionaries and not citizens (715B). Thus, the law must rule above the factions that inevitably reduce society to a state of perpetual warfare.

The Athenian Stranger next explains what conception of law underlies this position. Law as coercion, on his analogy, is like the way a slave doctor treats a slave, merely ordering him to do this or that without regard to whether or not he understands what he is doing.⁴⁵ This uncomprehending obedience is the antithesis of the rule of law, which is more like the way a free doctor treats a citizen: he explains and persuades, not giving his prescriptions until he has won the patient's agreement (719E–20E). Similarly, law should persuade and educate, and depends upon the agreement of the citizens.⁴⁶ Indeed, the basis of the rule of law in the acquiescence of free subjects is expressed and symbolized in the preambles that are to precede both the law code as a whole, and each individual law.⁴⁷ The preamble must explain the injunction and persuade the citizens of its rightness (722B–23A), rather than merely threatening like a tyrant or despot (859A).

Of course, as was seen above, the real “persuasion” of citizens upon which the rule of law depends comes through the education that produces

43. As appears when institutional arrangements are discussed later, the “monarchical” principle of authority is institutionalized largely through the mechanisms of elections and age and property qualifications.

44. 715A–B: “After battling for public office the victors appropriate the business of the state so much to themselves that no share whatever in governance falls to the vanquished. . . . Such societies do not possess constitutional government, nor are their enactments law, for they are not passed in the common interest.” In 832C–D oligarchies, democracies, and autocracies are characterized in this same way.

45. On the importance of this passage for Plato's treatment of consent, see A. Laks, “L'utopie législative de Platon,” *Revue Philosophique de la France et l'Étranger* (1991): 424–25, and cf. Friedländer, *Plato*, 3:425, and Klosko, *Plato*, pp. 226–29, for differing views on Plato's treatment of consent.

46. See also 857C where this simile is discussed again.

47. The best recent treatment of the preambles is Bobonich, “Persuasion.”

civic virtue.⁴⁸ Plato underscores the importance of persuasion as the primary means to secure compliance with the law by making, through the preambles, the form and substance of the code itself the embodiment of this idea. The “model” preamble to the code of Magnesia (726A–34E) grounds the laws on a hortatory summary of the theory of socialization set out in the first three books. As the preamble makes clear, this socialization defines (and redefines) values of honor and shame so as to inhibit individuals from seeking honor in the feuds and factions that characterize civic life in an agonistic society (730B). Instead, competitive impulses should be directed towards rivalry in virtue (731A). The preamble closes by exhorting citizens to *choose* (733D–E, 734C–D) this life of virtue over inferior paths of life by following a *self-imposed law* (733E νόμον ἑαυτῷ ταξάμενον). Again, Plato underscores that the just society that the lawcode embodies depends upon the choices of individual citizens. Not through coercion and force, but only through a process of what we might call “internal legislation” can that civic virtue arise upon which the rule of law and true constitutional government depend.⁴⁹

These general principles, elaborated in Books 1–4 and encapsulated in the preamble just discussed, inform the concrete institutional arrangements laid out in Books 5–6. These institutional arrangements, in turn, aim at providing the economic and political basis for that just constitutional order envisaged earlier. In describing these institutional arrangements the Athenian Stranger begins with the fundamental principle that a stable social order must be founded on distributive justice. That is, escape from the difficulties that beset existing societies “must be sought in the combination of justice and freedom from avarice. There is no road to deliverance, broad or narrow, on other grounds, and we must take this principle as a pillar of our society” (737A, 744C–D). Plato’s sociological analysis of the dangers of gross inequalities in distribution, as well as his moral psychological account of the divisive force of envy (737B, and cf. 731A–B), buttress his position that legislation must produce justice in distribution, defined as preventing excesses of wealth or poverty (744D–E).⁵⁰ Few subsequent political theorists have so clearly recognized the political, sociological, and moral psychological dimensions of this central facet of the problem of order. Indeed, Plato’s analysis goes very much against the grain of the classical Anglo-American tradition, embodied, for example, in Locke, but has a good deal in common with the notion of justice in distribution adopted by contemporary theorists like John Rawls. Indeed, the classical solution to the problem of envy has simply been to ignore it, relying upon the coercive apparatus of the law to deter the poor

48. Education, it will be remembered, aims at “drawing and leading children to the rule that has been declared right by the law . . .” (659D). This education, then, produces virtuous citizens who “know when to rule and when to be ruled as justice requires.”

49. The “enactment” of this “self-imposed law” depends, of course, upon the system of *paideia* that the preamble and Books 1 and 2 have elaborated. See also 790B where understanding is the vehicle of this internalization (and cf. 861B–C).

50. Aristotle deals at length with the relation between envy and faction in *Politics* 5.

from acting out their feelings of resentment towards the wealthy.⁵¹ Since Plato has established the principle that the laws must reflect the interests of the whole community rather than a particular faction, and that the rule of law must be based upon willing compliance of free citizens, this coercive solution is not acceptable.

In existing societies to implement this redistributive imperative would require autocratic power.⁵² The device of the foundation of a new society, Magnesia, enables Plato to sidestep this problem, in the same way that the state of nature operates for later theorists. Thus, since a new society distributes land from scratch, it is possible to ordain that each family will possess an equal allotment of land (737C–38A). Further, to ensure that this basic equality will be preserved and that each family will always possess a social minimum, land is made legally inalienable (740B). This is the first measure to establish the rough equality of distribution that is necessary to inhibit envy and faction and to promote civic harmony.⁵³ Second, gold and silver are barred so as to frustrate the means for accumulating wealth (742A). Third, since some individuals will bring more property into the society than others, there will be a grouping of individuals on the basis of wealth into four categories.⁵⁴ Under no circumstances will members of the highest group be permitted to possess more than four times the wealth of the lowest. This ensures that disparities will remain relatively narrow. Any excess is redistributed to those with less (744B–E). Membership in these categories is not fixed, but designed so that individuals can move up or down (744C).⁵⁵ These steps ensure, on Plato's view, not only that envy and faction will be minimized, but also that all citizens will possess sufficient means to enable them to participate in civic life.

One might, of course, object to these arrangements, as would Locke or Nozick, because they limit individuals' freedom to dispose of and manage their property as they see fit. This limitation would be an infringement of liberty and would thus contradict the basic goals of "true legislation" that Plato had earlier set down. In a crucial, though often overlooked, passage at the end of Book 5, however, Plato meets these objections.⁵⁶

51. Even Rawls, who acknowledges the importance of the problem of envy, makes certain assumptions that permit him to assume away some of its most troubling aspects. Nozick deals at length with this issue in chapter 7 of *Anarchy, State, and Utopia* (New York, 1985).

52. 739A, and see also 711A–D and 735D. Recall also the discussion above of societal resistance to radical change.

53. See 741D–E, which emphasizes the way in which such arrangements will avoid the evils of existing societies by leaving little opportunity for the accumulation of wealth.

54. Plato indicates at 744B that complete equality of distribution would be the best path, but notes that it is impossible. It is impossible, of course, because, as noted above, citizens would not agree to such a radical change in their economic and social status. Thus, as the discussion of radical change indicated, and as will soon be made explicit, the limits of change are set not by the imagination of the legislator but rather by what the citizens are willing to accept. This is, of course, indispensable where a requirement of true constitutional government is the consent of the citizens.

55. This is, puzzlingly, denied by Wood and Wood, *Class Ideology*, p. 200.

56. Neither Stalley (*Introduction*) nor Morrow (*Cretan City*) discusses these passages in connection with the rule of law, though they are central to an understanding of Plato's view of the importance of autonomy and consent.

Such arrangements, says the Athenian Stranger, will never be fully realized, because they presuppose “a population who will not be unwilling to endure such regulations, but who will accept lifelong restrictions on their property, restrictions on procreation as we have proposed, and deprivation of gold . . .” (745E–46A). In legislating in this way, says the Athenian Stranger, they have been acting as if they were “telling dreams or fashioning a city and its inhabitants out of wax” (746A). He goes on to say that he is well aware of this limitation, but in constructing a model (παράδειγμα) such as this, one ought to aim first at achieving its truest and most perfect expression (746B). After this has been accomplished, it will be necessary to consider the difficulties and expediency of its practical application (746C). The extent to which the model will be adopted depends upon the willingness of the citizens to submit to restrictions upon their liberty (745E–46A). The legislator will have to adapt his proposals to the exigencies of the actual situation: when particular arrangements are impossible to put into practice he will have to content himself with institutions that conform as closely as possible to the character of the ideal (746C). Since real citizens are not “made out of wax” they must be willing to accept the legislative proposals of the νομοθέτης if the conditions necessary for true constitutional government are to be met.

This interpretation of the conditions of legislation is supported by an ensuing passage that also indicates that the lawcode of Magnesia is not to be thought of as being imposed upon the citizens by the legislator. The Athenian Stranger comments on the audaciousness of their proposals, in that they have lightheartedly assumed that the citizens “will accept these laws which they have been promulgating” (752B). He goes on to explain that no group of men is likely to accept them from the first, but if they (the Athenian Stranger and interlocutors) had the chance to propose them to a generation that had already been educated under them, then they might be successful in their endeavors (753B–C). The willingness of citizens to accept such laws forms the limit of what can be enacted. The “startup problem” prevents the enactment of a perfect scheme, and the legislator will have to try to persuade the citizens to adopt as much of his program as possible.⁵⁷ If they willingly adopt laws that restrict their liberty to, for example, acquire or dispose of property, the legislative principles of freedom and autonomy are respected.

It is important to keep this central point in mind when assessing the relationship that Plato describes between the law and the citizens. The rule of law, he says, requires that magistrates should be slaves to the law (715D).⁵⁸ If the law does not possess this tyrannical sovereignty, he claims, the city is doomed (715D). Similarly, future lawgivers are

57. See, e.g., the discussion of the education of girls and boys, which repeatedly emphasizes that the program is to be adopted “if possible” (804D–5A). Likewise, 807A–B acknowledges that an exact realization of the ideal legislation will not be achieved because it is unlikely that citizens will be willing to accept the abolition of the family. See also 858A.

58. See also 700A, 714A–B, 715C, 729D–E. Cf. 857C–D on the necessity for the rule of law rather than of even the wisest of men.

enjoined to legislate only within the framework laid out by the original lawgiver (771C). While one may argue that tyranny of the law is nonetheless tyranny, for it denies the citizens the right to shape their own future, it is a "tyranny" only in a manner of speaking.

First, as discussed above, the lawcode can only come into effect if initially approved by the citizens who will live under its precepts.⁵⁹ The foundation of this new society depends not upon the imposition of law by an autocrat (710D–11E), but rather upon the acceptance of the code by those who become the original citizens of Magnesia (745E–46C, 752C–D, 832C). Thus, as in social contract theory, consent is necessary for the creation of the new society. If these citizens do not agree to adopt the legislator's proposals, Magnesia will never come into existence.⁶⁰ Second, he anticipates that the citizens will play a role in determining the rules under which they live, for as noted above, he indicates that any actual lawgiver will have to greatly modify the enactments of the "ideal" constitution, satisfying himself with a "second-best" or "third-best" approximation (746A–C, 807B, 858A).

Finally, and most importantly, the sovereign "rule" of the laws is merely a fiction designed to persuade citizens to pursue civic virtue in a certain way.⁶¹ That is, because the continuing authority of the law depends *solely* upon the willingness of the citizens to live by its precepts the sovereignty of the law is embodied in the autonomy of its citizens. Since, on Plato's view, true constitutional government is distinguished from existing states by the fact that it rules over willing and free citizens (832C), if the citizens as a whole cease to be willing to submit to the restriction on their liberty that they have heretofore accepted, the conditions necessary for the rule of law would cease to exist. Recall here the passage discussed above (746B), where the Athenian Stranger acknowledges that the existence of Magnesia depends upon citizens who are willing to submit to such restrictions *throughout their lives*. It is for this reason that Plato so heavily emphasizes the crucial role of education in regard to the subjective dimension of legal order.⁶² Unlike a real authoritarian state, where the authority of the law is maintained principally through the coercive force of the state regardless of the will of the majority of the citizens, the rule of law in Magnesia obtains only so long as the majority of the citizens accept its provisions. If enough citizens reject the institutional arrangements and these arrangements are nonetheless maintained by force, then Magnesia

59. The text is ambiguous as to whether the adoption of the lawcode requires unanimity or merely a substantial majority. In any event, since this is a new society the basic idea appears to be that if prospective citizens do not approve of the laws they will not settle there in the first place.

60. This point seems painfully obvious, but so many discussions of the *Laws* seem to start from the assumption that the citizens have no choice but to accept the legislation imposed upon them (see, e.g., Stalley, *Introduction*, p. 82; Klosko, *Plato's Theory*, p. 233). Yet in the *Laws*, as in classical contract theory, foundation is precisely a device designed to deal with the problem of consent. As for future generations, Plato *hopes* that education in Magnesia will, in turn, produce *their* consent (752C). What happens if that consent is not forthcoming will be considered below.

61. See Weinrib on the "fiction" of the rule of law.

62. See, e.g., 752C and the discussion above of education and socialization.

will have become another society ruled by factions, losing the “freedom, civic amity, and understanding” that once distinguished it.⁶³

Plato deals with this problem by imagining a set of institutions designed to educate citizens to believe that the laws are sacred and permanent. Some scholars have accepted this fiction at face value, arguing that once established the law will be almost impossible to change.⁶⁴ Stalley, for example, relies upon Plato’s injunction that after a ten year period of amendment and adjustment the laws are to become unalterable (772C). This provision, however, is itself alterable in two senses. First, it is subject to modification in the process leading to the initial adoption of the code. As emphasized above, the Athenian Stranger presents what ideally would be required, acknowledging that adjustments will have to be made in actual adoption and implementation according to the inclination of the citizens. Second, since this provision provides that all the laws are alterable for ten years, then the ten year rule itself, like all the other rules regarding changing the law, is legally subject to alteration during this period. The citizens could thus decide that they desire more flexible laws concerning amendment.⁶⁵ Though the legislator *advises* against any fundamental tampering with his scheme, by acknowledging the necessity for adaptation, filling of gaps, and amendment he leaves room for alteration of both substantive rules and rules regarding change.⁶⁶ Understandably, the Athenian Stranger chooses not to emphasize this flexibility but repeatedly underscores the necessity of following his guidelines.

Thus, while the lawgiver establishes procedures to inhibit dramatic changes in the code, these “procedures” are in reality no more than persuasive devices. Just as the citizens of Magnesia can reject or amend the code initially proposed to them by the lawgiver, so can they at any time after its enactment change their mind and either start over or amend the existing code. This is possible in two ways. First, since Magnesia is an experiment to which a group of citizens have decided to submit (746A–C), they can always decide collectively that they no longer desire to pursue it. This state of mind, if shared collectively, would itself constitute the ultimate failure of the experiment and the “true constitutional government” based upon freedom, willing acceptance, and understanding, would cease to exist. In Magnesia, unlike the ideal city of the *Republic*, there is *no* coercive authority apart from the citizens to prevent them from doing so. The Athenian Stranger clearly envisages the possibility of such a failure when he enjoins the Curators of the Law to abandon the state and go

63. For this reason, as discussed above, the Athenian Stranger frequently qualifies legislative proposals by noting that they will be implemented “if possible.” See, e.g., 804D–5A.

64. See, e.g., Stalley, *Introduction*, p. 82, and E. Barker, *Greek Political Theory* (London, 1960), pp. 352–53. Morrow, *Cretan City*, pp. 570–71, on the other hand emphasizes that Plato foresees the ongoing need for adaptation and amendment, as does Jaeger, *Paideia*, 3:260.

65. At 772C4 the Athenian Stranger says at the end of ten years the Guardians of the Laws will declare them to have reached perfect fulfillment and thenceforth to be immutable. They might equally well decide, or be persuaded by the citizens, that they have not yet reached that state. Again, the Athenian Stranger is only attempting to *persuade* them of the importance of stability. He can do no more.

66. See, e.g., 769D–70B, 846C, and other passages discussed by Morrow, *Cretan City*, pp. 570–71.

into exile if the citizens change the constitution in a way that will make them unworthy (770D–E).

Second, the citizens can change the laws under certain conditions (which conditions, as noted above, are themselves subject to change).⁶⁷ Even after the ten year period for adjustment has passed, when “necessity” requires it they may change the “immutable” laws, but only with the advice of the assembly, the magistrates, and the oracles (772C–D).⁶⁸ So, on the one hand, the Guardians of the Laws themselves must be legislators and not merely curators, and must fill in the many omissions in this outline of a code (770B). On the other hand, the laws are to be regarded as sacred and immutable, or at least changes are to be made only under narrowly circumscribed conditions. Rather than taking all this too literally,⁶⁹ I would suggest that Plato here expresses the ambivalence towards change found in most constitutional systems. Change is necessary for a system to survive, but if it occurs too easily or too often, it undermines the sense of eternity, sacredness, and permanence that masks the fact that foundational documents are, in reality, an expression of the will of the people who adopted them and whose respect gives them continuing legitimacy. Plato’s requirement that “all the oracles” agree to change along with the assembly and the magistrates nicely illustrates this point. Finally, it is because Plato clearly recognizes that his vision of true constitutional government depends solely upon the disposition of the community of citizens to accept its authority that he so strongly emphasizes the need for a system of education that will develop those habits and faculties of judgment that will lead citizens to understand its value. On this understanding, says the Athenian Stranger, hangs the “salvation or ruin of a society,” for in its absence the laws will be without force (715D).

III

Theorists, whose proposals for radical reform also acknowledge the importance of respecting freedom and autonomy, necessarily confront the intractable problem of where such citizens would come from who would be disposed to adopt such laws and to live in such a community. For theorists less concerned with the subjective dimension of legitimacy, the fiction of consent provides a solution to this dilemma; the fiction is, of course, buttressed by the coercive power of the state, which Hobbes so clearly recognized as the ultimate source of political order.⁷⁰ On the other

67. See also the discussions of changing and supplementing the laws at 772A, 769D–E, 818E, 828B, 835A–B, 840E, 846B–C, 855C–D, 957A–B, 968C.

68. Klosko, *Plato's Theory*, pp. 232–33, argues persuasively that this passage should be taken to apply to the laws in general. See his nn. 4 and 5 for references to the secondary literature on the question.

69. As do Stalley, *Introduction*, p. 82, and Klosko, *Plato's Theory*, p. 233.

70. By the “fiction of consent” I mean the way in which in classical theory the fiction of the social contract operates to bypass the real problem of consent as the subjective dimension of legitimacy. Classical contract theory typically maintains that consent to the contract legitimates the political order, but since the contract is itself a fiction, then so is the consent that legitimates it. Likewise, the fact that in actual civil society citizens have not left the commonwealth is taken to “imply” their consent.

hand, Plato, like Rousseau, recognizes that since real citizens are not “made out of wax,” the realization of a legislative “dream” like the *Laws* depends upon the existence of circumstances under which a community is willing to adopt and live by the principles set out there (746A–C, 752B–C). The difficulty, of course, is that only a virtuous community would be likely to do so, and the production of that civic virtue is itself contingent upon education under this system.

Rousseau, drawing upon Platonic models, is well aware that political transformation depends upon precisely the kind of moral reformation at which Plato’s theory of legislation aims.⁷¹ As he puts it in *The Social Contract*: “He who dares to undertake the establishment of a people should feel that he is, so to speak, in a position to change human nature, to transform each individual . . . into a part of a larger whole . . . ; to alter man’s constitution in order to strengthen it. . . .”⁷² How is he to do this? Not through the traditional means of laws that threaten severe punishments, but through an education that over time produces that genuine virtue that alone recognizes itself in the laws of the community:

To these three sorts of law add a fourth, the most important of all. It is not engraved in marble or bronze, but in the heart of the citizens. . . . When other laws grow old and die away, it revives and replaces them, . . . and imperceptibly substitutes the force of habit for that of authority. I am speaking of mores, customs, and opinion, a part of the law . . . with which the great legislator secretly occupies himself, though he seems to confine himself to the particular regulations that are merely the arching of the vault, whereas mores, slower to rise, form in the end its inevitable keystone.⁷³

It is ironic that this very concern with the subjective dimension of legitimacy should provide the path whereby Rousseau and Plato each adopt positions that have led critics to label them as totalitarian theorists. This is not surprising, however, for if the existence of the well-ordered society depends wholly upon its acceptance by citizens, and if only virtuous citizens would accept and thus instantiate such a society, then everything hinges upon the production of virtue. Towards this end both Plato and Rousseau establish a kind of civic religion that represents a primary vehicle for the reproduction of the norms and beliefs on which virtue depends. Likewise, both of them are willing to punish severely those who deny this civic religion, which consists largely of the sorts of collective fictions that constitute the moral, social, and political bedrock of most societies.⁷⁴ To

71. M. Siverthorne, “Rousseau’s Plato,” *Studies on Voltaire and the Eighteenth Century* 116 (1973): 235–49, argues for Plato’s influence on Rousseau. It is beyond the scope of this paper to take up this matter in detail, but the concluding section proceeds on the assumption that significant aspects of *The Social Contract* were influenced by Plato’s *Laws* and *Republic*.

72. J.-J. Rousseau, *The Basic Political Writings* (Indianapolis, 1987), p. 163. All subsequent page references are to this edition.

73. *The Social Contract*, p. 172. A comparison of Rousseau’s “great legislator” with Plato’s depiction of the ideal nomothete of the *Laws* would repay serious examination.

74. Note that for Rousseau the civic religion constitutes a kind of noble lie. Its principles, which are to be accepted without elaboration or commentaries, are: “The existence of a powerful, intelligent, beneficent divinity that foresees and provides; the life to come; the happiness of the just; the punishment of the wicked; the sanctity of the social contract and of the laws” (*The Social Contract*, p. 226). Compare *Laws* 899C–900C, and for the punishment of impiety see 907D–9D.

this extent, both Rousseau and Plato restrict the freedom and autonomy that in the central part of their theories they carefully enshrine.⁷⁵

The concern with the subjective dimension of legitimacy that led Plato and Rousseau to emphasize the virtue that alone could produce a free and just society, also led them to restrict that freedom in order to prevent certain individuals from "contaminating" the process of socialization upon which that virtue depends. Like all great political theorists they do not provide definitive solutions to the basic problems of political and social theory, but rather illuminate them; and few theorists have illuminated the dilemmas of order as penetratingly as Plato, Hobbes, and Rousseau. However, if ordaining punishment for civic impiety qualifies Plato and Rousseau as "totalitarian," then such labels apply equally well to the religious and other forms of intolerance that have characterized most modern western societies (and much of their political theory) until quite recently.⁷⁶ Indeed, what my argument has largely aimed at is showing how centrally Plato's *Laws* fits into the western discourse of republican political theory that is usually taken to form the intellectual and ideological substructure for modern constitutionalism. Indeed, I think it only a slight overstatement to claim that with its central commitment to the rule of law, its revolutionary enfranchisement, military service, and education of women, its mechanisms for eliminating poverty and the envy and faction produced by major disparities of wealth, and its mixed constitution providing for a popular assembly and the election of officials through a general franchise, the *Laws* represents a set of social arrangements that goes well beyond those advocated in classical republican texts.⁷⁷ To characterize such a constitution as "totalitarian," and to marginalize Plato as somehow outside the dialogue of modern constitutionalism, is surely to turn a blind eye to much of our own intellectual and institutional history.⁷⁸

*University of California,
Berkeley*

75. Subject to the crucial proviso indicated above, that Plato's lawgiver will attempt to persuade the citizens of the wisdom of such enactments when they are adopting his code. If the code provides such punishments for impiety it is because the citizens have agreed to accept such provisions.

76. It should be remembered that though Locke argued strongly for religious toleration he meant toleration of varieties of Christian belief, not toleration *tout court*. Klosko, *Plato's Theory*, p. 228, argues that the treatment of impiety undercuts the whole doctrine of consent and legitimacy.

77. With the major exception of its position on slavery. On the enfranchisement of women, see D. Cohen, "The Political and Legal Status of Women in Plato's *Laws*," *RIDA* 34 (1987): 27-40.

78. I would like to acknowledge the very helpful comments and criticisms of those who reviewed this paper for *CP*.