Epinomia: Plato and the First Legal Theory

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ERIC HEINZE*

Abstract. In comparison to Aristotle, Plato's general understanding of law receives little attention in legal theory, due in part to ongoing perceptions of him as a mystic or a totalitarian. However, some of the critical or communitarian themes that have guided theorists since Aristotle find strong expression in Plato's work. More than any thinker until the nineteenth and twentieth centuries, Plato rejects the rank individualism and self-interest which, in his view, emerge from democratic legal culture. He rejects schisms between legal norms and community values, institutional separation of law from morals, intricate regimes of legislation and adjudication, and a culture of rampant litigation. He rejects the alienation of individuals, from each other and from their communities, that is so easily bred within highly complex political and legal systems. An understanding of his approach to some of the classic questions of legal theory provides insight not only into some central ideas of his own thought, but also into the roots of critical and communitarian critiques of law.

Who wrote the first Western legal theory? The Bible certainly laid foundations for legal thought (see, e.g., Villey 2001, 70–81), but they were not systematically developed until late antiquity¹ and the Middle Ages (see, e.g., Aquinas 2000, pt. I–II, qs. 90–100).² Another candidate is Aristotle, treated in several standard textbooks as the first thinker in the Western tradition to suggest a general and systematic understanding of law (see,

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¹ Augustine wrote in the late third and early fourth centuries C.E. See O'Meara 1984, vii. The Talmud dates from 400 C.E. See Metzger and Coogan 1993.
² Aquinas wrote the Summa Theologicae from 1266 to 1274. See, e.g., Finnis 1998, 10.

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The suggestion that Plato wrote the West’s first legal theory should come as no surprise. He also wrote the West’s first systematic philosophies of ethics and politics. Yet attempts to begin Western legal theory with Plato can prove frustrating. We could read a text like the Republic as a treatise on higher or natural law, in that it is the Form of Justice that makes those things just which are just. But how do we discover the nature or content of that Form? Who can really understand it? Perhaps the philosopher ruler; yet the Republic is vague about what, precisely, the philosopher ruler can know. Alternatively, we can read the Republic, Crito, Statesman, or Laws as totalitarian tracts that decline to state a theory of justice because Plato cares not about justice per se, but about who controls us and how we are controlled (see, e.g., Popper 2003, 1). Yet readings of Plato as the father of all Hitlers and Stalins have allowed little scope for coming to terms with what Plato actually says and why he says it (see, e.g., Brown 1998, 13).

Most texts on legal theory either omit Plato altogether or provide little more than collapsed summaries of, say, the Republic or Laws. The Crito is sometimes discussed with reference to civil disobedience (see, e.g., Schiff

3 The term “philosopher ruler” is better than “philosopher king,” since women can qualify for the role. See, e.g., Plato 1997a, 540c. Cf., e.g., Pappas 2003, 113.

4 Elsewhere I argue that the neglect of Plato stems largely from critiques of mysticism and totalitarianism by leading anti-fascist intellectuals, such as Karl Popper and Bertrand Russell, which also extended to condemnations of such figures as Rousseau, Hegel, Marx and Heidegger. Those criticisms exercised great influence in the aftermath of World War Two, particularly in the English-speaking world. Liberal as well as critical legal scholars, receptive to such critiques, have ended up largely avoiding Plato. Yet such critics were not free of their own prejudices. While the rehabilitation of Plato in the humanities has been underway for decades, legal theory has largely missed it (see Heinze forthcoming-a).

5 See, e.g., Davies and Holdcroft 1991, chap. 6, citing only Aquinas as an example of pre-modern theory; Davies 1994, 61–2, briefly mentioning Aristotle and omitting Plato; Wacks 2005, 17, briefly mentioning ancient Greece, with no reference to Plato. In some cases, the omission arises because an author expressly limits the exposition to post-17th century legal theory. See, e.g., Cotterrell 2003; Goyard-Fabre 1997.


2002, 477, 483–92; cf., e.g., McCoubrey and White 1999, 64–7), but that is one of Plato’s briefer works, containing few of his deeper insights. The Statesman, crucial to Plato’s view of legal rules and the rule of law, is rarely mentioned at all. Recent scholarship has sometimes drawn upon Plato to discuss specific issues, notably Plato’s view of rhetoric. Rarely, however, have scholars attempted to trace central issues in Western legal theory back to Plato. The classicist Huntington Cairns did insist on the primacy of law in Plato’s thought:

Plato took the widest possible view of law. [. . .] Law was a subject which he kept constantly before him, and there is scarcely a dialogue in which some aspect of it is not treated explicitly. His theory of law is a fundamental part of his general philosophy [. . .]. [Plato] isolated a range of legal ideas among the most important in the history of law. (Cairns 1942, 359)

Cairns stressed Plato’s importance to the perennial concerns of legal theory: “[T]he questions raised by Plato have been among the most useful ever formulated for jurisprudence. [. . .] [Plato’s] grasp of legal problems was so acute that it is enough to venture the paraphrase that Western jurisprudence has consisted of a series of footnotes to Plato” (ibid., 387). Similarly, Jerome Hall went so far as to call law “the central, unifying subject of Plato’s philosophy” (Hall 1956, 171). However, their studies are half a century old. When they were writing, Kelsen and Hart were still ascendant. Theorists still posed the question “What is law?” believing that generally conclusive answers could be given. Unsurprisingly, Cairns and Hall focused on Plato’s answers. They examined various rules and practices proposed by Plato, and the values those rules and practices are intended to promote. (Similarly, in MacIntyre’s view, Ross’s 1908 translation of Aristotle belies misleadingly modernist, rule-bound assumptions, by translating kata ton orthon logon to mean “in accordance with the right rule” rather than “according to right reason”; MacIntyre 1981, 152–3.) More recently, the advent of critical and post-structuralist approaches has confirmed that legal theory need not only propose models of law. It can also consist of challenges to dominant attitudes and perspectives, even where alternatives are admitted to be problematical.

It is Plato’s challenges to legal theory, more than any discrete model of law, that will guide me in this article. I shall argue that Plato provides some of the impulses that would later guide theorists as diverse as Aristotle, Aquinas, Rousseau, Hegel, Marx or Heidegger, as well as contemporary critical and communitarian thinkers. Plato provides insights into such fundamental concepts as “freedom,” “democracy,” “rules,” “positivism,” “individual,” “community,” “morals,” “politics,” “government” and

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8 See the collection of essays in Iowa Law Review, 74 (1989), starting at 787.
Indeed "law" itself. (Of course, questions immediately arise as to whether
Plato could have understood those concepts the way we understand them.
For example, doubt commonly arises about how reliably Plato's view of
demokratia can be applied to our own institutions and experiences. That
problem is not peculiar to Plato’s legal theory. It has long divided scholars
of ancient history and ancient philosophy. To understand Plato’s view of
law, then, I shall proceed on the assumption that his fundamental points
can be applied to our societies even if he could not have framed any such
intention. Similar approaches have long been common among scholars of
Aristotle, who apply Aristotelian ideas to today’s circumstances, while
recalling that historical differences set limits on such applications—see
generally Tessitore 2002.)

I. Liberty, Community, Identity

Marxism and Critical Legal Studies were responses to nineteenth and
twentieth century societies marked by rapid industrialization, erratic
markets, urbanization, the transformation of family and social networks
through new economic pressures, and the perception of individuals’ alienation
from each other and from their societies. Social, political and economic life in Ancient Athens was, of course, different from that of the
nineteenth and twentieth century West. Yet there is some common ground.
Athenian dominance emerged not, like that of the Macedonians or Romans, through military conquests, but through a commercial empire and
a spirit of social interaction based on robust, arm’s length exchange (see,
e.g., Martin 1996, 116–21). Crucial to Plato’s understanding of law, then, is
his critique of commerce-driven democracy.

A. Democracy and Distrust

By ancient standards, Athenian economic strength entailed a high degree
of individual autonomy, unlike the societies of Sparta, Persia or Egypt. Like
Rousseau and Marx—and, more recently, critical and communitarian scholars—Plato examines individualism as something that serves not to
liberate but to alienate us, placing self-interest above shared aims and
values. A culture of vibrant trade drives individuals to seek ever more
goods and services; to enter into ever more commercial transactions, ever
increasing the number of legal disputes (Plato 1997a, 405a–b; cf. ibid.,
565c). As later thinkers would also argue, democracy becomes an empty
shell within which individual freedom reduces to the pursuit of self-
interest, with little confluence of individual interests, and ever more
collisions,

* See, e.g., excerpts and bibliography in Robinson 2004, chap. 4.
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[Socrates:] [A]s licentiousness¹⁰ […] breed[s] in the city, aren’t many law courts […] opened? […] Don’t you think it’s shameful and a great sign of vulgarity to be forced to make use of a justice imposed by others, as masters and judges, because you are unable to deal with the situation yourself? […] [And] isn’t it even more shameful when someone not only spends a good part of his life in court defending himself or prosecuting someone else but […] is persuaded to take pride in being clever at doing injustice and exploiting every loophole and trick […] and all for the sake of little worthless things and because he’s ignorant of how much better it is to arrange one’s own life so as to have no need of finding a sleepy or inattentive judge? (Plato 1997a, 405a–c; cf. ibid., 565c)

Plato condemns a society “in which men concoct every possible device to damage and hurt each other” through legal processes (Plato 1997b, 679e). Freedom and democracy become not expressions, but enemies, of justice. Law becomes impotent to overcome the same interpersonal divisions that it creates and perpetuates.

Democracy is appealing, precisely because individuals pursue their own ends. Those of us who are easily enticed by democratic individualism have, he tartly suggests, no more depth than silly women and children who are infatuated by every trinket and bauble,

[Socrates:] I suppose that it’s most of all under [a democratic] constitution that one finds people of all varieties. […] [I]t looks like [democracy] is the finest or most beautiful of the constitutions, for, like a coat embroidered with every kind of ornament, this city, embroidered with every kind of character type, would seem to be the most beautiful. And many people would probably judge it to be so, as women and children do when they see something multicolored. (Plato 1997b, 557c)

In sum, ex libertate Liberace. Further comparison with Rousseau or Marx shows Plato’s rejection of individualism acquiring existential proportions. Individualism entrenches interpersonal divisions, creating a society in which we become increasingly separated—alienated¹¹—from each other. We find ourselves enviously competing against, and antagonistic towards, each other. We lose any sense of shared purpose (except, perhaps, an utterly fanciful, nostalgic sense—cf., e.g., Sandel 1998, 148–51, 161—, as might be expressed through cheap patriotism). We may be profoundly social creatures, but open-ended freedoms pull us apart. That shattering of humanity has a dual aspect. On the one hand, it comports alienation from others,

¹⁰ In English, the word “licitentiousness” sometimes carries a sexual connotation. However, Plato mentions various selfish pursuits: Plato 1997a, 403c–412b.
¹¹ See, e.g., Starobinski 1971, chaps. i–iv, examining alienation from others and from oneself as central themes of Rousseau’s thought; Marx 1956, 347, arguing that concepts of civil law assume, and perpetuate, schisms between private and public identity; cf. Stalley 1983, 97–9. Of course, Rousseau does not attack democracy altogether. He is one of its greatest theorists; nor is Marx’s primary concern democracy as such. A prime target for both of them, however, is liberal, rights-based society, placing individual interest over shared values.
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[Socrates:] [I]njustice has the power, first, to make whatever it arises in—whether it is a city, a family, an army, or anything else—in incapable of achieving anything as a unit, because of the civil wars and differences it creates; and, second, it makes that unit an enemy to itself and to what is in every way its opposite, namely, justice. (Plato 1997a, 351e–352a)

On the other hand, it comports fragmentation of the self,

[Socrates:] And even in a single individual, [injustice] has by its nature the very same effect. First, it makes him incapable of achieving anything, because he is in a state of [internal] civil war and not of one mind; second, it makes him his own enemy, as well as the enemy of just people. (Ibid., 352a)\textsuperscript{12}

Those last two passages emerge at an interesting point in the Republic. They arise within a discussion about tyranny, which we, today, commonly view as the opposite of democracy. It may come as a surprise that the Republic uses similar arguments to denounce both despotism and democracy. What unites the two, for Plato, is that both assume a principle of self-interest. De Tocqueville’s “tyranny of the majority” would have come as no surprise to Plato or Aristotle. Tyranny consists of one individual, the ruler, pursuing sheer self-interest. Democracy may distribute greater or lesser degrees of power (at the very least, a right to vote) over many individuals; however, their pursuit is also self-interest (see Plato 1997a, 338d–339a). To use more recent terms, Plato believes that incentives to pursue self-interest preclude the development of democracy into civic republicanism, instead degenerating into sheer interest group pluralism (see, e.g., Sunstein 1988, 1539). Those same themes of intra-personal and inter-personal alienation would later influence such thinkers as Hegel and Heidegger.

In later writing on democracy, that view of it as a cesspool of divergent self-interests is by no means universal. Rousseau’s political ideal is democratic, but, in contrast to Locke, it envisages a democracy of unified, collective interests, as opposed to regimes of higher-law rights and liberties (see generally Rousseau 1964a, 279). The problem is that Rousseau’s communitarian democracy never came about. Far more successful have been models broadly along the lines of Locke, Mill or Rawls, which balance democratic majoritarianism against individual rights, creating liberal democracy rather than popular, communal democracy. For Rousseau and Marx, a regime devoted to extensive individual rights, far from eliminating the dominance of private interests, merely replaces one such dominance with another. In Marx’s view, the French revolution did not eliminate the private interests of the ruling class; it merely created a new

\textsuperscript{12} The idea of internal fragmentation arising in a society defined by interpersonal and social fragmentation can be found elsewhere in Plato. See generally, e.g., Republic, books viii and ix (Plato 1997a), depicting the decline of political regimes in terms of internal fragmentation and individual alienation. See also, e.g., Plato 1997b, 626d.
kind of ruling class with its own private interests.\(^{13}\) Plato’s rejection of democracy is not a rejection of a highly communal, Rousseauvian model, but of a democracy that promotes individual interests at the expense of the community. Democracy in that sense merely replaces a Hobbesian conflict with a Lockean one: If the Hobbesian war of all against all is waged with sticks and stones (until Leviathan suppresses it), a Lockean war of all against all is waged with rights and duties, with rules and procedures, under the supposedly dispassionate eye of the referee judge.\(^{14}\)

Questions about whether or to what degree it would be accurate to call ancient Athens economically or socially “liberal” are admittedly complex. Its slavery and class system largely contradict liberalism as understood since Locke. For present purposes, then, there is no need for us to determine the precise extent to which an Athenian liberal ethos might have existed. Suffice it to say that, through his focus on democracy’s tendency to support individualism and free trade, Plato’s critique of democracy at least anticipates later critiques of liberal society. Consider also the social dimension. Plato asks about people in a democracy, “[A]ren’t they free? And isn’t the city full of freedom and freedom of speech? And doesn’t everyone have license to do what he wants?” (Plato 1997a, 557b, Socrates speaking; cf. ibid., 562b–c). In no way does he pose these questions in a spirit of admiration. He rejects unfettered speech because he rejects the displacement of social values from the social to the individual realm: “Extreme freedom can’t be expected to lead to anything but a change to extreme slavery” (ibid., 564a, Socrates speaking).

When the only interest of citizens in a democracy is self-interest, they end up with no higher values than those let loose on the majority by wealthy demagogues. Today we might call them media moguls and corporate advertising campaigns, and the powerful interests behind them. Plato calls them Sophists, and the rich men who pay them. The victims of individualism are not merely interpersonal relationships and community cohesion, but truth itself. In a market-driven society, even debates about morals and politics become commodified. Sophists earn money teaching rhetorical skills aimed at winning any side of an argument—not on the basis of its merits, but regardless of them. Democracy becomes sheer demagogy as justice itself, in lawsuits heard by citizen juries, becomes subject to sheer Sophistic rhetoric, which is how Plato viewed the trial and

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\(^{13}\) That conclusion follows from the thesis that feudalism had merely been replaced by a regime of private property in the hands of a privileged bourgeoisie. See, e.g., Marx and Engels 1966a, 461, 472, 475.

\(^{14}\) Locke sought a society in which law would support individuals’ generally benign natures. It might therefore be deemed unfair to attribute to Locke a highly litigious model. The term “Lockean” here should not be understood to expresses Locke’s highest ideal so much as a model in which, that ideal failing, litigation of rights must become the inevitable means of conflict resolution.
death sentence of Socrates. Plato views Socrates as the outstandingly virtuous citizen of Athens; a majoritarian judicial system that condemns Socrates for his countermajoritarian views, let alone putting him to death for them, confirms Plato's view of the corruption of law in a democracy (see, e.g., Plato 1997h, 324e; cf. Plato 1997c, 118a). Law becomes not the servant of justice, but its enemy. Success in court depends not on truth but on the appearance of truth. Plato rejects the pursuit of rhetoric, the quest for persuasion in one's own self-interest, utterly divorced from dialectic, the quest for truth, regardless of self-interest.\footnote{Of course, rhetoric need not be seen as inevitably corrupt. Aristotle argues in his Rhetoric that it is can be an effective ingredient of public life. Plato, however, rejects that view: Plato 1997a, 532b-533e. Cf., generally, Gorgias.} Sophists grow wealthy teaching and practicing rhetoric (see, e.g., Plato 1997d, 19d; Plato 1997e, 313d-314b), in contrast to Socrates, who refused money and remained poor, purporting to challenge others' claims to knowledge instead of providing instruction of his own (see, e.g., Plato 1997d, 19d-24b, 31b-c, 33a). Insofar as it is rhetoric rather than truth that influences the Athenian Assembly in its legislative and judicial functions, that pseudo-truth is most available to the wealthy (cf. Roberts 1998, 51).\footnote{Admittedly, some historical questions arise. Although Athenians enjoyed greater individual liberty than citizens of neighboring societies, it is debatable whether they were really as hedonistic, divisive, and bereft of civic-mindedness as Plato suggests. Indeed, his attitude towards Athenians is somewhat ambivalent. He does note that Athenians are reputed for their wisdom (Plato 1997e, 319b). He goes so far as to say that "when an Athenian is good, he is 'very, very good' [ ] not because of any compulsion, but spontaneously": Plato 1997b, 642c. Such passages leaves little clue as to how common he thought wise or virtuous Athenians to be, or whether they were so because of democracy or in spite of it. While the trial of Socrates is crucial to Plato's rejection of democracy, it may not represent a typical example of Athenian political and legal processes. Then as now, hard cases made bad law. Some Athenians appear to have felt aggrieved by Socrates' ties to such figures as Alcibiades, Critias and Charmides, who collaborated with Sparta's crushing defeat of Athens, and of its democracy, at the end of the Peloponnesian War, the period that ushered in the decline of Athens. Athenians were not unusual in taking impiety very seriously, as a threat to their existence, since the gods could punish the entire community for the impiety of one member: See Brickhouse and Smith 2004, 85-97. It is by no means clear that the jury was an unreflective lynch mob. See also Roberts 1998, 249, suggesting that the vote may have been close. Plato is probably right to condemn Socrates' conviction as a woeful injustice. That does not mean that Athens was, altogether, woefully unjust.}

I am adopting a working dichotomy between individual and collective good. Arguably, however, the opposite of selfishness in the Republic is not community as such, but Justice itself. For Plato, community is not a good in itself, but only insofar as it serves justice and the good life. Plato and Aristotle both recognize that communities can adopt bad values. Plato denominates as just not any old communal values, but those that are themselves just. Indeed, his admiration for Socrates' non-conformity (see, e.g., Plato 1997h, 324e; cf. Plato 1997d, 19d-24b, 31b-c, 33a) precludes any understanding of Plato as simplistically anti-individualist. Moreover, in presenting that view, I am not attempting any rigorous evaluation. Today,
many would reject the view that democracy inevitably degenerates as Plato suggests, or that it remains bereft of ethical foundations. Where Plato, Rousseau or Marx see selfishness and alienation, Locke or Mill see tolerance and pluralism. Nor would that defense of democracy have been alien to ancient Greeks: Pericles finds a similar, deeply moral basis for Athenian democracy (Thucydides 1982, II.36, 57, 40). My only aim is to suggest that concerns about individual alienation and collective disintegration in an age of democracy are not the inventions of Marx, Kafka or Elliot. They were well known to Plato, who uses them in laying foundations for Western legal theory.

B. Epinomia

The Republic seeks alternatives to a legal system that promotes self-interest over co-operation. Plato describes not one model society but two. The famous one is the city of the philosopher ruler, the society that fills up most of the work. Early in the text, however, Plato imagines a different society (Plato 1997a, 369b–372d), which reveals more about his approach to law and politics than is commonly appreciated. Members of the first society seek only enough food, shelter and clothing to lead healthy, peaceful lives. They undertake enough agriculture, craft and trade to meet their basic needs. They do not seek excess of the kind that would require either advanced agriculture (and thus greater stretches of land, which, until recently, and often still today, has been a source of conflict between neighbors as well as nations: ibid., 373d), or intensive capital or labor of the kind that tends to produce disparities of wealth, and, with them, economic and political divisions. The first society has no organized government. For Plato, only societies in pursuit of ever greater material wealth—unhealthy, "luxurious" societies—require pervasive stratification into political and economic classes, into rulers and ruled (ibid., 372e–373b), leading to the far more intricate second society for which the Republic is famous. In all of Plato's works, the Republic's first society is the only one he calls, without qualification, "true" and "healthy" (ibid., 372e). Individuals' interests converge because they lack the pressures of competition and rivalry. As a result, disputes are rare and straightforward enough to be resolved informally, without the need for detailed, institutionalized systems of limiting, channeling and policing individual interests.

Some commentators use the term "minimal" to describe the first society (see, e.g., Annas 1981, 73), but that label only goes so far. Nozick's libertarian ideal might also be minimal, in the sense of advocating minimal government, but would support expansive, vigorous and highly...

competitive trade, and thus, presumably, a well-developed judiciary, contrary to the ideal of the first society. The first society must surely have some legal system—ubi societas ibi jus—if only in the sense of some pattern of conduct habitually followed\(^{18}\) to harmonize individuals’ conduct and to prevent or to resolve conflict, and which distinguishes it from other kinds of regimes. It will be helpful to find some phrase or description, as we shall see the ideal adopted in the first society forming a foundation for Plato’s legal theory. We could postulate descriptions as different as “anarchy,” “communism,” “holism,” “radical democracy,” “communitarianism,” or “customary law.” In Section III.A, I shall suggest that, while each of those terms might apply to some degree, none is wholly satisfactory. Instead, I shall begin with the ancient Greek concept of *nomos*, which, although encompassing formally promulgated law, referred more broadly to social values, habits and customs. R.F. Stalley writes,

For most English speakers, the paradigm case of law is a statute […]. But there is, of course, much law that does not fit this pattern—the common law, early customary law, international law and so on. The Greek word *nomos* […] has, if anything, an even wider extension. It may refer to any form of order which is actually accepted or which ought to be accepted by a social group. Thus it can apply to what we would regard as rules of morality or etiquette, to religious beliefs and practices, to the general way of life of a particular community and even to the habits of mankind as a whole when compared, for example, to those of the beasts. Often the best translation is not “law” but “convention” or “custom.” (Stalley 1983, 23, internal citations omitted)

Richard Kraut writes,

[The Greek term that is translated as “law”—*nomos*—covers not only the enactments of a lawgiver or legislature but also the customs, norms, and unwritten rules of a community. The noun *nomos* is cognate to the verb *nemein*, one of whose senses is “to believe.” Whatever conduct a community believes to be fitting—its proper and customary way of doing things—constitutes the *nomoi* (plural of *nomos*) of that community. There can be no such thing as *nomoi* in which no one believes; for a *nomos* to exist is for it to be recognized and observed by a group of people. (Kraut 2002, 105; see also Ostwald 1969, in part 20–54)

Building upon that concept of *nomos*, I shall propose the term *epinomia*. I derive that term by adding the Greek *epi*, which means “on” or “upon.”\(^{19}\)

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18 That seemingly Austinian suggestion of a “habit of obedience” may appear anachronistic as applied to Plato: See Austin 1998, 193. However, the concept occurs in Aristotle 1984b, IL8, 1269a20–21 arguing that “the law has no power to command obedience except that of habit.”

19 The term *epinomia* is not entirely a neologism. It appears in ancient Greek with reference to rights of grazing. That usage is distinct enough to avoid any confusion with the meaning I am suggesting. Any overlap with the (possibly apocryphal) Platonic dialogue entitled *Epinomis* is coincidental. That name was chosen by subsequent Platonists to refer simply to the fact that the dialogue was seen as supplemental (*epi*) to the *Laws* (*Nomoi*).
I shall propose, then, the concept of an epinomic theory of law, according to which law does not heavily rely upon a distinct system of norms, institutions and procedures, such as legislatures, courts, or executive and administrative bodies. Instead, law is deeply embedded in, pervasively reflecting, shared values, habits and attitudes. Rules need be neither copious nor complex. To be sure, the concept of nomos must not be romanticized, nor, again, do shared norms guarantee a just society. Plato, like Aristotle, is not content with just any system of nomos. Each seeks a model in which nomos will result in justice. Aristotle’s serial examination of virtues in the Nicomachean Ethics is aimed not merely at individual development, but at the improvement of communal life through nomos. The point of the Republic’s first society is not that it is characterized by nomos—so are lots of societies—but that nomos there produces justice.

This cursory account of epinomia may suggest any number of weaknesses. It may appear to blend law entirely into broader social and ethical practices. How can a theory of law treat law as not law in any specific sense? That is not a question Plato examines. Although he clearly sees high degrees of willing cooperation as a key to justice, it is unclear, for example, whether or to what degree any of what Hart calls “secondary” rules or norms—norms about norms, if not rules about rules—might fit such a regime. Indeed, the whole question of how to address disobedience or conflict barely arises in either the Republic’s first or second societies. Nevertheless, from the Republic’s first society, to Rousseau’s volonté générale, to Marx’s communist ideal, the ideal of a legal order deeply woven into the social fabric—even to the point of rendering meaningless any distinct concept of law—has held sway over some of the West’s most influential thinkers, and must be examined, if only to contemplate its inadequacies (which Plato himself arguably understood in a later work like the Laws, as I shall suggest in Section III.C). Unlike MacIntyre, who affirmatively advocates an Aristotelian approach to virtue, I do not wish to endorse an epinomic theory of law, but simply to suggest its importance in the history of legal theory.

Like any heuristic construct, that concept of epinomia cannot elucidate all of Plato’s political or legal theory. Some scholars might object to the term because it suggests a paradigm that Plato never expressly adopts. If Plato adopts a paradigm at all in the Republic, it would appear to be one rooted in his theory of Forms, viz., the Form of Justice—that by which any just thing is just. Yet the Form of Justice, like Plato’s theory of Forms generally (cf. Plato 1997a, 514a–521b), is anything but straightforward. It is easy to imagine the Form of Justice as a kind of looming virtuality, disclosing its secrets only to the philosopher ruler through abstruse ratiocination. However, even assuming that the Form of Justice is the ultimate source or the ultimate reality of just things, that does not mean that, for Plato, reasoning about justice is possible only by reference to the Form of
Justice. Plato constantly makes arguments about justice and injustice without invoking it. We have already seen some examples in his criticisms of democracy. The fact that the theory of Forms is, at the very least, attenuated or problematized, if not abandoned, in the later works, confirms that approach.20 The concept of epinomia in this article is intended not to eliminate the Form of Justice, but to seek what may be some of its real significance for Plato, or to seek some common strands running through Platonic works whose unity is not otherwise apparent.

C. Problems and Objections

The Republic's first society is not the only place where Plato's epinomic theory of law can be found. In Section III.C, I shall argue that it runs throughout his works, providing a unifying element to his legal and political theory, an element that has remained important for legal theory up to the present day. The Republic's first society is not strictly necessary to find an epinomic legal theory in Plato's works. In the remainder of this article, I shall draw upon passages in various places of the Republic, and in Plato's other works. Nevertheless, I do feel that the first society provides a fuller understanding of Plato's epinomic theory. Since that view has not previously emerged in Plato scholarship, it is important to consider some objections that might arise.

One objection to ascribing philosophical importance to the first society is that Plato cannot have taken such a society very seriously. Allan Bloom, for example, calls the first society "obviously impossible" (Bloom 1968, 307, 346). Other commentators either disregard it entirely or, noting the abrupt end to the discussion of it, infer that Plato rejects it out of hand (see, e.g., Annas 1981, 73; Pappas 2003, 61–3; Sayers 1999, 20; see also, e.g., Rice 1998, 40; Böckner 1985, 230). Let us take a look at that sudden ending. Socrates has been describing the first society quite cheerfully, but is interrupted by Glaucou, who objects that too few people will accept such a simple regime,

[Glaucou:] If you were founding a city for pigs, Socrates [. . .] wouldn't you fatten them on the same diet?

[Socrates:] Then how should I feed these people, Glaucou? [. . .]

[Glaucou:] In the conventional way. [. . .] [T]hey should recline on proper couches, dine at a table, and have the delicacies and desserts that people have nowadays.

[Socrates:] All right, I understand. It isn't merely the origin of a city that we're considering, but the origin of a luxurious city. [. . .] [T]he way of life I described won't satisfy some people, it seems, but couches, tables, and other furniture will have to be added, and, of course, all sorts of delicacies, perfumed oils, incense,

20 See generally, e.g., Parmenides, Theaetetus, Statesman and Laws.
prostitutes, and pastries. We mustn't provide [the people] only with necessities [. . .] such as houses, clothes, and shoes, but painting and embroidery must be begun, and gold, ivory, and the like acquired. (Plato 1997a, 372d–e)

According to Nickolas Pappas, "Socrates never rejects the name 'city of pigs' for this town: [H]e may be conceding that life here falls short of the fullest possibilities open to humans" (Pappas 2003, 63). Yet that interpretation is questionable. Throughout the Republic, Socrates' views become the work's principal theses, while contrary views of his interlocutors are rejected (cf. ibid., 1–2; Sayers 1999, 4). No commentator has explained why, at one of the most critical moments in the text (i.e., elaborating a model at some length, then simply abandoning it), Plato should depart from that pattern and express his own views through an interlocutor who disagrees with Socrates.

No, Socrates never rejects the name "city of pigs"; nor, however, does he ever endorse it, despite Glaucos' emphatic invitation for him to do so. Socrates does indeed follow Glaucos in abandoning further discussion of the first society. However, he describes the move as an abdication of the search for a truly just society. For the rest of the work, the search will be for a society that Socrates calls deeply flawed. Plato has used the first society in part to show that the second one will be ill-suited to achieving justice, even if it is the best we might hope to achieve, and even if a few hundred pages will now be devoted to it. Socrates states that "the true city, in my opinion, is the one we've described, the healthy one, as it were. But let's study a city with a fever, if that's what you want" (Plato 1997a, 372e–373a). Commentators generally assume that Plato dismisses the first society because Glaucos dismisses it. None, however, have explained why, in all of Plato's works, it is the only society he calls "true" and "healthy." To be sure, I am not swinging to the opposite extreme by arguing that Plato unequivocally places the first society above the second. I maintain only that Plato does not mean the first society to be rejected out of hand. He does take some of its elements seriously, including, in my view, its epinomic character, which survives into the second society and into his other works.

An assessment like "obviously impossible" suggests that Plato's view of the first society depends on its ability to be realized in practice. However, that assumption is questionable in the Republic, where Plato expressly denies that the value of an ideal model, including that of the second society, lies in its practicability. Socrates explicitly casts doubt on the possibility of the regime of the philosopher ruler ever being realized (ibid., 471c–472a, 472e–473b, 499c, 502c, 540d–e) just as he casts doubt on our ability to perceive truth itself—the Forms—in the allegory of the cave (ibid., 514a–521b). He casts no such doubt on the first society. (Any number of anthropological studies might suggest that the first society, however
idealized or simplistic, comes closer to actual human societies than anything contained in the *Republic*’s second society; not in some romantic sense that everyone sits around placid and serene, but in the limited, rather familiar sense that there actually have been, and still are, societies with relatively small populations and small-scale hunting, agriculture or trade, lacking distinct institutions of government.2\textsuperscript{20} Similarly, Rousseau concedes that the state of nature cannot provide a practicable model. A return to the state of nature is indeed impossible (see, e.g., Rousseau 1964b, 226). That impracticability does not, however, diminish the state of nature as a conceptual model for understanding law, justice and ethics.

Another objection to the first society as an affirmative Platonic model might be that it fails to take into account certain features of human nature that Plato deems essential. For example, the tripartite division of the second society serves to mirror a tripartite division of the soul, and the fact that, in different individuals, it is a different principle that dominates (Plato 1997a, 415a–c). The absence of that exploration of human nature in the first society might seem to suggest that Plato does not see in the first society any deep foundation in human nature. However, it can just as plausibly be argued that, in the first society, the absence of luxury and competition eliminates the kind of intra-personal and inter-personal conflict that renders necessary the dissection of human nature later in the work.

Two other assertions of the first society’s impossibility are mutually exclusive: They cannot both be correct, and I shall argue that both are false. Some readers might see the first society as too crude to represent a political ideal. Others might see it as too idyllic. Let us start with the argument that it is too crude. Plato could be thought to reject the first society because its lack of material comfort would preclude the leisurely life essential to the pursuit of philosophy and thus of justice.\textsuperscript{22} Pappas argues that the first society will be “unphilosophical” since it “does not promise to foster the thoughtful self-awareness needed for the cultivation of genuine virtues like justice” (Pappas 2003, 63). Further evidence for this view might lie in the absence of any description of actual human character or interactions in the first society, as if it is downright hostile to any model of individual development or collective justice. That thesis is unsatisfactory on several counts.

(a) If it simply means that Plato’s description of the first society fails to adopt the cultivation of virtue in express terms, then the point is inconclusive. Yes, the first society does not expressly mention the cultivation of virtue; nor, however, does it expressly exclude such activity. Arguably,

\textsuperscript{20} Plato ponders the real existence of simpler societies in Plato 1997b, 676a–680e. It is difficult to know how literally to construe that postulated history, as it is expressly presented as speculation. See, e.g., ibid., 677a. Nevertheless the discussion is not presented as an explicitly mythical account, as in Plato 1997f, 269a–276c or 1997b, 713c–714b.

\textsuperscript{22} See, e.g., Plato 1997a, 500b, arguing that the study of philosophy requires leisure.
rigorous, formal, structured cultivation of virtue—the entire scheme of education found in the luxurious, second society—is simply not required for the simplicity of the first.

(b) Pappas's point might also be taken to mean that the first society is simply too austere to allow the leisure required for philosophy. However, Plato suggests the opposite. The first society is neither deprived nor ascetic. The inhabitants "feast" and "drink their wine" (Plato 1997a, 372d). If, in order to suggest the model's inadequacy, Plato had imagined the first society as impoverished, he could have limited its activities to the procurement of food, clothing and shelter (ibid., 369d). His addition of currency-based trade, for example (ibid., 371b), including maritime import and export (ibid., 370e–371a)—inimical, say, to Rousseau's idyllic state of nature—would be utterly baffling and fortuitous additions on his part, as they entirely defeat that aim. Nor is their role obvious for a society that Plato has already decided not to take seriously.

Far from promoting a life that is solitary, poor, nasty, brutish or short, the first society plausibly represents at least one ideal of the good life: comfortable, but not in excess, and therefore conducive to moral, political and intellectual excellence. A life unencumbered by the pursuit of excess material goods may be the one in which philosophy thrives, as Plato's admiration of Socrates' own way of life is often meant to suggest. Whether that is, in fact, Plato's highest ideal of the good life, is a harder question—seeking examples of Plato's highest ideals is often difficult. Philosophy is not expressly excluded from the first society. Plato simply remains silent on the point.

The opposite objection is that Plato intended the first society as an idyllic fairy tale, akin to the expressly mythical golden age scenarios that he introduces in the Statesman and the Laws, as calculated contrasts to a more plausible model (see, e.g., Plato 1997f, 269a–276c; 1997b, 713c–714b). Yet that suggestion defeats itself. Throughout his writings, Plato is constantly aware of the role of myth. He knows he can depict a scenario in mythical terms when he wishes to underscore its implausibility or its purely allegorical function. The Republic already includes several myths and allegories, including the "noble lie" justifying the division of individuals into classes, the allegory of the cave (Plato 1997a, 514a–521b), the image of the divided line (ibid., 509d–511e), and the tale of the afterlife (ibid., 614b–621d). Plato's failure to portray a model society in allegorical or mythical terms is no oversight. It is affirmative evidence that he does not

23 That difficulty in Plato's thought is most prominent in the early works, in which ideals are examined, but never conclusively defined.

24 See, e.g., Plato 1997a, 376c–385c, noting the importance of myths told to children. Cf., e.g., Cooper 1997, 1772-3, listing Plato's references to Homer; Heinze, forthcoming-b.

intend the first society to be understood as meaning something other than what he actually says, at least, no more so than the second society. Plato’s various works plow through many conceptions of society: real, ideal, mythical and hypothetical. When Plato calls the first society “true” (ibid., 372e) that is not the kind of word he uses casually. A philosopher who casts justice, alongside truth itself, as one of the themes running throughout and defining the entirety of his work, should not be taken lightly when he singles out one model of society as truly just. (By analogy, Sean Sayers reproaches Bloom for arguing that women’s equality in the Republic is intended only ironically—Sayers 1999, 83.26 If Sayers is right, it is because, more generally, Plato should not be assumed not to believe what he writes unless evidence of irony or parody is manifest.)

When we are considering the greatest stylist in Western philosophy, we must pay attention to literary form as well as substantive content. Consider a comparison. It is sometimes the case in Shakespeare that characters with elaborate speech, who appear to display intellectual depth, and to speak subtle truths, turn out to have spoken falsely. Goneril claims to love her father “beyond what can be valued, rich or rare” (King Lear, I.i.59) only to deliver him into a storm that same night (King Lear, III.iv). Polonius admonishes the highest moral rectitude—“This above all, to thine own self be true” (Hamlet, I.iii.78)—then proceeds to eavesdrop on Hamlet behind a curtain (Hamlet, III.i.27–29). Such was Plato’s view of the Sophists, whose profession was not to speak truth, but only to appear to do so, through whatever rhetorical ruse accomplished that aim. Socrates constantly insists that they abandon long, ornate speeches in favor of “laconic brevity” (Plato 1997a, 243c), in favor of more terse, dialectical, truth-seeking, question and answer (Plato 1997a, 532b–534e).27 “Where words are scarce, they are seldom spent in vain” (Richard II, II.i.9–10). For Shakespeare, those who speak truth often28 do so plainly and directly: “More matter, with less art” (Hamlet, II.ii.95). Certainly, Plato knows that not all thoughts can be summarized in a few pithy words; that some are genuinely complex.29 His attack is not on complexity, but on Sophistic grandiloquence or obfuscation. The fact that Plato describes the first society briefly and tersely (in contrast to the sometimes humorous proximity with which he describes the second) does not render it unimportant. The concise account may narratively suggest that justice in the first society is straightforward, unfussy, unencumbered by the entire apparatus of strictures, procedures and institutions characteristic of “unhealthy” societies. Brevity in its depiction may

26 Cf., e.g., Vonessen 2003, 31–3, criticizing dismissive readings of Plato’s actual words.
27 Cf., generally, Phaedrus, Protagoras, Gorgias.
28 Admittedly, Shakespeare is not simplistic or formulaic. Don John, albeit “not of many words,” deals falsely: Much Ado about Nothing, I.i.157.
29 We sometimes see Socrates struggling with that very problem, forced to make a few lengthy speeches of his own, e.g., in Phaedrus, Protagoras and Gorgias.

be the first society’s loftiest endorsement. Note also that when Plato thinks
so little of a political theory that he wishes to dismiss it in short order, he
is not shy. His attacks can be merciless. Such is his treatment of two other
views of law—“to each his due” and “might makes right”—introduced
early in the work, which I shall discuss in Section II.A. That dismissive
approach differs entirely from Socrates’ account of the first society.

Finally, an anonymous reader has suggested that my focus on the first
society makes Plato look suspiciously Aristotelian, at least in terms of
Aristotle’s concept of general justice. The concept of epinomia might
appear to be more of a willful reading of Aristotelian values into Plato than
a genuinely Platonic ideal. The epinomic ideal might certainly be said to
place the ethical life of active, civicly minded individuals at the focus of
the socio-political order in ways more akin to the Politics and Nicomachean
Ethics than to anything in the second society, or in the Statesman or Laws.
That objection is difficult to assess. It may be no objection at all. MacIntyre
has argued that “Aristotle’s belief in the unity of the virtues”—which could
certainly be called an epinomic ideal—“is one of the few parts of his moral
philosophy which he inherits directly from Plato” (MacIntyre 1981, 157).
An understanding of the first society as Aristotelian may explain why
Plato, in his other models, develops epinomia in a different direction from
Aristotle, out of skepticism about our ability to realize Aristotelian values
in a “luxurious” society. Again, I am not claiming that Plato necessarily
attaches more value to the first society than to the second, or to models
considered in his other texts. All of his models are problematical, but all
allow him to develop aspects of his thought. When the Republic, Statesman
and Laws are compared, it can be argued that none of Plato’s imagined
societies provides the definitive statement of his views, but that each
provides important insights. The Republic’s first society contains a legal
ideal, which, as I shall argue, is retained throughout the work, and
throughout Plato’s other writings on law and politics.

II. Competing Theories

Plato develops his epinomic theory in several ways. One way, as we have
seen, is through a critique of democracy and its litigious culture. He also
develops the theory through critiques of other common understandings
of law. He does not give them specific names, but I shall call them classical
positivism, legal autonomy, and fair apportionment.

A. Epinomia against Classical Positivism: Law as the Will of the Ruler

An age-old theory of law examined in the Republic is the thesis that law can
only be understood as an expression of power, distinct from moral
concerns—in Annas’s words, “justice is nothing but obeying the laws”
(Annas 1981, 36). In modernity, that approach has become associated with the classical positivist tradition, traceable in particular to Hobbes. Certainly, the analytic positivism of Austin, Kelsen or Hart does not reduce to a simplistic maxim of might-makes-right. Nevertheless, the idea of obedience to positive law, without regard to politics or morals, has continued to be of central importance to positivism. That idea is by no means an invention of modernity. It is proposed early in the Republic by Thrasymachus: "[J]ustice is nothing other than the advantage of the stronger" (Plato 1997a, 338c). Law is the means by which rulers maintain power, subordinating all interests to their own.

[Thrasymachus:] [.. .] Democracy makes democratic laws, tyranny makes tyrannical laws, and so on with the others. And they declare what they have made—what is to their own advantage—to be just for their subjects, and they punish anyone who goes against this as lawless and unjust. This, then, is what I say justice is, the same in all cities, the advantage of the established rule. Since the established rule is surely stronger, anyone who reasons correctly will conclude that the just is the same everywhere, namely, the advantage of the stronger. (Ibid., 338d–339a)

Plato responds that a system of sheer obedience to existing law, regardless of its substantive justice, cannot last. No ruler is strong enough to rule alone. A ruler needs subordinates and allies serving with selfless commitment; yet selflessness is least fostered where legality is defined by the pursuit of anyone’s, including the ruler’s, sheer self-interest. A Stalin or a Ceausescu may preach a common purpose, but that purpose endures only as long as people recognize it as such. It vanishes as soon as it reveals itself to be sheer self-interest,

[Socrates:] Do you think that a city, an army, a band of robbers or thieves, or any other tribe with a common unjust purpose would be able to achieve it if they were unjust to each other?

[Thrasymachus:] No, indeed.

[Socrates:] What if they weren’t unjust to each other? Would they achieve more?

[Thrasymachus:] Certainly.

[Socrates:] Injustice, Thrasymachus, causes civil war, hatred, and fighting among themselves, while justice brings friendship and a sense of common purpose. (Ibid., 351c–352a)

For critics who see Plato as a totalitarian, Thrasymachus’s argument might merely be seen as too crude. Those critics see in Plato not a rejection of totalitarianism, but simply a search for a subtler form, achieved more through mental control than physical coercion (see, e.g., Popper 2003, vol. 1). As I have suggested elsewhere, arguments about Plato as a totalitarian, although not to be dismissed, have long been challenged, and in some
cases have reflected more about the philosophical assumptions of figures who waged such attacks than about Plato (cf. Brown 1998). I shall not pursue that question here, but shall simply note the error of believing that the debate between natural law and positivism only becomes systematically articulated with the advent of European modernity: It was well known to ancient Greece.

While we cannot know how Plato would have responded to contemporary positivists, the foregoing passage provides a clue. Theories as different as those of Hobbes, Austin, Kelsen and Hart all require some notion of a habit of obedience—of enough conformity to legal norms and practices, within a sufficiently stable socio-political context, to enable law to come into being and to persist. Plato appears to question that premise. He seems willing enough to concede that a highly coercive system might thrive over a short term, and might be called a legal regime in that limited sense. His aim, however, is to draw attention to a systemic instability which, he maintains, ultimately dooms any habit of obedience to law in such regimes. He suggests as much in the Republic’s cyclical theory of constitutions, whereby, until a just legal order is achieved, one unstable or corrupt regime inevitably yields to another, in endless succession. The timocratic society, inevitably dividing into factions, comes to be overthrown and replaced by an oligarchic constitution. The oligarchic society, inevitably dividing into factions, comes to be overthrown and replaced by a democratic constitution. The democratic society, inevitably dividing into factions, comes to be overthrown and replaced by a tyrannical constitution, and so on (Plato 1997a, 544a–569c). Aristotle’s account, which draws on historical examples, suggests that Plato is not involved in idle speculation, but might easily have cited the ultimate failure of a habit of obedience to be maintained for those legal orders that are based fundamentally on coercion (as well as for some of those that may not be based wholly on coercion, but that are defective in other ways). To be sure, Plato may be wrong. Given Aristotle’s examples, Plato would presumably have known that a highly coercive system may indeed command a habit of obedience over a reasonably long and stable period of time, at least long enough not to be deemed wholly transient, even if it does ultimately fall. Today, it is hard to dismiss out of hand a positivist claim that, say, the Soviet or even Nazi regimes were in some sense genuinely legal regimes. But even Plato does not seem to deny that such regimes are indeed legal in some sense. What he denies is that they are legal in the most plausible sense. On his account, they are necessarily destined to fail from the outset through an inevitable, systemic disunity that precludes any habit of obedience to law in the longer term.

30 See examples cited throughout the Politics.
Moreover, Plato’s apparent rejection of a command theory is not his most important insight. Lots of thinkers—Locke, Kelsen, Hart, Radbruch—have rejected command theories that designate rulers as the ultimate sources of law, they themselves standing above all law. Those thinkers reject the actual or potential arbitrariness of such theories, favoring instead some theory of norms that supersede and constrain officials. In modernity, common wisdom has tended to cast the dichotomy of men above laws and laws above men into a strict opposition, not readily admitting of alternatives. Some version of a liberating laws above men struggle is commonly recounted as a triumph over a despotic men above laws regime, from the American and French revolutions, through to the Second World War, right up to the fall of the Berlin Wall. Plato, however, rejects both alternatives. They both assume precisely the kind of schism between humans and laws that an epinomic theory seeks to overcome. On the one hand, Plato’s philosopher ruler is intended as the complete opposite of Thrasymachus’s might-makes-right despot. The philosopher ruler is not expected to govern with a heavy hand or to be forever engineering and manipulating the details of everyday life. The ruler remains detached from the political rough-and-tumble because the epinomic ideal seeks to avoid political division and fragmentation. Where shared values are strong—where it is largely shared habits, customs and attitudes that govern—the philosopher ruler usually needs to intervene only in occasional and incidental ways. On the other hand, in the same passage in which Plato rejects Thrasymachus’s men above laws theory, he also rejects a laws above men theory. Let us now turn to that argument.

B. Epinomia against Fair Apportionment: Formalism, Generality, and Rule Skepticism

When asked what justice is, the average person might invoke some conventional or common-sense idea of fairness. Early on in the Republic, just before Socrates’ discussion with Thrasymachus, Polemarchus\(^3\) proposes a theory of (what I shall call) justice as fair apportionment: “[I]t is just to give to each what is owed to him” (Plato 1997a, 331e, citing the poet Simonides). That *suum cuique* maxim epitomizes the ideal of the rule of law, i.e., of laws above men. If I owe you £1000, borrowed and now owed under otherwise routine circumstances, no ruler should abrogate that debt out of the sheer self-interest that may be advanced either by harming you (perhaps you are her enemy) or by helping me (perhaps I am her friend). Even the ruler should be bound by that rule. That fair apportionment

\(^3\) My discussion here simplifies the arguments in Plato 1997a, 328d–336a. For economy’s sake, I shall mention only Polemarchus, as I shall elide his arguments with those of his father, Cephalus.
principle becomes germane to Aristotle's concepts of particular (compensatory and distributive) justice (see Aristotle 1984a, V2–5), and has been a cornerstone of liberal notions of the rule of law up to the present day (see, e.g., Kelsen 1960, 390–7; Rawls 1999, 208).\footnote{For a study of formalism in the equal application of rules, see Heinze 2003a.}

Plato rejects it. The problem with such a maxim is that the phrase "is owed" can turn out to be an empty formalism. Not all situations will so straightforwardly mirror your loan to me and my resulting debt to you. Consider, for example, a government that wants to promote irrigation. Does it then "owe" water to each farmer equally? Or in proportion to each farmer's land? Or in proportion to each farmer's land discounted by each farmer's individual wealth? Or to wheat farmers more than soy farmers, if it deems wheat more important? Indeed, if the distribution arises from sheer government largesse, does the government owe any farmer anything at all? Should the government be deemed free to distribute the water however it likes (perhaps preferring farmers in a region of loyal support)? Or consider Plato's own example. If I grab a weapon out of your hand to stop you from committing murder, do I in any sense "owe" you the weapon (or even the value of the weapon, if I know that, after paying you, you will just buy another)? The legal-theoretical problems raised in the Republic include, then, the age-old problems of formalism and the generality of legal rules: "Everyone would surely agree that if a sane man lends weapons to a friend and then asks for them back when he is out of his mind, the friend shouldn't return them, and wouldn't be acting justly if he did" (Plato 1997a, 331c—Socrates speaking to Cephalus).

Plato offers further arguments (ibid., 331d–336a) to challenge the fair apportionment thesis, which I shall not examine here. What unites them is his view that legal principles formulated in abstract, general terms inevitably entail contradictions: on the one hand, I should do justice; on the other hand, justice means rendering to each his due. To do justice, I should return the weapon; and to do justice, I shouldn't return the weapon. Plato can be said to anticipate rule skepticism, not in the sense of doubting whether it is really rules that decide cases, as opposed to political, institutional, social or psychological factors,\footnote{On twenty-century rule skepticism, see, e.g., Frank 1949, vii–xiv; Llewellyn 1960, 75–92.} but in the sense of finding the generality of legal rules too flawed to provide or explain law's legitimacy. That skepticism reflects Plato's broader approach to philosophy, certainly in his early, Socratic dialogues, where general, abstract definitions are always sought but never found.\footnote{On Socratic \textit{elenchus}, see generally Kniest 2003; Zehnpfenning 2001, chap. 3.} He rejects the thesis of fair appropriation just as he rejects, for example, the view that courage can be defined as "endurance of the soul" (Plato 1997g, 192c). Yes, in some instances courage can be defined that way. However, my soul can also show "endurance"
when I persevere in spending money (ibid., 192e). Similarly, in some cases, it is just to render to each his due. To set down that principle as categorical, however, would be either vacuous or contradictory: vacuous, insofar the concept of “one’s due” is left undefined; contradictory, insofar as any definition leads to injustice in some cases. One might respond that rules can have exceptions, and that formalism and generality therefore do not pose real problems. For example, in the case of taking someone’s weapon, exemptions from ordinary duties are well known. The solution of admitting exceptions (or equitable remedies), however, does not solve, but only displaces the difficulty. An articulated exception, even if it applies to a smaller range of cases, is still as much of a formalized generality as is the rule itself. On what grounds is it chosen? How wide is its scope? Does it always apply? Or are there exceptions to the exceptions? Exceptions do not solve the problem of formalism and generality. They are the problem.\(^\text{35}\)

[Law could never accurately embrace what is best and most just for all at the same time, and so prescribe what is best. For the dissimilarities between human beings and their actions, and the fact that practically nothing in human affairs ever remains stable, prevent any sort of expertise whatsoever from making any simple decision in any sphere that covers all cases and will last for all time. (Plato 1997f, 294b; cf. White 1996, 583, 588–9)]

One reason why Polemarchus’s definition resonates with ordinary intuitions is precisely because it can be expressed as a concise formula. It can be set down, even written down. Plato’s skepticism towards legal formalism runs to his skepticism towards the very possibility of expressing truth in fixed—notably, but not only, written—form.

[Socrates: ] [O]nce a thing is put in writing, the composition, whatever it may be, drifts all over the place, getting into the hands not only of those who understand it, but equally of those who have no business with it; it doesn’t know how to address the right people, and not address the wrong. And when it is ill-treated and unfairly abused it always needs its parent to come to its help, being unable to defend or help itself. (Plato 1961, 275e)

Indeed, a formalized legal rule does more than just “drift.” It is applied in law courts, where money or prejudice rather than truth may decide the dispute, as in Socrates’ trial. Plato exposes the manipulability of legal rules which, while formally cast as principles of fairness, can be systematically deployed to favor the interests of the wealthy and powerful. That view became a cornerstone of Marx’s critique of liberal democracy. Plato’s concern is not with writing as such, but only as one, particularly powerful, kind of formalism. Note the analogy to health and illness, to which I shall return in Section II.C.

\(^{35}\) Cf. Heinze 2005, chap. 1, examining the problem of generality of legal norms.
If a doctor, or else some gymnastic trainer, were going to be out of the country and away from his charges for what he thought would be a long time, and thought that the people being trained, or his patients, would not remember the instructions he had given them, he would want to write down reminders for them [...]. But what if he came back unexpectedly; having been away for less time than he thought he would be? Do you think he wouldn't propose other prescriptions, contrary to the ones he had written down, when things turned out to be different [...]? [...]
And as for the person who has written down what is just and unjust, fine and shameful, good and bad, or has laid down unwritten laws on these subjects [...], if the person who wrote them on the basis of expertise, or someone else resembling him, arrives, is it really not to be permitted to him to give different instructions contrary to these? (Plato 1997f, 295c–e)

Plato is the first Western philosopher to explore the problem of rule formalism as one of the defining problems of law. On a first reading, it may be missed altogether. The Republic can easily come across as highly rule-bound, far more so than anything in Aristotle. We are easily overwhelmed by the second society’s endless rules and prescriptions: music is played like this, poetry is written like that, physical training includes such-and-such. . The text can appear to be little more than a system of rules: The philosopher ruler does x, the guardians do y, everyone else does z. The Laws, too, launches a barrage of rules, and whole passages are devoted to formulating and explicating them. Yet the highly regulated models of the Republic's second society or the Laws should not be construed as an expression of Plato’s faith in recourse to formal, general rules as a fundamental component of a just legal system. Plato’s skepticism toward formal, general rules is just that. It is not an absolute rejection. A rejection of rules in all circumstances would be self-contradictory, since a categorical prohibition on formal, general rules would itself be a formal, general rule. Both the people of the first society, or the philosopher ruler in the second, might decide to maintain or to adopt formal, general rules in some instances (such as, for example, some of the rules that the Republic itself proposes about education, property, and the like—Plato 1997f, 293c–d). In a situation of emergency, such as a massive, surprise military attack, attention to individual circumstances may become unfeasible, and rough general rules may be the only safe option; e.g., “All lights out at dusk.” (In theory, liberal democracy runs in the opposite direction: Law is largely expected to proceed through promulgated, general rules—see, e.g., Fuller 1969, 39, 47, 48—, which, in time of emergency, may require suspension in favor of ad hoc state action.36)

That being the case, one might at first seek to distinguish between a “strong” epinomia, which allows but does not require formal rules, and a “pure” one, which affirmatively forbids them. On closer examination,

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36 See, e.g., Heinze 2003b, 176–9, examining formalism in the application of rules during states of emergency.
however, no such distinction is required. In any instance where the decision to adopt some normative, institutional or procedural formalism could be said to flow genuinely from shared interests of society, it could be said to arise from an epinomic order, and not to be at odds with it. (A pervasive epinomia thus characterizes both of the Republic’s model societies, and will be distinguished momentarily from a more genuinely partial epinomia.) A great irony of the Republic is that it pervasively adopts that same principle of fair apportionment which was the very first theory that it had rejected. The whole division of society into ruler, guardians and remaining inhabitants follows a general principle of “to each his due” or “to each according to his merit and ability.” That general principle is followed, yet never formally adopted as a maxim of law or justice; to adopt a formal maxim to which society would be bound is to risk doing injustice. Like Locke, then, Plato rejects a Hobbesian, sovereign-based command theory of positivism. However, Plato’s rule skepticism also leads him to reject a liberal theory that would substitute a rule-bound laws above men regime for a command-based men above laws regime. Like Hart, Plato also rejects Austin’s brand of a command theory of positivism. Again, however, Plato’s rule skepticism also leads him to reject Hart’s style of modified positivism, obviously influenced by liberalism, that would substitute a rule-bound laws above men regime for a command-based men above laws regime.

C. Epinomia against Legal Autonomy

Again, the might-makes-right thesis is only one element of legal positivism. After Austin, both positivist and liberal theories of law seek to account for the ever-growing complexity of the post-nineteenth century regulatory and administrative state, understanding them as highly autonomous systems. That view reflects public perceptions. When asked what law is, ordinary individuals in Western societies are likely to respond in terms of the activities of distinct and specialized legislative, executive, judicial and administrative bodies, a view promoted not only in their everyday experience, but also by popular media images. The modern State is commonly regarded as successful when it possesses those things, and they function reasonably well; or as failing when it lacks them, or when they function poorly. In other words, a State is, today, regarded as “healthy” when it possesses such things, and as “unhealthy” when it lacks them. Plato claims the opposite. His metaphors of health and sickness reveal a good deal about his view of the autonomy of law. Examination of those metaphors will require a brief detour, through a comparison of law and medicine, but will bring us back to Plato’s epinomia.

The lumping together of law and medicine—in particular, of lawyers and doctors as parasites who prosper from the misery of others—is an old
trope. Few pursue it as forcefully as Plato (see, e.g., Clark 2003). A crucial device in the Republic is the analogy of health in an individual to health in a society. The first model society is healthy insofar as it is just. Deviations from that model breed injustice, as they arise from an unhealthy society. Of particular interest is a distinction between diseases of privation and diseases of excess. Diseases of privation are those that harm us because of our inevitable bodily imperfection as human beings. No human effort can fully avoid them. If, for example, despite taking every precaution, I am attacked by a wild animal, deep wounds may endanger my health, regardless of how conscientiously I ordinarily eat, drink and exercise. The healthy society, for Plato, is one in which medicine serves to remedy those kinds of ills—the ills of people who otherwise pursue good health.

By contrast, an ethos of individual freedom promotes not enlightened self-interest—individual ends pursued for the long-term well-being of oneself as well as one’s community—but rather a wholly unreflected need for gratification, with all the physical consequences that promote not the worthy science and practice of medicine, but its abuse.

[Socrates:] [D]oesn’t it seem shameful to you to need medical help, not for wounds or because of some seasonal illness, but because, through idleness and the life-style [of excess], one is full of gas and phlegm like a stagnant swamp, so that sophisticated [...] doctors are forced to come up with names like “flatulence” and “catarrh” to describe one’s diseases? (Plato 1997a, 405c-d)

For Plato, to draw the analogy from medicine back to law, a society that abuses medicine in that way inevitably abuses law in the same way. From Plato’s perspective, it is hardly far-fetched to suggest, as the “flatulence” of our own day, such concoctions as “jurisdiction to determine jurisdiction” or “defensive non-mutual collateral estoppel.” Like an addiction, craving to be fed, until one’s life must forever be adjusted to appease it, the primacy of self-interest produces a society that constantly produces new conflicts. Such a society must endlessly enact and re-enact laws to redress those conflicts, with no view to a longer-term, collective interest.

[Socrates:] [W]hat about market business, such as the private contracts people make with one another [...] or contracts with manual laborers, cases of insult or injury, the bringing of lawsuits, the establishing of juries, the payment and assessment of whatever dues are necessary in markets and harbors, the regulation of market, city, harbor, and the rest—should we bring ourselves to legislate about any of these?

[Adeimantus:] It isn’t appropriate to dictate to men who are fine and good. They’ll easily find out for themselves whatever needs to be legislated about such things.

[Socrates:] Yes, provided that a god grants [good laws and their preservation].

[Adeimantus] If not, they’ll spend their lives enacting a lot of other laws and then amending them, believing that in this way they’ll attain the best. (Ibid., 425c-e)

The analogy to medicine follows,

[Socrates:] You mean they'll live like those sick people who, through licentiousness, aren't willing to abandon their harmful way of life?

[Adeimantus:] That's right.

[Socrates:] And such people carry on in an altogether amusing fashion, don't they? Their medical treatment achieves nothing, except that their illness becomes worse and more complicated, and they're always hoping that someone will recommend some new medicine to cure them. [...] And isn't it also amusing that they consider their worst enemy to be the person who tells them the truth, namely, that until they give up drunkenness, overeating, lechery, and idleness, no medicine, cautery, or surgery [...] will do them any good? (Ibid., 425e)

Then the analogy back to law,

[Socrates:] The person who is honored and considered clever and wise in important matters by such badly governed cities is the one who serves them most pleasantly, indulges them, flatters them, anticipates their wishes, and is clever at fulfilling them. [...] [Such] people pass laws [...] and then amend them, and always think they'll find a way to put a stop to cheating on contracts and the other things I mentioned, not realizing that they're really just cutting off a Hydra's head. (Ibid.)

Again, self-interest pits individuals against each other and against society. In the Lockean war of all against all, the law's role is merely to march in ceaselessly to resolve one clash, only for another to occur. The law requires endless amendments and revisions to deal with endless trains of conflict. For Plato, a just society does not abuse law, like medicine, to redress such ills only by promoting new ones. A just society prevents them from arising in the first place. It prevents the vicious cycle of clash, remedy, clash, remedy. In a society of excess, law becomes not the cure for society's ills, but an accomplice to them. It can never operate casually or informally in the epimonic sense. Rules must constantly be promulgated and amended, while lawsuits become increasingly routine. It is in the same vein that Aristotle writes, "the habit of lightly changing the laws is an evil [...] the citizen will not gain so much by making the change as he will lose by habit of disobedience. [...] [A] readiness to

37 See note 15 above.

38 The liberal reader may cringe at Plato's use of concepts of health and illness to denote conformity with, and deviance from, a social norm. Psychiatry and psychology have at times been marshalled to brand political, cultural or personal non-conformity as illness. See, e.g., Heinze 1995, 39–41, noting recourse to clinical methods to suppress non-normative sexual identity or conduct. Even leaving aside those graver abuses, one might object that the sheer Puritanism of the Republic's first and second societies holds little appeal. The point I wish to stress, however, is that Plato's view that excess consumption has real consequences for the theory and practice of law raises as many questions for our world as it did for his.
change from old to new laws enfeebles the power of the law” (Aristotle 1984b, II.8, 1269a15–24).

Such pressures destroy any possibility of a minimal, straightforward legal regime. Legal rules, institutions and procedures must grow and grow, requiring sophisticated legal autonomy, whereby rules, institutions and procedures take on a life of their own, becoming ever more opaque to the average citizen. The endpoint of that trajectory, a highly unjust concept of law, is one by which law becomes nothing but a system of rules and procedures, be they construed as issuing from the commands of an Austinian sovereign, or as traceable to Kelsen’s Grundnorm, or as Hart’s union of primary and secondary rules. A world in which legal rules, institutions and procedures exist in their own realm, far from representing an advance, illustrate the increasing alienation of individuals from each other and from their society. One can imagine Plato little impressed by such “developed” rules of our legal systems as, “if the gross income derived from an activity for 3 or more of the taxable years in the period of 5 consecutive taxable years which ends with the taxable year exceeds the deductions attributable to such activity (determined without regard to whether or not such activity is engaged in for profit), then, unless the Secretary establishes to the contrary, such activity shall be presumed for purposes of this chapter for such taxable year to be an activity engaged in for profit. In the case of an activity which consists in major part of the breeding, training, showing, or racing of horses, the preceding sentence shall be applied by substituting ‘2’ for ‘3’ and ‘7’ for ‘5’” (United States Internal Revenue Code, I.R.C. §183(d)(1986)).

We have seen, then, that central tenets of various theories of classical and contemporary jurisprudence were well understood and examined in Plato’s work. Plato largely grasped what we recognize as classical notions of legal positivism, and at least of legal (if not full-blow social and economic) liberalism, as well as tenets of what are today recognized as radical theories, theories of communitarianism, and, of course, theories of natural law, in addition, as I am arguing, to proposing his own epinomic theory. Plato similarly understood the analytic tenet of understanding law as an autonomous system. Western jurisprudence stands indeed as a long footnote to Plato.

III. Epinomia in Context

The epinomic ideal that emerges in the Republic’s first society can be scrutinized for its possibilities, and limitations, at several levels: in the whole of the Republic; in the whole of Plato’s dialogues; and in legal theory beyond Plato. As each of those levels is vast, I shall only provide a partial sketch.
A. Epinomia Distinguished from Related Concepts

Ideals of small, harmonious, non-coercive, non-rule-bound societies are familiar enough, through such concepts, not all mutually compatible, as “anarchy,” “communism,” “holism,” “customary law,” “communitarianism” or “pure democracy.” On at least some readings of each of those terms, a considerable degree of overlap with the concept of epinomia can be postulated. The problem is that these terms have been used in different senses by different thinkers. As each concept raises vast issues, I can only provide some brief notions. While it might well be worthwhile to examine any of these concepts to determine the degree to which they conform to or depart from an epinomic ideal, none of them is straightforwardly synonymous with it.

Anarchy. The Republic’s first society might be called anarchy, not in the colloquial sense of sheer chaos, but in the etymological sense of no rule, no distinct government entity ruling over the people. Human existence as described in Rousseau’s Discourses is anarchic in that sense, yet differs from the Republic’s first society. In the Discours sur l’origine et les fondements de l’inégalité, Rousseau describes human beings in a state of nature, not requiring organized society at all. Contact between individuals is spontaneous. It neither engenders nor requires any ongoing commitments. In other words, Rousseau’s state of nature postulates not only no rule but also no law. It is not only anarchic but also, so to speak, anomic.

The Republic’s first society does not go that far. It includes ongoing, organized, predictable, cooperative activity. It is anarchic, but epinomic. (Nor does the Republic’s first society swing far enough in the other direction to resemble the democracy proposed in Rousseau’s Social Contract, which, however attentive to the voice of the people, clearly requires a distinct, formalized, institutionalized governmental structure, and made Rousseau more the bête-noire of anarchists than their hero—see, e.g., Préposiet 2002, 180–6.)

As to more recent anarchist thinkers such as Stirner or Proudhon, their antipathy to organized, bureaucratic government no doubt suggests some measure of epinomic sentiment. They seek a cohesive social ordering that would arise not coercively, but organically, spontaneously and through individual consent, again obviating any need for distinct governmental institutions. Stirner, however, is more critical than systematically constructive—skeptical about the state, but not advocating the kind of cohesive community of the Republic’s first society.

Proudhon, too, criticizes liberal institutions of government and property ownership; however,
unlike Plato, his solution is to redefine, rather than to abolish, the concept of private property.\textsuperscript{43}

Communism. The Republic’s first society might be called “communist,” in the sense Marx envisaged for the final phase of human society, after the full withering away of the state. There can be little doubt that final-phase communist society is intended to realize an epinomic ideal. However, Marx declined to provide any detailed account of final-phase communism. He felt its precise structure and character could not easily be predicted so far in advance.\textsuperscript{44} To call the Republic’s first society “communist” in the Marxist sense would, then, raise more questions than it would answer (and it is doubtful whether any other sense would command unanimous agreement). Moreover, subsequent to Marx, the term came to be used in senses that neither Marx nor Plato had in mind, for example, by the nominally communist parties of the Soviet Union and its satellites (see, e.g., Constitution of the Union of Soviet Socialist Republics [1977]). The concept of epinomia can be used unencumbered by that history. A concept such as “socialist” is even less appropriate, as it is ordinarily distinguished from “communism” precisely because of its state-centered quality.

Holism. Plato’s emphasis on unity aims to counteract the individualism and fragmentation of democracy. The term “holism” can be used to signify a social and political order in which individuals share common aims, the destiny of each member being fundamentally linked to that of the others. The problem with that term is that it does not, in itself, suggest anything about the status of formal rules (see, e.g., Popper 2003, vol. I, 97). No doubt we would assume a strong role for custom, habit and shared values. However, there is nothing intrinsic in the concept of “holism” that suggests a necessary antipathy towards formal, general rules. The various ideal societies contemplated by Plato—the two of the Republic, the one of the Laws, or even the golden age of the Statesman—all suggest some holistic ideal, although they suggest different attitudes towards formal rules.

Customary Law. The concept of customary law seems close to some epinomic ideal. However, the term “custom” is used in various senses. It

\textsuperscript{43} Cf. Préposiet 2002, 166–70, noting Proudhon’s rejection of communism.

\textsuperscript{44} Accordingly, Engels writes that Marx’s Das Kapital does not explain “wie es denn eigentlich im kommunistischen Tausendjährigen Reich aussehen werde” (“what the 1000-year reign of communism will look like”—author’s translation). It explains only “wie die Dinge nicht sein sollen [. . .]” (“what things will not be like”—author’s translation): Engels 1956b, 216. Marx and Engels restrict themselves to defining communism either in purely general, suggestive terms, or in negative terms, i.e., in terms of what it is not and what it is intended to replace. Communist society is described as one “wo die Interessen der einzelnen nicht einander entgegengesetzt, sondern vereinigt sind” (“where the interests of individuals do not oppose each other, but are united”—author’s translation): Engels 1956b, 536, 539. “Der Kommunismus ist [. . .] nicht [. . .] ein Ideal [. . .]. Wir nennen Kommunismus die \textit{wirkliche} Bewegung, welche den jetzigen Zustand aufhebt” (“Communism is [. . .] not [. . .] an ideal [. . .]. We call communism the reality movement, that will eliminate existing circumstances”: Marx and Engels 1956b, 11, 36.
is used in areas of Western private law, such as contract, where, for example, a standard business practice may carry normative authority. Similarly, customary law remains a fundamental source of international law, which is heavily state-centered and institutionalized—see, e.g., Statute of the International Court of Justice, 38(1)(b). These examples show how the term can denote a feature of a highly litigious regime, diverging from Plato’s ideal. By contrast, socio-legal literature has used the term to suggest the exclusion of, say, institutionalized and bureaucratic statutory law. Yet the term is used more as an empirical-descriptive term than as an ideal-prescriptive one (see, e.g., Cotterrell 1992, 22–3), and can apply to very different types of societies.

**Communitarianism.** The Republic’s first society might be called “communitarian,” insofar as individual, interpersonal and community interests are aligned and not in conflict. I have noted the view that liberalized democracy assumes, or creates, inevitable tensions among individuals, and between individuals and government, aiming more at the management of those tensions than at their full elimination. Communitarian theories do not see those tensions as inevitable, and aim to unify individual and collective interests. Yet it is by no means clear that communitarian theories necessarily shun states or rules. Even more than “anarchy” or “customary law,” “communitarianism” denotes a range of political ideals, some incompatible with others, from the Christian community of Aquinas, to the democratic ideal of Rousseau, to the post-statist ideal of Marx, to any number of recent versions advocated by such thinkers as MacIntyre, Sandel, Taylor or Walzer. Basic questions such as whether there is a state apparatus, and how the community is structured, are not sufficiently clear from the term “communitarianism,” which can give rise to too many variations to allow any assumption of an obvious overlap between it and the term “epinomia.”

**Ideal Democracy.** There might be some justification for calling the Republic’s first society a “pure,” “radical” or “ideal” democracy (cf. Rousseau 1964a). There would be some irony in such an assessment, in view of Plato’s strong rejection of democracy—irony, however, which may only underscore the subtlety of Plato’s thought. The lack of institutionalized government, and thus of any distinction between rulers and ruled, certainly suggests some kind of consensus-based, hence democratic, ideal. Nevertheless, democracy in that first society can only be postulated. It is never expressly embraced. In view of his great preoccupation with democracy, Plato might easily have said of the first society, “This is what democracy should be.” But he makes not the remotest suggestion to that effect. While the epinomic ideal carries over into the Republic’s second society and Plato’s other model societies, a democratic ideal does not.

**Autocracy.** In the Laws, the term “autocracy” is used to characterize a simple society lacking distinct governmental institutions (Plato 1997b,
Epinomia: Plato and the First Legal Theory

680b). In such a society, rule is exercised over households by their heads, with no additional government required to rule over households collectively (ibid., 680e). The problem is that no mention of the structure, or even the existence, of individual households, or of their interrelationships, is made in the description of the Republic's first society, and the abolition of the family in the second society raises too much doubt about whether a household-based society is required or intended for the first.45

B. The Broader Text—Epinomia in the Republic's Second Society

I shall not undertake a detailed examination of the Republic's second model society, as it has always been far better known and studied. No justice can be done to the intricacy of its arguments in a brief article, and introductions and commentaries have long been widely available. I shall simply suggest in brief terms that an epinomic approach informs the Republic as a whole.

If epinomia depends upon values, habits and customs, it comes as no surprise that education plays a cardinal role in the second model society. Education in virtue begins at the earliest age. Plato argues that society cannot "carelessly allow the children to hear any old stories, told by just anyone" (Plato 1997a, 377b). He introduces the Republic's infamous doctrines of censorship: "Then we must first of all, it seems, supervise the storytellers. We'll select their stories whenever they are fine or beautiful and reject them when they aren't. And we'll persuade nurses and mothers to tell their children the ones we have selected" (ibid., 377b–c, Socrates speaking).

The precise extent to which Plato advocates censorship and indoctrination has long been subject to debate, and I shall not examine it here. The aim of shared values is social cohesion. Other infamous doctrines proposed in support of that aim are the abolition of private property and of conventional marriage, in favor of a community of property and children (ibid., 416d–417b, 423e–424a, 451c–e, 457b–461e, 462b–c, 464b–d). Those doctrines, too, aim at the elimination of individual attachment to self-interest, in favor of communal values.

[Socrates:] And what about lawsuits and mutual accusations? Won't they pretty well disappear [...] because [people] have everything in common except their own bodies? Hence they'll be spared all the dissension that arises between people because of the possession of money, children, and families. [...] Nor could any lawsuits for insult or injury justly occur among them [...] (Ibid., 464d–e; cf. Plato 1997b, 739c–e)

45 Moreover, the description of autocracy is otherwise rather brief and cryptic. It is hard to know, for example, how the example of Homer's Cyclopes in Plato 1997b, 680b–d, is to be interpreted. Is it comical? If so, is it therefore sceptical? Or evidence of belief that Homer whimsically portrays some genuine form of social organization?
In examining conventional models of government, Plato suggests that different kinds of rule have something in common. Management of the state by the ruler or statesman resembles management of the family by the head of household. The former is like the latter writ large. The good head of household seeks unity and cohesion in the family; the good ruler strives for unity and cohesion in the state (Plato 1997f, 258e–259b). That ideal leads him to the government of the philosopher ruler (ibid., 473c–d). If justice cannot be achieved through formal, general rules, it can only be achieved through an epinomic regime—a social order that either prevents conflict from arising in the first place, or is able to resolve it justly without compulsory recourse to rules.\(^46\) The most plausible view appears to be that the philosopher ruler would be neither bound to, nor barred from, general legal rules, principles or procedures (either of those options would amount to the pre-eminence of some rule), but would reach an independent determination of their desirability under any given circumstances.

C. The Broader Context—Plato and Beyond

Doubt inevitably arises about whether any society can prosper either without formally adopted rules and processes, or with their status left so uncertain. For today’s highly populated and complex societies, the epinomic ideal seems unfeasible. Turning to Plato’s Laws, we find a work that oozes with institutions, regulations and procedures, even for some seemingly minor matters. That difference could seem to suggest that Plato came to view epinomia as impractical. However, the prominence of rules and procedures in the model society of the Laws by no means suggests that it is destined for pervasive legalism. Plato continues to reject the hyper-legislation and hyper-litigation characteristic of democracies (see Plato 1997b, 679d–e). The aim of formal rules must be to promote the deeper habits, customs, traditions and attitudes that will, organically, give rise to virtuous, lawful conduct (see ibid., 630e–631a). The epinomic ideal is now modified, but not eliminated. Pure epinomia is replaced by partial epinomia, or, to introduce a second, more precise term, rule epinomia, i.e., the recognition that formal, general rules and processes are required, but only insofar as they serve the cultivation of community values and cohesion, and not for the purpose of creating an ever-expanding, highly autonomous

\(^46\) Aristotle rejects Plato’s views in part because he rejects the concept of unity as a founding principle of political and social order. He holds instead that internal diversity is indispensable. Aristotle rejects the analogy from rule over the state to rule over the family. On his view, the principle of the state, unlike that of the family, is not unity, but plurality: “Is it not obvious that a state may at length attain such a degree of unity as to be no longer a state?—since the nature of a state is to be a plurality […] Again, a state is not made up only of so many men, but of different kinds of men; for similars do not constitute a state”: Aristotle 1984b, II.2, 1261a1–24.
legal system, alienating and alienated from individuals, and supporting ever greater degrees of legislation and litigation. In order to mitigate problems of interpretation and application of formal, general rules, Plato proposes that rules be promulgated with interpretative guidelines as to their meanings and aims, in the form of preambles. He distinguishes the two components of "law" and "preface to law," which, taken together, assure that the person for whom law is promulgated "accepts [the lawmaker's] orders—the law—in a more co-operative frame of mind" (ibid., 722e–723a).

Of course, the familiar problems of rule interpretation ("hard cases") show how such interpretative guidelines provide no guarantee of certain or uncontroversial resolutions, and Plato has no illusion that the society proposed in the Laws will be problem-free. Far from a rupture, however, the Laws very much retains the epinomic ideal of the Republic, seeking some way of reconciling it with the inevitability of formalized legal rules, institutions and procedures. In this way, the Laws provides a link from the epinomic ideal of the Republic to the epinomic ideals of thinkers as different as Aristotle, Aquinas, Pufendorf, Rousseau, Hegel, Marx, Heidegger, and contemporary critical and communitarian writers. The acceptance of some measure of formal rules and processes means that the Laws must make a partial concession to the thesis of fair apportionment, which must include some principle of "like treatment of like cases." Plato recognizes that imperative, but continues to underscore the dangers of rules applied mechanically. He takes as an example "the relations between an honest man and a scoundrel" (Plato 1997a, 757b) to emphasize that "[i]ndiscriminate equality for all amounts to inequality" (ibid., emphasis in Cooper's edition). We can accept Plato's general point about the dangers of formal rules, without having to accept the underlying political order to which he refers in that passage, including, for example, the relationship between master and slave. In our day, the proposition that an "indiscriminate"—rote or mechanical—application of principles of equality can lead to inequality has been a fundamental precept of advocates of affirmative action. Of course, readers familiar with the Laws may not yet be entirely convinced. It may seem implausible that Plato is preserving an epinomic ideal in a text overflowing with rules. It is important to recall, however, that the rules in that text are intended not merely as a floor, but as a ceiling—as a template for (at least in its main lines) a largely complete, self-contained system, which would not require important or frequent additions and amendments. Judiciously interpreted in the light of their preambulatory principles, the rules are intended to remain stable, as they

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67 See, e.g., Regents of University of California v. Bakke, 438 U.S. 265, 402 (1978), Blackmun, J., concurring in the judgment in part and dissenting, arguing that "in order to treat some persons equally, we must treat them differently." Cf. Heinze 2003a 121–24.

would become integrated into society's habits and values (cf. Stalley 1983, 82).

Compare Aristotle's approach. As with much of his philosophy, Aristotle is responding to a Platonic challenge, in this case, what could be called Plato's "epinomic challenge" to law. Aristotle accepts Plato's condemnation of any regime that would rely too heavily on formal rules, procedures and institutions, without regard to the promotion of virtuous habits, values and customs. However, he rejects as unworkable any pure epinomia, that would swing to the opposite extreme of eliminating formal law altogether. His ideal regime adopts formalized rules, institutions and procedures, but with a view to minimizing recourse to them by promoting the deeper habits, values and attitudes. That median position is illustrated in his distinction between special and general justice. Formalized rules and procedures are indispensable for solving immediate problems, such as compensating wrongs or fairly distributing goods or resources. Aristotle thus accepts the fair apportionment thesis, as appropriate to special justice. Justice as a whole, however, or general justice, which makes society's everyday life fair and orderly, is concerned with more than resolving narrow and immediate problems of that kind.

"[P]ractically the majority of the acts commanded by the law are those which are prescribed from the point of view of excellence taken as a whole; for the law bids us practice every excellence and forbids us to practice any vice. And the things that tend to produce excellence taken as a whole are those of the acts prescribed by the law which have been prescribed with a view to education for the common good. [. . .] [T]he education of the individual as such [. . .] makes him without qualification a good man." (Aristotle 1984a, V2, 1130b23) 46

While special justice thus adopts the inevitably anti-epinomic features of legalism and formalism, general justice responds to the Republic's anti-legalism and anti-formalism with a pervasively epinomic legal order, as justice as a whole arises out of habits, customs and values.

Albeit in a very different political environment, Aquinas, too, adopts that kind of modified epinomia. Aristotle was the last of the leading Western thinkers who could so easily assume the polis for his model of law and government. After the Roman empire, Western societies could not easily assume that kind of political and social ideal. A theorist like Aquinas had to ponder larger political entities, such as kingdoms or the Church, where the rulers did not always have deep or ongoing contact with the ruled. In such a context, the importance of promulgating and publicizing law, in order to avoid uncertainty as to its content, or to avoid the abuses of ex post facto laws, took higher priority. Promulgation, however, means the formal-

46 Cf. the earlier version of Jowett's translation in McKeon 1941, reading "virtue" for "excellence" (arête).
ization of rules, with all the dangers to which Plato alludes. Aquinas had no access to Plato's texts dealing with law, politics and morals, yet considers precisely the kind of objection to legal formalism that Plato had raised.

"Every law is framed for the direction of human actions [...]. But since human actions are about singulars, which are infinite in number, matters pertaining to the direction of human actions cannot be taken into sufficient consideration except by a wise man, who looks into each one of them. Therefore, it would have been better for human acts to be directed by the judgment of wise men, than by the framing of laws. (Aquinas 2000, pt. I-II, q. 95, art. 1, obj. 3)"

Aquinas also refers to Aristotle's remark that "men have recourse to a judge as to animate justice" (ibid., obj. 2). Society need not rely mechanically on general principles, and can contemplate immediate circumstances,

"Animate justice is better than inanimate justice, which is contained in laws. Therefore it would have been better for the execution of justice to be entrusted to the decision of judges than to frame laws in addition. (Ibid.)"

In addition to the problem of formalism, there is the objection that the adoption of formal rules undermines the promotion of a deeper set of habits, customs, traditions and values,

"It would seem that it was not useful for laws to be framed by men. For the purpose of every law is that man be made good thereby [...]. But men are more to be induced to be good willingly by means of admonitions, than against their will, by means of laws. Therefore, there was no need to frame laws. (Ibid., obj. 1)"

Aquinas, then, recognizes and responds to Plato's central concerns about law, despite the unavailability of most of Plato's works. We have seen that, even assuming a polis, Aristotle disagreed with Plato's skepticism towards formalism, giving it a prominent role in his concept of special justice. For Aquinas, that approach would acquire all the more force in a larger, more distant or bureaucratic political body, where the promulgation and publicity of formal laws, despite their defects, may help to promote government accountability and to limit the abuse of power.49 Aquinas provides several defenses of formal legal rules (ibid., pt. I-II, q. 95, art. 1, rep. obj. 2), at the same time recognizing, like Aristotle, that they must promote, rather than replace, a society governed by good habits, customs and values. Formal law must be used against those who act lawlessly, but the preferable state of affairs is one

49 Cf. Aquinas 2000, pt. I-II, q. 90, art. 1, rep. obj. 3, arguing that "in order that the volition of what is commanded may have the nature of law, it needs to be in accord with some rule of reason. [...] otherwise the sovereign's will would savor of lawlessness rather than law."
in which order and justice prevail without the need for formally pro-
mulgated law.\footnote{Ibid., at principle reply, and at rep. obj. 1.}

Queen Mary, University of London
Law Department
School of Law
London E1 4NS
E-mail: e.heinze@qmul.ac.uk

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