The Status of Classical Natural Law: Plato and the Parochialism of Modern Theory

Eric Heinze

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<table>
<thead>
<tr>
<th>Andrew Botterell</th>
<th>Property, Corrective Justice, and the Nature of the Cause of Action in Unjust Enrichment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Mark Capustin</td>
<td>The Authority of Law in the Circumstances of Politics</td>
</tr>
<tr>
<td>Eric Heinze</td>
<td>The Status of Classical Natural Law: Plato and the Parochialism of Modern Theory</td>
</tr>
<tr>
<td>Travis Hreno</td>
<td>Necessity and Jury Nullification</td>
</tr>
<tr>
<td>Dimitrios Kyritsis</td>
<td>Principles, Policies and the Power of Courts</td>
</tr>
<tr>
<td>Marc Ramsay</td>
<td>The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failures of Mitigation?</td>
</tr>
<tr>
<td>Michael Robertson</td>
<td>Telling the Law's Two Stories</td>
</tr>
<tr>
<td>Veronica Rodriguez-Blanco</td>
<td>Peter Winch and H.L.A. Hart: Two Concepts of the Internal Point of View</td>
</tr>
<tr>
<td>Andrew F. Sunter</td>
<td>TWAIL as Naturalized Epistemological Inquiry</td>
</tr>
</tbody>
</table>
The Status of Classical Natural Law: Plato and the Parochialism of Modern Theory

Eric Heinze

Socrates transformed ancient thought, placing justice at the centre of abstract inquiry. Earlier Greek philosophy had focused on the natural world. Ethics and justice were the province of poets. Plato embraces that shift in written form, authoring Greek antiquity's first detailed and critical analyses of justice. For ethical and political theorists, Plato has always stood as the foundational thinker of the Western tradition. Justice is the subject of Plato's two longest and most intricate works, the Republic and the Laws. It is also key to such works as Apology, Crito, Ion, Euthyphro, Phaedo, Protagoras, Meno, Greater Hippias, Gorgias, Philebus and Statesman. Combined, those works cover over 800 pages in two standard English-language editions—certainly rivalling the output of Austin or Hart.

While Plato remains a towering figure in ethical and political philosophy, he has never played a serious role in legal theory. Legal theorists either ignore him entirely, or drop nonchalant references to “Platonic guardians” and “philosopher kings”, lacking any thoroughgoing engagement with his writings. Few serious legal scholars would presume to brush away Hart or Dworkin in such a breezy stroke (“For Hart, there is nothing important about law aside from rules” or “For Dworkin, there is no difference between judicial opinions and novels”). The fact that we do so with a thinker like Plato reveals very little about Plato, and a good deal about us.

The aim of this article is not to “rehabilitate” Plato, as if he were central to legal scholarship and had merely suffered from bad press (the way, for example, some scholars have sought to revitalize Austin by challenging Hart's account of him). Nor shall I undertake a general account of Plato's legal theory, which I have attempted elsewhere. Instead, my aim is to ask what we can learn about the limits—

I am grateful for comments provided by Peter Alldridge, Richard Bronaugh, Roger Cotterrell, Richard Nobles, David Schiff and Prakash Shah.


3. As Plato has figured more prominently in traditional philosophy than in legal theory, an age-old question emerges as to distinctions among such concepts as “legal theory”, “legal philosophy” or “jurisprudence.” Differences among those terms are not categorical, but more matters of emphasis and convention. Cf., e.g., Roger Cotterrell, The Politics of Jurisprudence vol. 2, 2nd ed., (London: Butterworths, 2003); Nigel Simmonds, Central Issues in Jurisprudence (London: Sweet & Maxwell, 2002). Accordingly, I shall not assume any points raised in this paper to be affected by possible distinctions among them.

4. See, e.g., Cotterrell, supra note 3 at 60-61; Wayne Morrison, Jurisprudence: From the Greeks to Post-Modernism (London: Cavendish, 1997) at 218-23.

in particular, the ahistoricism, or historical parochialism—of a tradition of legal theory that scarcely even notices the philosopher who had laid much of the framework for Western thinking about justice.

In the aftermath of World War II, both liberals and radicals were searching for the intellectual origins of Western totalitarianism. Plato emerged as the father of all Hitlers and Stalins. In the Humanities, that perspective, far from killing off Plato, elevated Plato studies to a more critical level. No such interest awakened among legal theorists, many of whom continue to embrace a straightforward Popperian view of (1) the philosopher-ruler as simultaneously mystic and proto-fascist, and (2) the theory of Forms as simultaneously hollow and absolutist. In some ways, that attitude is bizarre. Even if we concede the (highly debatable) proto-totalitarianism of Plato’s thought, conceptual links between classical positivism and totalitarianism, far from burying figures like Hobbes or Austin, has fuelled the keenest interest in them. So it cannot be Plato’s fascist tendencies, whatever they may be, that would account for the neglect.

Rather, in this article, I shall argue that the neglect of a figure like Plato reflects a broader trend among legal theorists, namely, their common failure to situate legal modernity—by definition, an historical concept—within a critically-minded history. (My criticism will be only of legal theorists’ approaches to pre-modern theory. I shall not examine legal scholars’ approaches to particular pre-modern legal systems, for which there have long been solid canons of research.) Many legal theorists today, despite their claims to have overcome de-contextualized, ahistorical positivism, and despite the limited revivals of Aristotle or Aquinas, perpetuate traditional positivism’s reductionist approaches to pre-modern theory. Figures like Austin, Kelsen, Holmes, Hart, Fuller, Finnis, Dworkin, MacKinnon or Raz, filling scarcely more than a century, are commonly cited to illustrate the variety of legal theory. By contrast, figures as fundamentally different as Sophocles, Plato, Aristotle, Cicero, Augustine and Aquinas, spanning two millennia, are often lumped together in a page or two, precisely in the way that traditional positivists had lumped them together (my example in this article will be Kelsen), under the heading of “natural law.”

Certainly, scholarly rubrics always have rough edges. “Positivist” means different things for Austin and Hart; “liberal” means different things for Mill and Rawls. “Natural law” covers an equally broad group. However, while legal scholars have devoted exacting scrutiny to elements that have distinguished one positivist from another, or one liberal from another, such efforts are not always made to draw

6. See infra Part II.
8. See infra Section II.
9. The term “philosopher ruler” is better than “philosopher king”, since women can qualify for the role. See, e.g., Republic at 540c. Cf., e.g., Nickolas Pappas, Plato and the Republic, 2nd ed. (London: Routledge, 2003) at 113.
fundamental distinctions among pre-modern thinkers. Pre-modern thinkers are commonly seen as essentially united in a so-called “search for higher values”, with only limited attention to their other, often more interesting and trenchant, insights into the core themes of legal theory. That neglect is troublesome in an age of social constructionism, in which we ask how some of our standard concepts emerge in contradistinction to supposed, often misleadingly or simplistically defined, opposites—the relevant concepts forming, in this case, an assumed polarity between, on the one hand, the complexity of modern theory, and, on the other hand some presumed unity of pre-modern theory in some postulated quest for higher norms.

My aim is not to eliminate all meaningful opposition between the concepts of the “modern” and the “pre-modern.” As Weber had already begun to show, there are features of our legal systems and theories for which a temporally distinct concept of “modernity” has real meaning, e.g., in their responses, to name just a few examples, to industrialization, or to the rise of complex commercial and financial transactions, or to the intricacies of the bureaucratic and administrative state. Nevertheless, questions remain as to whether we have constructed myths of legal modernity by defining it in contrast to unduly simplified concepts of pre-modernity—falsely characterizing modernity as entailing new and distinct understandings of law which were in fact well-known to pre-modern thinkers.

Certainly, the concept of “higher” values plays an important role in classical natural law and justice theories, as represented by Plato’s Forms, Aristotle’s *telos*, or Aquinas’s God. Yet no writer shows better than Plato how misguided we are if we conclude that classical natural law or justice theories were obsessed with legal or normative absolutes. Plato never embraces a wholesale reduction of justice to the mysterious “Form of Justice”, which would be accessible only to the elusive mind of some philosopher-ruler. I shall argue that his analyses of justice do not usually draw upon the theory of Forms or any other absolutist concepts. Legal scholars’ focus on Plato’s supposed moral absolutes also overlooks the dialectical character of his thought. In most instances, Plato’s specific assessments of justice and injustice flow more from a combination of dogged reason and sheer common sense than from any hermetic contemplation of some wholly abstract Form of Justice. (Certainly, we can rehash old debates about the sincerity of Plato’s dialectic, given the endless arguments in which Socrates’ interlocutors respond with remarks scarcely more challenging than, “Yes, that must be true, Socrates” or “I don’t see what other conclusion we can draw, Socrates.”)

No less than any other philosopher, however, Plato examines any number of objections and alternatives to his views, often paying far more attention to questions and challenges than to conclusive answers, which is precisely the characteristic that should justify his appeal for post-positivist theorists sceptical of unified and overarching theories of law). Perhaps even more than Aristotle or Aquinas, Plato shows us how many of the concerns that are central to modern theory were important in pre-modern thought—concerns, for example, about foundations, legitimacy, formalism or rule-bound elements of law.

It is no surprise that Aquinas often emerges as the real beneficiary of recent revivals of interest in natural law, often standing as the paradigm for the whole tradition, mostly because his theory conforms to modern scholars’ preconceptions about a pre-modern obsession with higher law, which his God supremely symbolises. Plato is particularly likely to be either neglected or misconstrued under that paradigm: the more we look beyond his theory of Forms, the more we find everything but straightforward notions of higher norms. (In fact, even the degree to which Aquinas fully conforms to that view is open to debate, but I shall not pursue that question here.) Failing to find that confirmation of their preconceptions about pre-modernity, many theorists conclude that Plato is at best muddled, and at worst has nothing much to say about law at all.

For those whose theoretical outlook remains anchored in positivism, none of this matters. They may acknowledge that law is an historical product, but do not see that fact as essential to the accurate description of law. However, for those theorists who remain sceptical towards the positivist tradition, things are not so simple. If you believe that law is fundamentally an artefact of its historical, social, political, cultural, ethical or economic contexts, then you are more likely to believe that the concept of modernity, and the ways we go about defining it, are important to legal theory. Insofar as positivists expressly define legal theory in ahistorical terms, it is not surprising that their accounts of pre-modern legal philosophy have been cursory and dismissive. By contrast, it is puzzling that legal theorists challenging the positivist legacy, insisting on the social, cultural or historical elements of law, frequently adopt the same collapsed accounts of pre-modernity that we find among traditional, hard-line positivists.

In Part I, I examine some typical approaches to Plato and pre-modern thought, arguing that today’s views have scarcely moved beyond those proffered by legal positivists over half a century ago. In Part II, I argue that those prejudices of legal positivists have strong correlates, within philosophy, to prejudices of logical positivists of the mid-20th century, which have long since been overcome in the Humanities, but continue to thrive among legal theorists. In Part III, I examine other pitfalls awaiting those who bring reductionist approaches to pre-modern thinkers.

I. Dominant Approaches: The Standard Textbooks

If I am to examine Plato as an example of modern theorists’ neglect of pre-modern thought, I face, from the outset, the task of having to explain a negative: why isn’t there much Plato scholarship within legal theory? I cannot start with a literature review, because there is no general literature on Plato’s legal theory. Publications can be found on specific issues in Plato’s thought, such as rhetoric

11. Cf., e.g., text accompanying infra notes 52-64.
or civil disobedience. But scholarship on Plato’s general understanding of justice is rare.

Absent any such canon within mainline legal theory, I shall instead turn to some of the standard introductory textbooks on legal theory. Given that textbook writers have limited space even to review the dominant movements, and often have to omit themes or figures that have exercised far more influence on legal scholarship than Plato, it is perhaps surprising to find any mention of him at all. Yet a considerable number of writers do seem to feel that he must somehow be mentioned. Certainly, introductory texts can never provide definitive accounts of any theorist. They are merely invitations to further reading, as their authors are usually the first to insist. Still, absent any real analyses of Plato in legal scholarship, it is remarkable that what the student texts do reveal—texts that are otherwise utterly different in their preferences, perspectives or methods—are suspiciously similar, suspiciously positivist, prejudices towards his thought and towards pre-modernity generally.

My criticisms will not be intended in any pedagogical sense. I shall take no detailed position on how to teach legal theory or to write student textbooks. If I had to write my own text, drawing from mainstream, or even alternative, legal scholarship, I might do no better than those currently on offer. What interests me is not that accounts of Plato in the basic texts are simplified or dismissive, so much as the ways in which he is simplified, which recapitulate the simplistic positivism that most authors claim to have surpassed. To be sure, I am aware that student texts are easy targets. My aim, however, is not to engage in searching Platonic exegesis—as one might do in commenting upon a magisterial treatise penned by a committed classicist—so much as to identify some overall attitudes towards Plato and towards pre-modern thought generally. I shall begin by dividing the standard texts into two overall approaches, ahistorical and historical. That distinction is loose, but I draw it because we might expect at least the more historically structured texts to devote closer attention to pre-modernity. As we shall see, that is not always the case.

A. The Ahistorical Method


13. Cf., e.g., text accompanying infra note 25.
14. In Heinze, supra note 5, I argue that it is not through Plato’s theory of Forms that we find the best insights into his legal thought. It is telling that two other general attempts are now a half-century old. See Huntington Cairns, "Plato’s Theory of Law" (1942) 56 Harvard L. Rev. 359; Jerome Hall, "Plato’s Legal Philosophy" (1956) 31 Ind. L. J. 171.
Jurisprudence: Theory and Context follows a similar sequence. That essentially ahistorical method is common among Anglo-American writers. They often begin at a relatively recent historical period, usually with classical positivism and the various, often liberal (then, later, perhaps more radical or critical) responses to it.

That starting point places, often uncritically, post-Westphalian, state-centered understandings of law in the foreground. Any alternatives to post-Hobbesian positivist, liberal or state-centered perspectives are generally limited to those theories that have arisen as conscious responses to them: Marxism, Critical Legal Studies, Feminism, Critical Race Theory, LatCrit, Queer Theory, Post-Colonial Theory, or Post-Modern Theory are all marshalled to challenge various assumptions within modernity, and perhaps to ponder alternatives to it. Yet those critical movements are themselves children of modernity, expressly defining themselves in relationship to it. Some of their core concerns—oppression, exclusion, construction of difference, privileged discourses—could certainly be applied to law and power in any number of cultural and historical contexts. Within legal theory, however, their application has generally been limited to actual or putative critiques of law within the timeframe of Euro-American modernity. In these ahistorically structured textbooks, the more detailed expositions of justice theory, or of other natural law or higher law theory, is commonly presented through the versions of writers like Fuller, Finnis or Rawls, who, too, are writing with any eye towards the norms and procedures of modern states. Finnis's natural law, for example, refrains from explicitly

18. See, e.g., Davies & Holdcroft, supra note 15 at chs. 1-5; Bix, supra note 17 at chs. 3-7; James Penner et al., eds., Jurisprudence & Legal Theory (London: Butterworths, 2002) at chs. 3-5 [JLT]; Hilaire McCourey & Nigel D. White, Jurisprudence 3rd ed. (London: Blackstone, 1999) at chs. 2 and 3. Within this category of ahistorical texts, we can distinguish a sub-group containing a distinctly thematic format—arranged according to concepts such as "Justice," "Morality," "Positivism," and the like. See, e.g., R.W.M. Dias, Jurisprudence, 5th ed. (London: Butterworths, 1985); George P. Fletcher, Basic Concepts of Legal Thought (Oxford: Oxford University Press, 1996). Such works, adhering even less to an overtly historical ordering, have been that much less inclined to examine ancient thought.
19. See, e.g., Davies & Holdcroft, supra note 15 at ch. 16; Bix, supra note 17 at ch. 19; JLT, supra note 18 at chs. 19-20; McCoubrey & White, supra note 18 at chs. 11 and 12.
22. See, e.g., Davies & Holdcroft, supra note 15 at 186-204, 268-308; Simmonds, supra note 3 at chs. 2, 7.
23. Cf. text accompanying infra note 70.
metaphysical concepts; in so doing, he effectively adopts the metaphysical neutrality characteristic of modernist, post-Enlightenment secularism.24

A few of the standard texts, such as *Jurisprudence & Legal Theory*, edited by Penner, Schiff & Nobles, do discuss the specific issue of the duty to obey law, examined in *Crito*.25 However, that brief, early dialogue provides an entirely preliminary insight into Plato’s broader understanding of law. In one of the text’s chapters on natural law,26 only half a page is devoted to Plato’s more general theory. The authors claim that Plato’s concept of justice is rooted in “absolute values”—not unlike the view of R.W.M. Dias in his *Jurisprudence*, where, in a brief discussion of Socrates and Plato, he attributes to Plato a “firm assertion of the discoverability of absolute standards [that] started European thought along a road which it still pursues.”27 Those traditional views, which hold that Plato’s ethical, political or legal theory is understandable only with reference to absolutes, expressly or tacitly correlate to limited readings of his metaphysics and epistemology, largely as set forth in the *Republic*. While Plato’s metaphysics and epistemology have long been subject to highly complex readings among classicists and political philosophers, legal theorists rarely appear to move beyond simplistic versions, that run more-or-less as follows: In the *Republic*, it is said, justice derives from the Form of Justice, which is an “absolute” concept of Justice. Yet, on closer examination, the Form of Justice (either in itself, or as divined by the philosopher-ruler) turns out to be unknowable. Accordingly, justice itself is unknowable. Plato therefore has no real theory of law or justice.

As I shall argue in Section II, those interpretations recapitulate views set forth a half-century ago by Karl Popper and other critics of Western authoritarianism. But first let’s consider Hans Kelsen, a mainline legal theorist who, too, had set the stage for that kind of reading at roughly the same time. It may seem unlikely that, in the 21st century, there would still be much use in picking a fight with Kelsen. After all, the positivism-versus-natural law debates have been rehearsed to death; nor can there be much in Kelsen that has not already been dragged over the coals many times before. Moreover, it is debatable whether Kelsen’s specific

28. Dias, supra note 18 at 74. Unlike Dias, then, Nobles & Schiff do not indicate whether they believe that Plato presents his “moral absolutes” as discoverable. In addition, Dias attributes the same belief in discoverable absolutes to Socrates. (He mentions only the historical Socrates, leaving unstated whether he assumes the views of the historical Socrates to be identical to, or in any respects different from, those of Plato’s Socrates. He cites only *Crito*, a Platonic source.) Of course, as Socrates left no written work, his beliefs must be reconstructed. Recourse to a “Socrates” figure became a stylistic convention in Athens, with any number of views attributed to him. There is good reason to believe Plato’s depiction when Socrates is engaged in *elenchus*—questions and answers eliciting contradictions in his interlocutors’ views, a process, however, that often yields no final answer to the question posed. It is far more questionable, however, whether Plato’s account is always reliable when he attributes to Socrates specific, affirmative views. See, e.g., Christoph Kniest, *Socrates zur Einführung* (Hamburg: Junius, 2003); Gregory Vlastos, *Socrates: Ironist and Moral Philosopher* (Ithaca, NY: Cornell University Press, 1991).
pronouncements on natural law exercised great influence. Kelsen’s stature in German or French theory may be solid, but Hart’s discussion of him is limited, and he is scarcely mentioned by scholars as different as, say, Dworkin, critical legal theorists, or feminists. Nevertheless, there is real value in re-visiting Kelsen’s approach to pre-modern thought. I shall not speculate on the degree to which Kelsen’s reading of Plato has been consciously followed; far more interesting is the fact that so many of today’s theorists, whether they know it or not, and even if they have not spent much time reading Kelsen, have scarcely progressed beyond the approach that he adopted over fifty years ago.

Kelsen begins by noting, that, to explain justice, Plato “develops his famous theory of Forms. The Forms are transcendent entities, which exist in exist in a world other than that which we can perceive through the senses.”99 Let’s just note from the outset that, whilst it is true that the Forms are not amenable to sensory perception, Plato does not in fact situate them in some “world” that is “other” than our own. A better reading would have stated that, for Plato, as indeed for much of Western philosophy aside from empiricism and logical positivism, our “world” does not consist solely of that which is accessible to sight, sound, smell, taste or touch. Aristotle’s unmoved mover, Aquinas’s God, Kant’s reine Vernunft (“pure reason”), Hegel’s Geist (“mind” or “spirit”), or indeed Freud’s es (“id”) or Heidegger’s thinking or poetic self, cannot, without more, be said to be fully knowable through the five senses.

But that point need not detain us here. To give Kelsen the benefit of the doubt, we can construe his choice of words in that passage as having envisaged not technical precision, but only a kind of impressionistic description of Plato. Kelsen then charges, “As to the idea of absolute Goodness, [Plato] even expressly states that it lies beyond all rational knowledge, i.e., beyond all thought.”99 In a nutshell, Kelsen’s argument, which I shall call “Kelsen’s tautology”, takes the following syllogistic form (for convenience, the formalization is mine),

(A1) The Form of Justice is unknowable.
(A2) The justice of any thing or person x derives from the Form of Justice.

∴ The justice of any thing or person x is unknowable.

From the perspective of classical, formal logic, every syllogism derives from—i.e., merely spells out in step-by-step fashion—a tautology. In that sense, following from Kelsen’s major premise A1, the theory that he ends up attributing to Plato amounts to no more than: “Justice is unknowable therefore justice is unknowable.” When Plato’s hundreds of pages on justice are collapsed into that empty tautology, it is no wonder that Kelsen fails to discuss him in any depth.


Surely, we would summarily dismiss any scholar who would reduce all of Kelsen's own theory in such a way, equally robbing it of its subtler insights, e.g.,
(B1) The Grundnorm is ultimately inscrutable.
(B2) A legal system is founded upon the Grundnorm.

A legal system is ultimately inscrutable.

Like many of today's textbooks, Kelsen never mentions any of Plato's more specific discussions of justice, nor the variety of Plato's approaches. Yet Plato's theory of Forms, and his approach to ethics and justice, are subtler than the wholesale reductions reflected in Kelsen's premises (A1) and (A2) would suggest. When later works like Thaetetus, Sophist, Parmenides, Statesman, or Laws are considered, a more complex metaphysics and epistemology emerge. In those works, the theory of Forms, if not abandoned, is largely absent from discussions of law and justice. Never, not even in the Republic, does Plato suggest anything like a straightforward deductive calculus, whereby act x would be subsumed under the Form of Justice in order to generate a finding that x is either "just" or "unjust." Certainly, Plato inveighs against the moral relativism of the Sophists. However, any suggestion that he sees the opposite as nothing more than an abstract moral absolutism finds little support in his writings.

In the Republic's famous image of the cave, and in other dialogues, Plato leaves unresolved whether or by whom absolute or ultimate moral values can be discovered. That ambiguity is sometimes reflected in his recourse to allegory in place of dialectic. Kelsen is right to identify, in the famous Letter VII, a Platonic scepticism towards definitive statements about "the truth that is attainable about virtue." But he is wrong to read that admission as an acknowledgment either of the futility of contemplating justice or of the essential "mysticism" of Platonic thought. Plato actually explains what he means a few lines further, arguing, "whenever we see a book, whether the laws of a legislator or a composition on any other subject, we can be sure that if the author is really serious, this book does not contain his best thoughts." The authorship of Plato's letters has long been debated, but the seventh letter is widely viewed as reliable, and that passage states views expressed by Plato elsewhere. Far from revealing any Platonic "mysticism" as legal theorists often suggest, such a passage is one of several examples of Plato's rule scepticism, an insight that has long been of fundamental concern to legal theory. By "rule scepticism", I mean not only scepticism about whether it is formally declared norms, as opposed to underlying social, political, economic or psychological factors, that

31. Cf., e.g., Rafael Ferber, "Did Plato ever Reply to those Critics, who Reproached him for 'the Emptiness of the Platonick Idea or Form of the Good'" in Essays, supra note 7 at ch. 4.
33. See generally, e.g., Plato, supra note 1, Apology, Protagoras or Gorgias, in which Sophists are portrayed as teaching only the pursuit of individual advantage.
34. See, e.g., Plato, supra note 1, Republic 517b.
36. Plato, supra note 1, Letter VII 344b.
38. Plato, supra note 1, Letter VII 344c.
39. See, e.g., Plato, supra note 1, Phaedrus 275e; Statesman 295c-e.
40. See infra Section II.
“really” decide disputes. Rather, I mean, in addition, scepticism as to whether a legal system can or should be conceived as an affair of rules (e.g., in Hart’s sense). Rule scepticism in those senses is often presented as a distinctly 20th century insight, associated with legal realism, Critical Legal Studies, and various post-critical movements. Yet similar insights abound in Plato’s Republic, Statesman and Laws. Far from presenting anything mystical, Plato shows himself to be anticipating later approaches, of writers as different as Aristotle, Aquinas, Rousseau, Hegel, Marx, Holmes and Dworkin, according to whom law must be understood not merely with reference to some abstract absolute, but, above all, with reference to the matrix of values and attitudes within which it is embedded (elsewhere I have proposed the term epinomia to describe that approach"). Small wonder that the Republic is largely devoted not to abstract speculation on the nature or definition of justice, but to the means—in particular, educational—by which social relations can be nurtured. Small wonder, too, that Aristotle’s detailed study of justice appears in a book devoted to the cultivation of aretē, i.e., human virtue or excellence, within the here-and-now context of everyday social life.

Plato does not refer to the Form of Justice every time he draws a conclusion about justice. He constantly takes, and invites us to take, positions on justice and injustice that rely more on common sense reasoning—or rather, on a dialectical training of intuitions, but not far from common sense—than on any clear reliance on the abstract Form of Justice. In Crito, it is largely a common-sense dialectic, and nothing mystical or metaphysically absolutist, that leads Plato to reject the view that an unjust conviction justifies evasion of punishment (which, incidentally, does not make his position there positivist: the view that an unjust law must be enforced need not assume that a legal system operates independently of politics or morals). Similarly, in Apology and Gorgias, Plato, again without needing to cite any absolute Form of Justice, inveighs against the corrupting influences of wealth or demagogy upon political and legal processes, in terms strikingly similar to our own condemnations when such forces rear their heads today. In Republic, Plato condemns the pursuit of self-interest within democratic societies as dangers to justice. He condemns a legal system that, far from curbing self-enrichment, lavishes upon it all the means to thrive, in the form of antagonistic legal entitlements. In Protagoras, he challenges practices that, instead of seeking to identify moral values, utterly eschew that search, offering their practitioners (notably the Sophists) only the tools for exploiting self-interest, and subverting justice, by being able to turn any conventional value towards individual advantage. In the earlier and briefer Euthyphro,

42. Cf. Heinze, supra note 5, sec. II.B.
43. Ibid. at sec. I.B. That approach is commonly associated with communitarianism; however, communitarianism can encompass a variety of approaches that may not all be particularly “rule sceptical” in the sense I am using here. Cf. ibid. at sec. III.A.
44. Cf., e.g., Julia Annas, An Introduction to Plato’s Republic (Oxford: Oxford University Press, 1981) at ch. 9 (arguing that, in the moral and political sphere, the Forms cannot be the objects of general and abstract propositions).
45. See, e.g., Plato, supra note 1; Republic 404e-405d; cf. generally, Heinze, supra note 5.
Plato questions the possibility of purely conventional foundations for any just normative system; and, in *Ion*, he rejects the suggestion that ingenuity in expressing social values (as he had found in Homer, or indeed as we might find anywhere from Shakespeare to Racine, Balzac, Schiller, Tolstoy, Zola or T.S. Eliot) betokens any critical understanding of them.

In sum, Plato constantly draws conclusions about, or relevant to, justice, without invoking "absolute", or indeed any particularly complex epistemological or metaphysical concepts, drawing him closer to the dialectical approaches of Gadamer or Habermas than to any caricature of dogmatic endorsements of moral absolutes. Certainly, Plato's variety of approaches makes him less manageable than the simple reduction of them to his theory of Forms would make him out to be. But they also render his approaches far more interesting. We are forced to abandon a single, overarching label ("natural law" or "idealism") under which the entirety of his thought might be subsumed, and forced instead to examine each of his specific arguments in turn, and in the dialectical spirit in which they are presented. It would be curious for that subtler approach to Plato, or to any pre-modern thinker, to come as a shock to modern legal theorists. Leaving aside a few die-hard positivists, legal theorists today overwhelmingly renounce the suggestion that any one, overarching principle, or discrete set of principles, can provide an exhaustive account of law. Fragmentation and partial insights are the order of the day. Many scholars now believe that vastly different—sometimes contradictory, both among themselves and even within themselves—understandings of law can each contribute genuine insights. Certainly, the basic textbooks insist on that view.  

Plato cannot be dismissed for failing to provide that one, unified account, which he himself suggests, and which theorists today generally hold, to be impossible. The notion of multiple and fragmented approaches to law or justice is no new discovery, and would only appear as such to those who, far from overcoming the confines of modernity, are sufficiently trapped within them to think that all of Western thought before the 20th century hinged upon straightforward "foundationalism" or "grand narratives." I doubt we can find a theorist who surpasses Plato in recognizing the real problems of foundationalism in moral, political or legal thought, which may be why he often approaches seemingly foundationalist projects, like his cities in the *Republic* or *Laws*, with considerable irony and a strong sense of the limits of such projects. (Aristotle's construction of law and morals as providing "practical" rather than "theoretical" domains of inquiry reflects a similar reserve towards abstract absolutes within the realm of the normative.  

Let's follow Kelsen a step further. At first, his choice of Plato as lynchpin of his attack on natural law may seem altogether odd. Natural law theorists in the 19th and early 20th centuries based few of their deeper insights on Plato. At the time


47. Cf., e.g., Cotterrell, *supra* note 3 at ch. 9 (noting the anti-foundationalist claims of post-modern and deconstructionist theory).

Kelsen was writing, Plato had never stood as the kind of towering pillar of the natural law tradition whom positivists would have had to defeat in order to nurture their own approaches. Why does Kelsen even bother turning so much attention to Plato—more, say, than to Aquinas, whose choice of God as the ultimate source of norms might have seemed the more obvious and manageable target; and who, as a Christian writer, represented a far more influential tradition in continental Europe? Once again, even if subsequent writers have not expressly followed Kelsen on this point, his overall approach reflects an attitude still frequently found among writers today. Kelsen sees Plato, largely through the theory of Forms, as an arch-naturalist, a bare-bones specimen of all that natural law says and does. By assailing Plato, Kelsen aims to uncover and demolish what he sees as essential to all natural law theories. (In fairness, he does see a wee bit more in Aristotle, but little of the depth or subtlety of Aristotle's understanding of general justice.) The Forms, which are supposed to be the perfect actualization of all that is—and, therefore, of all that is just—express, for Kelsen, precisely what Christians are doing by inventing God.

Kelsen's diagnosis of Plato seeks to show how all natural law theories boil down to different variations of the same core insights and assumptions. With the barest of caveats, the phrase "the Form of Justice" in Kelsen's autology can be replaced by "God" whereby all of Christian natural law would be just as handily disposed of. "[T]he idea of the absolutely Good", he argues, "plays the same role in Plato's philosophy as the idea of god in the theology of any religion." Note that German capitalizes nouns, so I give Kelsen the benefit of the doubt in translating "Gott" as "god" rather than "God." Even then, the assumption that "any religion" has a "theology" incorporating an "idea of god", if marginally forgivable through, say, to the Seventeenth or Eighteenth centuries, was careless parochialism by the time Kelsen was writing, when the variety and complexity of world religions had long been taken more seriously. Certainly, Weber had begun to signal a more nuanced understanding. Kelsen's approach emphasizes how casually, and with what little rigour, he purports to lump together and dispose of all natural law thinking, indeed as superstition, in one fell swoop. We would hope that today's legal theorists might tiptoe a bit more gingerly around such vast pronouncements about "any religion" or about "all" of classical natural law. Nevertheless, Kelsen's aim of treating all classical natural law theories as making essentially the same assumptions remains common among today's theorists.

Some authors take the bull by the other horn. Instead of reducing all natural law, including Aquinas, to Plato's approach, they reduce all of natural law to the old

51. See Weber, supra note 10 at ch. 10. Similarly, a work like Herman Hesse's Siddhartha from 1922 suggests how subtle appreciations of non-Western belief systems had long been penetrating educated Western European thought by the early 20th century. See Herman Hesse, Siddhartha: Eine indische Dichtung (Frankfurt am Main: Suhrkamp, 1959).
maxim *lex iniasiua non est lex*, "an unjust law is no law", as exemplified in Aquinas's approach. They use Aquinas as the same kind of proxy that Kelsen had made out of Plato, and with even less success. They scour the Greeks to find expressions of *lex iniasiua*. Failing to find it, or finding it only obliquely, they effectively characterize Plato's and even Aristotle's views as at best, vague and inchoate. For example, Bix writes that "one can locate a number of passages in the classical Greek writers that express what appear to be natural law positions", effectively casting doubt on whether Plato or Aristotle offer any distinct or developed views on law at all. Bix argues that it is only with Cicero that *lex iniasiua* is clearly announced, then later developed by Aquinas, as if Plato and Aristotle were somehow trying, but failing, to reach that (or some similar) goal. For a thinker like Aquinas, who delineates categorically distinct concepts of "natural" and "human" law, whereby natural law always stands as an eternal measure for any given human law, *lex iniasiua* indeed becomes an important feature (although Bix and others do note Aquinas's qualifications). In the same vein, Bix cites Plato's statement in the *Laws* that laws not aimed at the common good are "no true laws", and are therefore unworthy of obedience. That passage, however, is no different from several, more-or-less polemical passages in which Plato condemns bad law (not least, Plato's contemptuous dismissal of the content or operation of law in democracies such as that of Athens). However, the *Crito* is a classic, and far stronger and clearer, statement of the opposite view, i.e., that at least as a general matter, even deeply unjust laws may nevertheless command general public obedience. In the *Republic*, the *Statesman* and the *Laws*, Plato spends a good deal of time examining better and worse kinds of laws and norms (in addition to his condemnation of the Athenians' conviction of Socrates, e.g., in the *Apology*), as does Aristotle in the *Politics*. Bix's assumption of one fundamentally defining feature of classical natural law, in the form of a kind of universal and transcendental code, or indeed a maxim like *lex iniasiua*, which glows only dimly in Plato or Aristotle, then brighter from Cicero to Augustine, finally radiating with Aquinas, deeply mischaracterizes pre-modern thought. It omits any possibility that Plato and Aristotle are thinking about law, politics and society in altogether different terms from their Roman or Christian successors; that there is no particular brand of "natural law" that would sum up pre-modern thought.

Raymond Wacks takes the same approach. In *Understanding Jurisprudence*, Wacks claims, "It was ... the Catholic Church that gave expression to the full-blown philosophy of natural law as *we understand it today*," i.e., as a system of higher-law norms. For Wacks, too, *lex iniasiua* becomes the defining feature of classical

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52. Bix, supra note 17 at 65-66 [emphasis added].
53. Ibid. at 66.
54. Ibid. at 68.
55. Ibid.
56. Ibid. at 66, n. 3.
57. *Laws* 715b (Bix citing the Taylor translation). Cf., *Laws* 715b in *Plato*, supra note 1 (Trevor Saunders translating *out orthous nomour* as "bogus laws").
natural law. Unsurprisingly, he summarizes all of Greek thought about law during the time of Plato and Aristotle in four sentences, only specifically discussing Aristotle and stoicism. Wacks claims in passing that Plato and Aristotle expressed views resembling lex inustia, though he cites no original sources to support that claim. Bix makes an almost identical remark, also citing no original source other than the brief passages from Plato and Aristotle already mentioned. Wacks cites only Finnis who, again, refers only to the kinds of general, offhand passages to which Bix refers, and which do not even approach general characterizations of Plato's or Aristotle's views of law.

For Kelsen, collapsing Plato meant summarizing the whole project of natural law; for Bix and Wacks, summarizing Aquinas does largely the same job. I would argue, however, that Aquinas represents Aquinas, and does not particularly represent Plato or even Aristotle. How would we rate a scholar who took only Mill to represent all of liberalism, from Locke (whose fundamental, natural rights Mill rejects) to Kant (whose deontology Mill never seriously examines) to Rawls (whose post-industrial, administrative state Mill could not anticipate)? Wacks's one substantive sentence on Aristotle states, "With Aristotle, there is less reference to natural law than to the distinction between natural and conventional justice." Such a statement is either paradoxical or meaningless. Natural law theorists constantly discuss relationships (or "distinctions") between natural and conventional justice; to say that Aristotle, in doing precisely the same thing, thereby fails to do natural law, is not easy to fathom. And yet the statement isn't even true enough to merit that assessment. When read within the context of the Politics, and even more so within the context of the Nicomachean Ethics, it becomes clear that Aristotle's primary aim (not unlike Plato's on this point) is to harmonize legal norms and practices with the habits and customs of a well-functioning society, rendering rather artificial any categorical distinctions between "natural" and "conventional" justice. Arguably, that is why, within contemporary political philosophy, communitarian theorists find such appeal in him.

In his standard work Lloys Introduction to Jurisprudence, Freeman discusses only the Republic, summarizing Plato's legal theory in two sentences. Just as Bix and Wacks depict Greek thought as a kind of weak embryo of genuine natural law theory, Freeman, too, writes that Plato has "nothing to say on natural law as such in the sense of a normative and overriding system of rules." Like Bix and Wacks,

59. Ibid. at 19.
60. Ibid. at 17.
61. Ibid. at 19.
62. Bix, supra note 17 at 68.
63. Wacks, supra note 58 at 19, n. 14.
64. Finnis, supra note 24 at 363-66 (citing Laws 712e-713a, 715b; Statesman 293d-e; Republic 422e). Like Bix, Finnis, ibid. at 363, n. 8, follows Taylor's translation of "orthous nomous" in Laws 715b as "no true laws." Cf. supra note 57.
65. Wacks, supra note 58 at 17.
66. Cf. infra Section II.
68. Freeman, supra note 46 at 103.
69. Ibid.
Freeman does not explain why natural law should be understood in that "sense." Such a conception of natural law may apply to a modern theorist like Finnis, who, in a post-Westphalian, post-industrial age stamped with catalogues of individual rights, accords high status to certain enumerated individual interests. However, that view distorts even Aristotle, Augustine or Aquinas, let alone Plato.

Aristotle rejects the notion of law as being essentially, or ideally, a system of rules. His theory of special justice admittedly has a rule-bound quality, expressed in the form of calculable rectifications and distributions. Special justice, however, applies only in certain circumstances. Justice as a whole, or general justice, the everyday lawfulness of people going about their lives, arises from a matrix of shared values attitudes and customs. That view reflects the Greek understanding of the polis as a small, close community. It also adopts the concept of nomos, not as the equivalent of, but as, to an important degree, the opposite of modernist, more rule-bound concepts of law. In Aquinas's post-polis, post-Roman world, rulers were no longer assumed to maintain deep and ongoing contact with the ruled. In that context, formalized rules would inevitably take on a greater role. Certainly, then, Aquinas recognizes the importance of rules. Nowhere, however, does he propose anything like a system of rules as a means of understanding law or justice. None of his four concepts of law—eternal law, natural law, human law, divine law—boils down to a mere catalogue of rules. Aquinas sees rules, insofar as they are coercive, more as a necessary evil than as the crucial feature of law. The aim of good law is not to induce mechanical obedience, but "to lead men to virtue." Aquinas provides several defenses of formal rules, at the same time recognizing (like Aristotle, in this respect) that they must promote, rather than replace, a society governed by shared habits, customs and values. Formal law must be used against those who act lawlessly, but the preferable state of affairs is one in which order and justice prevail without excessive reliance on formally promulgated law. Similarly, it is questionable whether Augustine's civitas dei, or even the best possible civitas terra, are to be construed as essentially rule-bound worlds. To make the point in

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70. See, e.g., Finnis, supra note 64 at 85-90, 223-26.
72. Complete Works, supra note 1, Nicomachean Ethics v2-5, 1130a12-1134a15.
73. See Complete Works, supra note 1, Nicomachean Ethics v1; Politics vii.4-5, 1325b33-1327a12.
75. See, e.g., Summa Theologica, supra note 1 at Part I-II, q. 95, art. 1, answer.
76. See, e.g., ibid. at q. 91, art. 1.
77. See, e.g., ibid. at art. 2.
78. See, e.g., ibid. at art. 3.
79. See, e.g., ibid. at art. 4.
80. Ibid. at question 96, article 2, reply to obj. 2.
81. See, e.g., ibid. at q. 95, art. 1, reply to obj. 2.
82. See, e.g., ibid. at principle reply, and at reply to obj. 1.
a slightly different way, the relationships between classical natural law, commu-
nitarianism, and classical justice theory are complex, and each cannot easily be
explained without reference to the other.

Freeman's conception of natural law, then, provides an inapposite standard for
evaluating both Plato and other pre-modern theorists, and, in that respect, as in
other textbooks, scarcely moves beyond Kelsen. Kelsen, too, had fleetingly noted
the "variety" of natural law theories, but constantly reduces them to their super-
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ficially shared quality, namely, their representation of what he calls a "transcen-
dental" normative order relevant to, yet existing independently of material reality,
and which, in that respect, allows for few significant differences among them.
For Freeman, Plato's legal theory reduces to the philosopher ruler; and the
philosopher ruler reduces to Freeman's highly subjectivist—and, to that extent,
utterly un-Platonic—caricature of "the mystery locked in his own heart."33
Compared, say, to the Hobbesian or Austinian sovereign, who stand incontestably
at the foundation of those thinkers' respective theories, Plato's philosopher ruler
remains a relatively derivative, even tentative, construct. The Laws dispense with
it, and nothing in the Apology, Crito, Euthyphro or Ion, or even in the Phaedo,
Protagoras, Gorgias, Greater Hippias or Philebus distinctly depends on it. The
philosopher ruler is not the foundational figure for Plato that the sovereign is
for Hobbes and Austin.

B. The Historical Method

No general text on legal theory can employ a rigid chronology. By the time legal
theory moves into the 20th century, positivist, liberal, realist, and then natural law
and critical movements emerge in tandem, often in ongoing dialogue with each
other. Nevertheless, some of the standard texts attempt to incorporate pre-modern
legal theory within an historical sequence. Wayne Morrison's Jurisprudence and
Wolfgang Nauke's Rechtsphilosophische Grundbegriffe stand out among the few
historically-minded textbooks that provide at least an introductory sense of Plato
as a figure whose views on law reflect central themes throughout the history of
legal theory. Otherwise, even the historically-structured texts generally fail to pro-
vide subtler understandings of pre-modernity.

Norbert Horn's Einführung in die Rechtswissenschaft und Rechtsphilosophie provides a particularly serious attempt at a more rigorously historical approach,
including a thoughtful discussion of Plato. However his examination, too, reveals
the common pitfall of focusing too narrowly, and too literally, on the Republic.
Those who fall into that trap make either, or both, of two mistakes. Either, as Kelsen

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85. Freeman, supra note 46 at 103.
86. Morrison, supra note 4 at 26-40.
88. Norbert Horn, Einführung in die Rechtswissenschaft und Rechtsphilosophie, 2nd ed. (Heidelberg: C.F. Müller Verlag, 2001) at ch. 10.
does, they reduce Plato’s entire understanding of justice to the Form of Justice, and then reduce the entire Form of Justice to something fundamentally cryptic; or, as Horn does, they reduce Plato’s thought to a mechanical schema, i.e., to the mere system of rules and institutions required to keep the model society running: the philosopher ruler does x, the guardians do y, everyone else does z. \textit{Voilà} the Republic’s “legal system.” Plato’s legal thought becomes reduced to a mere summary of the Republic, with no specific, critical attention to the subtler questions of, say, rule scepticism, formalism, or the character of the relationships between law and other social values.

Arthur Kaufmann’s \textit{Problemgeschichte der Rechtsphilosophie} briefly notes the roots of Western philosophy, including legal theory, within pre-Socratic Greek thought, but says nothing about Plato’s distinct contribution.\textsuperscript{89} J.M. Kelly’s \textit{A Short History of Western Legal Theory}, more than most English-language texts, takes seriously the importance of approaching Western legal theory as an intellectual history dating back to antiquity, but offers only a perfunctory analysis of Plato.\textsuperscript{90} In \textit{Asking the Law Question}, Margaret Davies’s two-page “critical understanding”\textsuperscript{91} of Aristotle\textsuperscript{86} omits discussion of Aristotle’s most basic concept of general justice,\textsuperscript{93} let alone his concepts of nomos,\textsuperscript{86} of the polis,\textsuperscript{90} or of specific justice,\textsuperscript{88} and includes no other discussion of Greek thought. George Christie and Patrick Martin offer a thoughtful appreciation of Plato,\textsuperscript{96} but reserve their detailed exposition of classical justice theory for Aristotle\textsuperscript{88} and Aquinas.\textsuperscript{99} Note also that we can count, as a subgroup among the historical texts, those that could be called \textit{modernist}\textsuperscript{100} Such texts expressly situate their inquiry in the post-Westphalian West.\textsuperscript{100} Once that time frame is expressly stipulated, an inquiry beginning with Hobbesian or Austinian positivism becomes historically justified. Such texts make no pretense to examine pre-modernity, and thus avoid the overly simplified approaches of most of those that do. Still, they merely leave open the question as to the degree to which legal

\begin{flushleft}
90. J.M. Kelly, \textit{A Short History of Western Legal Theory} (Oxford: Oxford University Press, 1992) at 4, 12, 15-16, 22, 31, 33-36, 64. \\
91. Margaret Davies, \textit{Asking the Law Question} (North Ryde, NSW: The Law Book Company, 1994) at 1. \\
92. \textit{Ibid.} at 61-62. \\
93. \textit{Complete Works}, supra note 1, \textit{Nicomachean Ethics} V1. \\
94. Cf. text accompanying supra note 74. \\
95. Cf. text accompanying supra note 73. \\
96. Cf. text accompanying supra note 72. \\
98. \textit{Ibid.} at 29-117. \\
100. Again, I am using that term in a broad sense, to include theories critical of, but nevertheless generated within, and usually as a response to, modernity. Cf. text accompanying supra notes 19-21. \\
101. See, e.g., Cotterrell, supra note 3; Simone Goyard-Fabre, \textit{Les principes philosophiques du droit politique moderne} (Paris: Presses Universitaires de France, 1997). Despite occasional references to pre-modern thought, Simmonds’s work is situated firmly within the perspectives of modernity. See Simmonds, supra note 3.
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theory should be confined either to a post-17th century, or even to a post-19th century, framework.

C. Some Objections

That brief sampling of standard textbooks suggests a dismissive attitude towards Plato, reflecting a more general dismissal of the complexity of pre-modern thought. Increasingly, the content of English-language texts has become limited to theories generated within the late 19th and 20th century, and increasingly Anglo-American sphere. That almost exclusive emphasis on theories arising out of Western or Anglo-American modernity turns pre-modern approaches into distant curios, scarcely relevant to modern concerns. The idea that one can generate a critique of a temporally-defined concept like “modernity” without stepping outside of that temporal frame, without placing modernity in a critical, historical context, is one of the oddities of Anglo-American legal theory, absent from many continental approaches.

Today, much Anglo-American legal theory (although we could concede some worthy exceptions) consists of little more than 20th-21st century English-speakers discussing 20th-21st century English-speakers. Once again, it is the vestigial, die-hard positivists who can best defend that approach, insofar as they openly declare law’s essential elements to be describable in ahistorical terms. But for those who claim to understand law and legal thought as products of history, the failure to take that reflexive step outside of their own time-frame of Western modernity is puzzling. (To be sure, the superiority of continental approaches to antiquity does not mean that they are superior overall. Continental texts, albeit stronger on pre-modernity, are often weak on recent critical—e.g., post-colonial or post-structuralist—developments. Moreover, in focusing on Plato, I seek to call attention to a deficit throughout modern legal theory. For example, continental theorists, albeit stronger on pre-modernity, also overlook much of Plato’s distinct contribution.)

In both the historical and the ahistorical approaches, some of the most fundamental problems of justice are often presented as if no one had given them much thought until 19th century positivism began to crumble. The Holocaust, the Nuremberg Tribunals or Stalinism are commonly introduced as the big test for positivism. The impression is almost conveyed that questions of tyranny or abuse

102. There are exceptions. See, e.g., Morrison, supra note 4 at 15-74 (examining ancient and medieval approaches in greater detail).
103. For recent examples, see, e.g., Naucke, supra note 87 at 9-53 (examining approaches to law from Plato to Machiavelli); Horn, supra note 88 at §§ 10-14 (examining ancient Greek, ancient Roman, and medieval thinkers); Hasso Hoffmann, Einführung in die Rechts- und Staatsphilosophie (Darmstadt: Wissenschaftliche Buchgesellschaft, 2000) at 67-108 (examining pre-modern concepts of justice); Michel Villey, Philosophie du droit (Paris: Dalloz, 2001) at 40-71 (examining ancient concepts of justice). There are notable exceptions to that trend among Anglo-American texts, but very few. See, e.g., Christie & Martin, supra note 97 at 29-187. Cf. text accompanying supra notes 98-99.
104. See text accompanying supra note 89.
105. See, e.g., McCoubrey & White, supra note 18 at 50-52. Cf., e.g., Freeman, supra note 46, 367-91.
of law were just not major concerns of legal theorists before the 20th century. The opposite is closer to the truth. Tyranny—and, more generally, the relationships among law, ethics, justice and politics—is a central problem for Plato, as it is for Aristotle. By focussing on Plato, and the philosopher ruler, as the genesis of all Hitlers and Stalins, we too readily forget how vehemently Plato denounces despotic law and government, e.g., in his excoriation of the proto-Nietzschean Thrasymachus in the first book of Republic.

One can imagine some objections to the charges I bring against legal theorists. One objection might be called an appeal to "limited ahistoricism" which might run like this: "Of course modern legal theory concentrates on today's states. That is our context. Those are our legal systems. Pre-modern thought may be interesting, but is not our immediate concern." Yet that would merely be another version of age-old objections to all historically-minded research: Why study Dante or Shakespeare, when we live in the here and now? Why study Caesar or Charlemagne, when we live in the here and now? Those are old chestnuts, and, again, the objection is persuasive if law, as the positivists maintained, is a fundamentally ahistorical product. Certainly, it is the way standard textbooks on mathematics, chemistry, physics or biology are written, devoting perhaps a few, anecdotal pages to historical views, for purposes of drawing some fleeting comparisons. If, however, our legal systems are deeply historical and cultural products, then the reason to study a figure like Plato is precisely because we critically understand modernity only by locating it within a time-frame that reaches beyond modernity.

Another objection might be called the appeal to the disciplines, which might run as follows: "Of course philosophy such as Plato's is important. But that's not legal theory. It's moral philosophy or political philosophy." Here too, debates about the integrity of the disciplines are old, and I shall not rehearse them now. Driven to their extreme, they would force us into the starkly parochial (arguably imperial) view that there just was no thoroughgoing theoretical thinking about law at any time or place, prior to Western, indeed nineteenth century, modernity—a view that any student might well draw from most of today's textbooks on legal theory. It is understandable for today's Physics undergraduates to conclude that there just wasn't much informative thinking about quantum mechanics (taking the term precisely) before the advent of Euro-American, 20th century thought. It is remarkable, however, that many legal textbooks send their readers away with the same conclusions about law, and suggests how strongly today's legal theorists are wedded to much of the spirit of positivism that they insist they have overcome. Again at least the die-hard positivists have grounds, within their own framework, for dismissing virtually everything written before Austin, throughout virtually all of history and culture, in all other times and places, as not legal theory. Most legal theorists today, however, overwhelmingly dismiss the implicit positivist rejection

106. See, e.g., Plato, supra note 1, Republic, 338c-354c (rejecting Thrasymachus' separation of law and morals). See also, generally, Gorgias. Cf. Heinez, supra note 5 at sec. II.A.

107. See text accompanying infra notes 72-74.

108. See supra note 106.

of any interdisciplinary method. It is astounding that we would all suddenly retreat to the conventional assumptions of positivism by finding in Plato “only” ethical and political theory, utterly bereft of serious—tacitly taken to mean distinct and autonomous—legal theory.

II. Hocus Pocus and Sieg Heil!

The foregoing review of the standard texts suggests that legal theorists’ understandings of Plato, and by extension of much classical natural law, are largely perfunctory, even parodic. Two views merit further attention. Freeman, like Kelsen, stresses Plato’s drift towards mysticism. Others stress his drift towards dictatorship. Those two assessments are not distinct. In the aftermath of World War II, the Holocaust, and European colonialism, leading philosophers began to examine authoritarianism in Western moral and political thought. Isaiah Berlin, for example, in language still common today, condemned the “authoritarian state obedient to the directives of an élite of Platonic guardians.”

A monumental work of the period is Karl Popper’s two-volume The Open Society and its Enemies, first published in 1945. Popper sought to link mystical and authoritarian tendencies in Western thought. Such critiques were all too welcome for anyone wanting to appear progressive by dispensing with whole blocks of the Western canon. Of course, that utterly dismissive stance was never Berlin’s or Popper’s intention. They in many ways revered the thinkers they criticized, but counted among a generation of post-War intellectuals who, like Horkheimer or Adorno, approached reverence not from a stance of pious deference, but of the kind of critical engagement that had already been inaugurated by Hegel and Marx. Popper provided powerful reasons to keep reading Plato.

In legal theory, certainly Anglo-American, no such attitude of critical engagement emerged. In Britain, the immediate post-War period came to be dominated by analytic jurisprudence, itself linked to the logical positivism that enjoyed a heyday in the years leading up to, and immediately following, the Second World War. Not all of its exponents approached the issues of mysticism and totalitarianism with Popper’s deftness. Although much of Popper’s interpretation of Plato

110. See, e.g., McCoubrey & White, supra note 18 at 60-62.
114. See, e.g., ibid. at 32 (expressing admiration for Plato).
can be challenged, he is rarely casual or dismissive. However, in the empirical, often aggressively anti-metaphysical approaches that dominated much 20th century Anglo-American thought,117 Plato’s non-empiricism left him open to being dismissed as a mystic.118 At the height of logical positivism, any philosopher not firmly rooted in empiricism, from pre-Socrates through to Heidegger (an easy target,119 for well-known biographical reasons120), fell under suspicion. Rousseau, Hegel or Nietzsche all provided rich pickings for the logical positivist wanting to link mysticism to authoritarianism.

To this day, the standard Anglo-American introductions to legal theory pay little attention to those thinkers. (Here again, a comparison with continental counterparts is instructive. Simone Goyard-Fabre’s introductory text spends well over 25 pages on Rousseau, and well over ten on Hegel, along with detailed examinations of Nietzsche and Heidegger.121) By Bertrand Russell had condescendingly remarked that Rousseau, “though a philosophe in the eighteenth-century French sense, was not what would now be called a ‘philosopher.’”122 Rousseau’s Contrat Social had “made possible the mystic identification of a leader with his people” and “much of its philosophy could be appropriated by Hegel in his defense of the Prussian autocracy.”123 While Roosevelt and Churchill are applauded as sons of Lockean rationalism,124 Hitler is ludicrously branded “an outcome of Rousseau.”125 Hegel’s thought, too, “may be regarded, to some extent, as an intellectualizing of what had first appeared to him as mystic insight.”126 Russell has little difficulty tracing those thinkers’ fascism-cum-mysticism back to Plato, linking Plato’s “other-worldliness” to authoritarianism.127 (It is grimly amusing that Russell’s History of Western Philosophy, which might more aptly be named Bertrand’s Warhorse of Anglo-American Clichés about Philosophy, is still commonly consulted by Anglo-American legal theorists,

116. See, e.g., Lesley Brown, “How Totalitarian is Plato’s Republic?” in Essays, supra note 7 at ch. 1.
118. See, e.g., Bertrand Russell, History of Western Philosophy, 2nd ed. (London: Routledge, 2000) at 123.
119. See, e.g., Rudolph Carnap, “The Elimination of Metaphysics through Logical Analysis of Language” in Logical Positivism, supra note 117 at 60.
120. See, e.g., Rüdiger Safranski, Ein Meister aus Deutschland: Heidegger und seine Zeit (Frankfurt am Main: Fischer, 2003) at 258-64, 270-80, 392-410.
121. Goyard-Fabre, supra note 101 at 28-33, 145-53, 176-88, 199-203, 316-21, 337-40, 345-56. For similar approaches, see, e.g., Hoffman, supra note 103; Horn, supra note 88; Naucke, supra note 87.
122. Russell, supra note 118 at 66. The word “now” in that sentence raises a question that Russell nowhere answers: under which circumstances would that present be said to have begun, and under which circumstances would it be said to come to an end?
123. Ibid. at 674 [emphasis added].
124. Ibid. at 660.
125. Ibid. Cf., e.g., Michel Launay, “Introduction” in Michel Launay, ed., La Nouvelle Héloïse (Paris: Flammarion, 1967) at xvi (arguing that Rousseau was hostile to mysticism).
serving more to reinforce old Anglo-American stereotypes than to examine non-empirical philosophy in a more serious vein.)

Like the summary charges of authoritarianism, such charges of mysticism are misleading. Plato’s repeated attacks on rhetoric, in favour of relentless analysis of arguments—which is nothing other than an insistence on legitimacy—is neither the mark of the dreamy mystic nor of the fanatic authoritarian. It is commonly upheld as an exemplar, even the very origin, of Western rationalism, with its demands for intellectual accountability, its suspicion of sheer convention or dogma. Nietzsche’s critique is far more perceptive than Russell’s, pinning on Plato not a dreamy mysticism, but an unrelenting rationalism. Admittedly, Platonic Forms are not susceptible to empirical scrutiny. Of course, nor was the premise of logical positivism that no non-tautological propositions can be meaningful beyond those that can be subjected to empirical examination. Russell’s dismissal of Plato reveals more about his own prejudices regarding what counts as philosophy than about the philosophers he dismissed. His History stands only on the basis of a tacitly stipulated, painfully narrow, definition of “philosophy.” Russell never explains that definition, nor is it consistent with Russell’s boast of construing philosophy in a “very wide sense.” Russell flatly equates non-empirical philosophies with mysticism, then collapses mysticism into authoritarianism. Indeed, Berlin, albeit equally vigilant about the dangers of authoritarianism among the same thinkers criticized by Russell, adopted a somewhat more moderate position, declining to dismiss them all as mystics. Those shortcomings of the logical positivist approach have been understood in the Humanities for decades; yet they have gone largely unnoticed in the approaches of legal theory textbooks, among many of the same scholars who claim to challenge the content or intellectual foundations of legal positivism.

Even if we admit a link between European romanticism and authoritarianism in the 19th and 20th centuries (as suggested in debates about Nietzsche or Heidegger, the issue is complex), it remains questionable whether we can so handily extrapolate those trends onto Plato. One important feature is shared by figures as different as Aristotle, Locke, Rousseau, Bentham, Kant, Hegel, Marx, Nietzsche or Heidegger—their ability to be interpreted in oppressive as well as liberating ways. Certainly, we can debate what would count as “oppressive” or “liberating.” But, however we may define those terms, there is ample reason to count Plato among those generally complex thinkers.

Kelsen further examines Plato, and classical natural law, in an article entitled “Plato and the Doctrine of Natural Law.” As with Russell, that analysis ends up

128. See, e.g., remarks on Apology, Protagoras and Gorgias from Plato in supra note 129.
129. It is arguably more precise to bestow that distinction upon Socrates. Nevertheless, it is through Plato that Socratic dialectic is commonly thought to inaugurate much of the Western rationalist tradition. See, e.g., Kniest, supra note 28 at 34-36. Cf. Barbara Zehnpfennig, Platon zur Einführung (Hamburg: Junius, 2nd ed., 2001) at ch. 3.
130. See, e.g., works cited in supra notes 117 and 119.
132. See generally Berlin, supra note 111.
133. See, e.g., Safranski, supra note 120. See also, e.g., Rüdiger Safranski, Nietzsche: Biographie seines Denkers (Frankfurt am Main: Fischer, 2000) at 351-60.
134. Kelsen, supra note 84.
The Status of Classical Natural Law

saying more about Kelsen than about Plato. It amounts to little more than a sheer polemic against the entire natural law tradition. Once again, it is not Aristotle or Aquinas, but Plato who is taken as the paradigm for all classical natural law. Kelsen writes, "[t]he so-called doctrine of natural law is characterized by its assertion that it is able to find ideal law ... in nature in general and in human nature in particular. By 'nature' is meant empirical reality, and by 'human nature,' the actual human condition."[135] Certainly, natural law theories must and do take human experience into account. They hold, however, that material experience alone does not yield principles of justice; that such principles are products of thought (or, perhaps, for some natural law theories, faith or revelation, but I’ll leave those aside for now), which, while grounded in experience, can also abstract from it.[136]

In other words, Kelsen faults principles of natural law because they cannot be found in empirical reality. In so doing, he uncritically assumes the logical positivist anti-metaphysics advocated during the earlier and mid-20th century: "The assertion that norms of the correct, just law are immanent in the empirical reality of nature could only be proved if an analysis of this reality could actually show a system of incontestable norms for the proper conduct of men, as such an analysis shows a series of generally recognized, verifiable causal laws."[137] Kelsen’s argument here assumes the possibility of settled knowledge about the concept, and content, of "empirical reality." Yet it is difficult today to accept that the logical positivists’ attempt to provide such an account of "empirical reality" ever succeeded. Carnap’s Der logische Aufbau der Welt represented a particularly rigorous attempt, but is appreciated today more as intellectual history than as a basis for founding an exhaustive account of the empirical world.[138]

Characteristic of the classics of legal positivism, Kelsen’s 1949 General Theory of Law and State defines positivism largely in contradistinction to natural law.[139] The quarrels between positivism and natural law are arguably as old as legal theory

135. Ibid. at 24 [original emphasis].
136. Cf., e.g., Thaetetus (suggesting that knowledge cannot have an entirely empirical foundation). Indeed, one can hardly overlook Kant, who is not easily dismissed as a mystic. Kant’s entire critical system departs from the famous claim, "Wenn aber gleich alle unsere Erkenntnis mit der Erfahrung anhebt, so entspringt sie darum nicht eben alle aus der Erfahrung. Denn es könnte wohl sein, daß selbst unsere Erfahrungskenntnis ein Zusammengesetztes aus dem sei, was wir durch Eindrücke empfangen, und dem, was unser eigenes Erkenntnisvermögen ... aus sich selbst hergibt." Immanuel Kant, Kritik der reinen Vernunft, ed. by Wilhelm Weischedel, Werkausgabe, vol. 3 (Frankfurt am Main: Suhrkamp, 1968) at 45 [original emphasis]. [“But although all our cognition commences with experience, yet it does not on that account all arise from experience. For it could well be that even our experiential cognition is a composite of that which we receive through impressions and that which our own cognitive faculty ... provides out of itself.” Immanuel Kant, Critique of Pure Reason trans. by Paul Guyer & Allen W. Wood (Cambridge: Cambridge University Press, 1998) at 136]. Curiously, Popper waxes ebullient about that Kantian tradition, as appears particularly clearly in the German version of his Open Society. See Popper, “Immanuel Kant: Der Philosoph der Aufklärung” in Popper, Die offene Gesellschaft, supra note 113 at XX. Cf., ibid. at V (dedicating Die offene Gesellschaft to Kant).
137. Kelsen, supra note 84 at 24.
138. See Rudolph Carnap, Der logische Aufbau der Welt (Hamburg: Felix Meiner Verlag, 1998). Cf. Quine, supra note 117 at 39-42 (challenging the logical positivism of Carnap’s earlier and subsequent writings). Some modern philosophers might, against Quine or other critics, seek to defend Carnap’s project. However, far more argument would be required than is provided by Kelsen.
139. Kelsen, General Theory, supra note 29 at 3-14.
Consider the ways in which the two figures are understood to approach politics. The society ruled by the Republic's philosopher ruler is imaginary. That "clean slate" postulating of ideal models of government recurs in Western philosophy. Such a strategy says, "Let's set aside actual conditions for the moment, and consider which political or moral norms or institutions are correct in principle, even if there is no assurance of their being achieved in practice." Some Western philosophers might find it impossible to think normatively about politics without such a model, on the assumption that one cannot decide what is correct in practice without first deciding what is correct in principle. Plato adopts that clean slate approach again in the Laws, and thinkers from Aristotle to Rawls continue the tradition.

Yet that Western, clean-slate method is alien to Confucianism. Western readers may have difficulty finding any political model at all in Confucianism, for the simple reason that Confucianism studiously avoids postulating ideal models. Confucianists ponder government insofar as it arises out of existing conditions, recognizing, moreover, that existing conditions are constantly subject to change, which cannot easily be accounted for by means of fixed, ideal models. The Confucian sage does everything but keep his eye fixed on one ideal model, hovering above actual conditions. That approach is not just nuts-and-bolts pragmatism, devoid of a deeper worldview. Confucian metaphysics contemplates the Way (tao) of Being and our involvement in it. That understanding of Being, and of the conclusions we can draw from it about right conduct, can never be formulated independently of immediate circumstances. The Confucian Way persists not in spite of, but rather through, constant change: "Being long lasting does not mean being in a fixed and definite state. Being fixed and definite, a thing cannot last long. The way to be constant is to change according to circumstances." I do not propose to take a position on the meaning or merits of such a philosophy, but only to point out the ongoing fallacy of collapsing pre-modern thinkers, even from utterly different cultures and traditions, under that all-inclusive heading of "natural law."

Casual readings of different philosophies can create the illusion of similarities that do not exist, particularly when one too casually relies on modern translations of ancient texts. Such translations cannot avoid employing ostensibly similar terms for concepts that are fundamentally different. For example, the Greek aretē and the Chinese jen can both refer to a state of character that, in English, could be described as "virtuous." It would be misleading, however, to conclude that the philosopher ruler, in cultivating aretē, is doing the same thing as the Confucian sage who cultivates jen. Plato and Confucius are similar in placing a high value on forming the ruler's character. However, their respective views on what that character is and how it is formed could not be more different. The Republic's abolition of conventional marriage and family is, again, utterly hypothesized. The philosopher

157. Cf., e.g., Plato, supra note 1, Republic 368a-369a (proposing to imagine a model society).
158. Plato, supra note 1, Laws 702d.
159. Chu Hsi & Lü Tzu-Ch'ien, supra note 156 at 1.13.
rulers are distilled through a social and educational system that leaves them ultimately unencumbered by interpersonal ties, which would hinder the business of abstract theorizing and governing.\textsuperscript{161} The Confucian sage is educated from early childhood within the heart of the family, as he moves from being a loyal son to a responsible husband, father and head of household. Chu Hsi and Lü Tsu-Ch’ien thus expound the cardinal Confucian principle that the “foundation for the government of the world” is both “the ruler’s person” and “the family.”\textsuperscript{162} What is crucial in that passage is not simply that marital and family ties are not abolished, but that the conduct of family life altogether represents one of the key guides to an individual’s jen. “In order to see how a ruler governs his empire, we observe the government of his family.”\textsuperscript{163} Governing the family requires that one be “earnest in ties of affection.”\textsuperscript{164} Compare Plato: “No one whose thoughts are truly directed towards the things that are ... has the leisure to look down at human affairs .... Instead, as he looks at and studies [eternal] things that are organized and always the same, that neither do injustice to one another nor suffer it, being all in a rational order, he imitates them and tries to become as like them as he can.”\textsuperscript{165} Again, such a passage should not be construed to mean that Plato only reaches conclusions about justice through reference to the Form of Justice. It does, however, show Plato’s understanding of wisdom and knowledge to be fundamentally opposed to anything like the Confucian tradition. Confucius was said to have urged, “In guiding a state ... love your fellow man.”\textsuperscript{166} Otherwise, on the interpretation of Heng-Ch’ü, “laws cannot operate by themselves.”\textsuperscript{167} No such injunction to love one’s people is expressly required of Plato’s philosopher ruler, let alone to assure the operation of the laws.

The fundamental concept of the philosopher ruler as an individual subservient only to truth is also at odds with Confucianism, which holds that truth must at times be sacrificed to preserve other important values. For example, “[w]hen a scholar is in a high position, his duty is to save his ruler from making mistakes and not to follow him in wrong doing. When a scholar is in a low position, sometimes he should save the ruler, sometimes follow the ruler, and sometimes follow the ruler only after he has failed to save him.”\textsuperscript{168} The Confucian sage does indeed strive to “distinguish good and evil”, yet truth is altogether orchestrated differently in the Republic, as reflected, for example, in Plato’s and Confucius’ respective views on art and literature. For Plato, art must be engineered to meet specifically articulated political ends. Even Homer is to be abolished if he cannot fill that bill.\textsuperscript{169} For Confucius, the classics hold intrinsic value, irrespective of their ability to meet

\begin{enumerate}
\item See, e.g., Plato, supra note 1, Republic V, 457c-471b (proposing the abolition of the family and community of wives and children).
\item Chu Hsi & Lü Tsu-Ch’ien, supra note 156 at VIII.1.
\item Ibid.
\item Ibid. at VI.5.
\item Plato, supra note 1, Republic VI, 500b-c.
\item Chu Hsi & Lü Tsu-Ch’ien, supra note 156, at I.5.
\item Ibid. at VIII.23.
\item Ibid. at VII.18.
\item Plato, supra note 1, Republic II, 376c-398b. Cf. generally Ion.
\end{enumerate}
preconceived government aims. They provide crucial insights for applying past experience to present circumstances: "The Master said to [his son], 'Have you studied the [classic poems] Chou nan and Shao nan? To be a man and not to study them is, I would say, like standing with one's face directly towards the wall."(Chu Hsi & Lü Tsu-Ch'ien explain, "To stand with one's face against the wall means that one cannot see anything in the place nearest to one and cannot go a step further.") That respect for classics echoes the role of tradition altogether—again, of only limited importance in Plato's clean-slate society. "The Master said, 'When those above are given to the observance of the rites, the common people will be easy to command.'"

IV. Conclusion

We are left, then, with (1) Nobles & Schiff, who find in Plato absolute values; (2) Dias, who deems those values discoverable; (3) Kelsen, who deems them undiscoverable; (4) Bix and Wacks, who find in ancient Greece some scant and feeble attempts to do what Aquinas does; (5) McCoubrey & White, whose Great Dictator comes delivered from a Chinese take-away; (6) Freeman, who finds the whole business sheer mystery; (7) Horn, who peels Plato off the divan; and (8) Davies & Holdcroft, who find nothing notable in ancient Greek thought at all. What unites all of them is the long shadow of that same 20th century positivism which most or all of them claim to have overcome, and which their colleagues in the Humanities had overcome several decades ago—that positivism which, failing to see mechanical rules and systems in Plato, see nothing but caricatures.

Even seasoned philosophers and classicists find Plato and antiquity difficult. There are no shortcuts into pre-modernity, just as there are none into modern thought. Aristotle and, usually before him, Plato identified many of the perennial concerns of legal theory. Legal theory has not yet superseded them, certainly not enough to justify the cursory and dismissive attitude towards pre-modernity that characterizes much of modern legal theory. The concept of legal modernity is an historical one, and can only be understood as such, i.e., with some meaningful understanding that other cultures and thinkers have had very different understandings of law, and which cannot easily be collapsed under the highly generalized heading of "natural law."

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170. K'ung Ch'iu, supra note 155 at XVII.10. Cf. Chu Hsi & Lü Tsu-Ch'ien, supra note 156 at VI.21 (explaining, "To stand with one's face against the wall means that one cannot see anything in the place nearest to one and cannot go a step further.").

171. Chu Hsi & Lü Tsu-Ch'ien, supra note 156 at VI.21.

III. False Analogies

I have suggested some ways in which pre-modern theory, using the example of Plato, has been neglected or oversimplified in legal scholarship. My final aim is to illustrate further hazards of lumping together vastly different theories under an unduly generalized understanding of classical natural law. George Fletcher throws Plato into a discussion of Aristotle, claiming that Aristotle, "following Plato in The Republic, perceives justice as a ... quality that leads to the flourishing of the individual."\textsuperscript{146} The individual? \textit{Which} individual? All individuals equally? Slaves too? Women (who fare rather differently in Plato's Republic, where they have a shot at equality, and Aristotle's Politics, where they don't)? Is that "individual" flourishing (very much an ideal of middle-class modernity) ever purchased at the price of the flourishing of the community? Or never? In view of Aristotle's strong criticisms of Plato's political theory,\textsuperscript{147} is he really "following" Plato on this point? Fletcher rightly sees in Aristotle's theories of corrective and commutative justice concepts that remain useful for understanding current-day issues.\textsuperscript{148} On many crucial points, Plato and Aristotle can well withstand that kind of transposition into a modern context. That makes them classics. However, an appreciation of their overall approaches to law, and to fundamental questions of individuality and community, emerges only when they are examined with some regard to the political and legal worlds that they knew and imagined.\textsuperscript{149} We gain better insight into modernity when we understand the kinds of circumstances that ancient thinkers did, and didn't, consider. It is a

\textsuperscript{140} See, e.g., \textit{Plato}, supra note 1, \textit{Republic} 338c-354c (rejecting Thrasydamus' separation of law and morals).

\textsuperscript{141} Kelsen, \textit{General Theory}, supra note 29 at 8.

\textsuperscript{142} The more detailed exposition in Kelsen, \textit{supra} note 29 still fails to overcome the basic problem of unduly generalizing about natural law theories.


\textsuperscript{144} Cf. Heinze, \textit{supra note} 5 at secs. II.A-II.B.

\textsuperscript{145} Cf. ibid. at sec. II.B.

\textsuperscript{146} Fletcher, \textit{supra note} 18 at 92.

\textsuperscript{147} See, e.g., \textit{Complete Works}, \textit{supra note} 1, \textit{Politics} II.1-6, 1260b28-1266a30.

\textsuperscript{148} Fletcher, \textit{supra note} 18 at 88-92.

\textsuperscript{149} Cf. text accompanying \textit{infra} note 73.
bit embarrassing to have to make these points to senior legal theorists, when our colleagues in the Humanities had learned them as undergraduates.

A narrow focus on, or highly literal reading of Plato—again, usually meaning the Republic—occasionally results in the construction of far-fetched analogies between figures or themes having little to do with each other. Horn compares Plato’s tripartite division of the soul with Freud’s categories of Ich (“ego”), Über-ich (“superego”) and Es (“id”). In so doing, he falls into a fairly obvious trap, arising from the fact that each thinker does indeed divide the human psyche into three parts. Certainly, both Plato and Freud examine tensions between desire, reason and social norms. However, those surface similarities only conceal thoroughgoing differences between them. (Indeed, in view of Freud’s capacious grasp of the Western humanist canon, and eagerness to locate within it mirrors of his own ideas, as in his references to Sophocles, Da Vinci, Shakespeare, or Dostoevsky, he arguably would have drawn the analogy to Plato himself had he found it useful.) For Plato, the soul, which fundamentally defines the human, is non-organic and constitutionally infused with the capacity to grasp ethical principles. Even where Freud expressly examines interactions between the individual and the collectivity, he declines to suggest anything like the Republic’s highly symmetrical, mirror-image analogue between society and soul—the structure of one reflecting and explaining that of the other.

Finally, another hazard that must not be overlooked is to lump together ancient thinkers not merely within the Western tradition, but even beyond it, assuming them all to be doing essentially the same things, without regard to vastly different cultures or timeframes. For example, McCoubrey & White analogize Plato’s philosopher-ruler to the Confucian sage, generalizing about pre-modern theory across a staggering cultural divide. The authors do call Confucianism only “a distant political parallel”, but nevertheless find the Confucian sage to be “more than a slight echo of the Platonic philosopher-king.” They devote much of an otherwise brief discussion to the analogy. The analogy to Confucius could indeed hold a superficial appeal, and is therefore worth considering. For, on closer examination, it relies on little more than the image of the storybook wise man. Certainly, both the philosopher ruler and the Confucian sage must cultivate qualities such as wisdom or self-discipline. However, any deeper comparison only underscores the fallacy of seeing pre-modern theories as so many variations on more-or-less constant themes.

150. Horn, supra note 88 at 136.
151. See, e.g., Plato, supra note 1, Meno 81b-c; Phaedo 70a-106e; Phaedrus 245c-249c; Republic 608c-612a.
152. Plato, supra note 1, Republic 368e-369a.
153. McCoubrey & White, supra note 18 at 62.
154. Ibid. at 53.