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ORIGINS OF THE GAME THEORY OF LAW AND THE LIMITS OF HARMONY IN PLATO'S *LAWS*

Arthur J. Jacobson*

In his last dialogue, the *Laws*,¹ Plato presents what we today can recognize as a game theory of law. He describes the views on human nature, the nature of human association and the divine that this theory requires. He traces its origins to rejection of a competing, musical model of law, which he presented in the *Republic*.²

The musical model regards law as an instrument for achieving harmony. The harmony that law helps achieve is justice—a harmony of the soul, or virtue, and a harmony of citizens living together in a city. But justice is not a natural harmony, or not a natural harmony simply (the same is true in music). It can be achieved only by knowing, that is to say perceiving, what is just. Justice is possible only if knowledge is possible, and knowledge is possible only in a harmonious universe that can thoroughly be grasped by intelligence. The unanswered question in the *Republic* is whether the universe is harmonious and open to intelligence. In the nature of things, we cannot know the answer to that question, because we have no way of knowing what the universe might be other than through intelligence. But we do, at least, have an image of justice formed by intelligence. The harmonic model imagines that the correct laws, aided by a proper musical and gymnastic education, create a soul in harmony with itself in a city of citizens in harmony with one another, a soul and city alike that are devoid of disintegrating conflict. Law in a just regime permits citizens to collaborate as partners.

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¹ PLATO, *THE LAWS OF PLATO* (Thomas L. Pangle ed. & trans., Basic Books 1980) [hereinafter *THE LAWS*]. Pangle's translation of *The Laws of Plato* is used throughout.

² PLATO, *THE REPUBLIC OF PLATO* (Allan Bloom trans., 2d ed. 1991) [hereinafter *REPUBLIC*].

This is precisely the thought that the game theory of law rejects, that any regime can ever be just (in the sense of the *Republic*) or existence devoid of conflict, that harmony of the soul or partnership in the city is possible. The game theory of law asserts instead that citizens only collaborate in conflict, and that the only harmony law can achieve is accord about the rules in which conflict is conducted. Citizens engage in conflict out of anger or desire. They collaborate over rules for conducting conflict out of playfulness. They make or follow rules because they want to play games. To want games of any sort—children's games or games of citizens pitched in conflict, athletic contests, lawsuits, or political campaigns—is to desire some kind of lawfulness. That is why the gods make or follow laws, whether the laws of nature or human laws, because they are playful.³ Humans too make or follow laws when they are playful, as if they were gods. The lawgiver in Plato's *Laws* aims to create not a just regime, but one whose laws, by dint of play, charm its citizens into non-disintegrating, harmonious forms of conflict. Play transforms conflict, the conflict of war or civil war, into contest.⁴

Though Plato does not directly discuss the point, the word "harmony" itself expresses conflict. The particle "*har*" in Indo-European languages signifies "the unification of disparate or conflicting elements into an ordered whole."⁵ Games and har-

³ See THE LAWS 903d, *supra* note 1, at 303.

⁴ On the devotion of Athenian aristocratic culture to contests, see CHRISTIAN MEIER, *ATHENS: A PORTRAIT OF THE CITY IN ITS GOLDEN AGE* 114-15 (1998). Plato's text abounds in references to games and to play and its opposite, seriousness. These and related terms occur more frequently in the *Laws* than the index to the best contemporary scholarly edition indicates. See THE LAWS, *supra* note 1. The passages are:

Play: 635b, 636c, 643b, 644d, 649d, 650a, 653e, 656b-e, 657c-e, 666b, 667e, 671e, 673a, 673d-e, 685a, 688b, 732d, 761d, 764e, 772a, 778a, 789b, 794e (the lyre), 796d, 808e, 819b-c, 820c-d (playing at draughts), 832d, 834d, 844d, 887d, 889d, 903d (draughts player), 935d, and 942a.

Seriousness: 636c, 643b, 644d, 647d, 656a, 659e, 664c, 668b, 673e, 688b-c, 707b, 722e, 724b, 732d, 735c, 743e, 769a, 770d, 772a, 796d, 803b-d, 816d-e (and the laughable, its opposite), 817a, 817c, 831d, 857d (laughing), 859a (laughed at), 887d, 889d, 893b, 935b, 935e, 942a, and 966b-c.

Games: 647d, 659e, 685a, 723d, 769a, 793e, 794a, 795d, 797a-c, 803e, 804a, 820c (draughts), 829b, 865d, 868a, 903d (draughts player), and 968b-969a (throw three sixes or three aces).

There are four references to jokes: 778a, 792e, 838c, 885c. Four to laughter: 816d-e (opposite of seriousness), 859a, 918e, and 935d.

⁵ EDWARD A. LIPPMAN, *MUSICAL THOUGHT IN ANCIENT GREECE* 3 (1975). Plato uses several different terms in the *Laws* to express various aspects of the idea of harmony. He uses *harmonia* to mean harmony proper, a concord of sounds, see, e.g., THE LAWS

mony simply emphasize different aspects of the same process: harmony emphasizes unification, and games, the conflicting elements. Or, harmony supposes that the conflict of the elements has been resolved in the harmonic order. Games suppose only the goodwill of the contestants and, when they have disputes about the rules of the game, their reconciliation.⁶

Plato identifies the coincidence of playfulness with lawfulness as intelligence. But it is not the intelligence of the *Republic*, not an instrument for grasping harmonious order. Intelligence in the *Laws* constructs the orders it grasps, human orders as well as natural. The instrument for knowing these orders is thus entirely adequate. Because intelligence both creates and knows orders of every sort, it is "god, in the correct sense, for the gods."⁷ The highest task of the lawgiver is proof of the efficacy of intelligence in both the natural and human orders, of the existence of god.

Play in general is pleasure without consequence, pleasure not bound to an object. It is unattached to achieving a benefit or being correct.⁸ Plato calls the pleasure that arises from play "joy."⁹ Neither play nor the special pleasure with which it is associated can be found in the tripartite soul of the *Republic*.¹⁰ There, a specific sort of pleasure accompanies each part of the soul, a pleasure for spirit as well as pleasures for calculation and desire. Each pleasure the soul experiences has an object—of anger in the spirited part of the soul, of benefit in the erotic

625d, *supra* note 1, at 4; see also AN INTERMEDIATE GREEK-ENGLISH LEXICON: FOUNDED UPON THE SEVENTH EDITION OF LIDDELL AND SCOTT'S GREEK-ENGLISH LEXICON 118 (Clarendon Press 1997) (1889) [hereinafter GREEK-ENGLISH LEXICON]. *Sumphonia* means a concord or unison of sound. See, e.g., THE LAWS 634e, *supra* note 1, at 14. *Asumphonous* means, of course, discordant. See, e.g., *id.* 777d, at 160; see also GREEK-ENGLISH LEXICON, *supra*, at 127; *id.* at 765. *Prosarmozo* means to fit to, thus to suit. See, e.g., THE LAWS 712b, *supra* note 1, at 98; see also GREEK-ENGLISH LEXICON, *supra*, at 686. *Emmeles* means sounding in unison, in tune, hence suitable or proper. See, e.g., THE LAWS 776b, *supra* note 1, at 164; see also GREEK-ENGLISH LEXICON, *supra*, at 253. *Sunodos* means singing or sounding in unison. See, e.g., THE LAWS 837e, *supra* note 1, at 229; see also GREEK-ENGLISH LEXICON, *supra*, at 781. In order to grasp Plato's doctrine of harmony in the *Laws*, it would be necessary to parse through his usage of these words, hence, to define them somewhat more articulately than Liddell and Scott. Unfortunately, Pangle, who is otherwise quite accurate, does not consistently reflect even the distinctions drawn by Liddell and Scott. See the relevant passages in THE LAWS, *supra* note 1.

⁶ See THE LAWS 627d-628e, *supra* note 1, at 6-7.

⁷ *Id.* 897b, at 295.

⁸ See *id.* 667e, at 49.

⁹ *Id.* 653d-654a, at 33.

¹⁰ See REPUBLIC 435e-441c, *supra* note 2, at 114-21; *id.* 580d-581c, at 261-62.

part, and being correct in the calculating part. Because each part of the soul has a pleasure specific to it and each pleasure an object, spirit, joining calculation, can balance and constrain desire. The soul and the city are then in harmony. But there is no place in the harmonic soul for pleasure without consequence. Pleasure not tied to an object, not locked in the soul's balance of forces, threatens the discipline of harmony.

The *Laws* abolishes this topography. Now the goal is not harmony, but playfulness. Such harmony as can be achieved is a consequence of joy, of the soul at play. It thus replaces the soul divided into spirited, erotic, and calculating parts with a "divine puppet" that gods control by two cords¹¹ or "opposed and imprudent counselors, which we call pleasure and pain."¹² Against these, the puppet can resist using a third cord, the "golden and sacred pull of calculation, . . . called the common law of the city."¹³ Use of the third cord frees the puppet from direct attachment to the cord of pleasure. It lessens the puppet's fear of pain. Spirit is no longer a part of the soul impelled by pleasure, no longer an ally of calculation against desire. It is just this fear of pain.¹⁴ Nor does the soul have a calculating part and a pleasure associated with calculation. Calculation is a separate cord the gods have made available, external to the soul, for pulling against the cords of pleasure and pain. It permits the puppet to escape from the tyrannies of the other cords.¹⁵ It creates the possibility of play.

Not everyone or every city is equally playful, or has an equal capacity for making or following laws. Joy is weaker in most people than pleasures and pains that are attached to objects, rooted as they are in the needs and passions of the body. The many are enslaved by erotic passion, by the pleasure flowing from benefit. Even the philosophic few are devoted to calculation because they take pleasure in being correct or learning. They are devoted to the pleasures of lawfulness directly, not for the sake of play. Their lawfulness is the opposite of play. Seriousness resembles playfulness in that calculation is a source of pleasure unattached to the needs and passions of the body. Serious people, unlike the many, do take pleasure without benefit.

¹¹ THE LAWS 644d-e, *supra* note 1, at 24-25.

¹² *Id.* 644c, at 24.

¹³ *Id.* 645a, at 25.

¹⁴ *See id.* 864b, at 258.

¹⁵ *See id.* 863e, at 257.

But their pleasure is not without consequence; they aim for truth and correctness rather than benefit. They are not playful. As a consequence of their devotion to truth, the lawfulness they pursue has nothing to do with conflict. Serious people obey the laws because it is right or convenient or because they love order, not because they want to play. Their passions turn elsewhere, towards the heavenly harmony that must always elude the city. Devotion to lawfulness for its own sake cannot form a practical basis for the many living together, certainly not in conventional regimes falling short of the just regime of the *Republic*. For these serious lovers of truth can neither acknowledge nor tolerate the reality of conflict. The many are perfectly happy to fight each other over the objects of their desires, but ultimately incapable of submitting voluntarily to law. Philosophers have a passion for lawfulness, but not for governing the inevitable conflicts of the many. Only a divine man, one whose passions cannot be located in the ordinary topography of the soul, both loves lawfulness and relishes conflict.

Because intelligence includes both lawfulness and playfulness, some orders or aspects of orders are subject to necessity, while some are not. When subject to necessity, the order constructed by intelligence is a natural order, and god is the intelligence constructing it.¹⁶ When not subject to necessity, the order is conventional, and the intelligence constructing it is human intelligence. Because human intelligence is part of the natural order, the existence of conventional orders, but not their content, is necessary. If all orders were natural orders, human intelligence could not be playful. If conventional orders were unnecessary, human intelligence could not be lawful. In contrast with the *Republic*, in which the only necessary order is the harmonious order of justice, the *Laws* asserts the necessity of a conventional order as well.

The *Laws*, then, does not reject harmony or justice altogether, only the thoroughgoing harmony, the transcendent justice of the *Republic*. A part of justice, a semblance of harmony, is possible. A just regime is one whose citizens maintain a conventional order constructed by a playful intelligence.

The surest support for this regime is not to be found in the harmonious soul, but in the playful spirit of divine men—not in virtue, but in the passion of intelligence. Only the support of

¹⁶ See *id.* 818a-b, at 209-10.

the lawless, unserious many depends on virtue of a sort—not the transcendent virtue of the *Republic*, but a minimum or contracted virtue that makes conventional order possible. Because the many are devoted to the needs and passions of the body, the virtue that binds them to the conventional order must belong to the body as well. It is a virtue that we share with animals. This animal or conventional virtue is drawn from courage and moderation, two of the four virtues whose unity constitutes transcendent virtue in the *Republic*. It is the part of courage that habituates citizens to defend the conventional order unthinkingly, and the part of moderation that trains them to follow it unquestioningly. Conventional virtue draws nothing from prudence and justice, the other components of transcendent virtue, or from the parts of courage and moderation that incline the soul towards truth. Precisely because conventional virtue fails to engage the calculating part of the soul, it is a flimsy barrier against the animal passions that the calculating part arouses and strengthens. Nor does conventional virtue ever constrain the serious few to support a conventional order. Philosophic courage renders anything less than the whole of transcendent virtue powerless against the passion for truth. Philosophers might be persuaded to support a conventional order out of their desire for lawfulness in general. But they could just as well decide at any moment that the laws of the conventional order are not true laws, not serious. The lawless and unserious many are a manageable annoyance in conventional regimes. Philosophers are their serious opponents.¹⁷

¹⁷ Following the accepted approach to the *Laws*, Glenn Morrow believes that philosophy and law are interdependent, "exercising a joint sovereignty in philosophically formulated law." GLENN R. MORROW, *PLATO'S CRETAN CITY: A HISTORICAL INTERPRETATION OF THE LAWS* xvi (1993). Morrow believes that the law is "a kind of formal sovereign, a politically authoritative expression of the insights of philosophy, so far as they bear upon the ordering of states." *Id.* at 576. What gives law (*nomos*) its authority (its title to rule in Plato's terms) is the intelligence (*nous*) it contains, and it is the job of philosophy to apprehend this intelligence and mold it into legislation. Morrow argues:

At the same time law becomes essential to the effective authority of philosophy; for it is not abstract theoretical insights that govern the city, but these insights formulated in legal terms and publicly declared as rules for the ordering of the state. There would thus be a kind of compound sovereignty—of legal technique and scientific knowledge, neither of which is capable of accomplishing its political task without the other.

Id. at 576-77. Morrow's discussion of the relationship between philosophic knowledge and law is correct. But he is wrong about what is sovereign: neither law, nor philosophy, nor a compound of the two is sovereign in Plato's city. Games are.

If philosophers are few, divine men are fewer,¹⁸ and a regime dominated by divine men inconceivable.¹⁹ Originally, perhaps, the many were children of gods,²⁰ and playful spirits sufficiently numerous to control conventional regimes directly. Over time, however, the divine strain, if it ever was, dwindled. The political dilemma of the *Laws*, then, is to found and preserve a lawful regime when the vast majority of citizens, including the serious philosophic few, lack the divine passion to make or follow laws playfully, and a lawful regime can endure no other way.

Plato suggests an array of devices for resolving the political dilemma for a time, if not forever. They include deception about the nature of god, myths, education in conventional virtue, games proper, and intelligent legislation.

Divine men deceive both the unphilosophic many and the serious few about the nature of god. The truth that must be concealed is that god is intelligence, the coincidence of playfulness and lawfulness. This truth must be concealed from the unphilosophic many, because knowing it, their angers and desires would overcome their lawfulness. It must be concealed from the philosophers, because they would use the truth to destroy convention, whose content is neither serious nor justified by a harmonious order of nature.

Divine men deceive the many by means of a false public doctrine. They say that the gods (not god) enforce a harmonious order of retributive justice. Thus, they give the conventional order divine sanction. Transcendent justice in the *Republic*, by contrast, depends entirely on an harmonious natural order without divine sanction. The falsity of the doctrine of divine retributive justice may be uncovered by ordinary philosophic technique. It is apparent to the serious philosophic few. The order that god (not the gods) enforces is a natural order having nothing to do with retributive justice. It is lawfulness itself, which can neither conceive nor correct deviations from lawfulness. Retributive justice has no place in a harmonious natural order. Justice harmonizes cities and souls. It educates. It does not punish.

Divine men deceive the philosophic few, in turn, by not contesting their view that god, like them, is serious and not

¹⁸ See THE LAWS 951b, *supra* note 1, at 353.

¹⁹ See *id.* 739d-e, at 126.

²⁰ See *id.* 948b, at 350.

playful, that god disappears into the harmonious natural order of lawfulness. The falsity of the philosophic view of god as lawfulness merely is not transparent to philosophic discourse. It is hidden to all but playful spirits, divine men who approach the *Laws*, and therefore law, as a game.

The deception of the lawless and unserious many is also hidden, not spoken of as a deception. Nor does the *Laws* lay bare the philosophic discourse that demonstrates the falsity of the many's view of the gods. The *Laws* deceives about its deceptions. This is in sharp contrast with the *Republic*, which presents deception of the many openly to its readers. The scene of the *Republic* is a private discussion among those who take pleasure in philosophic discourse. (The old man, Cephalus, who dislikes philosophy, leaves). The discussion has no public significance, except as it persuades young men like Thrasy-machus to lead a just life. Like its participants, the readers of the *Republic* are those with a taste for philosophy. They are not the unphilosophic many. Hence, the *Republic* can present the truth openly, including its deception. Not so the *Laws*, whose discussion leads to the founding of a city. The record of the discussion will be taught to children.²¹ Also, the many receive at least the rudiments of a philosophic education,²² while the *Republic* restricts philosophic education to one of the three classes in the city, the guardians. The *Laws* democratizes philosophic education, in part because calculation is useful in daily pursuits, but also because conventional regimes must weaken the power of philosophers to disrupt them by blurring the distinction between the many and philosophers. The *Laws* must hide from philosophers whatever it hides from the many. The few now are not philosophers, but those with playful or intelligent spirits.

Myths present the conventional order as natural or as created by the gods. They persuade young people and the many that the specific contents of the conventional order are either an element of the natural order or protected by divine sanction. They describe and defend a source of law other than the conscious, articulate work of an historical lawgiver. The product of mythic sources of law is often in the form of "legal custom."²³ The *Laws* casts off the misgivings surrounding myth in the *Re-*

²¹ See *id.* 811d-e, at 202; *Epinomis* 980d, in *THE COLLECTED DIALOGUES OF PLATO* (Edith Hamilton & Huntington Cairns eds., 1989).

²² See *THE LAWS* 818a, *supra* note 1, at 209.

²³ *Id.* 626b-d, at 4-5.

public. In the harmonious view of the universe, myth veils the truth (or falsehood, for that matter) in sensation. The truth is always an expression of relations among sensuous objects, their harmony, and therefore always abstract. The purpose of myth is either deception or the poetic presentation of truth to weak intellects. It is hardly worth distinguishing myth from lie. Thus the great deception of the *Republic*, that different classes of citizens are molded from different metals, is a myth, but Socrates calls it a "noble lie" instead. The *Laws* holds myth in higher esteem. Myth is not the degenerate presentation of truth; it has nothing to do with truth. Myth is an explanation for why we do things a certain way that has no other explanation. It is enchantment of the soul,²⁴ not explanation in the style of the *Republic*, the knowing presentation of harmonic relationships. Explanation is appropriate only to things that are, in fact, in harmony—the natural order and perhaps accord over the rules for conducting conflict. The entire dialogue may be seen as an effort to rescue a myth about the origin of the laws of Knossos from Kleinias's skeptical, knowing explanation.

Education in conventional virtue, like conventional virtue itself, makes no demands on the calculating part of the soul. In the *Republic*, by contrast, to be virtuous is to know; to become virtuous, to learn. Education in the virtues necessary for maintaining a conventional regime is habituation into convention. The means for inculcating virtue are non-rational—drinking parties to strengthen souls against pleasure in the interests of moderation, military exercises to strengthen them against pain in the interests of courage. But conventional virtue does assume at least the possibility of a complete virtue, engaging intelligence as well as the needs and passions of the body. The *Laws* does not present conventional virtue as such. Mere habituation into a conventional order without ongoing struggle for a philosophic conception of virtue deprives virtue of its power to support convention. Conventional virtue is thus liminal virtue, even if the philosophic project might prove ultimately to be impossible. The *Laws* thus solves a problem that haunts the account of virtue in the *Republic*: How is virtue possible in regimes other than the harmonious regime of the just city? The *Republic* has only a mythic answer to this problem, the myth of Er, in which unjust souls choose a miserable and shameful life

²⁴ See *id.* 840b-c, at 231-32.

in their return to life from the dead according to the inexorable operations of natural harmony. But it is not a practical answer, which the *Laws* supplies.

Deception about the nature of god, myth, and education in conventional virtue—each in its own way assumes a deficit of intelligence, and each is limited in the stability it guarantees. Each is constantly prey to philosophic disruption from one side, erotic and spirited passion from the other. Games as such provide a more stalwart defense of conventional regimes. They engage the passions of intelligence against anger and desire. Not being serious, they are not subject to disruption by philosophy. A commitment to games, as such, draws the energies of citizens into harmless pursuits that might otherwise be devoted to law-suits, destabilizing erotic conquests, and the unequal accumulation of wealth. As contests, games provide perspicuous occasions for the reward of conventional virtue, in choruses and mock combat. As a result, they prepare the city for war. Games also cultivate playful intelligence, leading citizens to approach the serious activities of the city in a playful spirit. Games, like education in conventional virtue, have the effect of habituation. In contrast with the harmonic model of the *Republic*, knowledge alone does not guarantee virtue. The exercise of intelligence is a sort of pleasure, and the soul can be bent along its lines.

Not every game turns the soul away from anger and desire. Not all play leads to political stability. Intelligence is not free to pursue games that undermine the premises of intelligence in the city and in the soul. Hence attention to the games children play, though not formally a subject of politics and legislation, is a political task of utmost urgency.²⁵ Likewise, politics and legislation must be conducted with the aim of maximizing the possibility of playfulness in adults as well as in children, in games as such as well as in the serious games of civic life. Legislation must enhance intelligence. It must be intelligent legislation.²⁶ The political psychology of the *Laws* thus bears a family resemblance to the political psychology of utilitarianism. Both use the levers of pleasure and pain. Both use calculation to maximize a certain quantity in the citizen and in the city. The difference between the two is that the quantity utilitarianism seeks to maximize is pleasure of any sort, whether the pleasure of anger,

²⁵ See *id.* 797a, at 185.

²⁶ See *id.* 644c-645c, at 24-25.

desire or of play. The *Laws* does not try to maximize the pleasures of desire and minimize the pains of anger. They are too politically disruptive and will inevitably undermine the goal of utility. Instead, the *Laws* tries to achieve a middle course between pursuing pleasure and fleeing pain, a condition which Plato calls "grace" and which was unavailable to the soul in the *Republic*. The graceful soul is the soul that has quieted pleasure and pain, that is ready for playfulness, ready to behave with intelligence in personal matters and in the affairs of the city.

Plato offers no formula for achieving intelligent legislation. Much of the *Laws* is a demonstration of factors that must be taken into account by the lawgiver—topography, culture, technology, population, political conditions, and so forth.²⁷ Plato does not propose, as he did in the *Republic*, a single ideal political structure, whether absolutely ideal or ideal simply for communities structured as cities. Laws must change as conditions change. But even if conditions were absolutely stable, the lawgiver must remain open to superior laws from other cities, if only because the project of conventional virtue must never be closed. The lawgiver in the *Laws* is forced to get the agreement of the politically active citizens that proposed laws are in fact intelligent. This is a quite different agreement than the lawgiver in the *Republic* ever would have sought. Law's appeal in the *Republic* is that it is correct, that it is in harmony with the structure of the universe. The test for harmony is clear and transparent to argument. Only the character of those conducting the argument is open to question, not argument itself. The same cannot be said of argument about the factors leading to intelligent legislation. Whether an argument is correct is not immediately apparent. It becomes apparent over time, as it persuades or fails to persuade first, those conducting the argument, and then the many as they go about their lives. The argument about factors must charm both the arguers and the actions of those subject to legislation. Justice now is what the *Republic* said it should never be: It is rhetoric, the persuasiveness of an argument about factors, of the conventional order itself. Now it is not character that is open to question, but rather the persuasiveness of argument for the conventional order, in which character is a factor that argument takes into account.

The political dilemma of conventional regimes is accompa-

²⁷ See, e.g., *id.* 747d-e, at 135.

nied by a dilemma in the operation of intelligence that further undermines the capacity of these regimes for stability. Intelligence must be at once absolutely free to lay down laws—otherwise it could not be playful—and absolutely bound once it has—otherwise it could not be lawful. Once it has laid down laws, does intelligence cease to be playful? Does it become serious, entirely devoted to lawfulness? The dilemma can be put another way: Are the gods bound by convention, the laws created by human intelligence? Humans, after all, are bound by the laws the gods lay down. That is why humans can be serious, or experience lawfulness apart from playfulness. But are the gods serious too? Are they bound by laws that divine playfulness had no hand in creating? They must be; otherwise convention would not be absolutely binding, as it must for human intelligence to be playful. So the gods, like humans, must be at once serious and playful. Whether human or divine, intelligence seems to be playful at one moment and serious the next, playful with respect to one set of activities and serious with respect to another. It cannot be entirely playful everywhere at once. But then is intelligence possible?

Plato resolves this dilemma by resort to a device that underscores the dependence of intelligence on persuasion rather than logic, on charm rather than correctness. In order to be entirely playful, intelligence must repeat its operations. The playful spirit, whether human or divine, never follows laws. It uses them to play. Each time it uses a law, the playful spirit reenacts it in fresh applications of intelligence. Hence, it is essential that the lawgiver accompany each law by a "prelude" (*prooemia* or *paramuthia*), explaining why the lawgiver finds the law persuasive. The laws, accompanied by preludes, express the lawgiver's intelligence. Each encounter with the laws re-engages that intelligence. No moment is entirely free and no moment bound, no moment entirely playful and no moment serious, for lawgiver and citizen alike. The playful lawgiver is bound to make only such laws as will appeal to citizens' intelligence. Serious citizens are free to accept or reject unappealing laws. Every moment for everyone is at once playful and serious. Plato has a word to describe these serious games and playful laws: The coincidence of the playful and the serious is the "noble." The entirety of life, Plato says, should be devoted to "noble games."

God too repeats the operations of intelligence by creating human intelligence as part of the order of nature. God alone

would not be intelligent, just as the philosopher alone, apart from dialogue, would not be doing philosophy. We describe god as "gods" to express the inherent multiplicity of intelligence, its need for conversation. Human intelligence reenacts the laws of divine intelligence by discovering and grasping natural necessity. Understanding is divine play. Divine intelligence foreshadows the laws that human intelligence makes by having inspiring them. The divine prefiguration of human intelligence is creativity.

Despite all the political devices for ensuring the stability of conventional regimes, despite the possibility of nobility, a conventional order, however intelligently conceived, must ultimately depend on punishment. "[W]e're humans," says the dialogue's leader, the Athenian, "and legislating now for the seed of humans."²⁸ The subject of punishment scarcely need be raised in the *Republic*. The just order, after all, is one of harmony, and lawbreaking is unimaginable in a harmonious universe. The *Republic* discusses punishment only as a figure of argument,²⁹ an operation of the natural order of justice,³⁰ or as an accompaniment of injustice in ordinary regimes,³¹ as the punishment of children,³² or of fellow Greek cities in factional strife. Not once does Socrates discuss punishment in the ideal civic order. Plato's *Statesman*,³³ a middle dialogue, imposes a single penalty for lawbreaking of any sort, no matter how trivial the law or minor the infraction. Anyone who breaks the law dies.³⁴ The role of the statesman is to weave the "web of political action,"³⁵ to prepare the laws as well as those subject to the laws, by skillful legislation and breeding.³⁶ A lawbreaker is the product of bad breeding, who must be destroyed. The conventional regime of the *Laws* has neither the assurance of harmony nor the assistance of skillful breeding. It is a retributive regime

²⁸ *Id.* 853c, at 245.

²⁹ See *REPUBLIC* 337d, *supra* note 2, at 15; *id.* 457e, at 136; *id.* 474a, at 154; *id.* 506d, at 186.

³⁰ See *id.* 347a-c, at 25; *id.* 366a, at 43; *id.* 380b, at 58; *id.* 445a, at 124; *id.* 591b, at 273-74; *id.* 615b-616a, at 298-99.

³¹ See *id.* 338e, at 15; *id.* 363d-e, at 41; *id.* 365b, at 42; *id.* 405c, at 84; *id.* 492d, at 172; *id.* 610d, at 294.

³² See *id.* 465a, at 144.

³³ *PLATO'S STATESMAN: PART III OF THE BEING AND THE BEAUTIFUL* (Seth Benardete trans., 1986).

³⁴ See *id.* 297e, at 50-51.

³⁵ *Id.* 311b, at 67.

³⁶ See *id.* 310e, at 66.

supported by animal virtue. It fights back. It treats lawbreakers as fomenters of conflict of the sort that disintegrates the regime. But again, because the horizon of virtue must never be closed, the conventional regime retains echoes of the harmonious one: Punishment is shameful and perplexing in a well-constructed city,³⁷ and its aim is "to create friendship in place of discord."³⁸ It also preserves the breeder's elimination of bad stock: Lawbreakers whose characters cannot be reformed must be killed.³⁹ Even so, the conventional regime deploys an array of specific punishments for particular infractions, without regard to creating friendship or reforming character. The punishments even recognize the distinction between voluntary and involuntary infractions,⁴⁰ though the Athenian continues to insist that all injustice is involuntary.⁴¹ Hence, the conventional regime employs a conventional system of punishments, closing the horizon of virtue for those among the lawless and unplayful many whose souls are not tamed by retributive theology, myth, education, the intelligence of laws, or games.

SOME DIFFICULTIES OF EXPOSITION

The interpretive and expository difficulties of the *Laws* only begin with the deceptions practiced by the Athenian. The "argument" (*logos*) of the *Laws* sings⁴² to the Athenian and his two old companions on their walk from Knossos to the "cave and temple of Zeus."⁴³ The word for "law" in ancient Greek, *nomos*, was also the word for "song," a form for praising the gods in a musically and ethically lawful manner.⁴⁴ When the ar-

³⁷ See THE LAWS 853b, *supra* note 1, at 245.

³⁸ *Id.* 862c, at 255.

³⁹ See *id.* 862a-863a, at 255-56.

⁴⁰ See *id.* 865a, at 259-64.

⁴¹ See *id.* 860d-e, at 253-54.

⁴² See *id.* 653d, at 33.

⁴³ *Id.* 625b, at 3.

⁴⁴ See *id.* 700b, at 85; LIPPMAN, *supra* note 5, at 82-83. On the belief in Plato's time that the musical use of the word was connected with "a strict adherence to rules," see 1 GREEK MUSICAL WRITINGS: THE MUSICIAN AND HIS ART 249-55 (Andrew Barker ed., 1984). The Athenian puns on the dual use of *nomos* in Laws 799e-800a. In Book XII, the Athenian links *nomos* to *nous*, intelligence. He describes how judges must be open to "the many just, good, and noble things in the other cities." THE LAWS 957b, *supra* note 1, at 360. "For of all branches of learning," he says:

those which have the most sovereign influence in making the learner become better are the ones that pertain to the laws—if, that is, they should be correctly set up; and they would be, or else our divine and marvelous law [*nomos*] would in vain possess a name akin to intelligence [*nous*].

gument sings to the Athenian, it has the force of law, exercised through enchantment and divine inspiration rather than punishment and shame. Like song, argument has a certain order, a determinate length. The Athenian conceives of the argument as poetry, musical speech, not prose.⁴⁵ Unlike prose, the order and length of poetry or songs cannot vary without altering their essential contents. To say that an argument is song or law is to insist that the argument be exactly as it is, using the same words in the same order, and no other. Such an argument, at least according to its terms, is unfit for restatement or redaction, especially not, as here, redaction of a part. But why should we trust the duplicitous Athenian? Perhaps the lawgiver does not want us to restate or redact, to interpret, just to repeat the process which led to the laws. We need not, after, all, subject ourselves to the law of the Athenian's argument, to repeat his argument in our reading of the *Laws*. Thus, Leo Strauss's account of the *Laws* is not simply a restatement of the argument that sings to the Athenian. Rather it is an aid to reading that argument against the action of the dialogue for the purpose of reaching an argument that differs from the Athenian's, which is Plato's argument as author of both the action and argument of the dialogue.⁴⁶ But Plato's argument does not claim the authority of law.

I have chosen two especially problematic moments in the argument to convey the difficulties of Plato's austere and complex text: the lawgiver's deceptions and the contraction of virtue. I chose these two, because they, more than other moments in the argument, cannot be even apparently proven by direct reference to one or two texts. In order to hear the argument in these moments, it is necessary to play "this moderate old man's game concerning laws."⁴⁷

Id. 957c, at 360.

⁴⁵ See THE LAWS 811d, *supra* note 1, at 202.

⁴⁶ See LEO STRAUSS, THE ARGUMENT AND THE ACTION OF PLATO'S LAWS (1975). The same is true of Thomas Pangle's Interpretive Essay. See THE LAWS, *supra* note 1, at 375-510.

⁴⁷ THE LAWS 685a, *supra* note 1, at 68. The Athenian repeats the reference to law as an "old man's game" in Book VI. "Then our prudent game of the elderly would have been played in noble fashion thus far." *Id.* 769a, at 156. The first reference was in Book III.

SUMMARY OF THE ACTION

Before turning to the lawgiver's deceptions, and as an aid to those who are unfamiliar with the dialogue, I shall briefly summarize its course.

Three old men—an Athenian, a Cretan, and a Spartan—are walking from the Cretan city of Knossos to a cave, probably the Idaean cave, where Zeus was raised as a child, some twelve or thirteen hours from Knossos on foot.⁴⁸ According to myth, Zeus gave Crete its laws, which were the most celebrated in Greece in Plato's time. So the dialogue begins by the Athenian (who is unnamed in the dialogue) asking Kleinias, the Cretan, and Megillus, the Spartan, who is given the credit for laying down their laws? Kleinias answers that it was a god.⁴⁹ The Athenian proposes that they pass the time "discussing the political regime and laws."⁵⁰ Without waiting for their agreement, the Athenian launches the discussion by asking Kleinias the reason Cretan law has ordained the common meals, the gymnastic training, and the weapons they employ.⁵¹ Kleinias answers that the institutions are directed towards the endless war of city against city and the weapons adapted to Crete's peculiar terrain.⁵² The dialogue and all its problems have begun.

The Athenian then shows Kleinias how the endless war of city against city will also be a war of neighborhood against neighborhood, household against household, each man against every other man, and a war between the better and the worse in each person.⁵³ Just as one side is victor in war, the better or worse is victor in the city and each person, and the person is either superior or inferior to himself, as is the city. In order to avoid the city's dissolution into civil war, someone must bring harmony among the better and the worse in the city.⁵⁴ The best, he says, is neither war nor civil war, but peace and good will towards one another.⁵⁵ So the customs of Crete and Sparta cannot be directed just towards war, as Kleinias and Megillus think.⁵⁶

⁴⁸ See MORROW, *supra* note 17, at 27.

⁴⁹ See THE LAWS 624a, *supra* note 1, at 3.

⁵⁰ *Id.* 625a, at 3 (footnote omitted).

⁵¹ See *id.* 625c, at 4.

⁵² See *id.* 625c-626b, at 4-5.

⁵³ See *id.* 626c-e, at 5.

⁵⁴ See *id.* 626e-628c, at 5-7.

⁵⁵ See *id.* 628b-c, at 7.

⁵⁶ See *id.* 628e-630d, at 7-9.

The Cretan lawgiver must have had all of virtue in view, not just a part.⁵⁷ They must start over again, evaluating the practices of the Cretan lawgiver, first from the perspective of courage, then from the perspective of the other parts of virtue—prudence, moderation, and justice.⁵⁸

The Athenian then asks whether the bad man is just one who is inferior to pains, or inferior to pleasures as well.⁵⁹ The defect of the Cretan and Spartan practices is that they do not train men to be victors over pleasures, just over pains.⁶⁰ They inculcate courage, but not moderation. Indeed, the common meals and the gymnastics have just the opposite effect, says the Athenian: they encourage corrupt sexual pleasures and licentiousness among the abandoned women.⁶¹ Megillus reacts angrily that the Athenians are drunkards,⁶² and the Athenian embarks on a defense of well-conducted drinking parties, both as an aid to the statesman for testing the character of citizens for moderation,⁶³ and as training in moderation as well.⁶⁴

The dialogue now takes a sharp turn. The Athenian begins discussing the “original source of the political regime,” which takes up Book III. He describes a political history of the Greek cities and the Persian Empire and draws from these histories two basic models for all regimes: Persian monarchy and Athenian democracy.⁶⁵ These two are good regimes when moderate, that is, when the regime has a proper balance of slavery and freedom, but bad when the virtue of each regime is taken to an extreme (in monarchy, slavery; and in democracy, freedom).⁶⁶ The Athenian then traces the corruption of each of these regimes. Book III closes with the Athenian asking why these things have been said.⁶⁷ He says that they discussed all these things “for the sake of understanding how a city might best be established sometime, and how, in private, someone might best lead his own life.”⁶⁸ Kleinias tells the Athenian that “some

⁵⁷ See *id.* 630e, at 9.

⁵⁸ See *id.* 632e, at 11-12.

⁵⁹ See *id.* 633e, at 13.

⁶⁰ See *id.* 634b-c, at 13.

⁶¹ See *id.* 634c-637c, at 13-17.

⁶² See *id.* 637b, at 16.

⁶³ See *id.* 638c-650b, at 17-31.

⁶⁴ See *id.* 652a-674c, at 32-57.

⁶⁵ See *id.* 693d-e, at 78.

⁶⁶ See *id.* 694a-b, at 78-79.

⁶⁷ See *id.* 701c, at 86-87.

⁶⁸ *Id.* 702a-b, at 87.

stroke of luck has brought before us the subjects of all these arguments we've gone through, for I at any rate have now come almost to the point of needing them."⁶⁹ For Kleinias is one of ten Knossians who have been asked to found a colony. The subject of the rest of the dialogue—Books IV through XII—has been joined: Advising Kleinias the best laws for the colony and the reasons for them. "So let's try now," says the Athenian, "first in speech, to found the city."⁷⁰

Book IV begins with the Athenian addressing matters of topography,⁷¹ who will be the colonists,⁷² and what sort of regime they are founding.⁷³ The Athenian then imagines an introductory speech before the assembled colonists concerning justice and the divine law.⁷⁴ He says that he wishes "that the people would be as persuadable as possible with regard to virtue; and it's clear that the lawgiver will also strive to achieve this, in every facet of his legislation."⁷⁵ Turning to the form of lawgiving, the Athenian argues that free people need preludes explaining the purpose of the laws.⁷⁶ In the midst of this argument, he proposes the first law, regarding marriage.⁷⁷ (It is now noon; they started the argument at dawn⁷⁸). At the end of Book IV he introduces a discussion of things that are "very much in the common interest for the speaker and the listeners to deal with how they should be serious and how they should relax as regards their own souls, their bodies, and their property."⁷⁹

Book V begins with a long prelude to these things,⁸⁰ after which the Athenian says: "Let the speeches that constitute the prelude to the laws come to an end here."⁸¹ He says that a "law" must follow, "or rather, in truth, the outline of the laws of a political regime."⁸² But before that he finds it necessary to discuss purging the colonists of the unhealthy—those who are

⁶⁹ *Id.* 702b, at 87.

⁷⁰ *Id.* 702e, at 88.

⁷¹ *See id.* 704a-707d, at 89-90.

⁷² *See id.* 707e-708d, at 93-94.

⁷³ *See id.* 712c, at 98.

⁷⁴ *See id.* 715e-718a, at 102-04.

⁷⁵ *Id.* 718c, at 105.

⁷⁶ *See id.* 720a-724a, at 106-11.

⁷⁷ *See id.* 720e-721d, at 107-09.

⁷⁸ *See id.* 722c, at 109.

⁷⁹ *Id.* 724a-b, at 111.

⁸⁰ *See id.* 726a-734e, at 112-21.

⁸¹ *Id.* 734e, at 121.

⁸² *Id.*

unlikely to be good material for the city (the ill bred, the poor).⁸³ He sets up the number of households in the city.⁸⁴ In the course of the discussion of households, he says that the city they are constructing is "second-best":⁸⁵ it will not be the communist regime of the *Republic*.⁸⁶ Then follows a series of arrangements clustering about the household, respecting currency,⁸⁷ dowries,⁸⁸ and division into classes of unequal wealth.⁸⁹ The Athenian closes Book V with a discussion of the partition of the city.⁹⁰

Book VI is devoted first to creation of the ruling offices.⁹¹ He then discusses the assignment of a god to each part of the city.⁹² He returns to the law of marriage⁹³ and goes on to a discussion of property⁹⁴ and finally the procreation of children.⁹⁵ Book VII is devoted to education. Book VIII begins with an account of festivals,⁹⁶ proceeds to the regulation of erotic love,⁹⁷ then boundaries (right after!)⁹⁸ and petty disputes among neighbors.⁹⁹ He concludes Book VIII with the regulation of craftsmen,¹⁰⁰ provision of the food supply,¹⁰¹ the arrangement of the houses,¹⁰² and resident aliens.¹⁰³

The Athenian takes up judicial penalties in Book IX and in the very beginning of Book X.¹⁰⁴ The last crime the Athenian discusses, temple robbery, leads to his proofs that the gods exist, that they think about human beings, and that they are not easily persuaded by sacrifices and prayers, which occupies the balance

⁸³ See *id.* 735a-737b, at 121-24.

⁸⁴ See *id.* 737c-741e, at 124-29.

⁸⁵ *Id.* 739a, at 125.

⁸⁶ See *id.* 740a, at 126-27.

⁸⁷ See *id.* 742a-c, at 129.

⁸⁸ See *id.* 742c, at 129.

⁸⁹ See *id.* 742c-745b, at 129-33.

⁹⁰ See *id.* 745b-747e, at 132-35.

⁹¹ See *id.* 751a-771a, at 136-58.

⁹² See *id.* 771b-d, at 158-59.

⁹³ See *id.* 776b-781a, at 164-69.

⁹⁴ See *id.* 776b-783b, at 164-72.

⁹⁵ See *id.* 783b-785b, at 172-74.

⁹⁶ See *id.* 828a-835b, at 218-26.

⁹⁷ See *id.* 835d-842a, at 226-34.

⁹⁸ See *id.* 842b-843b, at 234-35.

⁹⁹ See *id.* 843c-846c, at 235-39.

¹⁰⁰ See *id.* 846d-847e, at 239-40.

¹⁰¹ See *id.* 847e-848c, at 240-41.

¹⁰² See *id.* 848c-850a, at 241-43.

¹⁰³ See *id.* 850a-c, at 243-44.

¹⁰⁴ See *id.* 884a-885b, at 280-81.

of Book X. Book XI is a discussion of private law. Book XII, which concludes the dialogue, begins with a law concerning false messages by ambassadors¹⁰⁵ and the law of theft.¹⁰⁶ It proceeds with military organization,¹⁰⁷ audits of magistrates,¹⁰⁸ and laws governing judges¹⁰⁹ and participation in public performances.¹¹⁰ The Athenian then discusses the laws governing intercourse with other cities,¹¹¹ and brief discussions of the law of pledges,¹¹² searches,¹¹³ statute of limitations,¹¹⁴ prevention of testimony,¹¹⁵ receipt of stolen goods,¹¹⁶ prohibition of private foreign policies¹¹⁷ and of receipt of gifts for public service,¹¹⁸ a census of private wealth,¹¹⁹ and votive offerings to the gods.¹²⁰ There follows a discussion of court organization¹²¹ and the laws regulating death and mourning.¹²² This last discussion leads the Athenian naturally to talk about laws and institutions for preserving the regime, most notably the nocturnal council.¹²³ The dialogue concludes with Megillus and Kleinias agreeing that they must try to persuade the Athenian to stay and "share in the city's founding."¹²⁴

DECEPTION

The Athenian makes four major comments about deception or lying.¹²⁵ The first¹²⁶ is at the end of an argument about

¹⁰⁵ See *id.* 941a-b, at 342.

¹⁰⁶ See *id.* 941b-942a, at 342-43.

¹⁰⁷ See *id.* 942a-945b, at 343-46.

¹⁰⁸ See *id.* 945b-948b, at 346-50.

¹⁰⁹ See *id.* 948b-949c, at 350-51.

¹¹⁰ See *id.* 949c-e, at 351.

¹¹¹ See *id.* 949e-953e, at 351-56.

¹¹² See *id.* 953e-954a, at 356.

¹¹³ See *id.* 954a-c, at 356-57.

¹¹⁴ See *id.* 954c-e, at 357.

¹¹⁵ See *id.* 954e-955b, at 357-58.

¹¹⁶ See *id.* 955b, at 358.

¹¹⁷ See *id.* 955c, at 358.

¹¹⁸ See *id.* 955d, at 358.

¹¹⁹ See *id.* 955e, at 358.

¹²⁰ See *id.* 955e-956a, at 358-59.

¹²¹ See *id.* 956b-958c, at 359-61.

¹²² See *id.* 958c-960b, at 361-63.

¹²³ See *id.* 960b-968e, at 363-73.

¹²⁴ *Id.* 969c, at 374.

¹²⁵ He refers glancingly to lying in three other places. The first immediately precedes the first major comment on lying in Book II, where the Athenian says that the true judge of music must not allow lack of manliness and cowardice to make him contradict what he knows when he disagrees with an audience "and pronounce a soft-spirited judgment, lying through the very same lips that just finished swearing an oath to gods." *Id.* 659a, at 39.

justice in the second of the twelve books of the *Laws*. It is in the part of the *Laws* that the participants—the Athenian, Kleinias, and Megillus—would have considered a private conversation, before they know that they will be founding a “city in speech”¹²⁷ or that the text of their conversation will be available to the occupants of whatever city they might eventually found in fact. We can expect, therefore, that the Athenian is less guarded in what he says here than he will be in his other comments about lying,¹²⁸ which he makes while they are founding the city in speech.

The Athenian is trying to convince Kleinias that someone who has everything that people regard as good, if he be unjust, “is a wretch and lives a life of misery.”¹²⁹ The Athenian’s argument is a key moment in the contraction of virtue, and should be recalled there. He says that the Cretans and the Spartans compel their poets to say this and that the three of them “presumably” say this as well.¹³⁰ Kleinias disagrees and says that the Athenian does not persuade him when he says that a man who lives an unjust existence is unhappy.¹³¹ The Athenian answers that to him “these things appear more necessary than the proposition that Crete is manifestly an island,”¹³² and that if he were a lawgiver he would try to compel the poets and everyone in the city to speak this way. Of course, “Crete is manifestly an

The second is a passage at the beginning of Book III, which will be discussed under the contraction of virtue. The Athenian talks about the survivors of a great flood having “naïve simplicity.” Whenever they heard something was noble or shameful, he says, they believed it. “No one had the wisdom, as they do nowadays, to know how to be on the lookout for lies. They believed that what they heard about gods as well as about human beings was true, and lived according to these things.” *Id.* 679c, at 62. In Book XI, after the last of the four major comments on lying, the Athenian says that the class of craftsmen and the class of those who preserve the deeds of craftsmen through defensive arts—

[A]ll these men continually take care of the country and the populace—the latter by ruling over the contests of war, the former by bringing into being tools and works for pay. In regard to such matters, because of their awe for the gods who are their progenitors, it wouldn’t be fitting for them to lie.

Id. 920e, at 321; see also *id.* 921a, at 321. Later, in Book XI, there is a passage on false testimony (937b-c). In Book XII the Athenian talks about the perils of bringing about false retribution, but attributes this mainly to mistaken judgment, not lying. See *id.* 943d-e, at 344-45.

¹²⁶ See *id.* 663d-e, at 44-45.

¹²⁷ *Id.* 702e, at 88.

¹²⁸ See *id.* 730c, at 116; *id.* 738e, at 125; *id.* 916d-917b, at 316-17.

¹²⁹ *Id.* 660e, at 41.

¹³⁰ See *id.* 661b, at 41.

¹³¹ See *id.* 661d-e, at 42.

¹³² *Id.* 662b, at 42-43.

island" is a statement of fact, contingent and not subject to necessity. Hence, to say that "the man who lives an unjust existence is unhappy," which is also a statement of fact, appears more necessary is not to say much. The Athenian appeals to what appears to him, to his authority, and his statement that he "would try to compel the poets and everyone in the city to speak this way" flows from the claim to authority. But the Athenian must do more to persuade Kleinias, who claims that he is speaking for Megillus as well.¹³³

The Athenian proceeds. He says that if the three of them could ask Zeus and Apollo, who gave Knossos and Sparta their laws, whether those who live a just life are happier than those who live the most pleasant life, the reply, "those who live the most pleasant," would be a strange one. The father or lawgiver who answered the same way would also appear strange "and unable to speak in consonance [*sumphonountos*] with himself."¹³⁴ But if the father or lawgiver said that the most just life was also the happiest, "I think everyone who heard him would ask whatever this was that the law was praising, what good and noble thing, superior to pleasure, was possessed by this life."¹³⁵ What would be the good, he asks, separate from pleasure that accrues to the just man? The Athenian answers that the good would be "fame, and the praise that comes from human beings and gods."¹³⁶ These are "good and noble," he says, but also pleasant. "So then the argument which does not split the pleasant from the just, and the good from the noble, is (if nothing else) persuasive in making some willing to live the pious and just life."¹³⁷

By the Athenian's own account, the argument for justice is "persuasive," not to everyone, just to "some." The only one who must certainly make this argument is the lawgiver. For him, "the most shameful and most opposed of arguments is the one that fails to declare that these things are so."¹³⁸ Others will either be persuaded or not. "For no one," says the Athenian, "would voluntarily be willing to be persuaded to do that which does not bring him more joy than pain."¹³⁹ The lawgiver "will

¹³³ See *id.* 622b-663a, at 42-43.

¹³⁴ *Id.* 662c-3, at 43.

¹³⁵ *Id.* 662e-663a, at 43-44.

¹³⁶ *Id.* 663a, at 43.

¹³⁷ *Id.* 663b, at 44.

¹³⁸ *Id.*

¹³⁹ *Id.*

somehow or other persuade, with habits and praises and arguments, that the just and unjust things are shadow-figures."¹⁴⁰ Hence, from the perspective of the unjust man the unjust things appear pleasant, while to the just man, the just things appear pleasant. "Which shall we claim is the better authority for judging the truth: that of the worse soul or that of the better?" "Necessarily," Kleinias admits with the reluctance of the unpersuaded, "I suppose, that of the better."¹⁴¹ Once again, the argument depends on authority, here the authority of the "better" soul. But does Plato, not the Athenian, want us to believe that the better soul truly has authority? Or shall we believe instead that justice is simply the rhetoric of Sophists, that the just and unjust things truly are "shadow-figures," not subject to the authority of better souls?

The text veils the answer to this question, but Plato gives us the means for lifting the veil. It lies in a significant omission. Curiously, fame and praise, which are key to the argument for justice, were not goods named by the Athenian either in his list of human and divine goods in Book I,¹⁴² or in the list of things "said to be good by the many" as part of his argument for justice.¹⁴³ In Book I the Athenian referred to a third list of goods, by the poet Tyrtaeus, which does include fame. But the Athenian mentions only one of the goods in Tyrtaeus' list, wealth, summarizing the others by saying, "and then he [Tyrtaeus] mentions just about all of them."¹⁴⁴ The Athenian is silent until this moment about the very good that provides the argument for justice. The silence is significant. Let us go back to Tyrtaeus's poem and compare his list with the list the Athenian gives in Book I. For Tyrtaeus the goods are eight in number, in this order: stature and strength, speed, beauty, wealth, monarchy, persuasive speech, and fame. The Athenian, in his own list, divides the goods into divine goods and human, or lesser, goods. He lists the lesser goods first: "Health leads the lesser goods; in the second place is beauty; third is strength, both in running and in all the other motions of the body; and fourth is Wealth—not blind but sharp-sighted, insofar as it follows prudence."¹⁴⁵ He then lists the divine goods: "Prudence, in turn, is first and

¹⁴⁰ *Id.* 663c, at 44.

¹⁴¹ *Id.* 663d, at 44.

¹⁴² *See id.* 631b-d, at 10.

¹⁴³ *Id.* 661a-b, at 41.

¹⁴⁴ *Id.* 629b, at 8.

¹⁴⁵ *Id.* 631c, at 10.

leader among the divine goods. Second after intelligence comes a moderate disposition of the soul, and from these two mixed with courage comes justice, in third place. Courage is fourth."¹⁴⁶ Note three points. First, the Athenian equates prudence with intelligence as the leading divine good. Socrates uses "prudence" interchangeably with "intelligence" in the *Republic*. But Socrates refers to "prudence" as a virtue, not a good. This will turn out to be significant for the restriction of virtue to conventional or animal virtue. Second, the Athenian puts justice in third place, after prudence and moderation. In the *Republic*, justice was the first of the virtues, not third. Here the leading good, human or divine, is intelligence—a demotion of justice. Third, the Athenian describes justice as a mixture of intelligence, moderation, and courage. From the perspective of the *Republic*, where justice was treated as the master virtue, this is not a surprising description. But he is careful to list justice seventh, even though it requires an awkward reference to courage, which comes after justice, eighth in the list. Why does the Athenian put justice seventh, when it would be less awkward to list it eighth? And why list it seventh at all, when at least according to the *Republic* it is the first of the virtues? Compare the Athenian's list with Tyrtaeus'. Both have eight goods. The seventh in Tyrtaeus's list is "persuasive speech." The good that the Athenian took care to put seventh is justice. By putting justice in seventh place, which certainly he did not have to do, the Athenian is equating justice with "persuasive speech." Justice, after all, is rhetoric. The Athenian has secretly prepared the reader for the conclusion that the better soul does not, after all, have authority, that justice is indeed a "shadow-figure," whatever persuades.

So the argument about justice proceeds. The Athenian says:

Even if what the argument has now established were not the case, could a lawgiver of any worth ever tell a lie more profitable than this (if, that is, he ever has the daring to lie to the young for the sake of a good cause), or more effective in making everybody do all the just things willingly, and not out of compulsion?¹⁴⁷

Without the preparation of Tyrtaeus's list, we might understand the Athenian to be saying that the argument has been estab-

¹⁴⁶ *Id.* 631c-d, at 10.

¹⁴⁷ *Id.* 663d-e, at 44.

lished, that the better soul has the authority to persuade us that the just life is the most pleasant. But he is not saying that at all. Instead, the Athenian is asserting the truth of the second part of the statement, that justice is a profitable lie. Lies can profit the lawgiver in lawgiving, which is a good cause. The lie, if it is a lie, can make everyone do just things willingly, not out of compulsion, but only if the lawgiver dares lie to the young.

The Athenian's first public comment treats lying differently. It is in Book V, in the general prelude that precedes all the laws and gets the citizens ready to receive them. The Athenian is describing "what sort of person one should be oneself if one is to lead the most noble sort of life."¹⁴⁸ He says that truth is the leader of good things for the gods, and of all things for human beings. To become blessed and happy, he says, one should partake of truth from the beginning, in order to live as a truthful man for as long as possible. "Such a man is trustworthy. The untrustworthy man is one who finds the voluntary lie congenial; he who finds the involuntary lie congenial is without intelligence."¹⁴⁹ Neither is enviable, he says, because every man who is untrustworthy and ignorant is also friendless. Eventually such a man is discovered, and in old age everyone will desert him, "so that whether his comrades and children are living or not he lives almost as if he were an orphan."¹⁵⁰ Apart from some characteristic puzzles—why does the liar live as an "orphan" rather than one who is friendless and childless?; why does the Athenian characterize speaking out of ignorance as a lie?; why is truth the leader of good things for the gods, but of all things for humans?—the text is plain enough that lying is no good and liars come to a bad end. Lying can only cause the liar harm, however much it occasionally benefits him. It has no decent role in the city, once the lawgiver has founded it.

The Athenian's second public comment follows soon after the end of the general prelude. The Athenian is discussing dividing the city into households with allotments.¹⁵¹ He has just described how the lawgiver must purge the colonists who will found the city of the poor and the bad,¹⁵² which is the lawgiver's very first task. The Athenian says that before he makes any

¹⁴⁸ *Id.* 730b, at 116.

¹⁴⁹ *Id.* 730c, at 116.

¹⁵⁰ *Id.*

¹⁵¹ *See id.* 737c-741e, at 124-29.

¹⁵² *See id.* 735b-736c, at 121-23.

other distribution of land, the lawgiver should set aside places for sanctuaries for oracles, statues, alters, and shrines and give each group in the city "a god or demon or some hero."¹⁵³ The reason for this, he says, is that when the various parts of the population gather together at regularly established intervals, "they'll be amply supplied with whatever they need; they'll become more friendly to one another, at the sacrifices, will feel they belong together, and will get to know one another."¹⁵⁴ The Athenian comments that there is no greater good for a city than that its inhabitants be well known to one another. When men's characters are obscured from one another, he says, no one ever gets the honor he deserves, either in terms of office or justice. "Above everything else, every man in every city must strive to avoid deceit on every occasion and to appear always in simple fashion, as he truly is—and, at the same time, to prevent any other such man from deceiving him."¹⁵⁵

The Athenian's third public comment treats lying ambiguously, unlike the first two. It is in Book XI, concerning private law. The Athenian is reciting a prelude about the "vice" of "adulteration,"¹⁵⁶ whether of currency or any of the "things in the marketplace."¹⁵⁷ "Every man must understand," he says, "that adulteration, lying, and deception constitute a single class, about which the many (speaking badly) are accustomed to make the pronouncement that such a thing may often be correct if it occurs each time at an opportune moment; but by leaving unregulated and undefined the where and when of the opportune moment, they inflict many penalties on themselves and others through this saying."¹⁵⁸ The lawgiver, however, must put boundaries around adulteration, "great or small."¹⁵⁹ In other words, lawgivers can tolerate greater or lesser amounts of lying in the marketplace. The Athenian's boundaries are rather broad:

No one who is not going to become most hateful to the gods shall commit in word or deed any lie, deception, or adulteration of something when this kind of thing is done by invoking gods; and such a man is the one who in swearing false oaths thinks

¹⁵³ *Id.* 738d, at 125.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* 738e, at 125.

¹⁵⁶ *Id.* 916d, at 316.

¹⁵⁷ *Id.* 917b, at 317.

¹⁵⁸ *Id.* 916d-e, at 316.

¹⁵⁹ *Id.* 916e, at 316.

nothing of the gods, or, in the second place, who lies in the face of those superior to him.¹⁶⁰

Buyers and sellers are free to lie, so long as they do not invoke the gods. The Athenian thus creates two classes of transactions: transactions unaccompanied by an oath, in which one is free to lie, and transactions accompanied by an oath, in which one is not free.

The Athenian thus presents three stances on lying. The first, the one in private conversation, is that it is appropriate to lie for the "sake of a good cause" and that lawgiving is such a cause. The second, in the general prelude before any laws,¹⁶¹ condemns lying wholesale for one who wants to lead "the most noble sort of life." The third tolerates lying, within boundaries, for buyers and sellers. Merchants, from the Athenians point of view, are not citizens dedicated to a noble life. Nor, apparently, are lawgivers (whose lies are "profitable"). Lying is tolerable under certain conditions only for lawgivers and merchants.

The Athenian lies to Kleinias and Megillus even before Kleinias asks him to participate in proposing laws for the new city he is involved in founding at the behest of his city, Knossos. Clearly the Athenian has a predisposition for lawgiving. He starts the dialogue, after all, by asking Kleinias and Megillus: "Is it a god or some human being, strangers, who is given the credit for laying down your laws?"¹⁶² To which Kleinias answers: "A god, stranger, a god—to say that which is at any rate the most just thing. Among us Zeus, and among the Lacedaemonians [Spartans], from whence this man here comes, I think they declare that it's Apollo. Isn't that so?" Megillus says, "Yes." Now the lie. The Athenian says to Kleinias: "Don't you people follow Homer, and say that Minos got together with his father every ninth year and was guided by his oracles in establishing the laws for your cities?"¹⁶³ The Athenian is referring to a passage in the *Odyssey*.¹⁶⁴ The scene is Odysseus's first meeting with his wife, Penelope, after he returns to Ithaca. Athene has disguised him as an old beggar. Odysseus has revealed his true identity to his son, Telemachus, but asks him not

¹⁶⁰ *Id.* 916e-917a, at 316.

¹⁶¹ With the exception of the marriage law, which is repeated with slightly altered contents after the general prelude. See *id.* 721b, at 108; 772d-e, at 166.

¹⁶² *Id.* 624a, at 3.

¹⁶³ *Id.* 624b, at 3.

¹⁶⁴ See HOMER, *THE ODYSSEY: A VERSE TRANSLATION* bk. 19, ll. 178-79, at 210 (Albert Cook ed. & trans., W.W. Norton & Co. 1993).

to tell anyone else, including his mother. Odysseus wants to find out the "bent of the[se] women."¹⁶⁵ Penelope welcomes the disguised Odysseus into her house. She asks him where he is from. He dodges the question. She asks again. Odysseus eventually answers, falsely, that he is the grandson of Minos, King of Knossos. But before he tells her that, he describes Crete as a populous land with many languages and cities. "And among those," he says, "is Knossos, a great city, where Minos, the intimate of great Zeus, ruled nine years as king." Odysseus does not say that Minos "got together with his father every ninth year," just that he ruled nine years. The Athenian is not simply mistaken—we know from numerous and sometimes lengthy quotes, not paraphrases, from Homer and other poets later in the dialogue that the Athenian has a good memory and knows his Homer. Quite the contrary. He has misrepresented Homer to Kleinias and Megillus.¹⁶⁶

Curiously, Kleinias does not disagree with the Athenian. He answers simply: "So it is said among us."¹⁶⁷ Presumably he means that the Cretans say just what the Athenian reports Homer as saying, not that the Cretans follow Homer. For we learn later in the dialogue, in Book III, that though the Spartans know Homer quite well, the Cretans know only a few verses of Homer and don't read much foreign poetry.¹⁶⁸ But can it be that the Cretans follow the Athenian's misleading account of Homer? Hence Kleinias must be lying too. Furthermore, Megillus knows his Homer and does not object to what the Athenian says about him. Perhaps Megillus is being taciturn—a Spartan virtue. If Kleinias agrees with the Athenian, why should Megillus spoil the party? But both Kleinias and Megillus are embarking on a risky conversation with the Athenian. We learn later, from the Athenian, that Cretan law does not allow young people to inquire which of the laws is finely made; only old people are allowed to, and only in front of a magis-

¹⁶⁵ *Id.* bk. 16, l. 304, at 180.

¹⁶⁶ Michael Grant says that the *Iliad* and the *Odyssey* seem to have reached their final, or nearly final, form in 750-700 B.C. See MICHAEL GRANT, *THE RISE OF THE GREEKS* 140 (1988). Therefore, it is probable that the text of the *Odyssey* that Plato used is the same as ours, and we can be fairly sure that Plato intended the deception. Wherever the Athenian quotes Homer's words, I use Pangle's translation. Otherwise, I use Albert Cook's translation. See HOMER, *supra* note 164.

¹⁶⁷ THE LAWS 624b, *supra* note 1, at 3.

¹⁶⁸ See *id.* 680c, at 63.

trate.¹⁶⁹ When the Athenian says that they may therefore discuss Cretan law, because all three of them are old, Kleinias agrees.¹⁷⁰ Neither says that Kleinias is a magistrate. Certainly Kleinias should have been uneasy talking with the Athenian in front of Megillus from the very beginning, and an uneasy person would be concerned that the person he is talking with is trustworthy. But Kleinias quickly concurs with the Athenian's account of Homer, not bothering to check its accuracy, possibly because he is embarrassed to show his ignorance of Homer in front of Megillus and the Athenian. He thus misses an opportunity to discover the character of the stranger. That is precisely why the Athenian misrepresented Homer, to test his companions' characters. It is the same reason Odysseus asked Telemachus not to tell Penelope his identity, in order to test her character.

Both Odysseus and the Athenian want to find out if the people with whom they are dealing are trustworthy. Odysseus wants to know whether he can still trust Penelope to be his wife after twenty years' absence. If she is not trustworthy, he cannot restore lawful order to Ithaca. It is not enough to defeat the lawless suitors in combat. Military superiority is inadequate by itself to construct a city. Hence the Athenian's second question to Kleinias: "Tell me this, now. For what reason has your law ordained the common meals, and also the gymnastic training and the weapons you employ?"¹⁷¹ Kleinias's answer is that the only reason for these warlike Dorian practices is to triumph in the inevitable and perpetual war of city against city.¹⁷² The Athenian then shows Kleinias by argument that preparation for war and the virtue of courage cannot have been the sole aim of the Cretan lawgiver. Without other goals and other virtues the city itself would dissolve in civil war. The aim of the lawgiver must be the "greatest virtue," not just courage.¹⁷³ After misquoting a second poet—the Spartan Tyrtaeus, who was originally from Athens—the Athenian quotes a third poet, Theognis, to say that the "greatest virtue" is "trustworthiness in the midst of dangers—that quality which someone would call perfect justice."¹⁷⁴ (The Athenian says that Theognis, who was from

¹⁶⁹ See *id.* 634e, at 14.

¹⁷⁰ See *id.* 635a, at 14.

¹⁷¹ *Id.* 625c, at 4.

¹⁷² See *id.* 625c-626b, at 4.

¹⁷³ See *id.* 630c, at 9.

¹⁷⁴ *Id.*

Attic Megara, is a "citizen of Sicilian Megara,"¹⁷⁵ a third unfuted misrepresentation.) As Socrates argued to Thrasymachus in the *Republic*, men who want to accomplish:

some common object . . . could never have restrained themselves with one another if they were completely unjust, but it is plain that there was a certain justice in them which caused them at least not to do injustice to one another at the same time that they were seeking to do it to others. . . .¹⁷⁶

It is a "certain justice"—not the thoroughgoing justice of the perfect regime—that the Athenian explores in the *Laws*.

The first interchanges in the *Laws*—Kleinias's response to the Athenian's question about the origin of the laws of Sparta and Crete, and the argument between Kleinias and the Athenian over Cretan law—are a microcosm of two ways of forming associations, apart from kinship and before the creation of a city.

The first way works by deception, politeness, and ignorance. The association it creates, the Athenian's conversation with Kleinias and Megillus, is marked at first by unintelligent repetition. Answering the Athenian's first question, Kleinias repeats himself—"a god, stranger, a god"—as if repeating "god" affirmed that it was so. He also repeats words the Athenian has just said to him. When the Athenian comments that it would not be unpleasant to pass the time discussing the "political regime and laws" on their walk from Knossos to the cave and temple of Zeus, the Athenian says: "there are resting places along the way, appropriate for this stifling heat; there are shady spots under tall trees, where it would be fitting for men of our age to pause often."¹⁷⁷ Kleinias answers: "And as one goes along this route, stranger, there are groves with cypresses of amazing height and beauty, and meadows in which we could rest and pass the time." To which the Athenian grimly replies: "What you say is correct." Kleinias responds: "Yes indeed. And when we see them we'll assert it even more emphatically."¹⁷⁸ Kleinias's are the methods of association known to unreflective men unrelated by passion or need or blood. They establish propositions by bare emphasis and flat repetition, not by argument. Their bond, such as it is, derives from the comfort

¹⁷⁵ *Id.* 630a, at 9.

¹⁷⁶ *REPUBLIC* 352c, *supra* note 2, at 31.

¹⁷⁷ *THE LAWS* 625b, *supra* note 1, at 3.

¹⁷⁸ *Id.* 625c, at 4.

that discussion affords them. They do not, unlike Spartans and Cretans in their meals, regard discussion as common to them all. When, after defeating the reason that Kleinias proposes for the Dorian practices, the Athenian suggests that they start over again from the beginning and have a "comforting discussion" of the virtues. Megillus uncharacteristically interrupts: "What you're saying is fine. How about trying first to test our praiser of Zeus here?"¹⁷⁹ To which the Athenian replies: "I will, but I'll also try to test you and me as well. For the discussion is common to us all."¹⁸⁰ Megillus's rejoinder to the Athenian's wish for a "comforting discussion" is a sharp reminder that the bonds of comfort must always yield to the competitive spirit. Discussion survives only when its participants regard it as something in common, as Spartans and Cretans see their meals.

The association whose aim is comfort is shadowed by death. While Homer implies that Minos died at the end of a nine-year reign, the Athenian says that "Minos got together with his father every ninth year."¹⁸¹ The visits were in the very cave to which the Athenian and his old companions were traveling. The route was lined by groves of cypresses, trees that in antiquity were associated with death and graves.¹⁸² The three companions, like Minos, are on the road to death. But in the Athenian's reworking of Homer, Minos does not die; instead he talks about law with his father. Conversation with a god about law "saves" Minos from death and can save the three companions as well. Though the three are not sons of a god, demigods, such as Minos, had sons and daughters, who in turn had sons and daughters. Some of these partly divine men and women are undoubtedly alive today. The logic of paganism requires it. These divine men and women cannot, as Minos did, have conversations with a god. But they can have conversations inspired by a god. And the conversations would not be unlike the conversations Minos had with his father. Undoubtedly, Minos went to Zeus in order to get fresh instructions. Perhaps circumstances had changed and new laws were required. Perhaps old laws were not working as Zeus had foreseen.¹⁸³ Zeus and Minos

¹⁷⁹ *Id.* 633a, at 12.

¹⁸⁰ *Id.*

¹⁸¹ *Id.* 624b, at 3.

¹⁸² *See id.* at 513 n.11.

¹⁸³ It is clear that Minos did not go to Zeus for instructions about applying the law, about interpretation. His brother, Rhadamanthus, was the judge, and Kleinias says only that Rhadamanthus "became very just. We Cretans, at any rate, would assert that he won

would discuss the very issues the Athenian discussed with Kleinias and Megillus. But the death from which their godlike conversation about law saves them is not the physical death from which the Athenian's deception saved Minos. The companions are not demigods. They do not talk with gods. Death for them is descent of the city into faction and disintegration of the soul.¹⁸⁴ The road from death, as it was for Minos, is making law with the aid of a god. Even though lawmaking cannot prevent physical death, providing laws upon the occasion of death is, nonetheless, "the end [*telos*] of the whole political regime."¹⁸⁵

Thus, the second way of forming associations is god-like conversation. It is intelligent argument about the aims and substance of law. The association this argument creates is the city, and cities can neither come into being nor survive by any other means. Absent intelligent argument, other grounds of association—whether passion, blood, or need—always lay the seeds of their own destruction, as the Athenian describes in his political history of Greece in Book III. The city formed by intelligent argument both maximizes the chances of its citizens for physical survival and minimizes the disintegration of their souls.¹⁸⁶

Like the unintelligent conversation that preceded it, the argument about law is marked by repetitions. But the repetitions of intelligent conversation are not the comforting ones that marked Kleinias's responses to the Athenian's first question. The Athenian's repetitions are never flat or bare. His repetitions reflect a change in position wrought by intervening argument, just as Minos's repeated visits to Zeus reflected changed

this praise because he regulated judicial affairs correctly in those times." *Id.* 625a, at 3. Interpreting the law does not require or permit divine inspiration. Making law does.

¹⁸⁴ See *id.* 626b-e, at 4-5.

¹⁸⁵ *Id.* 632c, at 11.

¹⁸⁶ In Book XII the Athenian describes the tasks of the judge. To be an even handed judge, he says, one must look to the "just, good, and noble things in the other cities," *id.* 957b, at 360, and learn whatever writings about them he has acquired. The good judge must especially learn the writings of the lawgiver, "as antidotes to the other speeches," *id.* 957d, at 360, that are motivated by a fondness for victory, thus:

making the just things abide and grow in the good men, and effecting the greatest transformation he can in the bad men, away from lack of learning, lack of restraint, cowardice, and all injustice generally—that is, for whoever among the bad men seem to have curable opinions. As to those whose opinions have really been fixed by fate, if to souls thus disposed they assigned death as the cure (a remark that it would be just to make often), such judges and leaders of judges would become worthy of the entire city's praise.

Id. 957e-958a, at 360-61. The connection of death with the two sorts of repetition is obvious.

or unanticipated conditions. The "double method" of lawmaking¹⁸⁷—first presenting a prelude, then the law—is likewise a kind of repetition, one that seeks to change conditions, to prepare the populace for receiving a law rather than to respond to changes.

The marriage law is the first of the Athenian's many repetitions¹⁸⁸ and illustrates their role in the argument. It is also the first law the Athenian presents to his companions, "the first law the lawgiver would lay down."¹⁸⁹ He presents the first version of the marriage law before he discovers the need for a general prelude preceding the act of lawgiving altogether. The law requires every citizen to marry between the ages of thirty and thirty-five. "If not, there is to be a penalty of fines and dishonor, the fines to be of such-and-such an amount, the dishonor to be of such-and-such a character."¹⁹⁰ What the Athenian calls at this point the "double formula"¹⁹¹ (what he will soon call "prelude") follows the "simple version"¹⁹² of the law. As motivation for marrying and producing children, the "double formula" relies solely on the "desire to become famous and not to lie nameless after one has died."¹⁹³

The Athenian presents a second version of the marriage law long after the general prelude. It is no longer the first law, but follows purging the colonists of the poor and the bad,¹⁹⁴ dividing the city into households with allotments,¹⁹⁵ prohibiting private possession of gold and silver, dowries and interest on loans,¹⁹⁶ creating a regulated class system of wealth,¹⁹⁷ siting the city and dividing it into twelve parts,¹⁹⁸ and establishing offices.¹⁹⁹ The second version clearly supersedes the first—during the discussion of households and allotments, the Athenian refers to the marriage law "that will be ordained."²⁰⁰ It permits marriage

¹⁸⁷ See *id.* 720e, at 108.

¹⁸⁸ The second concerns the proposition that no man is ever voluntarily unjust. See *id.* 731c, at 117; *id.* 860c-e, at 253-54.

¹⁸⁹ *Id.* 720e, at 108.

¹⁹⁰ *Id.* 721b, at 108.

¹⁹¹ *Id.*

¹⁹² *Id.* 721a, at 108.

¹⁹³ *Id.* 721c, at 108.

¹⁹⁴ See *id.* 735b-736c, at 121-23.

¹⁹⁵ See *id.* 737c-741e, at 124-29.

¹⁹⁶ See *id.* 741e-744a, at 129-31.

¹⁹⁷ See *id.* 744a-745b, at 131-32.

¹⁹⁸ See *id.* 745b-747d, at 132-35.

¹⁹⁹ See *id.* 751a-771a, at 136-58.

²⁰⁰ *Id.* 740c, at 127.

starting at the age of twenty-five and requires it by thirty-five, rather than requiring it be between thirty and thirty-five. It hedges the permission with conditions. Whoever wishes to be married must have "observed and been observed by others" and trust "that he has found someone who pleases him and is appropriate for sharing and procreating children."²⁰¹ The second version has specific money penalties, and the dishonor for not marrying has been sharpened.²⁰² Also, the prelude to the second version is far more elaborate than the prelude to the first. It asks the young person to "hearken to an account of how he should seek what is fitting and harmonious."²⁰³ It presents a series of considerations that those contemplating marriage ought to take into account:

In general, let there be one myth regarding marriage: in each marriage what must be wooed is not what is most pleasant for oneself, but what is in the interest of the city. It is according to nature that everyone always be somehow attracted to what is most similar to himself, and because of this the city as a whole becomes uneven as regards wealth and the dispositions of characters.²⁰⁴

Thus, someone from good parents should favor a poor prospective partner over a wealthy one, to equalize household wealth. An impatient and hasty person should try to marry someone with orderly parents, to ensure a moderate disposition in children. To enact these considerations into law, however, "would stir up the spiritedness of many."²⁰⁵ "That is why it is necessary to leave such things out of the law, and instead try to use enchanting song to persuade them that each should value more the similarity of their children than the equality in marriage which is insatiable for money."²⁰⁶

The second version of the marriage law thus speaks of permitting marriage as well as requiring it, because the law seeks to persuade citizens to take the interests of the city into account in their decisions to marry, apart from their individual passions. The second version specifies penalties instead of leaving them to be determined, because laws that come before it set up a basic political structure and household economy. The

²⁰¹ *Id.* 772d, at 160.

²⁰² *See id.* 774a-c, at 161-62.

²⁰³ *Id.* 772e, at 160.

²⁰⁴ *Id.* 773b-c, at 161.

²⁰⁵ *Id.* 773c, at 161.

²⁰⁶ *Id.* 773d-e, at 161.

second version is no longer the first law laid down, because the full implications of marriage for the interests of the city can be appreciated only once the policies behind the political structure and household economy have been clarified. The marriage law was first when the Athenian thought that marriage and procreation were solely a response to the individual's passions and concerns, of which the imminence of death is most important. The Athenian then considered that death is the "end of the whole political regime."²⁰⁷ Procreation, being opposite, must be put at the beginning. But marriage and the family are not the beginnings of the political regime. They are the scene in which the city's fundamental political concerns are enacted. The Athenian's "mistake," putting marriage law first, is a stage in the companions' journey from death, a release from their obsession with it. It is a redirection of their energies and wisdom towards the city. The law itself is transformed from a sheer reflection of nature, responding only to the impulses of sex and posterity, into an instrument of civic policy. Repeating the law and redoing it, supplements the nature of marriage with convention.

The interests of the city, as the Athenian states them, seem perfectly consistent with what is still the motivation for marriage and procreation, "the desire to become famous and not to lie nameless after one has died."²⁰⁸ The higher the citizen's sacrifice, the greater his fame and the fame of his family. The highest sacrifice, to die in battle, is the greatest fame. One sacrifice, however, undermines the entire aim of marriage: sacrifice of the name of the citizen itself, calling on the citizen to take action for which no fame to him or his family is forthcoming. This is the sacrifice that the dialogue demands of the Athenian, who is the only one of the companions whose name neither we nor apparently his companions know. We learn early on in Book I that the Athenian knows Kleinias's name, because he uses it.²⁰⁹ We can be fairly sure that at the start of the dialogue the Athenian does not know Megillus's name, for the first time he addresses Kleinias and Megillus together, he says, "Well, Kleinias, and Lacedaimonian stranger."²¹⁰ Nor, it seems, does Kleinias know Megillus's name, for twice he refers

²⁰⁷ *Id.* 632c, at 11.

²⁰⁸ *Id.* 721c, at 108.

²⁰⁹ *See id.* 634d, at 13-14.

²¹⁰ *Id.* 635e, at 15.

to Megillus as "this man here."²¹¹ The Athenian and Kleinias learn Megillus's name later in Book I, when Megillus indirectly tells them. After that, they use his name throughout the dialogue.²¹²

No one must know the Athenian's name, because he is a lawgiver, and a lawgiver must sacrifice the fame that would naturally follow from his accomplishment. The setting in which Megillus discloses his name explains why. The Athenian has just argued that the lawgiver must aim at all of virtue, not just courage, as Kleinias had claimed.²¹³ Thus the lawgiver must aim at moderation, which is one of the virtues.²¹⁴ Megillus could list all the Spartan laws and practices that cultivate courage,²¹⁵ but neither Megillus nor Kleinias can cite one Spartan or Cretan practice or law that cultivates courage against pleasures, or moderation.²¹⁶ So the Athenian begins a discussion of moderation.²¹⁷ He says that the Cretan men are immoderate, because they engage in homosexual practices.²¹⁸ Saying that he will leave Kleinias to defend Cretan law on this point, Megillus points out that Sparta does not tolerate the drinking parties that are common in Athens.²¹⁹ The Athenian says that perhaps someone from Athens's side would defend himself by "pointing to the looseness of your women."²²⁰ He then proposes to investigate the subject of intoxication.²²¹ He says that drinking parties, for the most part, are poorly conducted, but that he will examine the properly conducted drinking party.²²² The Athenian's defense of properly conducted drinking parties will be that they provide an education in and test of moderation.²²³ Before he presents the defense, however, he warns Megillus and Kleinias that it will be long-winded.²²⁴ Megillus then starts the speech in which he unveils his name.

²¹¹ *Id.* 624a, at 3; *id.* 626c, at 5.

²¹² *See id.* 683d, at 66 (the Athenian); *id.* 710a, at 95 (Kleinias).

²¹³ *See id.* 625c-632d, at 3-11.

²¹⁴ *See id.* 633c-634b, at 12-13.

²¹⁵ *See id.* 633a-c, at 12.

²¹⁶ *See id.* 634c, at 13.

²¹⁷ *See id.* 635e, at 15.

²¹⁸ *See id.* 636a-e, at 15.

²¹⁹ *See id.* 636e-637b, at 16.

²²⁰ *Id.* 637c, at 16.

²²¹ *See id.* 637d, at 17.

²²² *See id.* 639d-641a, at 19-21.

²²³ *See id.* 643a-650b, 23-31.

²²⁴ *See id.* 641e-642b, at 21-22.

Megillus says that the Athenian is probably not aware that "our hearth happens to be the consulate for your city."²²⁵ The children of such a hearth develop a friendly disposition towards the city for which their family is consul. So whenever the Spartans were blaming or praising Athens for something, Megillus would immediately hear other children crying: "That's your city, Megillus, that's dealing with us ignobly or nobly."²²⁶ His fights with the children led him to be "entirely well disposed"²²⁷ towards Athens. Thus the Athenian dialect is a "friendly sound" to him, and he believes "that those Athenians who are good are good in a different way. They alone are good by their own nature and without compulsion, by a divine dispensation: they are truly, and not artificially, good."²²⁸ So, he tells the Athenian, talk as long as you like.

Thus, Megillus is at odds with his fellow Spartans because of his own, as well as his family's, ties to Athens. The heated discussion of drinking, homosexuality, and loose women gives a sense of the anger that must have been directed at Megillus, and suggests why he may have come to Crete. Megillus was entirely unsuited to be a lawgiver for Sparta because of his identification with his family, with its own peculiar interests and allegiances. Given the variety of interests and allegiances that compete for power in the city, any citizen who dared propose laws would immediately be charged with promoting the interests of his family. Megillus's is just an accentuated instance of a more general problem.

Kleinias's reaction to the Athenian's warning reveals a somewhat different political and personal situation than Megillus's. Epimenides, he tells the Athenian, was born near Knossos and is related to Kleinias's family. Obeying an oracle, Epimenides went to Athens and "made some sacrifices that had been demanded by the god."²²⁹ Epimenides was a doctor and a seer. He told the Athenians, who feared a Persian invasion, that the Persians would not come for another ten years and would be defeated. (In fact, Epimenides lived a century before the Persian threat—a "mistake" by Kleinias.) "At that time, then" says Kleinias, "our ancestors formed a bond with yours,

²²⁵ *Id.* 642b, at 22.

²²⁶ *Id.* 642c, at 22.

²²⁷ *Id.*

²²⁸ *Id.* 642c-d, at 22.

²²⁹ *Id.* 642d, at 22.

and from that day to this, I and my family have felt well disposed towards your people."²³⁰ Epimenides's journey to Athens took place against a backdrop of bitter enmity. Minos, who had preceded Epimenides, was Athens's greatest enemy. Hence, Kleinias is reporting a dramatic transformation in his family's attitude towards Athens, and a partial transformation, certainly, in the attitudes of his fellow citizens. Otherwise, it is inconceivable that at the end of the dialogue Kleinias, urged on by Megillus, would ask the Athenian to help him found the city they have been discussing.²³¹ Thus, Crete could be receptive to the Athenian as a lawgiver, because Epimenides had gone on a mission to assuage Athens's worries, and Epimenides was a member of Kleinias's family. But Kleinias would have suffered the difficulties of any lawgiver—he would have been accused of favoring Athens out of family sympathy—had Epimenides—"that divine man"²³² as Kleinias calls him—not been ordered to travel to Athens at the instance of a god, and had he been the lawgiver rather than the lawgiver's companion. What distinguishes Kleinias's situation from Megillus's is that Kleinias can trace his family's involvement with Athens to a god. Also, fame for the laws will not fall predominantly on Kleinias, but on the Athenian, whose name and family the Cretans do not know.

The Athenian's anonymity recalls Odysseus's upon his return to Ithaca. This "man of many turns,"²³³ "of many devices,"²³⁴ and "many wiles,"²³⁵ learned not to disclose his name in his encounter with the Cyclops, Polyphemos—"a monstrous man . . . , who . . . did not consort / With the others, but stayed apart and had a lawless mind."²³⁶ Ignoring the anger of Zeus, "[t]he god of guests,"²³⁷ Polyphemos trapped Odysseus and his companions and started to devour them, one by one. Odysseus plied Polyphemos with wine. In a drunken stupor, Polyphemos asked Odysseus his name, who replied: "Noman do they call me."²³⁸ While Polyphemos was asleep, Odysseus and his men blinded him, and Odysseus tricked the Cyclops into letting them

²³⁰ *Id.* 642e-643a, at 22-23.

²³¹ *See id.* 969c-d, at 374.

²³² *Id.* 642d, at 22.

²³³ HOMER, *supra* note 164, at bk. 1, l. 1, at 1.

²³⁴ *Id.* bk. 4, l. 763, at 50.

²³⁵ *Id.* bk. 13, l. 311, at 147.

²³⁶ *Id.* bk. 9, ll. 187-89, at 95.

²³⁷ *Id.* bk. 9, l. 271, at 97.

²³⁸ *Id.* bk. 9, l. 366, at 99.

escape from his cave. Once they were safely aboard ship, Odysseus in his fury taunted Polyphemos: "Cyclops, if someone among mortal men should inquire / Of you about the unseemly blindness in your eye, Say that Odysseus, sacker of cities, blinded it / The son of Laertes, whose home is in Ithaca."²³⁹

Polyphemos then cursed Odysseus, asking his father, Poseidon, to stop him from reaching home or to arrive there ill, having lost all his companions. The gods permitted Poseidon only the latter revenge, and Odysseus spent ten more years away from home, for taunting Polyphemos and disclosing his name. During those ten years, and upon returning home, Odysseus reveals his identity only to those who have earned his trust. Even then, he identifies himself by name only twice—once to the Phaeacians,²⁴⁰ descendants of Poseidon who were extremely hospitable to him after he was driven onto their shore, and once to his oxherd, Eumaeos, who prayed in front of the disguised Odysseus for his return to Ithaca.²⁴¹ To others, he reveals only his relationship, such as father, husband, or owner of the house. Odysseus's heroic taunt, his desire that Polyphemos know the name of the man who bested him, delayed the construction of "lawful order" in Ithaca. Disclosure of his name put Odysseus at the mercy of Polyphemos's curse, of lawlessness, isolation, and disorder. Only once Odysseus masters his heroic impulse for fame does he successfully reach Ithaca, destroy the lawless suitors, and reconstruct Ithaca's civic order. (Recall that the motive for justice in the Athenian's first speech about lying was fame.)

Plato's identification of the Athenian with the trickster Odysseus is reflected in the precise wording of the Athenian's first question to Megillus and Kleinias, the very first sentence of the dialogue: "Is it a god or some human being, strangers, who is given the credit for laying down your laws."²⁴² He does not ask who made the laws, but who is given the credit. Heroic virtue is not the lawgiver's virtue. Lawgiving is possible only when "noman" gets the credit.

CONTRACTION OF VIRTUE

It is Kleinias, not the Athenian, who first refers to justice,

²³⁹ *Id.* bk. 9, ll. 502-05, at 102.

²⁴⁰ *See id.* bk. 9, l. 19, at 92.

²⁴¹ *See id.* bk. 21, l. 193-208; at 232.

²⁴² THE LAWS 624a, *supra* note 1, at 3.

when he answers the Athenian's first question, about the credit for laying down the laws: "A god, stranger, a god—to say what is at any rate the most just thing."²⁴³ That, in itself, is worthy of notice. Kleinias broaches the topic of justice, in the context of awarding credit, or fame, for lawgiving. He describes an extraordinary subject in an ordinary way. He applies the conventional notion of justice, giving each his due, to the very act of lawgiving itself, before giving each his due according to convention is possible. Before the law, the only possible justice is the transcendent justice of the *Republic*. But that is not what Kleinias has in mind.

Even though Kleinias is the first to raise the subject, the Athenian seems preoccupied with justice, indeed with all the virtues, throughout the dialogue. His criticism of Kleinias's response to his second question, about the reason for Crete's common meals, gymnastic training, and weapons is that in accounting for these warlike institutions Kleinias focused on only one part of virtue, on courage, at the cost of the other parts—prudence, moderation, and justice. Moreover, the Athenian sustains the argument of virtue to the very end.²⁴⁴ How then does virtue contract in a dialogue whose main character uses the language and tropes of virtue throughout?

As sometimes happens, Plato plants a clue. It appears in the Athenian's attack on Kleinias's use of "color" to describe "beauty in posture or tune."²⁴⁵ Kleinias uses the term in an off-hand way towards the beginning of the Athenian's argument that correctly managed wine parties educate the soul in moderation. The Athenian has already established that the uneducated man is the one untrained in choral performances, and the educated is the one sufficiently trained in them.²⁴⁶ He will soon establish that choral performances, which are "the combination of dance and song taken together as a whole,"²⁴⁷ are imitations of characters, and have the power, through habituation²⁴⁸ and joy,²⁴⁹ to form character.²⁵⁰ Hence, choral performances are at the center of education in virtue and the political health of the

²⁴³ *Id.*

²⁴⁴ *See id.* 965c-966b, at 370-71.

²⁴⁵ *Id.* 654e-655a, at 34.

²⁴⁶ *See id.* 654a-b, at 33-34.

²⁴⁷ *Id.* 654b, at 33.

²⁴⁸ *See id.* 655e, at 35-36.

²⁴⁹ *See id.* 654a, at 33.

²⁵⁰ *See id.* 655d-e, at 35-36.

city. Kleinias makes his remark about "color" in response to the Athenian's question: "Well, what should we declare constitutes beauty in posture or tune? Consider this: if a courageous and then a cowardly soul undergo identical and equal sufferings, do the same postures and utterances result?"²⁵¹ Kleinias answers: "How could they, when not even the pallor or color is the same?"²⁵² To which the Athenian answers:

What you say is fine, comrade. It should be noted, though, that music includes postures and tunes, since music involves rhythm and harmony; now one can speak of "good rhythm" and "good harmony," but one cannot correctly apply to either tune or posture and image "good color"—as the chorus teachers, speaking in images, do.²⁵³

Later in the same argument the Athenian describes the knowledge one must have in order to be a prudent judge of each image, in painting and music.²⁵⁴ He says that music presents a special difficulty, because it "requires the most careful treatment of all the images. For if someone makes a mistake in regard to music, he becomes well disposed toward wicked characters and he suffers the greatest harm."²⁵⁵ The Athenian comments that it is very difficult to tell if one has made a mistake, "because the poets are so inferior, as poets, to the Muses themselves. The latter would never make a mistake like setting a man's words to a woman's color and tune . . ."²⁵⁶

The Athenian's rejection of the use of the term *color* to describe tune or posture and his use of it shortly after to describe the mistakes of poets is curious, especially in light of Socrates' use of the term in the *Republic*. In Book X, Socrates returns to the prohibition against imitation in poetry, which he had begun to describe in his construction of the just regime. Imitation, he says, is third in remove from the truth, which is the forms. Construction by craftsmen, whether human craftsmen or god, is an imitation of the forms, or second from truth. Imitation by painters or poets is, in turn, imitation of the products of craftsmen, an imitation of an imitation.²⁵⁷ It is charming but false. It destroys the part of the soul devoted to truth, the calculating

²⁵¹ *Id.* 654e-655a, at 34.

²⁵² *Id.* 655a, at 34.

²⁵³ *Id.* 655a, at 34-35.

²⁵⁴ *See id.* 669a, at 51.

²⁵⁵ *Id.* 669b-c, at 51.

²⁵⁶ *Id.* 669c, at 51.

²⁵⁷ *See THE REPUBLIC* 595c-597e, *supra* note 2, at 277-80.

part of the soul.²⁵⁸ "So great is the charm that these things by nature possess,"²⁵⁹ says Socrates to Glaucon. "For when the things of the poets are stripped of the colors of the music and are said alone, by themselves, I suppose you know how they look. For you, surely, have seen."²⁶⁰ Socrates, at least, believes that music has color. The Athenian does not. Yet, having told Kleinias that it is wrong to attribute color to music, the Athenian speaks like Socrates. The Athenian simultaneously rejects Socrates' use of the term "color" to describe tune or posture, then uses it exactly as Socrates does. Clearly the Athenian is capable of rejecting a term of Socratic discourse, then using it. It is possible, at least, that he does just this with the discourse of virtue. Unlike the attribution of color to posture and tune, however, the Athenian does not explicitly reject the unity and completeness of virtue. Indeed, he consistently embraces it. But the argument about color refers to two moments in the dialogue that implicitly reject the discourse of virtue as well.

In his speech rejecting color as an attribute of posture and tune, the Athenian attributes the wrongful use of color to "chorus teachers, speaking in images." Yet the Athenian too is a chorus teacher. He brands himself a chorus teacher by using the image of color to describe the tunes and postures of men and women. It is he, after all, who sets up the three choruses—of children, youths, and adults—that "must all sing incantations for the tender young souls of the children," charming and habituating them to believe that "when we claim that the gods say that the most pleasant life and the best life are the same, we will be saying what is most true."²⁶¹ The choruses are the Athenian's response to a comment on lying, in which he said that even if the argument allying the just life with the pleasant life

[W]ere not the case, could a lawgiver of any worth ever tell a lie more profitable than this (if, that is, he ever has the daring to lie to the young for the sake of a good cause), or more effective in making everybody do all the just things willingly, and not out of compulsion?²⁶²

The Athenian teaches the choruses to sing about justice, and his teaching, just like a chorus teacher's, aims to be effective,

²⁵⁸ See *id.* 597e-605c, at 280-89.

²⁵⁹ *Id.* 601b, at 284.

²⁶⁰ *Id.*

²⁶¹ THE LAWS 664b-c, *supra* note 1, at 45.

²⁶² *Id.* 663d-e, at 44.

whether or not it is a lie.

Then, in the speech in which the Athenian wrongly attributes color to posture and tune, he says that the poets are inferior, as poets, to the Muses, who would never make a mistake like the very one the Athenian is making. In Book VII, on education, the Athenian returns to the subject of poets. He reflects that he too is a kind of poet, after rejecting the position held by "tens of thousands of people" that the young to be educated correctly must be "steeped in these poets."²⁶³ The Guardian of the Laws must be selective in the poetry that is taught to the young, for "everyone would agree with me that each of these men has uttered many things in a noble fashion, but also many things in the opposite fashion."²⁶⁴ Kleinias asks what model the Guardian of the Laws should look to in deciding what he would allow the young to learn and what he would prevent them from learning. The Athenian answers that he may well have been rather lucky:

As I looked now to the speeches we've been going through since dawn until the present—and it appears to me that we have not been speaking without some inspiration from gods—they seemed to me to have been spoken in a way that resembles in every respect a kind of poetry.²⁶⁵

The Athenian does not claim complete inspiration, only some. The question, then, at every moment in the dialogue is whether the Athenian is speaking with inspiration or is mistaken.

In a moment of the dialogue that has nothing to do with justice or the virtues, the Athenian reports that he definitely is speaking with inspiration. It is the only moment when he reports doing so, the only one in which the Athenian is sure that he is not mistaken. It occurs just before the discussion of poetic education, in Book VII. The Athenian has completed a discussion of early education²⁶⁶ and of the gymnastic art.²⁶⁷ He then returns to a discussion of "the gifts of the Muses and Apollo."²⁶⁸ He says that earlier they thought that they had completed the discussion of music, but not the discussion of the gymnastic art. But now "it is clear what things were omitted and that those

²⁶³ *Id.* 810e, at 201.

²⁶⁴ *Id.* 811b, at 201.

²⁶⁵ *Id.* 811c-d, at 202.

²⁶⁶ *See id.* 788a-794c, at 175-82.

²⁶⁷ *See id.* 794c-796d, at 182-85.

²⁶⁸ *Id.* 796e, at 185.

things should be the first things one tells everyone."²⁶⁹ "Listen to me, then; even though you've listened before, still, care must be taken now too, as something very strange and uncustomary is spoken and heard. For I'm going to present an argument that is somewhat frightening to utter; yet by becoming bold, somehow, I will not flinch."²⁷⁰ This is the argument: "I assert that in all the cities, everyone is unaware that the character of the games played is decisive for the establishment of the laws, since it determines whether or not the established laws will persist."²⁷¹ What must especially be avoided, says the Athenian, is innovation in games or music, for change, he says, is "much the most dangerous thing in everything except what is bad."²⁷² Hence, "this strange dogma," that "our songs have become 'laws.'"²⁷³

The Athenian turns next to "the teaching and handing down of these very things."²⁷⁴ The Athenian says that he is doing much the same as what a shipwright does, when he sketches the shape of ships in outline by laying down the keels. He is trying to distinguish the outline of the ways of life as they accord with characteristics of souls, investigating the characteristics we should incorporate "if we are going to be carried through this voyage of existence on the best way of life."²⁷⁵ He then says, almost as an aside:

Of course, the affairs of human beings are not worthy of great seriousness; yet it is necessary to be serious about them. And this is not a fortunate thing. But since we're here, if somehow we would carry out the business in some appropriate way it would perhaps be a well-measured thing for us to do. But whatever am I saying? Someone would perhaps be correct to take me up in this very way.²⁷⁶

Kleinias joins in: "Indeed!"²⁷⁷ The Athenian adds:

I assert that what is serious should be treated seriously, and what is not serious should not, and that by nature god is worthy of a complete, blessed seriousness, but that what is human, as we said earlier, has been devised as a certain plaything of god, and that this is really the best thing about it. Every man and

²⁶⁹ *Id.*

²⁷⁰ *Id.* 797a, at 185.

²⁷¹ *Id.* 797a-b, at 185.

²⁷² *Id.* 797d, at 186.

²⁷³ *Id.* 799e, at 188.

²⁷⁴ *Id.* 803a, at 192.

²⁷⁵ *Id.* 803b, at 192.

²⁷⁶ *Id.* at 192-93.

²⁷⁷ *Id.* 803c, at 193.

woman should spend life in this way, playing the noblest possible games, and thinking about them in a way that is the opposite of the way they're now thought about.²⁷⁸

Kleinias asks: "How's that?" The Athenian answers that people:

[S]uppose the serious things are for the sake of the playful things: for it is held that the affairs pertaining to war, being serious matters, should be run well for the sake of peace. But the fact is that in war there is not and will not be by nature either play or, again, an education that is at any time worthy of our discussion; yet this is what we assert is for us, at least, the most serious thing. Each person should spend the greatest and best part of his life in peace. What then is the correct way? One should live out one's days playing at certain games—sacrificing, singing, and dancing—with the result that one can make the gods propitious to oneself and can defend oneself against enemies and be victorious over them in battle.²⁷⁹

The Athenian then quotes from the *Odyssey*, which he describes as having blazed the trails along which one should go when one sings and dances in order to propitiate the gods and defend oneself against enemies. Athene, disguised as the old man, Mentor, is telling Odysseus's son, Telemachus, what to say to Nestor, a companion of Odysseus at Troy, in order to find out about the fate of his father. Telemachus is visiting Nestor's home, where he will be safe from the suitors, at Athene's urging. She says: "Telemachus, some thoughts you will have in your mind, And a god will suggest others. For I do not think You were born and raised without the favor of the gods."²⁸⁰

"This is the way our nurslings should consider things," says the Athenian. They should consider what the three companions have said to be:

[A]dequately spoken, but that the demon and god will suggest things to them regarding sacrifices and choral performances, thus indicating those whom they should offer games and propitiate, and when they should play each game for each, so as to live out their lives in accordance with the way of nature, being puppets, for the most part, but sharing in small portions of truth.²⁸¹

Megillus interrupts: Stranger, you are belittling our human race

²⁷⁸ *Id.*

²⁷⁹ *Id.* 803d-e, at 193.

²⁸⁰ HOMER, *supra* note 164, bk. 3, ll. 26-28, at 23.

²⁸¹ THE LAWS 804a-b, *supra* note 1, at 193-94.

in every respect!"²⁸² The Athenian responds:

Don't be amazed, Megillus, but forgive me! For I was looking away toward the god and speaking under the influence of that experience, when I said what I did just now. So let our race be something that is not lowly then, if that is what you cherish, but worthy of a certain seriousness.²⁸³

The passage from the *Odyssey* presents a direct conversation between Athene, the patron goddess of Athens, and Telemachus. Telemachus is in fact communicating with a goddess, but thinks he is talking to Mentor. Athene/Mentor promises him that a demon will come to his aid in his conversation with Nestor. Homer thus gives a model of divine inspiration. A goddess in the form of a man inspires Telemachus by predicting that a demon, not a god, will suggest thoughts to him. Telemachus does not know that the prediction itself is an inspiration, one that predicts demonic inspiration. Divine inspiration is a prediction, apparently by a human, but in fact by a god, of a lesser inspiration. The lesser inspiration is effective in ordinary conversation. Divine inspiration makes the lesser, demonic inspiration possible.

The demons ranked below the gods in Greek theology, and above the heroes.²⁸⁴ In both the *Republic* and the *Laws*, Plato treats demons as the divine part of the soul. In the story of Er, in Book X of the *Republic*, a "certain spokesman" in Hades marshaled the souls and reported to them "the speech of Necessity's maiden daughter, Lachesis. Souls that live a day, this is the beginning of another death bringing cycle for the mortal race. A demon will not select you, but you will choose a demon."²⁸⁵ In the part of the *Laws*'s general prelude concerning what sort of person one should be if one is to lead the most noble sort of life, the Athenian says: "On the whole, one should try to keep all great joy or great pain hidden under a seemingly veil, whether each person's demon remains in good condition or whether in some enterprises chance brings high, steep slopes for the demons to climb."²⁸⁶ In Book IV the Athenian discusses what sort of regime the companions plan for the city. To clarify the question, which mystifies Kleinias, the Athenian makes use

²⁸² *Id.* 804b, at 194.

²⁸³ *Id.* 804b-c, at 194.

²⁸⁴ *See id.* 717b, at 103.

²⁸⁵ *Id.* 817d-e, at 209.

²⁸⁶ *Id.* 732c, at 118.

of a myth about the "very happy rule and arrangement under Kronos,"²⁸⁷ which was long before the time of cities, whose history the Athenian describes in Book III. He says that Kronos understood that "human nature is not at all capable of regulating the human things, when it possesses autocratic authority over everything, without becoming swollen with insolence and injustice."²⁸⁸ So, just as we do not make cattle rulers of cattle or goats rulers of goats,

we exercise despotic dominion over them, because our species is better than theirs. The same was done by the god, who was a friend of humanity; he set over us the better species of demons, who supervised us in a way that provided much ease both for them and for us. They provided peace and awe and good laws and justice without stint.²⁸⁹

The Athenian thus finds a kinship between the demons of the happy rule of Kronos and the demons connected with souls.

Demonic rule may be possible, even in the time of cities, when demons suggest thoughts to souls. Divine inspiration, which appears only in ordinary conversation, is that demonic rule is possible. It urges us to heed demonic inspiration, which is neither divine nor natural. Instead, it requires work, the work of the soul in conversation with its demon and with other souls. The inspired speech of the Athenian to Kleinias and Megillus is divine, not demonic speech. It is an interruption in the work of the dialogue, a vision that the work is worthwhile and can be done. Nevertheless, though the divine speech also reveals a vision of the human situation, the Athenian must retract it. A divine vision may motivate him, but cannot motivate Kleinias and Megillus. That vision is too disturbing to contribute to the companions' work as lawgivers. If nothing human is serious, then virtue of any sort is impossible. The lawgiver may be beyond virtue, but the companions with whom he works cannot. The work of lawgivers depends on demonic speech, not divine vision. That lesser speech, which itself is veiled and uncertain, is intelligent conversation that may or may not grace the rest of the dialogue.

Demonic speech thus does not disavow virtue. That is why the Athenian makes the unity and completeness of virtue the central theme of the dialogue. Yet the Athenian conducts the dis-

²⁸⁷ *Id.* 713b, at 99.

²⁸⁸ *Id.* 713c, at 99.

²⁸⁹ *Id.* 713d-e, at 99.

course of virtue under the shadow of his divine vision. Though the discourse of virtue is necessary, it is also necessarily incomplete. That is the truth of the divine vision. The process of the dialogue is the simultaneous progress and disintegration of the discourse of virtue. Hence, the Athenian never completes the first task that he sets his companions, the orderly philosophic examination of the parts of virtue.

It is worth considering how the project of virtue is waylaid. After persuading Kleinias and Megillus that Minos's aim in the warlike Cretan practices could not have been restricted to the virtue of courage, the Athenian says:

In my opinion, it's necessary to start over again from the beginning, commencing just as we did, by first discussing the practices that contribute to courage and then proceeding through another and then yet another form of virtue—if you wish to do so. As soon as we've been through the first, we will try to use it as a pattern for the others and thus have a comforting discussion about them as we go along our route. Later, if god is willing, we'll show how what we just went through is aimed at virtue as a whole.²⁹⁰

Megillus agrees. The companions then commence a discussion of moderation: "Well, Kleinias, and Lacedaimonian stranger, suppose we turn to the next matter we proposed to deal with. Let's discuss moderation after courage."²⁹¹ Later, Kleinias agrees to a thorough and lengthy discussion of the contribution of drinking parties, a practice he might otherwise consider "too trivial to be worth so many words," to an education in moderation.²⁹² The discussion of moderation occupies the balance of Book I and Book II. Book III ought to begin a discussion of either justice or prudence, if indeed the Athenian is to stick to his plan, announced at the outset, of having a "comforting discussion" of all the virtues. But it begins instead with the Athenian posing a question: "So then that's how these things should be done. But what shall we assert was the original source of the political regime?"²⁹³

Surprising as it is, this question is not entirely without preparation. At the end of Book I, after the Athenian has established that drinking parties are an excellent test of modera-

²⁹⁰ *Id.* 632e, at 11-12.

²⁹¹ *Id.* 635e, at 15.

²⁹² *See id.* 645c, at 25.

²⁹³ *Id.* 676a, at 58.

tion just as practice for war is an excellent test of courage, he says: "This then—the knowledge of the natures and the habits of souls—is one of the things that is of the greatest use for the art whose business it is to care for souls. And we assert (I think) that that art is politics. Or what?"²⁹⁴ Kleinias agrees. In Book II the Athenian completes the discussion of moderation by arguing that insight into our natures is not "the only good to be derived from correctly managed wine parties,"²⁹⁵ but that wine parties contribute to forming character as well. Throughout, the Athenian discusses courage and moderation entirely without reference to political regimes and their origins. Courage and moderation, the Athenian seems to be saying, can be thoroughly understood apart from an investigation of the political. Justice and prudence cannot. They are the political virtues, the virtues of those who live in a *polis*. Courage²⁹⁶ and moderation²⁹⁷ need not be. They can be shared by animals.

The account in Book III of "the original source of the political regime" could perhaps be understood as a detour from virtue, preparing to finish the analysis of justice and prudence. That is not, however, how the Athenian's political analysis ends, even though the subject of the political analysis is "the progression of cities as they change towards virtue and at the same time towards vice."²⁹⁸ Instead, at the end of Book III, the Athenian recalls that in the course of the political analysis they said, "that the lawgiver must in laying down his laws aim at three things, namely that the city for which he legislates be free, that it be a friend to itself, and that it possess intelligence."²⁹⁹ He says that it is for the sake of these things that they are investigating which regime is correctly governed, the most despotic or the freest, and that they reviewed the political history of Greece, and "the arguments about music and drunkenness that emerged earlier than these, and the things that came before that. All these things have been discussed for the sake of understanding how a city might best be established sometime, and how, in private, someone might best lead his own life."³⁰⁰ The Athenian wonders what sort of a test in conversation they might set in speech

²⁹⁴ *Id.* 650b, at 31.

²⁹⁵ *Id.* 652a, at 32.

²⁹⁶ *See id.* 963e, at 368.

²⁹⁷ *See id.* 636b, at 14; *id.* 710a-b, at 95.

²⁹⁸ *Id.* 676a, at 58.

²⁹⁹ *Id.* 701d, at 87.

³⁰⁰ *Id.* 702a-b, at 87.

to reveal whether they have been making something useful. Kleinias answers that he is one of ten citizens of Knossos who have been commissioned to found a colony. They are to establish the same laws in the colony as in Knossos, but if they find better laws, to use them, even though they are foreign. He proposes that the three of them "construct a city in speech,"³⁰¹ just as if they were founding it from the very beginning. The three agree on this task and devote the rest of the dialogue to it.

The Athenian never returns to the virtues until the very end of the very last book.³⁰² There, he assigns to the Guardians of the Laws, the highest council in the city, the task that he began at the beginning of Book I, of unifying and completing the virtues. He charges them with developing arguments for the unity and completeness of virtue in order to provide "a safeguard of the laws." "To me it seems evident," he says, "that this is still lacking in our laws—the way in which the capacity of irreversibility ought naturally to be implanted in them."³⁰³ Yet the Athenian admits that it will be necessary to compel "even the guardians of our divine regime" to see what is "one in courage, moderation, justice, and prudence, and is justly called by one name, virtue."³⁰⁴ He urges his "friends," if they wish, not to let up now, but to "bear down hard on it, as it were, until we may express in an adequate way whatever it is that ought to be looked to—whether it be one, or a whole, or both of these, or however it is by nature."³⁰⁵ He asks whether they all suppose that if this eludes them, they will "ever be in a satisfactory situation as regards virtue, when we won't be able to explain whether it's many, or four, or one?"³⁰⁶ He answers his own question: "No. In that case (if, at any rate, we would obey our own advice), we will contrive some other way by which this will come into being in our city. If, however, it seems that the topic should be completely abandoned, then it must be abandoned."³⁰⁷

What began as a philosophic project ends as a political project. The task of safeguarding the laws with arguments for the unity and completeness of virtue belongs to a political or-

³⁰¹ *Id.* 702d, at 88.

³⁰² *See id.* 960e-965e, at 364-70.

³⁰³ *Id.* 960d, at 364.

³⁰⁴ *Id.* 965c-d, at 370.

³⁰⁵ *Id.* 965d, at 370.

³⁰⁶ *Id.* 965d-e, at 370.

³⁰⁷ *Id.* 965e, at 370.

ganization, with political aims, not to the philosophers. If the Guardians of the Laws cannot mount a philosophic defense of virtue, then they must find "some other way." If they abandon the project, it will not be because it is false, but because political necessity turns them a different way. Moreover, consignment of the project of defending virtue to a political organization transforms the substance of the project as well as the criteria for judging whether it should be abandoned or pursued. The virtue that the Guardians will be defending differs from philosophic virtue in prudence and justice, thus in moderation and courage as well.

In a passage in Book I that we shall soon examine more thoroughly, the Athenian follows Socrates in the *Republic*, treating prudence as simply another name for intelligence ("Prudence, in turn, is first and leader among the divine goods. Second after intelligence comes a moderate disposition of the soul."³⁰⁸). At this point in the dialogue, before the Athenian connects virtue to politics and assumes the task of lawgiving, his usage reflects the purely philosophic equation of virtue with knowledge. Subsequent usage does not. In the passage about the aims of the lawgiver, where the Athenian recollects what he said earlier in Book III, he uses the philosophic term, intelligence, rather than the conventional term, prudence, to describe one of the three aims of the lawgiver, "that the city for which he legislates be free, that it be a friend to itself, and that it possess intelligence."³⁰⁹ His recollection is not exact, however. The first time he listed the aims of the lawgiver, the Athenian was in the process of blaming "the so-called statesmen and lawgivers of old—and also the ones now"³¹⁰ for leaving the defense of Greece against the Persians to Sparta. He said:

And the reason we engage in such blame is to investigate the causes and to find out what should have been done differently. As we said with regard to the present case, they shouldn't have legislated great ruling offices, or unmixed authority; they should have considered something like the following: that a city should be free and prudent and a friend to itself, and that the lawgiver should give his laws with a view to those things.³¹¹

The Athenian recollects that he said "intelligence," when he ac-

³⁰⁸ *Id.* 631c, at 10.

³⁰⁹ *Id.* 701d, at 87.

³¹⁰ *Id.* 693a, at 77.

³¹¹ *Id.* 693a-b, at 77-78.

tually said "prudence," and lists it third, when he actually listed it second. Were this the *Republic* or even the first book of the *Laws*, we would probably conclude that the Athenian is equating the two. But he is aware of a difficulty. Directly after his first statement of the blameless aims of a lawgiver, he says:

By the way, let's not be surprised to find that we have often before laid down goals which we've asserted the lawgiver should look to when he lays down his laws, but that the goals don't appear to be the same for us each time. One should reason as follows: when we asserted one should look toward moderation, or toward prudence, or friendship, these goals are not different but the same. Even if many other words of this sort crop up, let's not let it disturb us.³¹²

But that is precisely what remains to be proven at the end of the dialogue, that virtue is one and not many. The Athenian's reassurance that differences in names ought not to disturb us is a false reassurance. Differences in names will greatly disturb him at the end of the dialogue. So we must take seriously the Athenian's switch, from "prudence" to "intelligence."

Furthermore, when the Athenian "compel[s]"³¹³ the Guardians of the Laws to find arguments for the unity and completeness of virtue, he lists its parts as "courage, moderation, justice, and prudence."³¹⁴ In the political discussion of virtue, "prudence" once again replaces "intelligence." When the Athenian first listed the aims of the lawgiver in Book III, he was engaged in a political discussion—blaming the rest of Greece for not helping Sparta against the Persians. It was only in recollecting this initial, political discussion of the aims of the lawgiver that the Athenian uses "intelligence" instead of "prudence." But the purpose of the recollection, the Athenian says, is "to pull up the argument like a horse,"³¹⁵ to assess where the argument is taking them. This is a philosophic, not a political moment. The Athenian engages in the philosophic evaluation of an argument, not in political discussion. But the discussions of the Guardians of the Laws about virtue will be political, just as the Athenian's was moments before. The Athenian means to be saying that "prudence" need not be "intelligence" in political discussion. Thus politically responsible citizens may applaud an

³¹² *Id.* 693b-c, 77-78.

³¹³ *Id.* 965c, at 370.

³¹⁴ *Id.* 965d, at 370.

³¹⁵ *Id.* 701c, at 87.

act or law that philosophers in intelligent conversation would otherwise condemn; an intelligent act or law may be politically imprudent. Political necessity may demand prudent, but perfectly unintelligent actions, and any scheme, no matter how intelligent, may be politically impossible. The wedge that the Athenian begins to drive between prudence and intelligence in this discussion has two edges: one is politics, the other, convention. Prudence tolerates both of them; politically unengaged, philosophic intelligence cannot. At other moments, the Athenian drives the wedge further.

In Book III the Athenian continues a discussion of justice that began in the first moments of the dialogue. The Athenian is describing the first political regime following a great flood. The flood, he says, destroyed almost everyone but a few mountain herdsmen, "little sparks of the human race saved on the peaks somewhere."³¹⁶ These remnants of humanity necessarily lacked "experience in the arts, and especially in the contrivances that city dwellers use against one another, motivated by the desire to have more, the love of victory, and all the other mischief they think up against each other."³¹⁷ "Do we suppose," he says, "that men at that time—inexperienced in the many beautiful things that go with urban life, and inexperienced in the opposite sorts of things as well—ever became either perfectly virtuous or perfectly vicious?"³¹⁸ They were "glad whenever they saw each other,"³¹⁹ because there were so few of them, and, lacking metal, they could not build ships and other means of transportation over land and sea.³²⁰ There was no war or civil war—the twin evils that haunt the opening pages of the dialogue.³²¹ They did not fight over food, because they were herdsmen, and there was no lack of pasture land.³²² A god had given them the arts of molding and weaving, so they had the other necessities of life.³²³ They were thus neither terribly rich nor terribly poor. The Athenian comments: "Now the most well bred dispositions usually spring up in a home when neither wealth nor poverty dwell there. For neither insolence nor injus-

³¹⁶ *Id.* 677b, at 59.

³¹⁷ *Id.*

³¹⁸ *Id.* 678b, at 60.

³¹⁹ *Id.* 678c, at 61.

³²⁰ *See id.* 678c-d, at 61.

³²¹ *See id.* 678e, at 61.

³²² *See id.* 678e-679a, at 61.

³²³ *See id.* 679a-b, at 61.

tice, nor again jealousies and ill will, come into being there."³²⁴ The Athenian says:

They were good on account of these things and also because of what is called naive simplicity. For whenever they heard something was noble or something was shameful, in their simplicity they considered what had been said to be the very truth, and believed it. No one had the wisdom, as they do nowadays, to know how to be on the lookout for lies. They believed that what they heard about gods as well as about human beings was true, and lived according to these things.³²⁵

"So," he concludes, "for the reason we already have explained, shouldn't we say that they were simpler and more courageous and also more moderate and in every way more just?"³²⁶

The Athenian's portrait of the world immediately after the flood resembles the "city of utmost necessity" in the *Republic*.³²⁷ Socrates's "true" or "healthy" city is naturally just: one man sticks to one art because it is expedient,³²⁸ not because men are well disposed or aware of the philosophic criterion of justice that Socrates will be able to describe only once the city has become "luxurious" or "feverish." The justice of the flood's survivors is different than both the natural justice of the true city and the philosophic justice of the feverish one. These people are not unwittingly just. Nor have they received a proper education in a properly constructed city. They are just simply by disposition.

Moreover, the Athenian's description of the survivors of the flood, "that they were simpler and more courageous and also more moderate and in every way just," omits intelligence (or prudence). Certainly the doctrine, that virtue is one, to which the Athenian returns at the end of the dialogue, would suggest that the survivors could not at once be more courageous and moderate and just than the Athenian's contemporaries, and at the same time less intelligent. If virtue is one, its parts must wax and wane in parallel, but here they do not. By omitting intelligence, the Athenian is suggesting either that it is independent of the other parts of virtue, or, because he continues to insist that virtue is one, that it is not a part of virtue at all. Yet, at the end of the dialogue the Athenian lists intelligence as leader

³²⁴ *Id.* 679b-c, at 61-62.

³²⁵ *Id.* 679c, at 62.

³²⁶ *Id.* 679e, at 62.

³²⁷ *REPUBLIC* 369d, *supra* note 2, at 46.

³²⁸ *See id.* 370b, at 46-47.

of the virtues.³²⁹

The Athenian continues. He says that all they have been saying about these early survivors of the flood and all that is to follow has been said as a way to understand the need that men of that time had for laws, and who was the lawgiver.³³⁰ Yet people then did not need a lawgiver; writing did not exist and their lives were "guided by habits [*ethesi*] and by what are called ancestral laws [*patriois nomois*]."³³¹ The Athenian asserts that even this is a kind of political regime. Everyone, he says, calls it "dynasty" [*dunasteian*].³³² It still exists in many places, he says, among Greeks as well as barbarians. Then he points out that this is presumably the regime Homer describes in connection with the household of the Cyclopes.³³³

Among these people are neither deliberative assemblies nor clan-rules [*themistes*]. But they dwell on crests of lofty mountains in hollow caves, and each gives the rule to his own children and wives, and they don't trouble themselves about one another.³³⁴

To which Kleinias replies: "This poet of yours seems to have been quite charming. We've gone through other verses of his and found them very urbane. But we're not familiar with much of what he says because we Cretans don't make much use of foreign poetry."³³⁵ Megillus joins in: "We, however, do; and he is probably the chief of such poets, although he portrays in each case a way of life that is not Laconian but rather sort of Ionian."³³⁶ He certainly seems to be a good witness now to your argument, since through his myth he attributes their ancient ways to savagery.³³⁷ The Athenian answers: "Yes, he is a witness, so let's take his word for it that such regimes do sometimes arise."³³⁸

Let us start with the Athenian's answer to Megillus. He

³²⁹ See THE LAWS 963a, *supra* note 1, at 367.

³³⁰ See *id.* 679e-680a, at 62.

³³¹ *Id.* 680a, at 62.

³³² See *id.* 680b, at 62.

³³³ See *id.* 680b-c, at 63.

³³⁴ See HOMER, *supra* note 164, bk. 9, ll. 112-15, at 94-95.

³³⁵ THE LAWS 680c, *supra* note 1, at 63.

³³⁶ Laconia is the region of which Sparta, or Lacedaemon, was the capital. See GRANT, *supra* note 166, at 90. Homer was probably born in Smyrna and worked in Chios, both in Ionia on the coast of Asia Minor. See *id.* at 139. Tradition had it that Ionia was settled by Ion, who stopped for a time in Athens before he arrived in Ionia. See *id.* at 137.

³³⁷ THE LAWS 680c-d, *supra* note 1, at 63.

³³⁸ *Id.* 680d, at 63.

agrees that Homer is a witness, but pointedly fails to agree that "he attributes their ancient ways to savagery."³³⁹ The Athenian attributes "naive simplicity" to the people who survived the flood, and by implication to the Cyclopes as well. Megillus undoubtedly thinks that the Athenian meant to call the dynastic regime "savage." But the Athenian's reply to Megillus makes it clear that he did not at all mean to call it savage. He meant to say exactly what he said, "that they were simpler and more courageous and also more moderate and in every way more just."³⁴⁰

Perhaps Megillus, who knows his Homer, takes a cue from Kleinias, who does not. Kleinias calls Homer "quite charming,"³⁴¹ his verses "very urbane."³⁴² Surely a product of Ionian urbanity regards the Cyclopes as savage. But that is not Homer's attitude. In lines close to the ones that the Athenian quotes, Odysseus describes the Cyclopes to the urbane and hospitable Phaeacians as: "an overweening / And lawless people, who, trusting in the immortal gods, Do not sow plants with their hands and do not plow But everything grows for them unplowed and unsown . . ."³⁴³ Odysseus describes himself as calling an assembly of his companions, and saying: "Stay here now, the rest of you, my trusty companions / To inquire about these men, whoever they may be, / Whether they are proud and savage and without justice / Or are friendly to strangers, and have a god-fearing mind."³⁴⁴

Odysseus does not call the Cyclopes "savage"; he simply wonders whether they are. He does say that they are "overweening and lawless," but shortly after, in the passage the Athenian quotes, Odysseus makes it clear that by "lawless" he means "without laws," not disordered or depraved. And "overweening" means arrogant, but only in the sense of having "too high expectations" or being "too self-confident."³⁴⁵ The Cyclopes trusted in the immortal gods that everything would continue to grow for them "unplowed and unsown." But they were not savage.

Odysseus's description of Polyphemos is quite another matter: "There a monstrous man usually slept, who alone / And

³³⁹ *Id.*

³⁴⁰ *Id.* 679e, at 62.

³⁴¹ *Id.* 680c, at 63.

³⁴² *Id.*

³⁴³ HOMER, *supra* note 164, bk. 9, ll. 105-08, at 94.

³⁴⁴ *Id.* bk. 9, ll. 172-76, at 95.

³⁴⁵ 10 OXFORD ENGLISH DICTIONARY 1136 (2d ed. 1989) ("overween").

aloof tended the animals. He did not consort / With the others, but stayed apart and had a lawless mind."³⁴⁶ Or: "At once my bold spirit / Sensed that the man would approach, clad in his great strength, / The wild man who had clear in his mind neither justice nor laws."³⁴⁷

Polyphemos is "monstrous," not how Odysseus describes the other Cyclopes. The others were lawless, but Polyphemos had a "lawless mind." He "stayed apart," was a "wild man," and "had clear in his mind neither justice nor laws." None of that need be true of the others. If anything, they are rather sympathetic to the unsociable Polyphemos. Polyphemos shouts in agony after Odysseus and his men have blinded him in the cave, whose entrance Polyphemos has shut with a large boulder:

When they heard the shout they trailed in from every side;
They stood around the cave and asked what bothered him:
"Polyphemos, how is it you are hurt so much as to shout so
Through the ambrosial night and to make us sleepless?
No mortal drives your flocks against your will, does he?
And no one is murdering you by craft or by force?"³⁴⁸

Polyphemos, hardly living up to his name ("polys-phemis, much-speech"³⁴⁹), answers: "Friends, Noman is murdering me by craft, not by force."³⁵⁰ Polyphemos appeals to the others as "friends," which he could do only if the Cyclopes have an ethic of friendship, even if Polyphemos is not himself a friend.

Putting Polyphemos aside, the Cyclopes may not have had an abundance of skill, but for that very reason, according to the Athenian, "they were simpler and more courageous and also more moderate and in every way more just." The Cyclopes were not intelligent; they lacked laws. But they were, nonetheless, more just than the urbane Greeks of the Athenian's time. Kleinias's and Megillus's urbanity, their confusion of intelligence with virtue, is exactly what prevented them from seeing this.

It is possible to be just without intelligence. Justice is neither a natural harmony nor the philosophic perception of natural harmony, as it is in the *Republic*. It exists apart from educa-

³⁴⁶ HOMER, *supra* note 164, bk. 9, ll. 187-89, at 100.

³⁴⁷ *Id.* bk. 9, ll. 213-15, at 96.

³⁴⁸ *Id.* bk. 9, ll. 401-06, at 100.

³⁴⁹ "Demou phemis" means the "voice or judgment of the people" in the *Odyssey*. See e.g., 15 *Id.* bk. 15, l. 468, at 172. Homer uses "demoio phemis" to mean "the place where the people talk, the place of assembly." See GREEK-ENGLISH LEXICON, *supra* note 5, at 859 ("phemis").

³⁵⁰ HOMER, *supra* note 164, bk. 9, l. 407, at 100.

tion, law, or especially the city. The *Laws* confines justice to a disposition. What sort of disposition may be mined from other moments in the dialogue.

In Book IX, devoted to retribution and punishment, the Athenian says that there ought to be one law and one judicial retribution in all cases of theft, whether someone steals something great or small.³⁵¹ Kleinias asks why the penalties should be the same for crimes that are so different.³⁵² The Athenian reminds Kleinias what he said earlier,³⁵³ when he compared everyone living under existing legislation, that distinguishes between great and small theft, to "slaves being doctored by slaves."³⁵⁴ A doctor who practiced medicine on the basis of experience rather than reason, says the Athenian, would burst out laughing if he encountered "a free doctor carrying on a dialogue with a free man who was sick—using arguments that come close to philosophizing, grasping the disease from its source, and going back up to the whole nature of bodies."³⁵⁵ To go through laws the way we are doing now, says the Athenian to a skeptical Kleinias, "is educating the citizens but not legislating."³⁵⁶ The Athenian asks Kleinias whether the writings about laws in the cities should "appear in the shapes of a father and mother, caring dearly and possessing intelligence, or, like a tyrant and despot, should they command and threaten, post writings on the walls and go away?"³⁵⁷ Kleinias tells the Athenian that he has spoken nobly. The Athenian explains to Kleinias that punishments, which are commanded by justice, are ignoble. Hence, the just, which they had thought to be the most noble, will also be said to be the most shameful.³⁵⁸ How is it possible to resolve this dilemma, that the just because of punishment appears ignoble? The Athenian explains.

The Athenian reminds Kleinias that earlier in the argument he said that "the bad are all bad involuntarily in every respect."³⁵⁹ Hence the unjust man, who is presumably bad, is involuntarily so. But the laws distinguish between voluntary and

³⁵¹ See THE LAWS 857a, *supra* note 1, at 249.

³⁵² See *id.* 857b, at 249.

³⁵³ See *id.* 720a-e, at 106-07.

³⁵⁴ *Id.* 857c, at 250.

³⁵⁵ *Id.* 857d, at 250.

³⁵⁶ *Id.* 857e, at 250.

³⁵⁷ *Id.* 859a, at 251.

³⁵⁸ See *id.* 859c-860c, at 252-53.

³⁵⁹ *Id.* 860d, at 253.

involuntary wrongs.³⁶⁰ He says that in order to be consistent, he must hold that involuntary wrongs, whether great or small, are not injustices at all.³⁶¹ "Generally speaking, friends," says the Athenian, "if someone gives something to somebody, or, on the contrary, takes something away, such a thing shouldn't be called simply just or unjust, but what the lawgiver should observe is whether someone employs a just disposition and character in doing some benefit or injury to somebody."³⁶² The lawgiver should redress injuries, but also "always try through the laws to create friendship in place of discord between the doers and sufferers."³⁶³ In the case of unjust injuries or benefits, "as many of these as are curable, being regarded as diseases in the soul, should be cured."³⁶⁴ Those who cannot be cured should be killed.³⁶⁵ The Athenian thus rescues justice from shame: punishment is cure, a transformation in the disposition of the wrongdoer rather than a retributive voluntary injury by the city on behalf of an aggrieved party.

But Kleinias is still perplexed. He understands that considering punishment to be transformation of an unjust disposition rescues justice from shame, but he still does not understand how it is that the law ought to treat great thefts the same as small ones. He wonders "how it is that the difference between injustice and injury has gotten mixed up with the difference between the voluntary and the involuntary in these matters."³⁶⁶ He forces the Athenian to explain the true ground of difference in the law's treatment of crimes, if it is not that they are great or small ones, hence to create a table of dispositions, and to say which dispositions are just and which are unjust.

The Athenian does just that. He says that they say and hear from one another that one thing in the soul, "either a passion or a part, is spiritedness—a possession that is by nature quarrelsome and pugnacious, overturning many things with uncalculating violence."³⁶⁷ Pleasure, he says, is not the same as spiritedness, but "holds absolute rule through a strength opposite to it: through persuasion and forceful trickery she does

³⁶⁰ See *id.* 861b, at 254.

³⁶¹ See *id.* 862a, at 255.

³⁶² *Id.* 862b, at 255.

³⁶³ *Id.* 862c, at 255; cf. *id.* 627b-628e, at 6.

³⁶⁴ *Id.* 862c, at 256.

³⁶⁵ See *id.* 862e, at 256.

³⁶⁶ *Id.* 863a, at 256.

³⁶⁷ *Id.* 863b, at 256.

whatever her intention wishes."³⁶⁸ Then the Athenian switches, to talk about spiritedness and pleasure as faults. Ignorance, he says, is the third cause of faults. From the point of view of the lawgiver, ignorance comes in two versions: a simple version that is the cause of "light faults," and a double version, "when someone lacks understanding because he partakes not only of ignorance but also of the opinion that he is wise, and believes he knows completely things about which he knows nothing."³⁶⁹ Then the Athenian says that at this point he would clearly define what he says is the just and the unjust, "without complication".³⁷⁰

The tyranny in the soul of spiritedness, fear, pleasure, pain, feelings of envy, and desires, whether it does some injury or not, I proclaim to be in every way injustice. When, on the other hand, the opinion about what is best (however a city or certain private individuals may believe this will be) holds sway in souls and brings order to every man, then, even if it is in some way mistaken, what is done through this, and the part of each man that becomes obedient to such a rule, must be declared to be entirely just and best for the whole of human life—even though many are of the opinion that such injury constitutes involuntary injustice.³⁷¹

The "three forms of faults," he says, "have been made clear."³⁷² One is pain, which they named "spiritedness" and "fear." A second is pleasures and desires, and the third is "the striving for expectations and true opinion concerning what is best."³⁷³ He divides the last into three, by cutting it twice. One cut:

concerns what is done through violence and open deeds on each occasion [traceable to spiritedness], the other concerns what takes place secretly, with darkness and trickery [traceable to pleasure]; then sometimes what is done combines both of these, and the laws dealing with this case would be the harshest.³⁷⁴

Injustice is an attribute of souls. It is not an attribute of deeds; a soul can be unjust "whether it does some injury or not."³⁷⁵ Injustice is the tyranny in souls of spiritedness and de-

³⁶⁸ *Id.* at 256-57.

³⁶⁹ *Id.* 863c, at 257.

³⁷⁰ *Id.* 863e, at 257.

³⁷¹ *Id.* 863e-864a, at 257-58.

³⁷² *Id.* 864b, at 258.

³⁷³ *Id.*

³⁷⁴ *Id.* 864c, at 258.

³⁷⁵ *Id.* 864a, at 257.

sire. A soul is never voluntarily unjust. Indeed, injustice is the very opposite of the voluntary. It is a soul whose actions or failures to act are dictated by passion. But the contrary is not true. A just soul is not one that engages in voluntary action simply, in action of any sort, so long as it is unconstrained by passion. For the soul can be dispassionate in two ways. One is the soul in which "the opinion about what is best . . . holds sway,"³⁷⁶ the other, a soul "striving for expectations and true opinion concerning what is best."³⁷⁷ Only the former is just. The soul that strives "for expectations and true opinion concerning what is best," while apparently unconstrained by passion, commits one of the last three faults listed by the Athenian. It can never sustain its dispassion, but is driven to pursue the "true opinion concerning what is best" in a spirited or desirous fashion. Only the soul in which "the opinion about what is best (however a city or certain private individuals believe this will be) holds sway" is free of fault, even when it commits what in the opinion of many is an involuntary injustice. The just soul follows "the opinion about what is best." It does not, like philosophers, strive for "true opinion." The just soul is obedient to the rule of an order, not because the order is true, but because opinion holds it. It is obedient simply because the order is conventional. Justice is an attribute of souls, but depends upon the existence of conventional orders. It is not the order itself that is just, but souls in obedience to the order.

Because the just soul is obedient to conventional, not true, orders, it is not, unlike the philosophic soul, bound to an object. The just soul obeys conventional orders without spiritedness or desire, but also without taking them seriously. Only as lawgiver does it subject an order to the test of intelligence. As citizen, it obeys the order playfully.

What is best in justice is not, however, what the conventional order defines as best. The soul itself does not become better by obedience. The Cyclopes were not better than Socrates; they were simpler and more courageous, moderate, and just. Justice looks beyond the conventional order's account of the good. Justice is, after all, transcendent, and the Cyclopes were not transcendentally just. Hence, the good of justice can be found only in breaches of the conventional order by wrongdoers. The Athenian identifies this good as the friendship he says

³⁷⁶ *Id.*

³⁷⁷ *Id.* 864b, at 258.

the lawgiver ought to try to create "in place of discord between the doers and sufferers."³⁷⁸

At the beginning of the *Laws* the Athenian asks Megillus and Kleinias whether there would be some judge for the brothers in a family, more of whom turned out unjust and fewer of them just.³⁷⁹ He asks:

Which would be better: the one who destroyed the wicked among them and set the better to ruling themselves, or the one who made the worthy men rule and allowed the worse to live while making them willing to be ruled? But I suppose we should also mention the judge who is third in respect to virtue—if there should ever be such a judge—one capable of taking over a single divided family and destroying no one, but rather reconciling them by laying down laws for them for the rest of time and thus securing their friendship for one another.³⁸⁰

Kleinias answers: "Such a judge and lawgiver would be better by far."³⁸¹ In the transcendent realm occupied by the lawgiver, the one person who precedes conventional order, justice is reconciliation.

In response to Kleinias the Athenian says: "And surely he would be enacting laws for them with a view not to war but to its opposite."³⁸² Kleinias agrees. The opposite of justice is war, especially war amongst members of a city or family. The Athenian asks:

Now what about someone who brings harmony [*sunarmotton*] to the city? Would he order its way of life with a view more to external war or more to that internal war called 'civil war,' which occurs from time to time and which everyone would wish never to come to pass in his city and, if it does, would wish to end as soon as possible?³⁸³

"Clearly," says Kleinias, "with a view to the latter."³⁸⁴ What would someone prefer, asks the Athenian, "civil peace brought about by the destruction of some and the victory of others, or friendship as well as peace brought about through reconciliation—supposing it were necessary to pay attention to external enemies?"³⁸⁵ Everyone, says Kleinias, would prefer the latter.

³⁷⁸ *Id.* 862c, at 255.

³⁷⁹ *See id.* 627c-d, at 6.

³⁸⁰ *Id.* 627e-628a, at 6.

³⁸¹ *Id.* 628a, at 6.

³⁸² *Id.*

³⁸³ *Id.* 628a-b, at 7.

³⁸⁴ *Id.* 628b, at 7.

³⁸⁵ *Id.*

The Athenian asks, would not the lawgiver also? "How could he not," answers Kleinias. "And doesn't everyone set up all his lawful customs [*nomima*] for the sake of what is best?"³⁸⁶ "How could he not?" Kleinias repeats. The Athenian responds: "The best, however, is neither war nor civil war—the necessity for these things is to be regretted—but rather peace and at the same time goodwill towards one another."³⁸⁷ In the city, peace and goodwill is the transcendent good, the aim of transcendent justice.

THE ATHENIAN'S GAME IN CONTEMPORARY GAME THEORY

The Athenian's game dominates the city. Everything in the city is based on it and sustains it. The rules of the game come from nature—from human nature and the nature of things—so long as nature, in turn, is understood as a second game, played by the gods. The city can have laws only because the gods are playful. It does have laws because certain divine men are playful as well. At the core of both games, the human game of law and the divine game of nature, is intelligence or god. Intelligence leads both the gods and men to create law.

Both the Athenian and modern game theorists are interested in the same question: Under what circumstances is maximizing, rational behavior possible in conditions of strategic interaction? But they have very different answers, and the difference lies in the distinction between rationality, or maximizing behavior, and intelligence or playfulness. Game theorists believe that rational behavior, unaccompanied by intelligence, is possible under a variety of circumstances. The Athenian, in contrast, believes that rationality on its own is possible in only one game: the ignoble game of war. In order for rational behavior to be possible in other games, in the noble games of the city, it must be accompanied by intelligence. When the sole motivation of players is the utilitarian goal of pleasure, the only game they will successfully play is war. When, however, the goal of the game is enjoyment—pleasure in the game itself rather than payoffs apart from the game—then the games of the city are possible.

The games of the city are special, because unlike the games of nature, which include but are not limited to war, they depend

³⁸⁶ *Id.* 628c, at 7.

³⁸⁷ *Id.*

on the existence of non-players to enforce the rules of the game. Players in ordinary games have the power to select a strategy, or rule, for which action, or move, to choose from a finite set of actions at each instant of the game.³⁸⁸ But they do not have the power to determine the actions or moves available to them. A non-player must guarantee the stability and integrity of the action set. In the Athenian's game there are no non-players, no one who is not also playing the game and therefore interested in the outcome of enforcement.

Because no disinterested non-player exists to enforce the rules of the game, the set of actions or moves available to each player is indeterminate. In ordinary games, players may select only actions that are available in the action set. The "play" of the game is confined to strategies. The action set itself is not "in play." In the Athenian's game no one is available to declare what is a legal move and what is not. Any strategy a player chooses is consistent with the rules of the game. The game has no rules, only strategies.

In ordinary game theory, "the modeller's objective is to use the rules of the game to determine the equilibrium,"³⁸⁹ where "equilibrium" is defined as a combination of strategies for all players that consists of a "best strategy" for each of them.³⁹⁰ The "equilibrium strategies" are "the strategies players pick in trying to maximize their individual payoffs."³⁹¹ The modeller's task is to decide what "best strategy" means, to construct an "equilibrium concept" or "solution concept," which is "a rule defining an equilibrium based on the possible strategy combinations and payoff functions."³⁹² Equilibrium is interesting to game theorists, because it predicts the combination of strategies that players will pick if they are rational. Sometimes, as in the Prisoner's Dilemma Game, the equilibrium does not maximize the joint payoff of the players. Game theorists are interested in finding the possible equilibria of a game and in answering such questions as: Does the equilibrium maximize the joint payoff?

The Athenian too is interested in equilibrium, though he prefers to call it "harmony." He also wants to know the relationship between whatever equilibrium there might be and joint

³⁸⁸ See ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 10-14 (2d ed. 1995).

³⁸⁹ *Id.* at 10.

³⁹⁰ *Id.* at 14-16.

³⁹¹ *Id.* at 15.

³⁹² *Id.*

payoffs. Yet he believes that, in a game like his, where the contents of the action set is "in play," an equilibrium confined to actions is impossible. An equilibrium, he thinks, must determine the action set before a second equilibrium predicts the best strategies of the players once an action set has been determined. The rules of the game cannot be the source of the first equilibrium, since equilibrium, from a different source, must first determine the rules of the game.

The Athenian's game must, therefore, proceed in two stages. Before the players can play the ordinary game of law, a game must be played to determine the set of available actions. The players of this second-order game must not be the players of the first-order game; they must not get payoffs from first-order strategies. If they did, then outcomes in the first-order game would determine strategies in the second-order game, and equilibrium of the action set would be impossible. Also, the action set available to the players of the second-order game includes different actions than those in the action set of the first-order game. The action set of the first-order game directly defines what is lawful and what is unlawful behavior. The payoffs driving the choice of strategies are determined by a utilitarian calculus. The choice of strategies in the second-order game does not lead to utilitarian payoffs in the ordinary sense, since second-order actions—lawgiving, or determining the actions of the first-order game—do not directly affect the welfare of the players. Moreover, second-order actions have first-order actions, or laws, as outcomes. They are not laws themselves, but precursors to laws. They are especially not procedural laws. Second-order actions are every bit as substantive as first-order actions.

The players in the Athenian's second-order game are the gods, together with god-like men. The second-order action set is determined by the laws god makes governing the universe and human action, including actions in the first-order game. It is the need for a second-order game and players distinct from those in the first-order game that drives the Athenian to the postulate of divine players. But the regress stops here. There is no third-order game. The action set of the second-order game is not determined by the gods—they, after all, are the players in the second-order game—but by god, divine intelligence. Thus the necessity in the Athenian's scheme for both a multiple and a singular account of divinity.

Game theory agrees with the Athenian that the participants in a legal system and law itself are capable of at least a part of intelligence. They assume that players engage in rational, maximizing behavior and show that games may be constructed in which players are able to act rationally.³⁹³ But the rational player need not be intelligent. The outcome of a game with players who are merely rational is determined (but not necessarily determinate). The players are not at play. The Athenian's notion of intelligence is consistent with rationality, but the quantity to be maximized is neither benefit nor correctness. The intelligent player maximizes playfulness. The outcome of the Athenian's game is undetermined, because the players are truly at play. The difference between rationality and intelligence is thus freedom. The role of the players in game theory is confined to recreating outcomes that follow objectively from rationality and the rules of the game. The game does not express their subjective freedom. The players are bound by the "law" of the game.

But game theorists are not bound. They, like the gods, are the creators of the games. They, like the gods, are playful in their creativity. By searching for action sets that maximize joint payoffs they exercise intelligence. The difference, therefore, between the Athenian's conception of the games of the city and the conception held by modern game theorists is that the Athenian requires at least some of the players to be intelligent. By separating intelligence from the game itself, by limiting the players to rationality, the game theorists truly are claiming to be gods.

Because game theory assumes the existence of a finite action set and non-players to guarantee its integrity and confines the players to rationality, it avoids addressing most of the issues tackled by the Athenian. The scope of the Athenian's argument—the nature of divinity, the doctrine of virtue, education in music and gymnastic, the deception of the lawgiver, myth, conventional order, and even playfulness itself—is shocking by comparison.

³⁹³ Game theory assumes that players are rational, but not necessarily that they have common knowledge that they are rational. See ROBERT GIBBONS, *GAME THEORY FOR APPLIED ECONOMISTS* 4-7 (1992).