

## A PLATONIC CRITIQUE OF CODIFICATION

Assistant Professor Kyle A. Scott  
University of North Florida

**Abstract:** Jeremy Bentham’s philosophy of law had great influence in America as he served as the intellectual predecessor to America’s codification movement. Criticism of codification has dwindled to almost nothing in the past seventy years. This paper suggests that criticism of codification, and legal positivism in general, can be found in a rather unlikely source: Plato. Mainstream legal philosophy does not treat Plato seriously on this point. This paper will turn to Plato for a definition of law and its proper form. In this paper, I show how Plato’s definition of law and its proper form serves as a critique of legal positivism and codification. This discussion has implications for modern notions of constitutionalism and lawmaking.

**Keywords:** Codification, Positivism, Plato, *Phaedrus*, *Statesman*, *Minos*

The rule of law is a necessity. Unfortunately, deficiencies in our understanding of the law complicate the matter. We often assume that the rule of law will provide a measure of justice that would not be achieved otherwise. But achieving justice is dependent upon how laws are created, interpreted and executed. In order for rule of law to provide those things, which we demand of it, we must first understand what just law is and what form it ought to take.

It is not uncommon for debates in political philosophy to cluster around two schools of thought. Such is the case in the dispute between legal positivists and anti-positivists.<sup>1</sup> The two modern pillars of this debate are H.L.A. Hart and Ronald Dworkin. “For the past four decades, Anglo-American legal philosophy has been preoccupied—some might say obsessed—with something

---

<sup>1</sup> There might be some objection to my categorization of legal theory as political philosophy. No doubt more than just political scientists partake in legal theory, actually far more law school professors engage in the enterprise than those in political science departments do. The argument I rest my categorization on is that lawmaking is necessarily a political enterprise. “In the modern world law plays a major role in the theoretical writing about politics. This is especially true in the United States; where prominent judges write political philosophy and political theorists actively seek to influence judicial interpretation of constitutional law” Josiah Ober, “Law and Political Theory” in *The Cambridge Companion to Ancient Greek Law*. Edited by Michael Gagarin. (2005) Cambridge, UK: Cambridge University Press, 394. And for this study—one that focuses on Plato’s legal theory—the relationship between law and politics is especially relevant when we understand that, “The practice of law and the development of political theory were closely intertwined within the Greek experience...” (Ober 2005, 394).

called the ‘Hart-Dworkin’ debate.”<sup>2</sup> Certainly, there are substantial variations within each school of thought—in some cases, there is little agreement over the central tenets of each school<sup>3</sup>—but even still, the parameters within which modern legal philosophy is debated is defined by the conflict between positivists and anti-positivists. If such a thing can be done, to state simply and directly the position of legal positivists is to say, “What counts as law in any particular society is fundamentally a matter of social fact...What the law is and what the law ought to be are separate questions.”<sup>4</sup> The opposing view is that moral considerations must play a role in legal decisions.<sup>5</sup>

Positivists and anti-positivists lack a definition of law independent of their jurisprudence. In each instance, the definition of law is dependent upon the jurisprudence, and the jurisprudence is dependent upon the definition of law. “One cannot identify the law on the basis of those same considerations which the law is there to settle.”<sup>6</sup> In order to create a coherent jurisprudence the definition of law must come before the theory. However, a definition of the law is insufficient for building a theory. If a scholar develops a definition of law—either what it is or what it ought to be—the next step in theory building should be to define the form the law is to take. In the Hart-Dworkin debate the form of law is treated as an application of the theory rather than a component of the theory. This is a grievous error as it underestimates the normative and practical import of form. Positivists are more likely to fall into this trap than their opponents are since positivists understand law as an authoritative social institution, or rather, a *de facto* authority.<sup>7</sup> And while legal

---

<sup>2</sup> Scott J. Shapiro, *The ‘Hart-Dworkin’ Debate: A Short Guide for the Perplexed*, Public Law and Legal Theory Working Paper Series No. 77. University of Michigan Law School, 1.

<sup>3</sup> Andrei Marmor, “Exclusive Legal Positivism.” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Edited by Jules Coleman and Scott Shapiro. (2005) Oxford, UK: Oxford University Press. Kenneth Einar Himma, “Inclusive Legal Positivism.” in *The Oxford Handbook of Jurisprudence and Philosophy of Law*. Edited by Jules Coleman and Scott Shapiro. (2002) Oxford, UK: Oxford University Press. H.L.A. Hart, *The Concept of Law*, 2<sup>nd</sup> Edition. (1997) Oxford, UK: Oxford University Press. Joseph Raz, *Ethics in the Public Domain*. (1993) Oxford, UK: Oxford University Press. Joseph Raz, *The Authority of Law: Essays on Law and Morality*, (1983) Oxford, UK: Oxford University Press. Carlos S. Nino, *Dworkin and Legal Positivism*, 89 *Mind* (1980).

<sup>4</sup> Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 *Ethics*. 286 (2001).

This is not the only definition possible nor is it beyond dispute the best definition. Exclusive positivists say that law is independent of moral reasoning whereas inclusive positivists try to soften this point by arguing that morality can be included into the discussion of law. But the position of inclusive legal positivists is criticized for being internally inconsistent. Marmor, above n 3, 115n17, 124; see also John Finnis, *On the Incoherence of Legal Positivism*, 75 *Notre Dame Law Review* 1597 (2000) for a discussion on the incoherence of positivist thought. For the most part, those legal positivists who preceded Hart—Hobbes, Austin, Bentham—were of the exclusive variety.

<sup>5</sup> Ronald Dworkin, *Law’s Empire*, (1986) Cambridge, MA: Harvard University Press.

<sup>6</sup> Marmor, above n 3, 120.

<sup>7</sup> Raz, above n 3.

positivists acknowledge that law must be legitimate, they state that the law always claims legitimacy, offering no viable—or legal—option for recourse.<sup>8</sup> For positivists, “legality is never determined by morality but rather by social practice.”<sup>9</sup> This paper does not defend Dworkin’s position, but it does critique the positivists, particularly those whose theory requires codified law.<sup>10</sup>

Mainstream legal philosophy does not treat Plato seriously on this issue. This paper will turn to Plato for a definition of law and its proper form. In so doing, the paper moves the debate beyond its current parameters thus opening a new path for political philosophy by exploring the deficiencies of our most common form of law. Codified law, since Bentham at least, has dominated the efforts of legal reformers. When a country reforms its laws it does so through codification. Plato offers the most comprehensive critique of this method of law making.

The *Laws* and the *Republic* might seem the proper place to turn to understand Plato’s theory of law. Seth Benardete writes, “The discussion of law is the proper mean between the theme of the *Republic* and that of the *Laws*.”<sup>11</sup> The *Laws* and the *Republic* seem to be at tension with one another and that tension cannot be resolved by looking at those texts alone. To understand the *Laws* and the *Republic* the reader must already understand Plato’s definition of the law and its proper form. Without this understanding one can be led astray to conclude that in the *Laws* Plato, “seems to have no idea of indefinite progress; one cannot improve upon perfection, and like Bentham he is apparently so confident of his science of legislation as to think that perfection is not very far distant.”<sup>12</sup>

---

<sup>8</sup> Marmor, above n 3, 108.

<sup>9</sup> Shapiro, above n 2; see also Himma, above n 3, 125.

<sup>10</sup> Marmor, above n 3 and John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence*, (1998) Indianapolis, IN: Hackett Publishing. Jeremy Bentham, *A Comment on the Commentaries and A Fragment on Government*. Edited by J.H. Burns and H.L.A. Hart. (1977) London, England: University of London Athlone Press. One subset of the positivist school are those who emphasize recognition. “Legal validity, according to this view which I will strive to defend here, is entirely dependent on the conventionally recognized sources of law” (Marmor, above n 3, 105). Since accepted sources of law are almost entirely codified law, particularly in the United States where the pinnacle of law is a codified constitution and where the codification movement pioneered by David Dudley Field has transformed areas previously governed by common law—such as the Uniform Commercial Code, Federal Rules of Civil Procedure, Sentencing Commissions in the United States—into codified law, it is accurate to classify exclusive positivists with positivists who require codified law even if the exclusive positivists do not explicitly mention codified law.

<sup>11</sup> Seth Benardete, *Plato’s Statesman: Part III of The Being of the Beautiful*. (1986) Chicago, IL: University of Chicago Press, 130.

<sup>12</sup> Glen Raymond Morrow, *Plato’s Cretan City: A Historical Interpretation of the Laws*, (1993) Princeton, NJ: Princeton University Press, 570-571. Other scholars have made similarly inaccurate comparisons. “Although committed to justice, Greek theorists were in some sense

This paper provides insight into the definition and proper form of law by examining the *Minos*, *Phaedrus*, and *Statesman*. With these three dialogues, Plato gives us insight into his theory of law. While restricting one's reading to only these three dialogues will not produce a comprehensive understanding of Plato's theory of law, reading these three texts will allow one to grasp what Plato meant by the term law and what form law ought to take. This paper will show that, for Plato, law sets out to discover the truth and codified law prevents the realization of that pursuit.

This paper will first consider the *Minos* and move on to a discussion of the *Phaedrus* followed by a discussion of the *Statesman*. The final section of the paper will provide a synthesis of the three dialogues to show how they can be, and should be, read together.

### Minos

It has been suggested that the *Minos* is entirely preliminary in that it is an introduction to the *Laws*.<sup>13</sup> Even if this is the case, it does not mean the dialogue is unimportant or deserves being ignored in the manner it has been traditionally. The *Minos* deserves attention, if for no other reason; because it is the only Platonic dialogue whose only theme is defining law.

As argued in the *Phaedrus*, the good writings are those that pursue the serious things.<sup>14</sup> This is the recurrent theme of the *Minos*, which defines law by its pursuit to discover the truth.<sup>15</sup> And that pursuit is where the law gains its legitimacy.<sup>16</sup> The law's pursuit of truth is also consistent with art in that art

---

legal positivists who could sum up the separation between any given set of laws and objective morality within the phrase *nomos basileus*?' (Ober, above n 1, 395). Statements such as these fail to appreciate the differences among Greek theorists (i.e., Hesiod, the Stoics, Plato) on the question of law. Oddly, Ober even acknowledges the differences among Greek theorists at a later point (Ober, above n 1, 396), but nonetheless classifies them all as positivists. Also, statements linking Greek theorists to positivism, particularly Plato, demonstrate a lack of appreciation for the restrictiveness of positivism and its exclusion of moral considerations; positions Plato necessarily rejects. This is an odd oversight on behalf of Ober who at 395fn2 acknowledges that legal positivism is linked to the thought of Hobbes, Locke, and Rousseau; hardly theorists one would classify with Plato in terms of legal theory.

<sup>13</sup> Leo Strauss, "On the *Minos*" in *Roots of Political Philosophy: Ten Forgotten Socratic Dialogues*, Edited by Thomas L. Pangle. (1987) Ithaca, NY: Cornell University Press, 67.

<sup>14</sup> Plato, *Phaedrus*, Translated by Harold North Fowler. The Loeb Classical Library. (2001) Cambridge, MA: Harvard University Press, 278d. Referred to as *Phaedrus* hereafter.

<sup>15</sup> Plato, *Minos*, Translated by Thomas L. Pangle in *Roots of Political Philosophy: Ten Forgotten Socratic Dialogues*. Edited by Thomas L. Pangle. (1987) Ithaca, NY: Cornell University Press, 315a. Referred to as *Minos* hereafter.

<sup>16</sup> Strauss 1987, 70.

pursues the discovery of things.<sup>17</sup> Good law can only be accomplished by kingly law, meaning law generated from good men.<sup>18</sup> Because men are infinitely variable laws too must be infinitely variable in that they must adapt themselves to different men in order to pursue the truth of things.<sup>19</sup> Ideally, a king with a wise soul would make the laws on the spot.<sup>20</sup>

Infinitely variable does not mean unstable.<sup>21</sup> As is seen in the example of the *aulos*, the laws must be wise and stable.<sup>22</sup> So while the *Minos* is clear on the point that law must be stable, variable, and wise; it is not clear on how to accomplish this mighty task.

A definition alone is insufficient, though it is certainly necessary, for developing a legal theory. The next step is to determine how to create laws that reflect the definition of law. While not explicitly discussed in the *Minos*, the *Phaedrus* and the *Statesman* provide the necessary insight. Once considered in this light, one can reflect back on the *Minos* and see how the *Minos*, *Phaedrus*, and *Statesman* work in unison.

### Phaedrus

John Kayser has argued that the *Phaedrus* should be read as the first dialogue, even though it is not, since it takes up writing as one of its subjects. Therefore, in order to understand any dialogue one must first understand Plato's teaching on writing which is most clearly expressed in the *Phaedrus*.<sup>23</sup>

Following the dramatic action of the dialogue reveals the *Phaedrus*' teaching on writing. Phaedrus comes to Socrates with a speech from Lysias which he thinks is of outstanding quality. Socrates observes that Phaedrus is carrying a written transcript of the speech and asks him to read it. So Phaedrus and Socrates find a spot below a tree near a stream outside of the gates of Athens at which time Phaedrus, after resisting at first, reads the speech to Socrates. Socrates remarks

---

<sup>17</sup> *Minos*, 314b; *Phaedrus*, 269e.

<sup>18</sup> *Minos*, 317b-c.

<sup>19</sup> *Ibid.*, 318a-c.

<sup>20</sup> *Ibid.*, 317b-d.

<sup>21</sup> Also, one should not confuse variable with different, as the unnamed interlocutor does. The unnamed interlocutor uses the different strategies of burial and sacrifice across cultures to show that laws are different (*Ibid.*, 315b-d). Socrates does not respond directly to this rebuttal but offers to embark on the discussion through a different manner of speaking. The reader is left to wonder if the cultures do vary that much or if it is enough of a similarity that all the cultures bury and sacrifice and differences in how they are carried out are unimportant in terms of the law.

<sup>22</sup> *Ibid.*, 318c.

<sup>23</sup> John R. Kayser, *Noble Lies and Justice: On Reading Plato*, 5 Polity. 491, 494 (1973).

that the speech is not very good and responds with his own unwritten speech that far surpasses the other speech. The action reveals the following points: First, one must truly understand the truth of things in order to craft a good speech. Second, the unwritten speech is superior to the written. Third, in order to achieve these goals one must be outside the city.<sup>24</sup>

### Good Rhetoric

The point of words is to lead the soul.<sup>25</sup> Therefore, one must not misuse words. In order to use words correctly so as not to mislead the soul, one must understand the soul and the difference between good and evil.<sup>26</sup>

Composing speeches well—either written or unwritten—is an art that requires one to divide things up and bring them back together. Socrates mentions specifically his preference for dialectical works as they are the only form that can divide things into their natural classes and bring them together.<sup>27</sup> Dialectic provides what all great arts provide, a discussion and high speculation about nature.<sup>28</sup> Socrates refers to dialectical speech as an art; while ignoring books of rhetoric.<sup>29</sup> It is unclear at this point, though briefly mentioned, whether dialectic may be taught, though it is agreed it would be gratifying if it could be taught.<sup>30</sup> But what is not in doubt is that proper discourses and training can give the soul the proper belief and virtue.<sup>31</sup>

“But evidently the man whose rhetorical teaching is a real art will explain accurately the nature of that which his words are to be addressed, and that is the soul, is it not?”<sup>32</sup> The good rhetorician must be able to classify men and speeches and know which speeches go with which man. The good rhetorician will be able to describe the soul accurately, the direction and action of the rhetoric, and adapt the speech to the differing needs of different souls in order to persuade the soul to virtue.<sup>33</sup> The rhetorician must know how to speak to

---

<sup>24</sup> It might be instructive, when considering the *Phaedrus*, to keep Plato’s *Seventh Letter* in mind, specifically 341c-e in which he writes that only a joint intercourse between teacher and pupil can lead to a true understanding of a subject, writing cannot. In this section of the *Seventh Letter* Plato also demonstrates why he thinks the written word is insufficient for teaching the multitude.

<sup>25</sup> *Phaedrus* 261a, 271d.

<sup>26</sup> *Ibid.*, 258d, 260a-c.

<sup>27</sup> *Ibid.*, 265d-e, 266a-b.

<sup>28</sup> *Ibid.*, 269e.

<sup>29</sup> *Ibid.*, 266d.

<sup>30</sup> *Ibid.*, 265d, 269e.

<sup>31</sup> *Ibid.*, 270b.

<sup>32</sup> *Ibid.*, 270e.

<sup>33</sup> *Ibid.*, 271a-c.

each man and possess the knowledge of when to keep silent.<sup>34</sup> And while all discourses are different, all have the same ends, and all are organized as a living thing with a body, head, and feet. The middle, according to Socrates, must fit in relation to the whole.<sup>35</sup> Only philosophy can give someone the knowledge to categorize men and speeches and to organize discourses correctly.<sup>36</sup> The discussion of the best rhetorician began with a discussion of knowledge of what is best for the whole<sup>37</sup> which sets up the argument that follows that in order to serve the whole one must be able to serve the individual which cannot be done without understanding the whole.

### Critique of the Written Word

Socrates and Phaedrus engage in a discussion of the written word after it is observed that the locusts were singing and their song is the gift of the muses; a gift which then plays on the soul and is audible, not something written.<sup>38</sup> It is stated bluntly that the books on rhetoric have gaps in them and that books cannot provide a full education. Thus one who learns from books has incomplete knowledge.<sup>39</sup> The written word is imitative of the living word of the one who truly knows.<sup>40</sup> This leads Socrates to worry that the written word cannot convey knowledge sufficiently which may lead us to be dominated by the instruments of our desire.<sup>41</sup> Because it is imitative it is insufficient, but this does not answer what the precise objections to the written word are. There are four, the last three of which are inseparable from one another. First, the written word destroys memory. Second, written words are distributed equally and identically to all. Third, they cannot be questioned or defend themselves. Fourth, they mislead people into thinking they truly understand something when they do not.

By using the example of Theuth and Thamus, Socrates demonstrates to Phaedrus how writing can be destructive. Theuth brought to Thamus his

---

<sup>34</sup> *Ibid.*, 271d-272b. This may shed some light on the question of whether dialectic can be taught. *Ibid.*, 265d, 269e

<sup>35</sup> *Ibid.*, 264c.

<sup>36</sup> *Ibid.*, 261a.

<sup>37</sup> *Ibid.*, 270b-c.

<sup>38</sup> *Ibid.*, 259a-e.

<sup>39</sup> *Ibid.*, 268c-e.

<sup>40</sup> *Ibid.*, 276a-b. In this section Phaedrus says, "You mean the living and breathing word of him who knows, of which the written word may justly be called an image." Socrates responds, "Exactly."

<sup>41</sup> Charles L. Griswold, *Self-Knowledge in Plato's Phaedrus*, (1986) New Haven, CT: Yale University Press, 207. It has also been suggested that the distance between the written word and the oral word is equivalent to the distance between life and death or knowledge and ignorance. Graeme Nicholson, *Plato's Phaedrus: The Philosophy of Love*, (1999) West Lafayette, IN: Purdue University Press, 78.

inventions. Thamus listened intently but when Theuth got to the letters Thamus objected. Theuth argued that the letters would make men wiser and improve their memory.<sup>42</sup> Thamus objected on both grounds arguing that the letters would induce forgetfulness as the letters would make it unnecessary for men to practice their memory since it could be replaced by letters. The written word is good for reminding but bad for memory.<sup>43</sup> The reader can see this point made earlier when Phaedrus, now not reading from the scroll on which he wrote Lysias' speech, inadvertently misquotes the speech by replacing madly with manfully. A mistake Socrates corrects, though not working from a scroll at any point in the dialogue.<sup>44</sup>

“You have invented an elixir not of memory, but of reminding; and you offer your pupils the appearance of wisdom, not true wisdom, for they will read many things without instruction and will therefore seem to know many things, when they are for the most part ignorant and hard to get along with, since they are not wise but only appear wise.”<sup>45</sup> Thamus reasoned that because men could read the words without assistance or guidance men would think themselves wise without truly being wise. This is encouraged by the written word because the written word cannot be questioned or respond to a misreading, nor can the written word say something particular to a general audience. Written words treat everyone the same.<sup>46</sup> Furthermore, written words encourage the pursuit of knowledge in books, not the true knowledge attained by self-questioning.<sup>47</sup>

While one can see how discouraging self-examination can lead to false wisdom, the lack of wisdom produced by the written word is based on two factors: its inability to respond to questions and its inability to know its audience. That written words cannot defend themselves is an obvious conclusion, yet a conclusion that Socrates feels the need to mention.<sup>48</sup> Because they cannot defend themselves they can be misinterpreted which means the reader can walk away thinking he has attained an accurate understanding when in fact he has not.

---

<sup>42</sup> *Phaedrus* 274e-275a.

<sup>43</sup> *Ibid.*, 275d; Nicholson, above n 41, p. 76.

<sup>44</sup> *Phaedrus* 265a.

<sup>45</sup> *Ibid.*, 275a-b.

<sup>46</sup> Plato, *Statesman*, in *Plato's Statesman: Part III of 'The Being of the Beautiful'*, Translated by Seth Benardete. (1986) Chicago, IL: University of Chicago Press, 294d-295a. Referred to as *Statesman* hereafter.

<sup>47</sup> Griswold, above n 41, 206, 212. That the dialogue between Theuth and Thamus occurs over virtue in the oral word and vices in the written word is meant to illustrate Socrates' position on dialogue as the medium for philosophical discussion (Griswold, above n 41, 205; Nicholson, above n 41, 75).

<sup>48</sup> *Phaedrus* 275d-e.

Following the example of Theuth and Thamus, and the agreement between Socrates and Phaedrus that the written word is a mere image of the one who truly knows, Socrates uses the example of the husbandman to show Phaedrus again why not knowing one's audience is harmful. The example shows that a husbandman will not plant his seeds in the heat of summer but only in those conditions that are right for growing. And because the person who has knowledge of the just and the good and beautiful can be no less wise than the husbandman then we must conclude that the wise person will not plant his words in those who are not ready to receive them.<sup>49</sup> Whereas, as discussed above, the good rhetorician must be able to divide men into appropriate categories and divide speeches into appropriate categories and know which category of speeches apply to each category of man, the written word is incapable of doing so thus making it a bad rhetorician.<sup>50</sup>

For serious matters Socrates prefers dialectic. The dialectical method allows one to plant seeds of truth into those souls fitting for intelligent words as certain souls are endowed with different qualities not all of which may be ready to receive the seeds of truth.<sup>51</sup> While the written word may be good for reminding it is not good for improving the memory or making one wise. Because it is unable to defend itself or know its audience the written word cannot instil wisdom in the reader.<sup>52</sup> Written words are intended to be playful and the good writer acknowledges that the written word is insufficient.<sup>53</sup> What is necessary for writing to be good is impossible to be captured in written laws—mainly the ability to know one's audience, provide a specific message suitable for that audience, and the ability to defend itself thus allowing for certainty and clarity—and those who make laws often mistake themselves for gods because they have written laws, which therefore displays their inability to be good law writers.<sup>54</sup>

The *Phaedrus* does not provide a complete treatment of lawmaking. This is why the *Statesman* must now be consulted.

### Statesman

---

<sup>49</sup> *Ibid.*, 276b-c.

<sup>50</sup> *Ibid.*, 271d-272b, 275e; Nicholson, above n 41, 76.

<sup>51</sup> *Phaedrus* 269d, 276e-277a. Griswold makes a compelling argument that writing and *techné* are related only to the extent that *techné* cannot be communicated through writing. Griswold, above n 41, 204.

<sup>52</sup> In addition to the passages from the *Phaedrus* cited above on this matter see also Kayser, above n 23, 498 and 504.

<sup>53</sup> *Phaedrus* 277e-278b, 277d-e.

<sup>54</sup> *Ibid.*, 277b-c, 258c, 278c.

Like the *Phaedrus* and *Minos*, research on the *Statesman* has been sparse compared to the amount of attention dialogues like the *Republic* and the *Apology* have received. Most of the earlier research on the *Statesman* is merely a summary of the argument.<sup>55</sup> But even these summaries get some of the information incorrect as Davis states that the *Statesman* performs a Solonian function.<sup>56</sup> This cannot be accurate if we are to take seriously Socrates' criticism of Solon in the *Phaedrus*.<sup>57</sup> In mainstream political science, Paul Stern<sup>58</sup> makes the most recent contribution to *Statesman* scholarship. Stern provides an insightful analysis of the role of *phronesis* in lawmaking. However, Stern's analysis does not include a discussion of what form law ought to take. This paper builds upon Stern's analysis to explain why law that comes from the statesman is superior to written law.

Young Socrates and the Stranger agree that statesmanship is necessary.<sup>59</sup> For only a statesman can, "distribute to those in the city that which with mind and art is most just, and can keep them safe and make them better for worse as far as possible."<sup>60</sup> The true statesman, who rules in accordance with art, is therefore free to act in the absence of, or contrary to, the written laws.<sup>61</sup> The Stranger gives the example of a doctor who leaves written instructions for his patients to follow while he is away. If the doctor returns and finds that things have changed and there is a better way to treat the patients than the written instructions provided, the doctor ought to be free to change his treatment.<sup>62</sup> To do otherwise would endanger the health of those who are under his care. The same is true for the statesman. Even when a law is in force, if the statesman deems it not in the best interest of the city he may violate it and provide for the city what is best. This point is supported by the sailor example as well.<sup>63</sup> Thus, it is a commonly accepted point that the statesman may act contrary to the written laws.<sup>64</sup> Unfortunately statesmanship is the most difficult human science

---

<sup>55</sup> Morris Davis, *The Statesman as a Political Dialogue*, 88 *American Journal of Philology*. (1967).

<sup>56</sup> *Ibid.*, 325. Davis is not the only one who has incorrectly attributed this position to Plato's statesman. Cairns seems to stop his reading of the *Phaedrus* at 257-258 when Plato writes of Lycurgus, Solon and other statesmen who like to sign their name to law. Huntington Cairns, *Plato's Theory of Law*, 56 *Harvard Law Review* (1942). Had Cairns and Davis considered *Phaedrus* 278c they would have revised their position and recognized that 257-258 was the beginning of a challenge to *Phaedrus* about what a true author ought to be.

<sup>57</sup> *Phaedrus* 278c.

<sup>58</sup> Paul Stern, *The Rule of Wisdom and the Rule of Law in Plato's Statesman*, 91 *American Political Science Review*. (1997).

<sup>59</sup> *Statesman* 292d.

<sup>60</sup> *Ibid.*, 297b. This follows the lesson learned from following the dramatic action of the *Phaedrus* that the good speech—which is the unwritten speech—can only exist outside of the city's walls.

<sup>61</sup> *Ibid.*, 293a-b, 293c-d, 295b.

<sup>62</sup> *Ibid.*, 295c-d.

<sup>63</sup> *Ibid.*, 297e-298a.

<sup>64</sup> Andrea Wilson Nightingale, *Plato's Law code in Context: Rule by Written Law in Athens and Magnesia*, 49 *The Classical Quarterly*. 113-114 (1999); Jacob Klein, *Plato's Trilogy: Theaetetus, the*

to acquire and a multitude is unlikely to acquire it.<sup>65</sup> Nevertheless, the state ought to be ruled by the highest *available* intelligence, for it is always better for the wise to rule the unwise.<sup>66</sup> If there is a city with no true statesman there must be an alternative to rule by a statesman. If a statesman is absent the highest *available* intelligence is the law. Rule of law is the second best regime.

The second best regime is not a just regime, but it is attempting to become just, just as the definition of law in the *Minos* is trying to become the discovery of what is.<sup>67</sup> The just regime, that which is ruled by a statesman, does not need written laws but all other regimes do simply because absent a statesman and absent laws tyranny will reign.<sup>68</sup> In the discussion devoted exclusively to the second best regime that begins at 297e and continues to 299e, the reader finds that the second best regime is imitative, much like the written word in the *Phaedrus* was found to be imitative of true wisdom.<sup>69</sup> Written law is consistently referred to as imitative.<sup>70</sup> This means that written law cannot be a true art, which means it does not discuss or speculate about nature in general, or human nature in particular.<sup>71</sup>

A comparison between the second best regime and the statesman's regime continues beyond 299e, and at each point the dialogue suggests that there are certain limitations imposed by law that will never allow the second best regime to become just. Laws in a second best regime prohibit violation; they must, as only the statesman—who is absent in the second best regime—is capable of violating the law justly.<sup>72</sup>

It is intimated that laws may be reformed without being violated as laws are made through trial and error.<sup>73</sup> However, when we unpack this simple statement the matter appears to reverse. Laws are prohibitions.<sup>74</sup> No one in the second best regime is authorized to violate these prohibitions.<sup>75</sup> But trial-and-error reform can only occur when errors are recognized. Errors in prohibitions can only be seen when a prohibition is violated, or when it is determined that a particular prohibition will lead to an undesirable outcome. This is problematic

---

Sophist, *and the Statesman*, (1977) Chicago, IL: University of Chicago Press, 185; Benardete, above n 11, 133; Davis, above n 55, 320.

<sup>65</sup> *Statesman* 292d.

<sup>66</sup> *Ibid.*, 290d, 296b.

<sup>67</sup> *Minos* 315a.

<sup>68</sup> *Statesman* 301a-b; Cairns, above n 56, 361.

<sup>69</sup> *Statesman* 299d; *Phaedrus* 275a-b.

<sup>70</sup> *Statesman* 301a.

<sup>71</sup> *Ibid.*, 299c, 300c; Klein, above n 64, 187; *Phaedrus* 269e.

<sup>72</sup> *Statesman* 300c, 295b.

<sup>73</sup> *Ibid.*, 300b.

<sup>74</sup> *Ibid.*, 300c.

<sup>75</sup> *Ibid.*, 300c, 295b.

in that if no one is authorized to violate the law, then all violations of a particular prohibition are illegitimate in the second best regime, thus there can be no reform through trial and error by violation, particularly since written law cannot admit its shortcomings. The second manner in which trial and error can be carried out is prohibited by the laws as well, but in a much more discreet manner.

“It is plain: all the arts we have would completely perish, and they would never come to be at a later time on account of this law that forbids their search. And hence life, which even now is hard, would prove to be altogether unliveable throughout that time.”<sup>76</sup> This is the response by Young Socrates to the Stranger when he asks, “Whatever would come to light if all these things should be practiced in this way, in conformity with writings and not in conformity with art?”<sup>77</sup> We know for certain that the two men must be speaking of all written laws and not just a select few as it was already determined—and would be again—that all written laws are imitative.<sup>78</sup> Thus, recognizing that a prohibition has led to an undesirable outcome would be impossible under the rule of law since the law by design is stifling and would prohibit the sort of independent thinking necessary to recognize an undesirable characteristic in the law. Anyone having the nerve to speak out against the laws or violate them would be punished by death.<sup>79</sup> Thus, the trial and error method of making laws is impossible as the written law prohibits all violations and stifles the thought necessary for questioning the law. Therefore, we should not be surprised at the badness of the second best regimes since laws, which guide second best regimes, cannot adapt to the changing needs of the city.<sup>80</sup> The rule of law acts “as if it were some self-willing and foolish human being who allows no one to do anything contrary to his own order or even for anyone to ask a question, not even if it turns out that, after all, something new is better for someone contrary to the speech which he himself enjoined.”<sup>81</sup> Laws, then, like the written speeches in the *Phaedrus*, do not allow themselves to be questioned.

Because this is the result of the written law, it is imperative that a statesman is independent of the written law and violate it when necessary. It has already

---

<sup>76</sup> *Ibid.*, 299e.

<sup>77</sup> *Ibid.*, 299e; see also Benardete, above n 11, 136; Klein, above n 64, 189; Nightingale, above n 64, 114-115.

<sup>78</sup> *Statesman* 299c-d, 301a.

<sup>79</sup> *Ibid.*, 297e.

<sup>80</sup> *Ibid.*, 301e-302a.

<sup>81</sup> *Ibid.*, 294c. In light of 294c it might seem overkill to have led the reader through an elaborate refutation of the trial-and-error fallacy, but this would have been merely refuting one line with the other without directly dealing with, or resolving the contradiction. The contradiction is put in place to show that even those laws that can be legally changed are in themselves contradictory, further demonstrating the insufficiency of the law.

been shown that the dialogue makes direct statements that the statesman should be independent of the law. But why the statesman should be authorized to do so has not been explored, though avoiding the pitfalls of the second best regime ought to be reason enough in some respects.

In the *Phaedrus* written speeches were unable to target their audience and appeal to individuals individually, the same is true with written laws in the *Statesman*. “Because a law would never be capable of comprehending with precision for all simultaneously the best and the most just and enjoining the best, for the dissimilarities of human beings and of their actions and the fact that almost none of the human things is ever at rest...”<sup>82</sup> The law cannot be precise and comprehensive. The law treats everyone the same.<sup>83</sup> Human nature is dynamic and varying therefore nothing static can decide anything in all cases at all times. Written law treats humans as something less than human. By the definition of the great arts given in the *Phaedrus* we know that written laws cannot be one of the great arts since written laws do not “demand discussion and high speculation about nature” but instead ignore nature, and perhaps even violate it.<sup>84</sup>

While it is determined that something never simple cannot be governed by something that is always simple that is precisely what the law tries to do.<sup>85</sup> This is almost an identical point to that made in the *Phaedrus* at 271d-272b that written speeches are inferior to spoken ones as it is the job of the rhetorician to divide men and speeches according to their nature and apply the proper speeches to the proper man, something the written word could never accomplish. Because in the second best regime a fixed law must govern what is always changing, irresolvable conflicts will inevitably result.<sup>86</sup> The limitations of the written law make the statesman necessary. If statesmen were constrained by the law life would be unliveable.

### Synthesis

This paper has set out to discover the proper form of the laws so that they may be allowed to discover what is, as that is what they desire to be according to the *Minos*. The discussion of the *Phaedrus* and the *Statesman* has shown that knowledge of the nature of things is imperative for one who seeks to govern. Written law is an insufficient substitute for the one who possesses true knowledge. Written words are limited, and in some cases can do harm, such as

---

<sup>82</sup> *Ibid.*, 294a-b.

<sup>83</sup> *Ibid.*, 294b-c, e.

<sup>84</sup> *Phaedrus* 269e. Written law treats an individual with lower dignity than the many (Strauss, above n 13, 77).

<sup>85</sup> *Statesman* 294b-c; Klein, above n 64, 184.

<sup>86</sup> Cairns, above n 56, 362.

when they allow someone to think he or she is wise when he or she truly is not. The above discussion intentionally separated the dialogues from one another; though it should be clear to the reader how they work together. In case it is not, this section will combine the three dialogues through certain instances where they overlap in order to show the reader, explicitly, that the written law is a poor substitute for the one who has true knowledge and that proper laws are those laws that are guided by this knowledge.

The *Minos* states directly that the one who is most knowledgeable about law is the one who is most knowledgeable about the *aulos*.<sup>87</sup> This statement seems most impractical. The most literal interpretation of this sentence suggests that Joshua Bell is the American best suited to make laws. While he may be the nation's most celebrated violinist, it is hard to imagine him as the nation's foremost expert on lawmaking as well. This statement by Socrates begins to make sense, however, when read in light of the *Phaedrus*. The musician has true knowledge of harmony. This knowledge is distinct from simply knowing how to strike the highest and lowest chords. To the latter individual the true knower of harmony would say, "You know the necessary preliminaries of harmony, but not harmony itself."<sup>88</sup> Therefore we may correctly reason that the one who is most knowledgeable about the *aulos* is the one who knows how to strike the highest and lowest notes and understands how to use this skill in making the notes work in harmony, just as the statesman must know how to make the people and the laws work in harmony, and be free to adjust the laws when necessary in order to maintain that harmony.<sup>89</sup> This point is consistent with Jacob Klein's analysis of *Statesman* 305e-311c when he says that the statesman must be able to weave the different people and needs together to form a whole. It should not be lost on the reader how closely related Klein's discussion of weaving in the *Statesman* is to the discussion of the true rhetorician in the *Phaedrus*, as the true rhetorician is able to "weave" the proper speeches and men together so that each learns what is necessary and proper. This reinforces the earlier conclusion that it is misguided to think that written laws are a sufficient substitute for the true knowledge of how to rule since they are mere imitations of true knowledge.<sup>90</sup>

Medicine is used in all three dialogues to illustrate the same point. In the *Minos* Socrates states that prescriptive writing comes from those who possess the knowledge of the art they are writing about, suggesting of course that the

---

<sup>87</sup> *Minos* 317e.

<sup>88</sup> *Phaedrus* 268e.

<sup>89</sup> *Statesman* 300e; see also Stern, above n 58, 274.

<sup>90</sup> It should also be remembered that in the *Minos* the best *distributor* of the law is also the most knowledgeable about the law (*Minos* 317e), a point directly comparable to the statement in the *Statesman* that "as long as they [just statesmen] always *distribute* to those in the city that which with mind and art is most just." *Statesman* 297b, italics my own.

statesman possesses knowledge of an art.<sup>91</sup> What has previously been assumed is that there is a possibility that art does not have to be written.<sup>92</sup> But that possibility has not been fully explored in the extant literature. If the reader of the *Minos* goes to the *Phaedrus*, the reader will see that a man who learns medicine from a book only, and thinks himself a physician, should be thought mad.<sup>93</sup> The *Statesman's* use of medicine quite clearly illustrates the point expressed in the *Minos* and *Phaedrus* that written laws and books in general, do not contain full knowledge. The *Statesman* shows that a doctor who leaves written instructions for his patients must be free to change those instructions as the need arises, as it is the doctor who possesses the knowledge of medicine and not the written instructions or the patient who he or she leaves the instructions with.<sup>94</sup> The point is more forcefully stated in the *Statesman* than anywhere else; even those instructions written by the one who possesses true knowledge cannot make the reader of those instructions as knowledgeable as the author. These examples support the conclusion that the written law is incapable of instilling true virtue.<sup>95</sup>

A common theme throughout all three dialogues is the variability in human nature, or the differences between humans. The *Phaedrus* strikes a stark contrast between the written word and the rhetorician on this point. The contrast is that written words do not know their audience and therefore cannot give to a reader what he or she needs as each reader has different needs.<sup>96</sup> As mentioned above, the *Statesman* points out, humans are infinitely variable and the law does a disservice by treating each individual the same.<sup>97</sup> Therefore we might conclude that while law is better than no law, the law cannot be just as it is impossible for something simple to be applied to something that never is.<sup>98</sup> Understanding the *Minos's* teaching on the law cannot be understood without reference to these lessons. The *Minos* does not explicitly recognize the differences between individuals to the extent the other two dialogues do. The *Minos* allows us only to speculate as to why the best laws are those handed down by the king on the spot or why the best laws are those laws given orally.<sup>99</sup> The only way to understand if this speculation is correct is to consult the other dialogues; it would be irresponsible to let only our speculation inform us.

---

<sup>91</sup> *Minos* 316c-e. For those who might be interested, this begins the central section of the central part of the dialogue. Strauss, above n 13, 72.

<sup>92</sup> Strauss, above n 13, 72.

<sup>93</sup> *Phaedrus* 268c. This section in the *Phaedrus* precedes by only a few lines, and therefore serves as an introduction to, the discussion of harmony that has already been dealt with in this paper.

<sup>94</sup> *Statesman* 295c-e.

<sup>95</sup> Benardete, above n 11, 130.

<sup>96</sup> *Phaedrus* 261a, 271a-272b.

<sup>97</sup> *Statesman* 294a-b.

<sup>98</sup> Klein, above n 64, 184.

<sup>99</sup> On this last point, one may speculate that this is why the discussion of lawgiving changes from written laws to spoken laws when the best laws are discussed. *Minos* 318c.

There are other instances of shared examples between these three dialogues, but none more than the ones selected work in concert to show the insufficiency of the written law. What must be in place is wisdom, or knowledge of nature, and for various reasons the written word cannot achieve this knowledge. The very nature of written law is inimical to human nature in that one is static and the other is variable. While laws can change they must first be violated, thus further demonstrating their insufficiency. The first step in formulating just laws is to first recognize the insufficiency of writing. We must not replicate the error of Solon pointed out in the *Phaedrus* and think ourselves wise because we can set down in writing prohibitions of human action. Only the pursuit of what underlies writings has worth. Writings are generated by humans with a particular knowledge, and perhaps writing brings to light the limits of human knowledge.

### Conclusion

In order for a law to be just it must persuade individuals to virtue. For this to be accomplished it must understand human nature. Written law cannot be just because it does not understand human nature. Just like other types of writing, written law can mislead people into thinking they are attaining something when they are not. And too like other types of writings, written law prohibits the sort of questioning that makes true knowledge possible. The shortcomings of written law are self-reinforcing thus creating a scenario in which the distance between the just and the law is increasing.

Law is not an option; we must have it. The question this paper raises is whether our current understanding of creating and reforming laws cannot be improved. As stated in the beginning, the current trend in legal reform is to codify and make uniform. Legal reform can take on other forms. Scholars must think seriously about the form of law and the extent of its impact. Jeremy Bentham took up this task, now it is time to correct the shortcomings of his codification movement.

This paper does not settle the Hart-Dworkin debate, but it lays bare some of the deficiencies of the positivist position, particularly of those in the exclusive camp. First, law must admit its limitations in order to change; positivism in its strictest form does not allow the law to make such an acknowledgement. What is lawful is right say the positivists. Second, positivists do not show an appreciation for the variation in human nature. Law, like good teaching, must meet the individual where she or he is, and take them where it would like for them to go. Before we can think ourselves ready to create jurisprudence, we must first be able to define the law and then theorize about its proper form.

Plato did this, and we should refine our understanding of his theory so that we may continue in the tradition of pursuing the truth.

