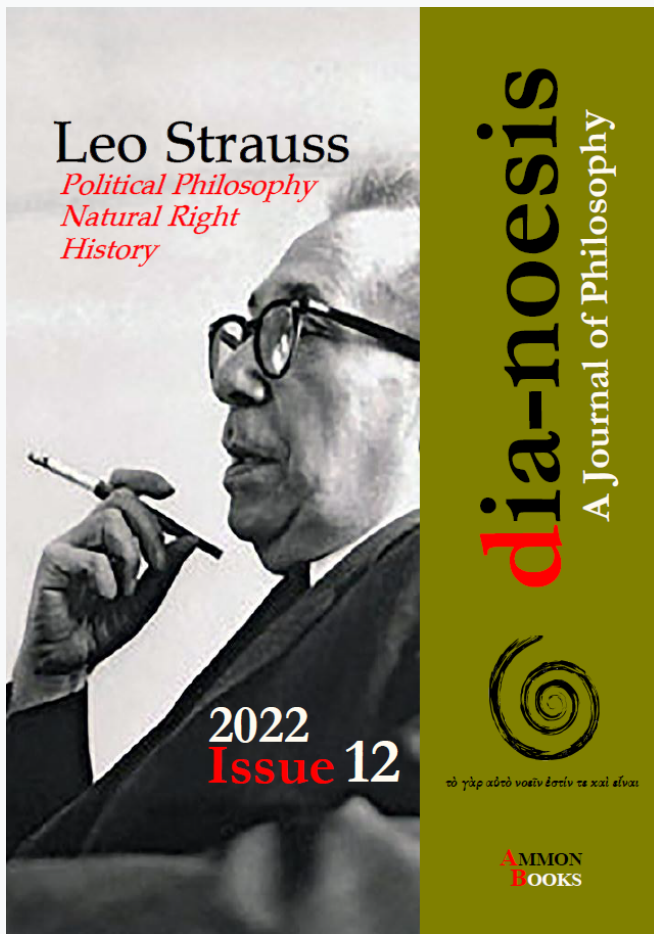


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Law's diversity:

Robert Howse

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Law's diversity: A reading of the Platonic *Minos*

Robert Howse¹,
Professor of International Law,
NYU Law School
robert.howse@nyu.edu

Abstract: Should the question of what is law be the central preoccupation of legal theory? Is this question inherently normative or could it be adequately answered by a purely descriptive or positive account?² Does the question itself wrongly suppose that there is an ultimate unity in law or legality that permits the elaboration of a “concept of law”? In the short Platonic dialogue the *Minos*, Socrates asks an unnamed comrade, “what is law for us?” Throughout the work Plato puts in question whether an essentialist account of law is reasonable at all, with Socrates and the companion exploring various constructions of law as unitary, universal, and unchangeable. In the argument, all of these are forced to yield to the reality of law’s diversity. This diversity, though, does not prevent a rational account of law’s functions of social order and control, nor exclude that there could be expert knowledge of law oriented to such ends. Yet this knowledge is never absolute or fixed, and always

¹ NYU Law School. This essay has been influenced by the interpretation of Plato by Leo Strauss, even though I differ from Strauss on many detailed readings of passages in the *Minos*. Cf. Leo Strauss, “On the *Minos*,” in *LIBERALISM ANCIENT AND MODERN* (1985). I am grateful to Peter Berkowitz and Christina Tarnopolsky for illuminating conversations about Platonic legal philosophy, and especially to my former student and research assistant, Professor Joanna Langille, whose own research on the *Minos*, not yet published, contains important insights. David Janssens, Tod Lindberg and Robert Goldberg read earlier versions and offered helpful comments.

subject to question and modification based on experience of law over time. Hence law can only “wish” to be the discovery of what is. Ultimately law’s diversity does not do justice to human diversity. Law, in responding to collective needs, inevitably clashes with differences among humans to some extent, and even where protecting physical collective existence is unable to minister to the individuality and difference among human souls.

Keywords: Plato, legal theory, Minos, positivism, legal pluralism, Straussian

Introduction

Should the question of what is law be the central preoccupation of legal theory? Is this question inherently normative or could it be adequately answered by a purely descriptive or positive account?³ Does the question itself wrongly suppose that there is an ultimate unity in law that permits the elaboration of a “concept of law”? Or does the diversity or heterogeneity of law make the effort at conceptual definition an inherently and questionably distortive exercise? While Plato’s dialogues contain numerous thematic discussions about laws and legality only in the *Minos*,⁴ a very short dialogue between Socrates and a nameless comrade does Plato³ have Socrates directly pose the question “what is law?”

In legal theory, much more attention has been paid to

³ See Huntington Cairns, *What Is Law?* 27 WASH. & LEE L. REV. 193 (1970).

⁴ Plato, “*Minos*” (tr. Thomas. Pangle) in *THE ROOTS OF POLITICAL PHILOSOPHY* (ed. Thomas. Pangle). (1987). All references in this essay are to the pagination/paragraphing in the Greek text as originally ordered by Stephanus, which is reproduced in the Pangle translation. In my own citations of the text, I have sometimes altered the translation of Pangle for greater precision or nuance. There is a debate among scholars of classical philology as to whether the dialogue was written by Plato himself or emanated from the Platonic school. I take no position in this debate. As discussed in the text of the essay, it is primarily of interest as an account of law as intrinsically diverse and of the relation of law to difference more generally. On the debate about provenance, see Mark Lutz, *The Minos and the Socratic Examination of Law*, AM. J. POLITICAL SCI. 54: 4 (2010).

another short Socratic dialogue, the *Crito*⁵, where the theme is not what law is but rather the justification for obedience to law. A friend of Socrates, Crito, who urges Socrates to escape from Athens to avoid the death penalty after Socrates' conviction on the political offenses of atheism and corrupting the young. In the *Crito*, Socrates has the laws of Athens (speaking as one) respond to Crito with arguments for obedience. There are varying scholarly views on the strength of these different arguments.⁶ By having the laws speak together in the *Crito*, Socrates dramatizes their hegemonic authority. But to understand the Socratic teaching on law, we must also consider the *Minos*, the deepest theme of which is law's diversity. That is the aim of this essay.

“What is Law-For Us?”

The opening of the *Minos* foreshadows the entire action and argument of the dialogue. From the very outset Socrates introduces a note of doubt concerning the applicability of Socratic questioning to law, for he asks not simply what is law but “what is law for us? (*hemin*).⁷ Law is not like the other things that Socrates could investigate by simply asking an interlocutor “what Is...?”

The qualification “for us” suggests the possibility that the meaning of law itself differs from community to community. But what kind of community does Socrates intend when he speaks of “us”? Intellectual affinity between Socrates and his interlocutor? The community of Greeks or of Athenians? The community of human beings (as opposed to gods or divine beings)?⁴

The comrade-either because he is sure of what community to which Socrates is alluding by referring to “us” or because

⁵ “Crito” (tr. R.E. Allen), in Plato, *THE DIALOGUES OF PLATO, VOLUME 1: EUTHYPHRO, APOLOGY, CRITO, MENO, GORGIAS, MENEXENUS* (R.E. Allen tr. and ed.) (1984).

⁶ See Frederick Rosen, *Friendship and Obligation in Plato's Crito*, *POLITICAL THEORY* 1:3 (1973). See also, R.E. Allen, *SOCRATES AND LEGAL OBLIGATION* (1980).

he is *unsure* and too embarrassed to admit it—does not ask Socrates what he means by “us.” He does however ask what kind of laws Socrates is referring to. To the doubt already introduced by Socrates’ qualification of the “what is” question, the comrade thus adds a further doubt about the unity of law. Might the philosophically interesting questions about law really be questions about the specialized substance and particular purposes of the different kinds of laws? The comrade seems intuitively doubtful that the question of what law is in general is worthy or capable of Socratic inquiry. What is there to say about law in general, as opposed to what could be said concerning particular laws or legal systems?

Stone or Gold?

Socrates compares the question “What is law?” to the question “what is gold?” The analogy between these *questions* implies some kind of likeness between law and gold. But what is this likeness? Socrates presents the answer in a highly indirect way. According to Socrates, one “gold” (a single gold thing or object) does not differ from another, in as much as it is gold. Socrates draws our attention to the incompleteness of that statement by now analogizing gold to stone: one stone does not differ from another in as much as it is stone. To understand the difficulty with (but also the truth disclosed by) Socrates’ *implied* analogy of law to gold we have to understand the difficulty with his *explicit* analogy of gold to stone. Whereas “stones” are naturally differentiated as individual objects, “gold” is usually hidden in that which is not gold—it must be discovered by human effort. Gold *objects*, whole things of gold, are the product of human art or *techne*. And these whole things or objects of gold differ one from another in their purity as gold—one could not misleadingly say that a 5-karat gold ring is less a “gold” than a 20-karat one.

This illuminates the precise meaning of Socrates’ formula that every gold object is like another “in regard to being

gold.” He means that each gold object is equally “gold” *to the extent* that it is gold. Thus, by analogy, each law is law *to the extent* that it is pure, natural “law.” Yet, like “gold”, law as something natural is not immediately present and manifest as a complete pure entity. No legal system is pure or natural law. Each individual law, and each system of positive law, deserves truly to be called law in as much as it contains elements of pure, natural law. One of the main transitions in the dialogue is the comrade’s acceptance that a bad law is not truly law; had he grasped the meaning of the analogy of law to gold, the comrade might have not conceded so much, or done so with an important qualification.

The analogy to gold also presages Socrates’ later insistence that law is a kind of discovery or art. The natural or pure law must be found or unearthed, it cannot be demonstrated from axioms, and thus its grasp is in some measure dependent on accident or chance. It always intermixed with other elements of “non-law”, with impurities—to be fully visible and to have its full or greatest value it must be purified or refined.

The Limits of Positivism

Invited by Socrates to answer the question of what law is general, the comrade does not pursue the thrust of the analogy between law and gold; on the contrary he answers in a positivist rather than a natural law manner. Law is whatever is “lawfully accepted”, in other words recognized (or perhaps even, obeyed or followed) as law.⁸ We should recall, however, Socrates’ initial formulation of his question as: “What is law *for us*?” Now Socrates had dropped “for us” in stating the analogous question concerning “gold”: he thus drew attention subtly to a possible limit in the analogy between law and gold. The comrade’s response is perfectly comprehensible as an answer to the question of “what is law for us?” if “us” is understood as “us fellow citizens.”

Socrates suggests it is somehow insufficient to answer the question “what is law?” in terms of the result of legal

⁸ *Id.* §313b.

acceptance: an adequate answer would imply the knowledge of the *active principle or force that produces or guarantees* lawful acceptance. Thus, Socrates says: “And so is speech in our opinion the things that are spoke, or sight the things that are seen, or hearing the things heard? Or does speech seem something different from the things that are spoken, and sight?”

something different from the things that are seen, and hearing something different from the things that are heard, and law, indeed, something different from the things that are lawfully accepted?”⁹

The immediate and unqualified concession by the comrade of the implication that law cannot be simply “the things lawfully accepted” suggests to Socrates that the comrade in need of some further clarification or explanation. In this explanation, Socrates drops the speech analogy, and reformulates those to hearing and seeing. Then, finally, he drops the analogy to hearing altogether and instead asks by what kind of showing or perception law is lawfully accepted. Socrates’ abandonment of the law as speaking and being heard indicates the distance between the *Crito* and the *Minos*. The radicalism of the *Minos* is suggested by the possible implication (albeit never presented *explicitly* without qualification) that a purported “law” does not deserve to be called “law” unless it can be *shown* to partake *to some extent* in true or pure “law.” As will be explained, this does not mean that a lawful and just man would disobey an unjust law, where lawlessness—a failure to obey—contributed to the destruction of the city.

The issue now becomes whether it is through demonstration or discovery that “law” is made manifest.¹⁰ We have already been prepared for the suggestion that the answer is, in fact, discovery through the analogy between law and gold. Socrates suggests that as discovery, law is an art, like medicine or divining. Medicine and divining, like prospecting for gold, are “arts” that involve for success

⁹ *Id.* §313c.

¹⁰ *Id.* §314b.

elements of intuition and perhaps even chance or luck-unlike mathematical skill for instance, which arguably depends on the strength of the pure mind. Moreover, divining implies an openness to what is beyond the human world and perhaps beyond the visible world- a finding of that which is not immediately manifest. Like prospecting or sluicing for gold.

The comrade assents easily to Socrates' suggestion that law is a "discovery of things." However, when Socrates asks him of which things it is a "discovery," the comrade does not say (following his earlier definition) that "law" is the art of "discovery" of the things "lawfully accepted." Instead, he suggests: "In my opinion at least, [law is] these official opinions and decrees passed by votes; for what else would one declare law to be? Also, as a result it's likely that what you've asked about, this whole, law is the official opinion of the city."¹¹

There is a broad compatibility between this new definition and the previous one that the comrade had offered: that which is lawfully accepted is lawfully accepted by virtue of emanating from an authoritative political institution "for us" Athenian citizens, the assembly ("passed by votes"). The difference is that this definition incorporates an implicit normative criterion for lawful acceptance, namely that the law is created by a (legitimate) democratic procedure. Thus, the comrade appears to have been, at least by implication, responsive to the concern that the principle by which something is lawfully accepted or obeyed as law be incorporated into a definition (which the initial positivist response of the comrade did not).

This said, the comrade's revised answer is a reasonable and defensible one (democratic positivism) even if it does not engage with Socrates' own logic, or really grasp its implications. Socrates response is to summarize the comrade's position as that law is political opinion and (for the first time in the dialogue) to award him some praise: "And perhaps what you say is nobly put." But then Socrates indicates that a rather different manner of proceeding is required to "know better" if what the comrade says is right.

¹¹ *Id.* §314b.

Law, justice, lawfulness and the preservation of cities

This new manner of proceeding begins by Socrates asking the comrade whether he would say that “some” men are wise.¹² He gladly assents, showing that (despite the democratic implication of the revised definition) he is not so much of an egalitarian as to think that all men are wise, even less that he is so conventionalist as to hold there is no such thing as wisdom but only opinion about law.

Then Socrates goes on to obtain the comrade’s assent to the following propositions: 1) The wise are wise through wisdom; 2) the just are just through justice; 3) the lawful are lawful through law; 4) the lawless are lawless through lawlessness; 5) the lawful are just; 6) the lawless are unjust. While Socrates thus connects justice with lawfulness and injustice with lawlessness, he is silent here as to the relationship of *wisdom* to law and justice. He is similarly silent as to the relation between wisdom, lawlessness and *injustice*.

Socrates shifts the focus from *lawfulness* and justice to *law* and justice. While he has asserted that the *lawful* are the just, he does *not* now assert that *law* and justice are the same. Socrates leaves it open that a law could be unjust but a man who is lawful and just would still obey it (In the *Crito*, Socrates does not defend the justice of *the specific law* under which he was convicted). As Strauss suggests, praise for law and for law-abidingness are not the same and the latter may be more general than the former). As we shall now, the ultimate criterion is utilitarian-what preserves rather than destroys cities and more. The lawlessness of disobedience even to an unjust law could be more destructive of the city than obedience to that law. In the *Crito*, the laws tell Socrates that by escaping punishment he would destroy the laws and with them everything else.

At this point, Socrates returns to the comrade’s early definition of law as “official opinion.” He now presents this definition as having been agreed between himself and the

¹² *Id.* §314c.

comrade: “Didn’t we declare...” (Originally Socrates had, more cautiously, simply said that the definition was “perhaps...nobly put.”) But then the Socrates proceeds to get the comrade to agree that “it is not correct to answer ...without qualification that law is the official opinion of the city”: some official opinions of the city are wicked, and since law is not wicked, an official opinion of the city that is wicked cannot be considered as law.¹³

The comrade is brought easily to this conclusion because he has perhaps thought that the previous exchange had produced the conclusion that law and justice are the same. Yet, as noted above, this conclusion does not necessarily follow either from the assertion that “lawful (men) are just” or that both law and justice are “most noble”. Had he followed Socrates more closely, the comrade could have replied entirely consistently with the letter of each of Socrates’ assertions that a man is just in the sense of lawful even when he follows a law that itself is not just. The comrade does not know how to reconcile his belief that law and justice are “most noble” with his critical attitude toward some official opinions of the city.

Legal Diversity and Cultural Relativism

This interpretation is supported by Socrates’ next move in the *Minos*, which is to reformulate the definition of law, to allow for the possibility that laws can be based on opinions that are not necessarily true. Law, Socrates suggests, “wishes to be the discovery of what is” (emphasis added). Thus, “the humans who, in our opinion, do not at all times use the same laws are not at all times capable of discovering what the law wishes-what is.”¹⁴

¹³ *Id.* §314e.

¹⁴ *Id.* §315a. Strauss notes the significance of this turn in the argument: “if law only wishes, or tends, to be the finding of what is, if no law is necessarily the finding out of what is, there can be an infinite variety of laws which all receive their legitimation from their end: The Truth.” Leo Strauss, *supra* n. 2, p. 70.

Socrates now invites the comrade to consider the diversity of law based on the notion that law “wishes to be the discovery of what is.” “For come, let’s see if from this point onward it becomes manifest if we at all times use the same laws, or different ones at different times, and whether all use the same or different peoples use different ones.”¹⁵

Based on this invitation, the comrade proceeds to describe differences in religious law and practice, both between different peoples at different times and among Greeks even at the same time. The examples cited by the comrade display his (explicitly hinted) doubt whether changes in laws can be fully understood in terms of linear progress from barbarism to civilization. Even within high or advanced civilizations there are significant differences, perhaps even shocking differences, between what is considered sacred on the one hand and sacrilege, on the other hand (The comrade perhaps prudently passes no comment on religious laws in Athens other than to point out that none of the things he mentions as done elsewhere are current done in Athens).

Socrates’ reaction to the comrade’s cataloguing of differences in religious laws in different places and times is to chastise the comrade for talking in his own manner, making lengthy speeches. This is inconsistent with Socrates and the comrade undertaking an investigation in common, according to Socrates. An investigation in common with Socrates requires acquiescence in Socrates’ own method; the comrade will be required to suppress his own voice, i.e., not speak in his own manner.

The comrade seems prepared to obey Socrates: “I’m willing...to answer whatever you wish.” This leads to an exchange where Socrates reformulates the universality of law so that it is compatible with the greatest diversity of values and beliefs. Each society’s laws reflect what that society believes to be just. Socrates’ analogy is to weight: it is everywhere believed that what weighs more is heavier and what weighs less is lighter. In other words, the laws in Carthage and Lycaea faithfully reflect men’s beliefs in those societies about what should be given greater or less weight,

¹⁵ *Id.* §315b

and the same is true everywhere.

The discussion of weight returns us in a way to the analogy between law and gold and stone at the beginning of the dialogue. A stone will have the *same* weight in Carthage and Lycaea, it will be neither heavier or lighter for weighing more or less. As for gold, two gold objects of the same *weight* may differ greatly in *value*, i.e., dependent on the extent to which they are pure gold.

The unspoken thought that weight may not be the sole measure of value is perhaps the prelude to Socrates' invocation of the noble: "The noble things, as is likely, are everywhere lawfully accepted as noble and the shameful things as shameful but not the shameful things as noble or the noble things as shameful."¹⁶ How should we relate this to Socrates' earlier assertion that justice and law themselves are "most noble" and injustice and lawlessness "most shameful"? That earlier assertion had been based on Socrates' definition of the "noble" as what preserves cities and the "shameful" as what destroys them. If we now bear in mind Socrates' hypothesis that law wishes to be the discovery of what is then the meaning of his statement that "The noble things, as is likely, are everywhere lawful accepted as noble" is that the law everywhere seeks what preserves the city. But what preserves the city may differ from time to time and city to city, thus resulting in different laws. And opinions in any given city at any given time may differ on what is required to preserve the city.

Why then does the comrade remain perplexed or concerned that the laws in Athens itself seem always to be changing? Perhaps, as Strauss suggests, the comrade has never really appreciated the significance of Socrates' emphasizing that law *wishes* to be the discovery of what is—a dynamic conception that seems to explain and perhaps even endorse experimentation and revision in law. It may also be the case that the comrade has not really assimilated, or forgotten, the utilitarian understanding of the noble, which Socrates had gotten him to assent to. The laws that the comrade seemed originally most concerned about in

¹⁶ *Id.* §§ 316a, 316b.

exploring legal diversity were laws concerning religious practices. How do these relate to the noble and shameful as understood by Socrates, i.e. the preservation or destruction of cities? In any case, when the comrade now shifts focus to the frequent change in laws in Athens, it is far from apparent that he is thinking any longer about religious laws. Has Socrates' renewed invocation of the noble (with no reminder of his earlier utilitarian spin on it) aroused an aristocratic prejudice in the comrade, which identifies the noble with what is venerable or unchanging, or that should not change (whereas the demos can never make up their minds)?

Petteia and Politeia

To the comrade's concern or puzzlement that the laws in Athens are changing all the time, Socrates responds: "Perhaps...you do not reflect, that these things being moved as pieces in a game of Petteia, remain the same."¹⁷ The pieces in a game of Petteia are stones or pebbles; we are therefore led to think again about the analogy between law and stone. A person observing the movement of pieces on the board would be perplexed, or see only disorder, unless she knew the rules of the game. Frequent change only seems anarchic or arbitrary to one who does not grasp the underlying rules or principles governing the dynamism.⁶ But of course this begs the fundamental question of whether the nature of law is to be grasped through the unity or order of such "meta-rules" or the diversity and changeability of the lower order rules that they (partly)determine. Are the rules of the game here the constitution or *politea*? Such a thought is inevitable once we recall that the alternative name for Petteia was *polis* or *poleis*. Although in Petteia the motions of the pieces are ultimately fathomable in terms of the *possible* patterns allowed by the rules of the game, the *actual* patterns in any particular game will be the product of the skill of the individual players operating within the structure created by the rules of the game.

¹⁷ *Id.* §316c.

That Petteia is a game of skill is what we need to have in mind as we consider Socrates next move in the argument, which is to suggest laws are the writings of those knowledgeable in a particular art. The first analogy is to medicine: the comrade easily agrees that writings about the healing of the sick belong to medicine and that those who are knowledgeable about medicine are doctors. Socrates proposes to the comrade that (with respect to medicine) the same things accepted by Greeks among Greeks are also accepted by the barbarians among themselves and among the Greeks as well. The comrade replies: "Surely there is a great necessity that those who know-Greeks and barbarians as well-agree with themselves in accepting the same things." Socrates then praises the comrade, saying "You are answering nobly."¹⁸ The differences between Greeks and "barbarians" do not translate into any inferiority of the latter with respect to law.

Having already alluded to religious interdictions in certain societies concerning the body and the treatment of the dead, the comrade cannot claim that differences between societies would have no effect on the general acceptance of medicine. Instead, he says that those who are knowledgeable accept as true medicine does not vary from society to society. We are thus led to consider that there *could* be an *art* of lawmaking that remains the same and valid in all times and places, yet because what is susceptible to being lawfully accepted may vary from time to time and place to place, the same art of lawmaking may result in different laws for different cities and for the same city at different times. The lawmaker must be concerned not simply with the ideal law, the "pure" or natural law, but what is capable of being lawfully accepted at a given place and time. This at once saves the elements of validity in the early definitions of law by the comrade while also following from the implicit analogy of law to gold; it also makes sense in terms of the *nobility* of law and justice being understood as their function of preserving cities while lawlessness (*disobedience* to law) is what destroys cities and thus is shameful.

But let us return to medicine. While it seems that Socrates

¹⁸ *Id.* §316d.

and the comrade are in agreement that such knowledge (“the laws” of medicine) is not culturally relative, the comrade goes a step further in suggesting that the same laws are accepted by those who know “at all times.” This again reflects an aristocratic bias in favor of the old and established; to the extent that, if taken at face value, the comrade’s statement would appear to deny the possibility of progress in medical knowledge. At the very least, we are once more reminded that the comrade has not grasped the implications of Socrates’ suggestion that law *wishes to be* discovery of what is.

Syggammata and Nomima

The comrade is brought to accept that medical laws are the writings of doctors. But there is a significant ambiguity that Socrates here suppresses. Doctors give orders or prescriptions to individual patients that could be regarded as “law” in the sense of ordinance or command; but here Socrates presents the laws of medicine as those writings that contain the underlying principles of the medical art on the basis of which prescriptions or ordinances are made for individual patients. Law as command and law as the principle or rule of reason underlying an art of legislation are both at play in the *Minos*.

But Socrates now presents examples where the writings in question contain the principles of various arts that, instead of entailing the command or prescription to human beings, are limited to the rule or control over *non-human phenomena* for the sake of some *human interest or need*. Thus, writings about agriculture, gardening, and cooking are discussed. In each of these cases, the question arises whether the “laws” in question can be said to be purely instrumental or themselves contain at least implicit interpretations or normative judgments about the human interest or need being served. In the case of agriculture, the need is one of physical survival of the community, at a minimum. In the case of gardening, do the writings of gardeners deal only with what techniques are

required in order to grow effectively given plants and shrubs, or do they imply judgments about what is an aesthetically harmonious garden, for example? Or are those concerns the realm solely of the garden owner employing the gardener, a matter of his or her preferences? And what about the cookbooks? It is perhaps more certain that there can be “rules” about what is a pleasing or harmonious garden than that there can be rules about what food is delectable. The examples seem to descend towards the understanding of law as purely instrumental reason (i.e. of *technē* in the service of given or revealed preferences whatever they may be) until Socrates returns to the underlying theme of the dialogue—the law(s) of the city.

To reconcile or salvage the unity of law in the presence of the comrade’s insistent claims about the diversity and variability of law, Socrates has shifted to an identification of the real “laws” with the rules or principles of knowing lawmakers. This allows him now to ask: “Well, and whose indeed, are the writings *and* legal practices concerning the organizing of a city?

Don’t they then belong to those who have knowledge of how to order a city?”¹⁹

Apparently, unlike the cases of medicine, agriculture, gardening, and cookery as presented above (albeit simplistically), with regard to those who know how to order the city Socrates indicates explicitly that they produce not only writings containing the timeless principles of the art, *but also* legal practices followed by citizens or subjects (*nomima*)-which may be written or not. Is there any actual real-world example of a knower of the law who wrote both a treatise setting out the abstract or universal principles underlying the art of law-making as well as an actual legal code? As we shall see, understanding the relationship between *syggrammata* and *nomima* will provide the key to the entire dialogue and its relation to the *Nomoi*.

After the comrade agrees to Socrates’ proposition that *both* the *syggrammata* and *nomima* concerning the organizing of a city belong to the knowers of how to order a city, he asks the

¹⁹ *Id.* §317a.

further question: “are they who have the knowledge any others but the statesmen and the kings?” The comrade replies emphatically: “these are the ones.” Apparently, then, Socrates and the comrade are in agreement that Socrates himself does not have knowledge of how to order a city, for he is neither a statesman nor a king. This is a conclusion that follows from the stipulation that such knowers produce *syggrammata* and *nomima*.

Having referred to the writings of “the statesmen and kings” Socrates subtly but immediately changes the categories to “kings and good men”²⁰ (*andron agathon*, an expression sometimes used for brave men, fallen on the battlefield, who sacrificed their lives to the city).

This prepares the shift in perspective to the founding rather than preservation of the city. The legal authority of the statesman or legitimate politician (*politikos*)-the capacity to produce lawful acceptance- derives from the regime (*politeia*), as was implied in the first definitions of law offered by the comrade, including the reformulated definition “political opinion” to which Socrates gave qualified approval. But the authority of kings and, especially, good men need not be derived from the constitution of an existing regime and thus may be precisely the kind of authority required to bring into being a new regime.

There follows an exchange with the comrade that leads to Socrates stating that “we were correct in agreeing that law is the discovery of what is”²¹. The exchange illustrates even more clearly than earlier ones that the comrade only agreed with Socrates that “law is the discovery of what is” and not that “law *wishes to be* the discovery of what is.” Socrates begins by suggesting that just as those who have knowledge will have the same *syggrammata* concerning the same things, they will never, *concerning the same matters*, change the *nomima*. The comrade’s immediate assent to this proposition indicates that he has not grasped at all the significance of the distinction between *syggrammata* and *nomima* (nor has Socrates chosen to explain it). The rational principles

²⁰ *Id.* §317b.

²¹ *Id.* §317d

underlying law or law making in general might be same everywhere and all times, and yet the reflection of those rational principles in specific legal norms that command acceptance might be at the same time highly variable.

This is entirely consistent with the idea of law “wishing to be the discovery of what is.” Socrates’ qualification that the *nomima* never be changed concerning “the same matters” also begs the question of what matters are the “same.” The radical implication is that where matters are not the same in all relevant respects it is *incorrect* to apply the same *nomima*. So far is the comrade from grasping the implicit radical challenge of Socrates’ qualification to the generality of law that Socrates easily gets him to say that there are correct, i.e. unchanging, *nomima* for medicine, cooking or gardening, not merely correct *syggrammata*. Does he really mean that doctors prescribe the same treatment regardless of the patient or that cooks make the same dishes regardless of the tastes of the diner or that gardeners do the same landscaping regardless of the aesthetics of the garden owner?

The disregard of the comrade for diversity among the subjects of law suggests a tyrannical instinct. Not surprisingly the exchange ends with the comrade accepting that what is not correct is not law-regardless of whether it seems to be law to non-knowers. The principle of consent, the agreement of the assembly, has been banished altogether. Hence, Socrates’ summation of the exchange, which indicates, by negative inference, the comrade’s non-agreement to law *wishing to be* the discovery of what is, even if it does not mean Socrates’ *retraction* of that qualification.

Law, the arts, distribution and kingship

The next section of the dialogue returns to the analogy between law and other arts. The characteristic activity of knowers of an art is now described not in terms of *syggrammata* or *nomima* but distribution. Indeed, it is left unclear as to whether there can be “correct” *syggrammata* or *nomima* concerning distribution in all of the senses Socrates

describes. Socrates begins with an understanding of distribution that is broadly consonant with the previous discussion of the arts: the farmer is presented as distributing seeds to the earth and the musical instrumentalist as distributing notes; the expertise is that concerning seeds on the one hand, and musical instruments, on the other. In each case the human needs or tastes or desires that are the ultimate end of the activity seem to have no place in the knowledge of the knower of the art. But then Socrates changes the *enjeu*, asking: “And who is best at distributing food to the bodies of humans? Isn’t it he who distributes what is suitable?”

The comrade’s answer is: “the trainer.” We learn several things about the comrade from this response. First of all, he does not take distribution to be a matter of distributive *justice*, but a kind of expertise about the body alone. Secondly, it is notable that he answers “trainer” rather than “doctor” or “cook”, the examples already given by Socrates. The example of the trainer could suggest a harmony between the needs of the city and of the individual in that a strong healthy body benefits both, as it most evident in the case of citizen-soldiers.

Socrates obtains the comrade’s agreement that the shepherd is the one most capable of pasturing a herd of sheep and then asks whether it follows that the laws of the shepherd are best for the sheep. Perhaps the trainer prescribes the same food whether the training is with a view to the battlefield (and thus possible slaughter or sacrifice) or personal erotic and athletic success. But the sheep are likely being herded so they can be slaughtered and eaten by human beings. Now Socrates abruptly shifts direction asking “whose laws are best for the souls of humans? Aren’t they those of the king?” “Declare it!” Socrates exclaims, as if he himself were issuing a royal command for the sake of the comrade’s legal or political education.²²

Does the comrade really mean to affirm that the king’s laws are best for the souls of humans *in the same manner* that the shepherds and the ranchers’ best for sheep and

²² *Id.* §318 (a).

cattle, i.e., in maximizing their instrumental value to others? We recall that the first positive law mentioned by the comrade was one that commanded human sacrifice. If the analogy to sheep and cows holds here, then the laws in question could be “best” either for serving the interests of the king or serving the interests of the whole community. Socrates’ praise of the comrade for speaking *nobly* evokes the later meaning: for Socrates had earlier identified the *nobility* of law and justice with their capacity to save cities in general. He had said nothing about their capacity to save diverse individual human souls.

Socrates now asks: who among the ancients was the best law giver with respect to the playing of the aulos?²³ Having just considered what is “best for human souls” we are now brought to full awareness of the incomplete and even misleading notion that what the knower of aulos playing is ordering or ruling with his laws is the aulos itself—the laws are “best” for the aulos only in the sense that they produce from the aulos music that has the “best” or most pleasing effects on individual human hearers; we cannot but think of Socrates’ suggestion early in the dialogue that law may be like hearing. The fact that there is here another art, different from the king’s, of making laws that are (ultimately) best for human souls in the sense of most pleasing to those individual souls, only reinforces the conclusion (following from the analogy of the king and the shepherd or rancher, and from the fact that when Socrates asks about laws for the *body* he refers to the human herd) that the king’s laws are best for human souls from the perspective not of each soul taken in its terms of its individual needs but from the perspective of the city and its preservation. What if the musical laws that are most pleasing for an individual soul are not the best laws for that soul from the king’s perspective, the perspective of the whole community?

²³ *Id.* §318b.

Laws and lullabies for those in need of the gods

Socrates now asserts: “Their aulos tunes are indeed most divine, and alone move and reveal those who are in need for the gods. And now they alone still remain, so as they are divine things.”²⁴ In the first sentence, Socrates understands “divine law” in a very specific way—it is not a law that originates with the gods or is for their sake (for example the law concerning human sacrifice); rather law it is law for those *human beings in need of the gods*. What appears to distinguish or identify these laws as divine is their continued existence over time.

The kind of human beings “in need of the gods” appear to need laws that last. This is a difficulty with the changeability of law, which is implied by the notion that law is the discovery of what is. How can the demand for stability of those in need of the gods be reconciled with the experimentation and revision that are entailed in law’s dynamic striving to be discovery of what is? As Socrates will suggest in noting that the Spartans took the “best” laws of the ancient Cretans, an order that selectively imitates the most ancient, or “divine” legal order, may be superior to the original model. This presages the way of the Athenian Stranger in the *Nomoi*.

But before he reveals the comrade that the Spartans chose the best of the Cretan laws, Socrates suggests to him that the best of the Spartan laws are Cretan. These are of course not contradictory propositions. But the latter proposition provides a basis *other than* veneration of antiquity for beginning with Crete rather than Sparta.

Minos and Rhadamanthus

When Socrates refers to Minos and Rhadamanthus as “good kings”, does he mean that they are good because their laws are good, or that their laws are good because they are good? As the comrade suggests, Lycurgus, a single man, is

²⁴ *Id.* §318b.

known as the founder of the Spartan laws. The Cretan laws, according to Socrates, are, by contrast, the product of two men. Are the best laws likely to be the product of one mind or authority or several minds or authorities?

As the comrade suggests, the two men in question, at least in Athens, had radically different reputations, Minos being known as “savage, harsh, and unjust” and Rhadamanthus as “just.”

Socrates counters that this reputation of Minos is based on the authority of the Athenian tragedians. Socrates answer is to salvage Minos’s reputation by an appeal to the authority of Homer and Hesiod against that of the tragedians.

Although begging the question of why the authority of one group of literary artists would be greater than that of another group, the appeal to Homer and Hesiod works with the comrade because, as we have seen already at several points in the dialogue, he is very apt to associate the authoritative with that which is oldest or longest lasting. The appeal to Homer and Hesiod appears even more tendentious when Socrates eventually admits that there was a factual basis for the attitude of the Athenian tragedians, which was that Minos had not only warred with Athens but exacted harsh retribution in victory.

Socrates never does deny that Minos was harsh, while he does reaffirm that he was good when he says that Rhadamanthus as well was good. We recall our early observation concerning Socrates’ silence about the relationship of justice/injustice, and lawfulness/lawlessness to the founding, as opposed to the preservation and destruction of cities. Could there be elements of unjust or lawless conduct that are necessary for the founding or institution of even the best laws? Are these laws inherently tainted by such unjust acts that might have been required for the founding of the legal order?

Socrates’ implicit answer to the latter question is negative: at least the nobility of the laws should be judged by their capacity to preserve the city into the future.

The Homeric authority on which Socrates relies is the slightest imaginable, as he more or less admits in saying that

the Homeric “eulogy” of Minos is entirely different from other Homeric eulogies for heroes. For what Socrates describes as a “eulogy” is a reference to the city of Knossos as “great” and to Minos himself as “the confident of the great Zeus.”²⁵

According to Socrates, if we assume that by “confidant” Homer intends that Minos was educated by Zeus, then this is very high praise indeed. Socrates suggests that Homer understands Zeus to be “sophist”: the sophists taught for money (unlike Socrates) and one wonders whether the presumed mercenary motivation of Zeus for consorting with Minos would not be a significant qualification on the extent to which Homer’s comment suggests a high praise of Minos.¹² According to Homer, Socrates suggests, “the art [of sophistry] itself is entirely noble...” But there are good reasons to think that *Socrates* does not believe that sophistry is entirely noble or even that it can be considered in the strict sense an art. Yet Socrates says there is an alternative understanding of the nature of the relationship between Zeus and Minos: Zeus participated in drunken orgies with Minos. What refutes this interpretation, according to Socrates, is that the laws Minos enacted in Crete were extremely restrictive of such drinking and the activity that goes with it. This refutation is only persuasive if what were required for founding a city were the same as that which was required for preserving it. Perhaps what Minos learned from Zeus was a god-like lack of restraint, a kind of lawlessness needed for founding or instituting a political and legal order. But this would be apt, on the other hand to be destructive rather than preservative of an *established* political and legal order.

Socrates imposes Socratic morality as the standard in his interpretation of Zeus’s relationship to Minos: Minos would have been a low *human being* (*anthropos*) if he had legislated things that were different from what he practiced or against what he believed. But perhaps there is an incompatibility between Socratic morality and the political morality of the good founder or lawgiver. The latter may have to be judged against the gods, who surely took liberties

²⁵ *Id.* §318e.

that they did not always afford to mortals.

According to Socrates *both* Rhadamanthus and Minos are good kings, and it is to both that he attributes the “laws” of Crete. Yet Rhadamanthus learned only part of the kingly art from Minos, not the whole art that Minos apparently learned from Zeus. In other words, that there were things Zeus taught to Minos that Minos refrained from teaching to Rhadamanthus. How is it that Rhadamanthus could be a “good king” and a source of the law in Crete, while knowing only a part of the kingly art, not the whole art? Rhadamanthus’ knowledge is appropriate to judgment; he is a good adjudicator in the courts. Socrates thus suggests that a good judge is a good king and a maker of laws, even if he does not know the whole of the kingly art. Is it possible that Crete’s laws were the best because they were the product of good *political* legislation by Minos and good *judicial* legislation by Rhadamanthus? Is the judicial adaptation of fixed written laws to individual situations and changing circumstances over time the best possible solution to the apparently competing demands identified in the *Minos* that the law be stable or fixed and that it be adapted to the needs of each soul, as well as that the same laws govern the same matters and hence that law be variable as “matters” are variable?

That part of the kingly art that Rhadamanthus did not know is indicated by the functions that Minos assigned to Talos rather than to Rhadamanthus. While Rhadamanthus administered the laws judicially in the city, Talos was a guardian of the laws among the neighboring villages and peoples. Talos was known as “brazen”: Socrates asserts that this was because he had the laws put on brass tablets and protected the legal order by going through the villages three times a year with the brass tablets. The known accounts of Talos, however, state that he was “brazen” because he himself was made of brass, and his role was the defense of Crete against its enemies. It is more probable that Talos entered the villages with brass knuckles not brass tablets.

However, through his conceit about the tablets, Socrates discloses a detail that may turn out to be of some importance:

the Cretan laws were written.

Founding a city among hostile and dangerous neighboring peoples or powers is part of the kingly art, as the art of the founder. Is Rhadamanthus' competence as a judicial legislator connected to his ignorance—one might say, innocence—of this part of the kingly art? A man like Talos, who knows that part of the kingly art not known by Rhadamanthus but required by foreign relations would be best sent out of the city, as indeed was Talos himself. While Rhadamanthus, who knew only part of the kingly art and was a good judge, is described by Socrates as a good king, and the laws of Crete are attributed equally to him and to Minos, Talos is not described by Socrates as a good king or indeed a king at all. Socratic justice and morality are not punitive. Socrates defends Minos against the tragic poets, insisting that he is a good king and that he knew the whole of the kingly art but this defense is subject to an important and interesting qualification. Minos should have watched out for his reputation with the tragic poets, according to Socrates. For this reason, Socrates goes so far as to suggest that Minos' attack on Athens was misguided (he says no such thing about the harshness to the neighboring peoples that was ministered through the hand of Talos). It was an error for Minos to attack Athens because Athens was a city full of wisdom as well as poetry. The reputation that Minos earned with the tragic poets, we may surmise, created an obstacle to the fusion of Athenian wisdom and Cretan law: Minos would have been a more perfect king or lawgiver if he had not created a reputation that got in the way of his laws being perfected through Athenian wisdom. He would have achieved even more than what he already achieved including through the Spartans having chosen the "best" of the Cretan laws and having enjoyed the happiness of the Cretans themselves.

Conclusion: *Nomima* as *syggrammata* and the limits of the Socratic way

Socrates concludes the discussion of Minos and Rhadamanthus and “their laws” by articulating explicitly the concept of the rational unity of law that survives or subsists through the many turns in the argument. He suggests: “the greatest evidence of [Minos] being good and lawful—as we said earlier, a good pastor—is that his laws are unchanged, as being those of one who discovered well the truth of what is, in regard to establishing a city.”²⁶ The laws of Minos have permanence in the sense that they reflect the true principles concerning legislation, and not on account of their antiquity or divinity as such. The *nomoi* of Minos are both *nomima* and *syggrammata*—both a positive legal code for Crete, imitated in part by Sparta, and a product of the discovery of what is concerning the ordering of a city. As *writings*, they are in principle permanently accessible. On the other hand, Socrates cannot question Minos; he can invoke the soul of Minos only in the question-begging and obscure fashion that depends on loose readings of the poets. Thus, the rational principles that Minos discovered concerning the ordering of a city cannot be ascertained and challenged through the Socratic method of questioning the purported knower. As the very title of the dialogue implies, an adequate Socratic treatment of law would entail Socrates questioning Minos himself. But if one can regard the *nomoi* of Minos as the *syggrammata* of a knower, would it not be possible to get to the bottom of Minos’ discovery through the examination of Minos’ *nomoi*—moving from the surface, the *nomima* to the rational principles of law that they disclose, and then correcting the former in light of the discovery of the latter?

In the final exchange of the dialogue, the comrade and Socrates restate their agreement that the best distributor or shepherd of human bodies—the lawmaker for human bodies—is the one who makes the body grow and makes it firm, distributing food and exercises (this is consistent with the comrades identification of the trainer earlier in the dialogue,

²⁶ *Id.* §§321b, 321c.

and thus an implicit affirmation that at least one of the comrade's unprompted answers is correct). The ambiguity of whether the mission is to make the individual stronger for the sake of the city (citizen-soldier) or for the individuals own benefit is simply carried over from the previous discussion of the trainer, although the reference to the shepherd at least suggests it is for the sake of the city, as the shepherd is making the sheep better for human consumption not intrinsically.

But this does not mean that Minos was, in essence, an athletic trainer. As Socrates reminds the comrade, he and the comrade never did figure out what things are distributed by the knowing law giver to make souls as opposed to bodies "better." Here the comrade admits he is at a loss. Socrates suggests that not knowing this is shameful for *their own souls, his and the comrade's*. Socrates' ultimate concern is for the state of the individual souls of himself and his comrades (in the broadest sense, including the nameless ones like his interlocutor in the *Minos*). What is intrinsically good for the individual souls may or may not be best for the salvation of cities and vice versa-and the gap might be larger than in the case of bodies. Law's diversity can never fully render justice to human diversity.

