



# *The foundations of the rule of law*

Article

Accepted Version

Zanghellini, A. (2017) The foundations of the rule of law. Yale Journal of Law and the Humanities, 28 (2). 2. ISSN 1041-6374 (In Press) Available at <http://centaur.reading.ac.uk/54870/>

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Publisher: Yale Law School

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# **The Foundations Of The Rule Of Law**

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## THE FOUNDATIONS OF THE RULE OF LAW

### *Abstract*

Formal conceptions of the rule of law are popular among contemporary legal philosophers. Nonetheless, the coherence of accounts of the rule of law committed to these conceptions is sometimes fractured by elements harkening back to substantive conceptions of the rule of law. I suggest that this may be because at its origins the ideal of the rule of law was substantive through and through. I also argue that those origins are older than is generally supposed. Most authors tend to trace the ideas of the rule of law and natural law back to classical Greece, but I show that they are already recognisable and intertwined as far back as Homer. Because the founding moment of the tradition of western intellectual reflection on the rule of law placed concerns about substantive justice at the centre of the rule of law ideal, it may be hard for this ideal to entirely shrug off its substantive content. It may be undesirable, too, given the rhetorical power of appeals to the rule of law. The rule of law means something quite radical in Homer; this meaning may provide a source of normative inspiration for contemporary reflections about the rule of law.

## 1 Introduction

An uncontroversial definition of the rule of law eludes us.<sup>1</sup> There is broad agreement about the features that should characterise the rules of a legal system if this is to conform with the rule of law – namely, generality, publicity, clarity, relative stability etc.<sup>2</sup> Scholars, however, disagree on what institutional and procedural arrangements the rule of law requires, on whether it has inherent moral value and on whether or not it imposes substantive constraints on the content of law. Disagreements on the last point mark a distinction between adherents of so-called “formal” and “substantive” conceptions of the rule of law. In this paper I argue that the ideal of the rule of law as it originally emerged in the West was substantive through and through, being inseparable from the idea of natural law; and that its origins are older than is generally supposed. Most authors tend to trace the ideas of the rule of law and natural law back to classical Greece, but I will show that they are already recognisable, and intertwined, as far back as Homer’s *Odyssey*.

The point of this analysis is not to suggest that the original meaning of the rule of law should control the current definition of that concept by virtue of its originality: conceptual disagreement about the rule of law is now such that “no purist can ... blame the others for distorting the notion of the rule of law”.<sup>3</sup> Rather, an inquiry into the original meaning of the rule of law is useful for the contributions it can make to the project of interrogating the normative attractiveness of current understandings of the ideal. At a minimum, it may be

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<sup>1</sup> Jeremy Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?,” *Law and Philosophy* 21 (2002): 137.

<sup>2</sup> Timothy A.O. Endicott, “The Impossibility of the Rule of Law,” *Oxford Journal of Legal Studies* 19 (1999): 1, 1-2.

<sup>3</sup> Joseph Raz, “The Rule of Law and its Virtue,” *Law Quarterly Review* 93 (1977): 195, 211.

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sobering to discover that the original version of rule of law meant something quite radical by today's standards.<sup>4</sup>

A sound understanding of how the rule of law was historically conceived may also help illuminate certain features of current debates about the rule of law. In particular, the original meaning of the rule of law – wedded to ideas of natural law and substantive justice – arguably partly accounts for the current contestability of the rule of law. With notable exceptions,<sup>5</sup> formal conceptions of the rule of law – drawing attention to virtues associated with law's formal features rather than the substantive merits of law – are favoured among contemporary legal theorists. These formal conceptions are attuned to the dominant positivist outlook in legal academia that insists that law and sound morality are not guaranteed to coincide (even conceding, as some positivists do, that there are necessary overlaps or points of contact).<sup>6</sup> After all, if the rule of law “represents a natural trajectory of normative thought projected out from the normative significance of law's defining features”,<sup>7</sup> then it would seem incongruous for positivist legal philosophers to insist on substantive dimensions of the rule of law. Yet, substantive understandings of the rule of law (particularly ones that make human rights central to it) are popular outside academia. They are even popular among legal academics whose specialism is not legal philosophy and who, therefore, are less troubled by any conceptual discontinuity between their (positivistic) concept of law and their (substantive) conception of the rule of law. I think that the fact that the rule of law ideal comes with a baggage that has historically emphasized substantive constraints on government may partly explain why some present-day positivists are committed to a substantive

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<sup>4</sup> Even if we did not have any instrumental reasons of the kind outlined in the text for undertaking an analysis of the rule of law in ancient Greece, the analysis is, needless to say, of interest in its own right – particularly perhaps in light of statements that may be taken to suggest that the tendency to associate the rule of law with substantive values is a modern development. See for example Raz, “The Rule of Law and its Virtue,” 214 (grounding his formal conception of the rule of law in a basic idea from which derive “the requirements which were associated with the rule of law before it came to signify all the virtues of the state”).

<sup>5</sup> T.R.S. Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

<sup>6</sup> John Gardner, “Legal Positivism: 5 1/2 Myths,” *American Journal of Jurisprudence* (2001) 46: 199, 223.

<sup>7</sup> Jeremy Waldron, “The Concept and the Rule of Law,” *Georgia Law Review* 43 (2008-2009): 1, 59.

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conception of the rule of law. Any act of interpretation (including interpretation of the rule of law ideal) takes place within, and is enabled by, a certain tradition in which both the text and the interpreter participate.<sup>8</sup> Because, as I will argue, the founding moment of the tradition of intellectual reflection on the rule of law in the West placed concerns about substantive justice at the centre of the rule of law ideal,<sup>9</sup> attempts at prising apart the rule of law's formal and substantive dimensions may feel contrived – at least for all of those who, unlike legal philosophers, do not make sustained reflection about the rule of law their vocation. Indeed, even legal *philosophical* thinking about the rule of law seems to remain partially haunted by its past, as suggested by the fact that some legal theorists' formal conceptions of the rule of law have a tendency to sidle towards substantive conceptions. They do so by postulating that the virtue of legality somehow tends to bring about, or at some level harkens back to, the good of substantively good law.

Jurisprudential literature on the rule of law is vast and this article does not attempt to provide a comprehensive overview. Rather, I choose to start by analysing the formal conception of the rule of law advanced by Waldron, in order to substantiate my claim that substantive understandings of the rule of law have tended to linger about and trouble jurisprudential discourse that professes to be committed to formal conceptions. In particular, I will argue that without sidling towards a substantive conception of the rule of law, Waldron's formal conception fails to make sense of its very point of departure – namely, the proposition that central to the rule of law is the idea that law makes state power less malignant. I will then argue that the rule of law owes that idea to natural law thinking, within whose framework that proposition makes full sense. The article goes on to examine the ancient pedigree of natural

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<sup>8</sup> Hans Georg Gadamer, *Truth and Method* (New York: Seabury Press, 1975).

<sup>9</sup> But note that there is no uninterrupted rule of law tradition running from ancient Greece all the way to the present day: "The rule of law as a continuous tradition took root more than a thousand years after the heyday of Athens. Greek ideas with respect to the rule of law are therefore best understood as exemplary models, inspiration, and authority for later periods." Brian Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge: Cambridge University Press, 2004) 7.

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law thinking about the rule of law. I will draw attention to the natural law basis of Aristotle's and Plato's reflections on the rule of law, before showing that the normative desirability of law's rule (in natural law terms) can be traced back to the very founding moment of the western literary tradition – the Homeric epic.<sup>10</sup>

### 2 Waldron (and Raz)

Waldron suggests that “the lead idea of the Rule of Law is that somehow respect for law can take the edge off human political power, making it less objectionable, less dangerous, more benign and more respectful”.<sup>11</sup> In normative terms, the rule of law is a requirement that government rule through laws rather than otherwise. But why would state power be less worrisome when channelled through law?

Waldron maintains that “to describe an exercise of power as an instance of law-making or law-application is already to dignify it”.<sup>12</sup> Waldron clarifies that as a “mode of governance” law “is thought more apt to protect us against abuse than (say) managerial governance or rule by decree”.<sup>13</sup> Channelling state power through law means subscribing to certain formal features of legal rules (generality, prospectivity, publicity, etc) and certain institutional features of legal systems (court litigation, judicial review, etc)<sup>14</sup> “at least to an extent that pays credible tribute to the concerns that underlie each of the criteria”, although

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<sup>10</sup> It is sometimes claimed that the rule of law requires that the same rules of conduct that govern the rest of the population should also apply to public officials. For reasons of space I will not discuss this point, but it is worth noting that the concept of *isonomia* – “equality of law to all manner of persons” – was central to Greek political thought. Robert Stein, “The Rule of Law: What Does it Mean?,” *Minnesota Journal of International Law* 18 (2009): 293, 298.

<sup>11</sup> Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?,” 159.

<sup>12</sup> Waldron, “The Concept and the Rule of Law,” 12.

<sup>13</sup> *Ibid.*, 11.

<sup>14</sup> Waldron argues that the rule of law is as much about legal rules and the features they should possess as about “the distinctive institutional features of a legal system, and ... the practices and modes of argumentation that they sponsor and accommodate.” Waldron, “The Concept and the Rule of Law,” 61-62. His argument is that the latter are not always adequately treated in discussions on the rule of law, which tend to emphasize “clarity and determinacy of rules for the sake of individual freedom, but not the opportunities for argumentation [in court hearings] that a free and self-possessed individual is likely to demand”. *Ibid.*, 66.

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Waldron concedes that “we may not have a precise sense of what that minimum is”.<sup>15</sup> State power that satisfies this minimum, namely *legal* power, is better than naked power because these features of legal rules and institutions enable people to exercise personal autonomy by reducing opportunities for arbitrary state action.<sup>16</sup> Furthermore, because these features are beneficial to the governed, even when a legal system’s conformity with the rule of law is sufficient to make it qualify as a legal system “we may still demand more of it on any or all of these dimensions”.<sup>17</sup> For Waldron, apparently, when it comes to conformity with the rule of law, less is never more.

Raz largely agrees with Waldron about the features that legal rules and institutions must conform to if a legal system can be said to uphold the rule of law: prospectivity, openness, clarity and relative stability of laws; independence of the judiciary; accessibility of the courts; judicial review; subjection of particular laws to general laws etc.<sup>18</sup> He also agrees that conformity with the rule of law is a matter of degree<sup>19</sup> and that it is morally valuable because it reduces opportunities for arbitrary state action, because it serves the values of predictability and certainty and because, in doing so, it is capable of expressing respect for human dignity by taking seriously people’s ability to plan their lives.<sup>20</sup>

Raz’s account differs from Waldron’s, however, in two crucial respects.<sup>21</sup> First, for Raz, all government is necessarily by law, as power that fails to be authorized by law is by definition not governmental power.<sup>22</sup> Furthermore, governing through law and in accordance

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<sup>15</sup> *Ibid.*, 42-43.

<sup>16</sup> Waldron, “The Concept and the Rule of Law,” 59-60. See also Jeremy Waldron, “Positivism and Legality: Hart’s Equivocal Response to Fuller,” *New York University Law Review* 83 (2008): 1135, 1143.

<sup>17</sup> Waldron, “The Concept and the Rule of Law,” 45.

<sup>18</sup> Raz, “The Rule of Law and its Virtue,” 214-218. Raz argues that these principles can be derived from the basic idea that law should be capable of being obeyed, which is a logical pre-requisite to the idea that people should obey the law, which in turn is conveyed by the literal meaning of “rule of law”.

<sup>19</sup> *Ibid.*, 212.

<sup>20</sup> *Ibid.*, 219-222.

<sup>21</sup> *Ibid.* Raz’s position on the rule of law is the object of interpretive disputes: Mark J Bennett, “Hart and Raz on the Non-Instrumental Moral Value of the Rule of Law: A Re-Consideration,” *Law and Philosophy* 30 (2011): 603.

<sup>22</sup> Raz, “The Rule of Law and its Virtue,” 212.



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with the rule of law are two very different things, for only a very minimal adherence to rule of law principles is required for law to exist<sup>23</sup> – so much so that merely satisfying that bare minimum can be meaningfully characterised neither as governance in accordance with the rule of law, nor as morally meritorious.<sup>24</sup>

If accepted, these two claims made by Raz – that all state power is law-based and that law-based power is consistent with egregious violations of the rule of law – make unintelligible Waldron’s statement that the rule of law captures the insight that state power is less objectionable when legal. Waldron’s idea, however, can be restated in a way that reconciles it with these two observations made by Raz. Thus, instead of saying that state power is less objectionable when it is legal, we could say that state power is less objectionable when it takes rule of law principles sufficiently seriously as to pay “credible tribute”<sup>25</sup> to their justifications. Thus reformulated, Waldron’s idea is neutral with respect to the question of whether paying such tribute is (as Waldron, unlike Raz, thinks) the condition for a system of governance to qualify as legal. That question is of course important; but since philosophers disagree about it, it is useful to suspend it in order to examine the other aspects of what Waldron argues is the central intuition underlying the rule of law ideal.

The next and crucial question is whether the idea that state power is better when it pays credible tribute to rule of law concerns holds water. I fear that it does not, unless we significantly qualify that idea. Two further remarks that Raz makes are relevant at this point. First, while adherence to the rule of law is morally valuable for the reasons already stated, there are other values that legal systems should cherish and which may require departures

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<sup>23</sup> For Raz “the extent to which generality, clarity, prospectivity, etc., are essential to the law is minimal and is consistent with gross violations of the rule of law”. *Ibid.*, 223-224. I

<sup>24</sup> “[T]hat the law cannot sanction arbitrary force or violations of freedom and dignity through total absence of generality, prospectivity, or clarity is no moral credit to the law. It only means that there are some kinds of evil which cannot be brought about by the law.” Raz, “The Rule of Law and its Virtue,” 224.

<sup>25</sup> Waldron, “The Concept and the Rule of Law,” 42-43.

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from the rule of law.<sup>26</sup> Secondly, adherence to the rule of law enables law efficiently to pursue its goals, but in doing so the rule of law “is . . . neutral as to the end to which the instrument is put”:<sup>27</sup> as Waldron himself half-concedes,<sup>28</sup> adherence to the rule of law may facilitate the pursuit of bad as well as good goals. To this extent, as Kramer puts it, the rule of law’s “moral bearings are protean”.<sup>29</sup>

The implication of these two points – that other important political values may conflict with the rule of law and that the rule of law facilitates the pursuit of bad goals – is the same: an *exercise of state power* that pays “credible tribute” to rule of law concerns cannot be assumed to be always better than one that departs from the rule of law. Since adhering to the rule of law will not always be desirable, we could say at most that a *system of government* (as distinct from a discrete exercise of state power) that pays due respect to rule of law concerns will be better than one that does not; but that says nothing about when and how often conformity with the rule of law is required and it refutes the idea that more conformity is always better.

The key intuition underlying the rule of law, as restated, sounds hopelessly vague. Can it be fleshed out further? Consider the case of the state’s pursuit of bad goals. Colleagues have sometimes told me that while the rule of law cannot make a substantively bad law into a substantively good one, at least compliance with the rule of law makes a bad law better than its non-complying counterpart. But this can’t be true of any nontrivial sense of “better”. To say something of use in relation to the normative desirability of conforming with the rule of law, “better” here must mean “overall better” – it cannot mean “better” merely along one of many dimensions of the normative position of those affected by the law. We know that the rule of law respects people’s ability to plan for their life and thereby respects their dignity as

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<sup>26</sup> Raz, “The Rule of Law and its Virtue,” 228

<sup>27</sup> *Ibid.*, 226.

<sup>28</sup> Waldron, “Positivism and Legality: Hart’s Equivocal Response to Fuller,” 1161-1162.

<sup>29</sup> Matthew H Kramer, “Freedom and the Rule of Law,” 61 *Alabama Law Review* 61 (2010): 827, 845.

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responsible agents; we also know that it limits opportunities for the arbitrary exercise of state power by preventing rulers, for example, to change the law at whim. But a bad law that complies with the rule of law is as likely as not to nullify any element of respect for people's dignity by disrespecting people by virtue of its content; and its relative stability may be bad rather than good as often as not. Furthermore, it will be more efficient at inflicting harm precisely by virtue of adhering to the rule of law. All things considered, taking rule of law concerns seriously is as likely as not to make a bad exercise of state power worse, or no better.<sup>30</sup> In other words, it seems difficult to make any valid general statements about the desirability, either way, of states adhering to the rule of law in their pursuit of bad goals.

Even the case of the state's pursuit of morally defensible goals<sup>31</sup> is not straightforward. As we have seen, there are competing values and concerns that may justify departures from the rule of law. Nonetheless, the case for claiming that conformity with the rule of law is better than not in this context sounds more promising. After all, compliance with the rule of law makes the pursuit of law's morally defensible goals more efficient; and in the context of state pursuit of morally defensible goals, it is meaningful to say that compliance with the rule of law genuinely expresses respect for people's dignity as free and responsible agents and reduces the opportunities for arbitrary power. Thus, to be plausible, the "lead idea" behind the rule of law<sup>32</sup> must be narrowed down to something along the following lines: *in pursuing morally defensible goals*, state power *tends* to be better when it pays credible tribute to rule of law concerns.

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<sup>30</sup> Waldron's recognition that conformity with rule of law principles "is not necessarily capable of rescuing a law from the gross iniquity of its content" (Waldron, "Positivism and Legality: Hart's Equivocal Response to Fuller," 1161-1162) does not go far enough, for it still appears to assume that such conformity nonetheless makes a difference for the better, even if not one big enough to tip the scales.

<sup>31</sup> By pursuit of morally defensible goals here I mean not only that the goal must be morally acceptable, but also that the state's choice to pursue it must be (promoting the arts, though laudable, should not come at the cost of starving orphans).

<sup>32</sup> Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?," 159.

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The point is not that the rule of law has no intrinsic moral value: it does, for all the reasons already examined and perhaps others.<sup>33</sup> But it does not automatically follow, from the fact that the rule of law has intrinsic moral value, that exercises of state power that credibly conform with the rule of law are, or even tend to be, better than ones that do not – unless we assume that they pursue morally defensible goals. Interestingly, at one point Waldron builds – albeit tenuously – the idea of morally defensible state goals into his definition of law: “[I]t strains our ordinary concept of law to apply it to norms that address matters of personal or partial concern or institutions which make no pretense to operate in the name of the whole community ... nothing is law unless it purports to promote the public good.”<sup>34</sup> Here Waldron is not denying that state claims to promote the public good are as likely as not to be instances of “linguistically mediated strategic action”,<sup>35</sup> rather than communicative action genuinely oriented towards reaching understanding. But he seems to think that purporting to promote the public good somehow brings the state closer to actually promoting it: “[U]nscrupulous rulers must make what they can of that fact when they decide ... to buy into the “legal” way of doing things”.<sup>36</sup>

This idea appears to echo Fuller’s claim that rule of law requirements effectively force the state to justify its exercise of power and hence make it less likely to pursue morally repugnant goals.<sup>37</sup> The objections to this argument are well-rehearsed. What matters for the purposes of my analysis is that Waldron’s formal conception of the rule of law is embedded in an analysis that performs some move analogous to Fuller’s attempt to argue that doing things in the right way (in adequately rule of law compliant ways) pulls them towards the good (substantively good goals). These moves – both Fuller’s and Waldron’s – illustrate, I think,

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<sup>33</sup> Nigel E. Simmonds, *Law as Moral Idea* (Oxford: Oxford University Press, 2007) 66, 101-104, 141-142; Nigel E. Simmonds, “Kramer’s High Noon,” *American Journal of Jurisprudence* 56 (2011): 135, 143, 146.

<sup>34</sup> Waldron, “The Concept and the Rule of Law,” 33.

<sup>35</sup> Juergen Habermas, *On the Pragmatics of Communication* (Cambridge, Ma: MIT Press, 1998) 129.

<sup>36</sup> Waldron, “Positivism and Legality: Hart’s Equivocal Response to Fuller,” 1167.

<sup>37</sup> Lon Fuller, “Positivism and Fidelity to Law – A Reply to Professor Hart” *Harvard Law Review* 71 (1958): 630, 636-637.

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that formal conceptions of the rule of law remain haunted by their substantive counterparts. This does not mean that formal conceptions are wanting or incoherent (they need not be) – only that they are sometimes troubled by anxieties about their own adequacy. These anxieties, I want to suggest, are the vestiges of the rule of law’s roots in natural law.

In sum, the very starting point of Waldron’s reflections about the rule of law – the key intuition that state power that credibly adheres to rule of law principles is better than naked power – is implausibly optimistic unless one qualifies it, primarily by building into it the condition that states pursue morally defensible goals. But building such a requirement into the rule of law ideal is proper of substantive rather than formal conceptions of the rule of law. Indeed, to the extent that morally sound law is seen as the central case of law (which Finnis maintains is the correct interpretation of one of the key arguments in the natural law tradition)<sup>38</sup> the proposition that legal power is less dangerous than naked power is straightforward to the point of tautology. Placed in the context of the substantive natural law tradition, “rule of law” conveys the moral imperative that states should govern not only through law that credibly complies with certain formal and institutional requirements, but substantively good – justice-oriented – law. Interestingly, many contemporary non-academic discussions of the rule of law tend to use the expression “rule of law” in a way very similar to this. In the rest of the paper I will argue that in the West the idea of the rule of law was, at its origins, inseparable from the idea of natural law,<sup>39</sup> and that we can trace those origins as far back as the *Odyssey*, which associates some very distinctive principles of substantive justice with the rule of law ideal.

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<sup>38</sup> John Finnis, *Natural Law and Natural Rights* (2<sup>nd</sup> ed, Oxford: Oxford University Press, 2011).

<sup>39</sup> See also V. Bradley Lewis, “Higher Law and the Rule of Law: The Platonic Origin of an Ideal,” *Pepperdine Law Review* 36 (2009): 631, 633.

### 3 Aristotle

Aristotle is “generally regarded as the founder of the Rule-of-Law tradition”.<sup>40</sup> Academic discussions of the rule of law frequently cite him,<sup>41</sup> and he is said to have provided the first “coherent description”<sup>42</sup> or unambiguous statement of the rule of law as a normative ideal.<sup>43</sup>

Aristotle distinguishes between forms of government on the ground of whether or not they are oriented to the common interest. Those that are so oriented are “true” forms of government; those that are oriented towards private interests are “defective” and “perverted” forms of government, where despotism reigns.<sup>44</sup> This distinction is more significant than the distinction between the government of only one person, of the few or of the many: for each of these types can govern either in accordance with the common good or private interests.

Aristotle concedes that if the many are not “utterly degraded” the pooling of their qualities in a government of the many is likely to have epistemic advantages over – that is make them better judges of policy than – the government of a single person or of the few.<sup>45</sup> The government of a single person and the government of the few have the further disadvantage that, they symbolically degrade (“dishonour”) those who are not allowed to share in the government.<sup>46</sup> Yet Aristotle’s main concern seems to be that the government be substantively just, in the sense of promoting the common good and not sectional interests; and he thinks

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<sup>40</sup> Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?,” 141.

<sup>41</sup> Friedrich A. Hayek, “The Origins of the Rule of Law” in *The Collected Works of F A Hayek, vol. 17, The Constitution of Liberty*, ed. Ronald Hamowy (Milton Park: Routledge, 2011) 232, 243; Eugene F. Miller, “Prudence and the Rule of Law,” *American Journal of Jurisprudence* 24 (1979): 181, 182-183; Harvey C. Mansfield, Jr., “Constitutionalism and the Rule of Law,” *Harvard Journal of Law & Public Policy* 8 (1985): 323; Rodger Beehler, “Waiting for the Rule of Law,” *University of Toronto Law Journal* 38 (1988): 298; Laurence H. Tribe, “Revisiting the Rule of Law,” *New York University Law Review* 64 (1989): 726, 727; Eric W. Orts, “The Rule of Law in China,” *Vanderbilt Journal of Transnational Law* 34, (2001): 43, 77-78; Endicott, “The Impossibility of the Rule of Law,” 2; Simon Chesterman, “An International Rule of Law?,” *American Journal of Comparative Law* 56 (2001): 331, 333-334; Stein, “The Rule of Law: What Does it Mean?,” 297.

<sup>42</sup> Mathew D. McCubbins, Daniel B. Rodriguez and Barry R. Weingast, “The Rule of Law Unplugged,” *Emory Law Journal* 59 (2009-2010): 1455, 1464.

<sup>43</sup> For a contrary view see, Waldron, “Is the Rule of Law an Essentially Contested Concept (in Florida)?,” 141.

<sup>44</sup> Aristotle, “Politics” in *The Complete Works of Aristotle, vol 2*, ed. Jonathan Barnes (6<sup>th</sup> printing with corrections, Princeton: Princeton University Press, 1995) 1986, 2030.

<sup>45</sup> *Ibid.*, 2034.

<sup>46</sup> *Ibid.*, 2033.

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that there is no guarantee that the government of the many will be a government for the common good (as opposed to the good of the majority).<sup>47</sup> He also states that this problem cannot be resolved by making the law rule instead of men, for laws too can be oriented to private interests rather than the common good.<sup>48</sup>

Elsewhere, however, Aristotle defends the rule of law. He concedes that governance constrained by pre-existing laws has the disadvantage of disabling public officials from acting in a way that is sensitive to all the circumstances of particular cases. Yet, he argues, this is a problem only in those particular cases when the law cannot satisfactorily settle the matter in advance; when the law can do so, the benefit of government constrained by legislation is that it will neutralize the risk of public officials' bias in the management of public affairs.<sup>49</sup>

The tension between the argument that law's rule does not guarantee good government and the argument that laws have the beneficial effect of neutralizing officials' bias is resolved by Aristotle's statement that laws should reign supreme "when good".<sup>50</sup> When "laws miss the mark", they are not binding.<sup>51</sup> Aristotle argues that "good laws, if they are not obeyed, do not constitute good government",<sup>52</sup> but he also clearly implies the reverse: "there are two parts of good government; one is the actual obedience of citizens to the laws, the other part is the goodness of the laws which they obey."<sup>53</sup> Obeying the law does not in itself make for good government unless the laws themselves are good.

Even when laws are for the common good, they do not completely oust the judgement of public officials, for officials are called upon to supplement the laws where these, by virtue

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<sup>47</sup> Ibid., 2033.

<sup>48</sup> Aristotle puts it in terms of the law itself being able to be either "democratic" or "oligarchical", by which he means that, rather than oriented to the common good, the law may promote the interests of the many poor or of the few rich (compare *ibid.*, 2031).

<sup>49</sup> Ibid., 2041.

<sup>50</sup> Ibid., 2035.

<sup>51</sup> Ibid., 2041.

<sup>52</sup> Ibid., 2054.

<sup>53</sup> Ibid.

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of their necessary generality, fail to cater for morally relevant aspects of particular cases.<sup>54</sup> A modicum of such failure is inherent in law, for not everything is susceptible of general legislation.<sup>55</sup> A different case, but one that stipulates a further limitation to the authority of even good laws, is that of men whose virtue or “political capacity” so far outstrips that of others that they cannot be bound – either as rulers or ruled, presumably – by any law and are indeed a law unto themselves.<sup>56</sup>

The following passage from Aristotle’s *Politics* is often quoted in discussions on the rule of law: “[H]e who bids the law rule may be deemed to bid God and Reason alone rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men.”<sup>57</sup> In light of what has been said above it seems clear that this passage is not – as it is sometimes taken to be – an apology of the rule of law as such, but of states under the authority of good laws.<sup>58</sup> Analogous observations apply to Aristotle’s argument that “where the laws have no authority, there is no constitution. The law ought to be supreme over all, and the magistracies should judge of particulars, and only this should be considered a constitution.”<sup>59</sup> Aristotle here has in mind not just any laws but good laws; and not just any constitution, but good constitutions. To put it in the terms familiar to natural lawyers, Aristotle draws a distinction between, on the one hand, the focal or true meaning of constitution and laws and, on the other hand, laws and constitution in merely their “technically certifiable”<sup>60</sup> sense. Aristotle defines the constitution as government,<sup>61</sup> but recall his distinction between true and perverted forms of government, based on whether or not they promote the common good. Elsewhere he defines the

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<sup>54</sup> Ibid., 2035.

<sup>55</sup> Ibid., 2043.

<sup>56</sup> Ibid., 2037.

<sup>57</sup> Ibid., 2042.

<sup>58</sup> See Beehler, “Waiting for the Rule of Law”; Jill Frank, “Aristotle on Constitutionalism and the Rule of Law,” *Theoretical Inquiries in Law* 8 (2007): 37.

<sup>59</sup> Aristotle, “Politics,” 2051.

<sup>60</sup> J.S. Russell, “Trial by Slogan: Natural Law and Lex Iniusta Non Est Lex,” *Law and Philosophy* 19 (2000): 433, 438.

<sup>61</sup> Aristotle, “Politics,” 2029.



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constitution as (government for) “the salvation of the community”<sup>62</sup> – this time clearly intending to highlight the focal meaning of constitution. Thus, where Aristotle says that without the law’s supremacy there is no constitution, he means that there is no government in the true sense of the word – no good government. By the same token, however, the lack of legal authority that results in an absence of good government is not a lack of the rule of law as such (not a lack of laws in the technically certifiable sense) but a failure in the authority of good laws (the central case of law).

In sum, while Aristotle defends the rule of law because he thinks a commitment to pre-established laws wards off the risk of arbitrary government, not just any law will do the trick. Not only the laws will have no authority over particular cases that call for ad-hoc management and with respect to people who clearly outdo others in excellence; but they will also need to be substantively good laws to have authority over those who appropriately come under their jurisdiction.

The main point that Aristotle makes about the rule of law, then, is entirely tautological if understood descriptively: being governed by officials who need to adhere to substantively good rules in cases in which these rules apply is preferable to being governed by officials who are free to choose good or bad courses of action in the same cases. Understood prescriptively, however, Aristotle’s theory of the rule of law is an invitation to govern well and to safeguard good government by passing good laws generally binding on public officials, with the laws’ goodness being measured by reference to the standard of the common good. What is lacking from Aristotle’s theory of the rule of law is just what is commonly thought to belong to it: a descriptive claim that government by (any) law is somehow automatically better than government by men, and a normative claim that, whatever else they do, governments should take care to do it through law.

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<sup>62</sup> Ibid., 2026.

#### 4 Plato

If Aristotle is generally (mistakenly) considered the godfather of the principle that the rule of law as such is better than rule by men, Plato – whose contributions to rule of law thinking in the past were “almost completely ignored”<sup>63</sup> and whose legal philosophy is marginalized within general jurisprudence<sup>64</sup> – is occasionally declared to have adhered to the opposite tenet.<sup>65</sup> While this conclusion may be warranted if one limited one’s analysis to Plato’s arguments in the *Republic*, other dialogues provide as strong a defence of the rule of law as is to be found in Aristotle’s *Politics*.<sup>66</sup>

In the *Statesman* – a dialogue whose importance has been recently reassessed, and whose treatment of the rule of law, in particular, has been argued to be of significance to contemporary political theory<sup>67</sup> – Plato develops an argument to the effect that in theory the goodness of government is purely a function of whether the rulers govern “on the basis of expert knowledge and what is just”, regardless of “whether they rule according to laws or without laws”.<sup>68</sup> Indeed, in an ideal world good government would require rulers to be given free rein, unhindered by any constraints interfering with their wise assessment of what each situation, in all its variable particularity, requires.<sup>69</sup> In the real, imperfect world, however, rulers too often lack the wisdom and expertise to govern well, as “a king does not come to be

<sup>63</sup> Jerome Hall, “Plato’s Legal Philosophy,” *Indiana Law Journal* 31 (1956): 171, 201.

<sup>64</sup> Brian Burge-Hendrix, “Plato and the Rule of Law,” in *Law, Liberty and the Rule of Law*, ed. Imer B. Flores and Kenneth E Himma (Dordrecht: Springer: 2013) 27, 32; Eric Heinze, “The Status of Classical Natural Law: Plato and the Parochialism of Modern Theory,” *Canadian Journal Law & Jurisprudence* 20 (2007): 323.

<sup>65</sup> Karen Turner, “Rule of Law Ideals in Early China,” *Journal of Chinese Law* 6 (1992): 1, 36.

<sup>66</sup> I will not analyse Plato’s arguments in the *Republic*, but note that they complement, rather than contradict, his defence of the rule of law: the *Republic* deals with the ideal state, while the dialogues defending the rule of law deal with what is possible and desirable for actual states in the real, non-ideal, world. Hall, “Plato’s Legal Philosophy,” 192; V. Bradley Lewis, “Higher Law and the Rule of Law: The Platonic Origin of an Ideal,” 634-656; Fred D. Miller, Jr., “The Rule of Law in Ancient Greek Thought,” in *The Rule of Law in Comparative Perspective*, ed. Mortimer Sellers and Tadeusz Tomaszewski (Dordrecht: Springer, 2010) 11, 13-18.

<sup>67</sup> Xavier Márquez, *A Stranger’s Knowledge: Statesmanship, Philosophy and Law in Plato’s “Statesman”* (Las Vegas: Parmenides 2012) 34, 341-364.

<sup>68</sup> Plato, “Statesman” in *Plato: Complete Works*, ed. John M Cooper (Indianapolis: Hackett, 1997) 294, 337.

<sup>69</sup> *Ibid.*, 338.

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in cities as a king-bee is born in a hive, one individual immediately superior in body and mind”.<sup>70</sup> The closest approximation to the ideal is then a principle that public officials strictly adhere to the laws,<sup>71</sup> which will “have been established on the basis of much experiment, with some advisers or others having given advice on each subject in an attractive way, and having persuaded the majority to pass them.”<sup>72</sup> It follows that in the real world good and bad governments are in fact appropriately distinguished on the basis of whether or not they rule according to “good written rules, which we call laws”.<sup>73</sup> As in Aristotle, the *Statesman*’s claim that laws must always be followed by public officials appears to refer to the focal meaning of law – namely, good law. Other platonic dialogues use “law” in just this sense, arguing that it is only “those who don’t know” who call “law” that which is not “correct.”<sup>74</sup> Under this interpretation, a society can be said to have law when its established rules have come about in a way that ensures that they will be as substantively good as our finitude can make them: by trial and error, on the good advice of experts, and after securing popular approval through persuasion.<sup>75</sup>

It seems unlikely that Plato thought that each individual rule that comes about in this way is guaranteed to be as good as it can be in an imperfect world.<sup>76</sup> If he did, the *Statesman*’s statement of the rule of law principle would coincide with Aristotle’s defence of the rule of law in the *Politics*: laws should reign supreme if and only if they are substantively good laws (that is genuine laws). The difference is that for Aristotle good laws are ones that promote the

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<sup>70</sup> Ibid., 346.

<sup>71</sup> Ibid., 342, 345-346.

<sup>72</sup> Ibid., 344.

<sup>73</sup> Ibid., 347.

<sup>74</sup> Plato, “Minos” in *Plato: Complete Works*, 1307, 1313

<sup>75</sup> Waldron argues something similar in the contemporary context: “[T]he production of a text as the focus of deliberation, clause-by-clause consideration, the formality and solemnity of the treatment of bills in the chamber, the publicity of legislative debates, successive layers of deliberation, and the sheer time for consideration – formal and informal, internal and external to the legislature – that is allowed to pass between the initiation and the final enactment of a bill: ... To wish to be subject to the rule of law is to wish to be subject ... to enactments that have been through processes like these.” Jeremy Waldron, “Legislation and the Rule of Law,” *Legisprudence* 1 (2007): 91, 107.

<sup>76</sup> See Robert P. George, “Reason, Freedom, and the Rule of Law: Their Significance in Western Thought,” *Regent University Law Review* 15 (2002-2003): 187, 191.

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common good and for *Plato* those that have passed certain semi-procedural tests which guarantee (as far as possible) their substantive goodness. I say *semi-procedural* because *Plato* speaks of laws that come into being with “advisers ... having given advice on each subject in an attractive way”: since the advice must be “attractive”, the test for law remains ultimately substantive. It seems more plausible, however, that the *Statesman*’s claim is that a body of rules that becomes established in this way (through experience, on the advice of experts and in accordance with the popular will) will tend, *on the whole*, to be as good as we can reasonably expect in an imperfect world.<sup>77</sup> This interpretation is in line with *Marquez*’s argument that *Plato* is “aware that law is imperfect, and willing systematically to investigate the nature of justice with a view to its improvement, but greatly suspicious of change in view of the irremediable scarcity of genuine political knowledge”.<sup>78</sup> If so, then recommending strict adherence to the laws means that public officials should follow the law even on those occasions when a particular rule may be bad – for when they do so, they will do right more often than not, and in any case more often than they would if left to their own devices. Even

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<sup>77</sup> It has been argued that *Plato*’s and *Aristotle*’s account of the rule of law “is too dependent on the sense that reason connects us to the divine or transcendent. ... in contemporary Western legal thought the ideal cannot be so grand an ideal as the rule of reason concerning all legal questions in both law-making and adjudication. For ... confidence in reason to reach substantive moral and political conclusions about all such matters ... is not widely enough shared to legitimate the legal system.” *Kenneth Henley*, “The Impersonal Rule of Law,” *Canadian Journal of Law & Jurisprudence* 5 (1992): 299, 302. *Plato*’s own account, however, strikes me as more nuanced than *Henley*’s article suggests. *Plato*’s idea that laws should become such by trial and error, on the advice of experts, and after securing popular approval through persuasion does not seem the same as a belief that transcendent reason will be infused into law in any simple way. Rather, albeit sketchily outlined, the idea parallels more modern accounts of the epistemic advantages of certain law-making processes (in terms of their likelihood of generating good laws).

<sup>78</sup> *Xavier Márquez*, “Knowledge and Law in *Plato*’s *Statesman* and *Laws*: A Response to *Klosko*,” *Political Studies* 59 (2011): 188, 189. *Kochin* reads the *Statesman* as affirming that second-best regimes can do nothing other than imitate the law of the best regimes – those lucky enough to be run by a ruler genuinely possessed of true knowledge. He objects to this on the ground that second-best regimes would need to adapt the laws to their own circumstances, which include the absence of a truly knowledgeable ruler, who would tailor rules to the different circumstances of each city. *Michael S. Kochin*, “*Plato*’s Eleatic and Athenian Sciences of Politics,” *The Review of Politics* 61 (1999): 57, 66-69. *Kochin*’s reading, however, gives rise to a paradox: how can regimes deprived of true political knowledge know what truly enlightened rules would prescribe in the first place, and how could they presume to adapt such prescriptions to their own circumstances? The paradox is dispelled if, in contrast to *Kochin*’s reading, we read the dialogue as stating that no community is ever under the rule of the possessor of the true political knowledge; on this reading, the idea of second-best regimes imitating the rules of ideal regimes is a metaphor – an invitation to real people to make real laws in accordance with certain processes (by trial and error, on the advice of experts, and after securing popular approval through persuasion) that have the kind of epistemic advantages resulting in the introduction of good enough laws (perfect laws being unattainable).

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under this second interpretation, however, “law”, within the rule of law principle, is defined restrictively in a way that makes it coincide – broadly if not exactly – with certain substantively good standards (at least as good as human law can hope to embody).

The same joining of the rule of law principle with natural law thinking is evident in the *Laws*.<sup>79</sup> Law, it is said in that text, must have “virtue”<sup>80</sup> or “complete justice” as its goal.<sup>81</sup> In talking about laws that are sound<sup>82</sup> or good<sup>83</sup> Plato recognizes that laws may also be unsound and bad. But the latter are actually “bogus laws”<sup>84</sup> and it is pointless to claim that they have any authority.<sup>85</sup> Unlike the *Statesman*, the *Laws*’ test for distinguishing bogus from genuine laws is entirely substantive and coincides with Aristotle’s: genuine laws are those “established for the good of the whole state”, as opposed to those that privilege sectional interests.<sup>86</sup> Having thus clarified how properly to understand the term “law”, the *Laws* declare: “Where the law is subject to some other authority and has none of its own, the collapse of the state ... is not far off; but if law is the master of the government and the government is its slave, then the situation is full of promise”.<sup>87</sup> The text also goes on to say that good government requires not only the rule of (good) law but public officials competent to administer the laws.<sup>88</sup>

When legal scholars acknowledge that some of Plato’s texts support the principle of the rule of law, they often reproduce the passage I have just quoted. As with discussions of Aristotle, however, they do not always contextualize it, so that the impression may be given of Plato’s unqualified support for the rule of law as such. But, as in Aristotle’s case, Plato

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<sup>79</sup> See R.F. Stalley, *An Introduction to Plato’s Laws* (Indianapolis: Hackett, 1983) 27, 33-34; Fred D. Miller, “Rule of Reason in Plato’s Laws” in *Reason, Religion and Natural Law: From Plato to Spinoza*, ed. Jonathan A. Jacobs, (Oxford: Oxford University Press, 2012) 31.

<sup>80</sup> Plato, “Laws” in *Plato: Complete Works*, 1318, 1325, 1393.

<sup>81</sup> *Ibid.*, 1325.

<sup>82</sup> *Ibid.*, 1326.

<sup>83</sup> *Ibid.*, 1398.

<sup>84</sup> *Ibid.*, 1401.

<sup>85</sup> *Ibid.*, 1402.

<sup>86</sup> *Ibid.*, 1401-2. The common good here includes the promotion of “habits of restraint”, as well as “health” and “wealth”, in that order. *Ibid.*, 1424.

<sup>87</sup> *Ibid.*, 1402.

<sup>88</sup> *Ibid.*, 1428.

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arguments in support of the rule of law are the arguments of a natural lawyer. For both philosophers their case for the rule of law rested on, and was limited to, an understanding of the central case of law.

### 5 Pre-Classical Greece: Homer

While historical discussions of the rule of law in contemporary legal scholarship conventionally go no further than Aristotle and Plato, the idea of the rule of law – indeed, as in the two philosophers’ work, a natural law-based understanding thereof – is discernible in texts that pre-date the classical age. In particular, it clearly emerges in a text that enjoys foundational status in the western literary tradition: Homer’s epic.<sup>89</sup>

It is in the *Odyssey* that the rule of law idea makes its appearance more insistently. The main concept driving the plot of the *Odyssey* – Odysseus’s fateful journey back to Ithaca after the sack of Troy – is rife with opportunities to explore the rule of law idea because Odysseus’s adventures bring him constantly into contact with foreign communities whose lawlessness (actual or potential) is a constant source of anxiety for the king.<sup>90</sup>

In making a case for the emergence, in the *Odyssey*, of a substantive understanding of the rule of law centred around ideas of justice, my analysis will not rest on the proposition that there is an obvious correspondence between the ways of thinking about justice and morality in Homer and at any subsequent time – whether Plato’s and Aristotle’s classical Greece or the world inhabited by contemporary legal philosophers. It would be absurd to

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<sup>89</sup> Interestingly, both Aristotle and Plato refer to Homer’s epic in their political work, in order to illustrate some points, or as a source of historical evidence. Aristotle, “Politics” 2039; Plato, “Laws” in *Plato: Complete Works*, 1318, 1370-71.

<sup>90</sup> In contrast, the *Iliad*, which deals with the last year of the decade-long siege of Troy by the Achaeans, is concerned with intra-Greek quibbles – Achilles taking exception to Agamemnon’s appropriation of his captive Briseis – and with the conflict between the Greeks and the Trojans. While the Hellenes regarded the Trojans as an “Eastern foe” (Bernard Knox, “Introduction” in Homer, *The Iliad*, trans. Robert Fagles (London: Penguin, 1990) 24), there is no emphasis in the *Iliad* on the idea of a cultural chasm or a battle of civilizations between the two camps.

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maintain that the basic Homeric understanding of justice, at least to the extent that it makes justice coincide with the divine order of the universe that may remain inscrutable to humans,<sup>91</sup> can successfully speak (at least philosophically) to many modern day audiences. Indeed, even those who stress the continuity in the main lines of Greek thinking about justice from Homer's time onwards accept that a break occurs with Plato and his successors.<sup>92</sup> And while the view that "any attempt to find an overall moral order [in early Greek literature] must fail"<sup>93</sup> is now rejected by many,<sup>94</sup> it does not of course follow that the moral universe of the ancient Greeks neatly (or even roughly) maps onto ours. What my analysis does presuppose and, I hope, will show, however, is that there are elements in Homer's thinking about justice that remain intelligible to modern-day readers as just that – statements about justice – and to which these readers can productively relate.<sup>95</sup>

### A Nausicaa and Alcinous

The first instance when the rule of law idea makes its appearance in the *Odyssey* is when Odysseus is shipwrecked on the island of the Phaeacians. Thanks to Athena's intercession, Odysseus has just been set free from his enthrallment to the nymph Calypso on the island of Ogygia. (Calypso had saved him when a sea-storm had wiped out his entire crew seven years before.) Odysseus sets sail on a makeshift raft from Ogygia, but is shipwrecked once more by Poseidon (the God of the sea having vowed to put obstacles in the way of Odysseus's return home after learning that the king of Ithaca had blinded his son Polyphemus). Odysseus ends up on the shores of Phaeacia, but he does not know it. Half-drowned, exhausted and naked –

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<sup>91</sup> Hugh Lloyd-Jones, *The Justice of Zeus* (Berkeley and London: University of California Press, 1971).

<sup>92</sup> *Ibid.*

<sup>93</sup> Michael Gagarin, "Blind Justice," *Arion: A Journal of Humanities and the Classics* 1 (1973): 197, 201.

<sup>94</sup> William Allan, "Divine Justice and Cosmic Order in Early Greek Epic," *The Journal of Hellenic Studies* 126 (2006): 1; Lloyd-Jones, *The Justice of Zeus*.

<sup>95</sup> On the enduring relevance of the *Odyssey* to Western political philosophy, including present-day debates about communitarianism and liberalism, see Patrick J. Deneen, *The Odyssey of Political Theory: The Politics of Departure and Return* (Lanham, MD: Rowman & Littlefield, 2000).

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at his most vulnerable – he is apprehensive: “Man of misery, whose land have I lit on now? What *are* they here – violent, savage, lawless? or friendly to strangers, god-fearing men?”<sup>96</sup>

Odysseus’s question sets up a set of binary associations: violence and savagery go hand-in-hand with lawlessness, while the qualities of being friendly to strangers and god-fearing are implicitly associated with legality or *lawfulness* – being endowed with, and abiding by, laws. Violence and savagery point to an idea of excess, of unrestrained frenzy. Like violence and savagery, god-fearing conjures up the idea of limits – but limits that are respected rather than transgressed. Being god-fearing, then, suggests something like recognising one’s finitude as a human being. Fearing the gods means refraining from offending them, and the trait that typically enraged the gods and attracted their punishment was *hubris* – extreme pride or arrogance.<sup>97</sup> Law and law-abidingness are then necessary to do the work of restraining human passions which, if left unbridled, result in violence and savagery.

Odysseus also implicitly associates friendliness to strangers (like the quality of being god-fearing) with legality. This gives legality a rather more substantive, concrete, and positive meaning. Legality is no longer just about self-restraint – as in god-fearing – but about goodwill. Genuine legality requires not only negative duties (staying one’s inclination to violently interfere) but positive obligations (welcoming those who, as strangers, lack material and social embedment in the community).

Odysseus’s doubts about the kind of people who live on the island are soon dispelled at the sight of the naked Nausicaa, daughter of the ruler of Phaeacia, who had been bathing in a nearby river. He addresses her as “princess” and “Goddess”.<sup>98</sup> Nausicaa and Odysseus share an elemental nudity in this scene but their nakedness is connoted very differently: whereas Odysseus is bespattered with sea-salt and sand, Nausicaa has just cleansed herself with

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<sup>96</sup> Homer, *The Odyssey*, 172.

<sup>97</sup> See Lloyd-Jones, *The Justice of Zeus*, 27.

<sup>98</sup> Homer, *The Odyssey*, 173.



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freshwater and applied oil to her skin. The contrast, erotically suggestive, is also normatively laden. Odysseus's brand of nakedness emphasizes his status as an alien supplicant vis-à-vis Nausicaa's comfortable social integration in civilized Phaeacia, signified by her very different kind of nudity. It is no wonder, then, that she replies to his plea for mercy with an offer of "clothing or any other gift, the right of worn-out suppliants come our way",<sup>99</sup> confirming that Phaeacia is very far indeed from being lawless.

The Phaeacians prove to be as good as their word, showering gifts on Odysseus. Nausicaa's father, Alcinous, during a banquet with music in Odysseus's honour, articulates as follows the principle by which the Phaeacians deal with strangers: "Treat your guest and suppliant like a brother: anyone with a touch of sense knows that."<sup>100</sup> While his daughter had spoken of this treatment as "the right of worn-out suppliants", Alcinous grounds this right in common sense. That is, it is not simply a contingent convention of the Phaeacians, but an unarguable requirement of justice recognized as such by all sensible or reasonable people.

At the same time, Alcinous employs exactly the same vocabulary of law in connection with this duty of friendliness to strangers that Odysseus himself had used. During the banquet Alcinous asks his guest to tell him of the people he visited during his journeys: "Who were wild, savage, lawless? Who were friendly to strangers, god-fearing men?"<sup>101</sup> The same formula is used again by Odysseus when, giving in to the entreat to recount these journeys, he tells of how he had sailed to an uninhabited island not far from the land of the Cyclops and, looking across the water towards the coast, had wondered about its inhabitants.<sup>102</sup> This formulaic use of words, repeated throughout the epic again and again, consolidates the association between, on the one hand, lawlessness and savagery and, on the other hand, between legality and the qualities of being friendly to strangers and god-fearing.

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<sup>99</sup> Ibid., 174.

<sup>100</sup> Ibid., 209.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid., 217.

## **B Polyphemus**

The Cyclops, as Odysseus recalls in telling his journeys to Alcinous, were indeed “lawless brutes”, living in caves and not given to agriculture, “each a law to himself, ruling his wives a children, not a care in the world for any neighbour”.<sup>103</sup> True law – that whose absence makes one lawless – is here the set of principles and rules that govern communal life. Only figuratively speaking are decisions that affect oneself or one’s immediate family “law”: so much so that being a “law” only to oneself and one’s family is, for Odysseus, the same as being lawless. Tellingly, this passage does not draw a distinction between private or intra-familial conduct that is principled and that which is arbitrary. Thus, Odysseus’s reflections on the Cyclops’ lawlessness reveal an understanding of law contingent on the public/private divide: law is partly identifiable by reference to the (public) subject matter of legal regulation. This association between law and the public sphere emerges as a matter of definitional necessity in this passage: being only a law to oneself and one’s family is *equated* with being lawless. In contrast, the association between law and more primitive ways of life is purely rhetorical: Odysseus does not expressly state that cave-dwellers to whom agriculture is unknown cannot be governed by laws. But speaking as he does in the same breath of the Cyclops’ ways of life as well as their lawlessness, he rhetorically associates the ordered governance of communal life (law) with the kind of “civilized” living enabled by the level of technological development necessary for building houses and cultivating land.

Odysseus’s remarks on Polyphemus – the Cyclops whose cave he explores and who ends up feasting on some of Odysseus’s men – confirm the natural law premises of Odysseus’s recurrent observations about lawlessness. He says that, readying himself for the

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<sup>103</sup> Ibid., 215.

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adventure that would bring him face to face with Polyphemus, he had the presentiment that he would cross paths with “a giant clad in power like armor-plate – a savage deaf to justice, blind to law.”<sup>104</sup> The Cyclops’s physical power makes him impervious not only to bodily attack but also to appeals to justice and comprehension of the law: his power is brute force par excellence – *brute* because insufficiently unrelieved by endowments of the intellectual and spiritual variety. The relationship between justice and law that this passage constructs is one of very strict proximity, if not coincidence. Polyphemus cannot *see* the law – is unable to tell law from lawlessness; and he cannot *hear* justice, which presupposes someone (vainly) making an appeal to it before the Cyclops. An appeal to justice is of no avail with the Cyclops because he lacks the ability to see the difference between state of affairs that are regulated by it (lawful ones) and ones that are not (lawless ones).

Thus, to say that the Cyclops are lawless is to say that they lack commitment to certain standards of substantive justice. Prime among these is, as we already know, the duty of hospitality towards supplicants, as Odysseus points out to Polyphemus:

[S]ince we’ve chanced on you, we’re at your knees in hopes of a warm welcome, even guest-gift, the sort that hosts give strangers. That’s the custom. Respect the gods, my friend. ... Zeus of strangers guards all guests and suppliants: strangers are sacred – Zeus will avenge their rights!<sup>105</sup>

Unlike their first appearance in the encounter with Nausicaa, this re-appearance of the two epithets constantly ringing through the epic in opposition to lawlessness (“god-fearing” and “friendly to strangers”) strongly suggests that the epithets are to be read through each other. And the “custom” of hosts welcoming strangers is no mere convention but, as a god-mandated duty, a requirement of justice and hence a law. The point is reinforced when

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<sup>104</sup> Ibid., 218.

<sup>105</sup> Ibid., 219-220.

Odysseus tells Polyphemus that his gorging on his companions “outrages all that’s right”.<sup>106</sup> Respect of the duty of hospitality is the prime indicator of legality and Polyphemus violates it in the most graphic way imaginable, “daring to eat [his] guests in [his] own house”.<sup>107</sup> If law (as suggested above) is conceived to be mainly about the regulation of communal life, where the self confronts the other, then Polyphemus’s (and later, the Laestrygonians’)<sup>108</sup> act of devouring Odysseus’s men is directly opposed not just to the most basic legal principle (the duty of hospitality), but to the idea of law itself: in engulfing Odysseus’s crew within his own individuality Polyphemus obliterates the other’s alterity, on which law is predicated.<sup>109</sup>

## C Circe

If respect for the duty of hospitality is paradigmatic of a state of things where law rules, the nymph Circe, queen of Aeaea (to whose coast Odysseus’s voyage brought him after his encounter with the Cyclops) has her own way of egregiously violating that duty, turning Odysseus’s companions into swine. She attempts the same trick on Odysseus, but he (whom Hermes has made immune to her magic) responds by unsheathing his sword. The phallic symbolism of this act is hard to miss, considering that Circe, cowered, responds by inviting Odysseus to share her bed: through “the magic work of love”, she adds, they will “breed deep

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<sup>106</sup> Ibid., 222.

<sup>107</sup> Ibid., 226.

<sup>108</sup> Ibid., 234.

<sup>109</sup> The egregious and abhorrent character of Polyphemus’s violation of the duty of hospitality makes Brown’s argument that “the rules of hospitality do not apply to the Cyclopes” sound outlandish to me. Christopher G. Brown, “In the Cyclops’ Cave: Revenge and Justice in *Odyssey* 9,” *Mnemosyne* 49 (1996): 1. Brown postulates this to make sense of Odysseus’s statement that Zeus was unmoved by his sacrifice of a ram to the God after escaping the Cyclops. Zeus’s indifference was shown, according to Odysseus, by the fact that many of his crew went on to die at the hands of Poseidon, whose power of revenge was invoked by Poseidon’s son Polyphemus, whom Odysseus had blinded before escaping from his clutches. Brown thinks Zeus’s failure to stop Poseidon’s revenge shows that Odysseus had been mistaken in assuming that Zeus was on his side when Odysseus had blinded Polyphemus for his failure to uphold the duty of hospitality. But there are more plausible ways of making sense of the relevant passage. For example, Zeus may allow Poseidon to avenge his son not because Odysseus was wrong in punishing Polyphemus’s lack of hospitality, but because Odysseus courted retribution by arrogantly identifying himself to the Cyclops after blinding him.

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trust”.<sup>110</sup> Odysseus consents to do so only after she swears, by “the binding oath of the blessed gods”, never to harm him.<sup>111</sup> Circe then treats Odysseus and his men to all manner of material comforts and they enjoy her hospitality for a whole year – those among them who had been turned into swine regaining their humanity in an even more resplendent form than they had possessed before.

We know by now that a violation of the duty of hospitality is symbolic of lawlessness – that is to say, from a natural law perspective, of a failure of justice. In the case of the Cyclops, however, that violation was also indicative of a more basic lawlessness. For, as I argued, law being concerned with the governance of communal life, it presupposes an other; but Polyphemus reduces alterity to oneness through cannibalism. Similarly, Circe’s abuse of her guests is lawless because it violates the requirements of justice, but it is also lawless in the same sense as Polyphemus’s abominations are: it eviscerates the very idea of law by eliminating its logical presupposition – namely, alterity. In Circe’s case this is not accomplished by phagocytizing the other, but by literally *dehumanizing* him.

By implication, when the swine are restored to human form and guests are given their due, the rule of law is also restored, or indeed established. Thus, what leads to Circe’s change of heart can also be seen as the founding acts of a new legal order. To be sure, here it is first a credible threat of violence from the abused other (Odysseus’s baring his sword) that leads to a formal commitment (sworn by the gods) to respect the other’s right not to be harmed; but the commitment is then cemented and enlivened by mutual trust (this trust being engendered, in the specific case of Circe and Odysseus, through acts of heterosexual love-making).<sup>112</sup> The outcome of this process is that the humanity of those who enjoy this newly established state of

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<sup>110</sup> Homer, *The Odyssey*, 240.

<sup>111</sup> *Ibid.*, 239.

<sup>112</sup> This in contrast with the homoerotic desire foundational to the political order of Athenian democracy during the classical age. See Victoria Wohl, *Love among the Ruins: The Erotics of Democracy in Classical Athens* (Princeton: Princeton University Press, 2002); Alcardo Zanghellini, *The Sexual Constitution of Political Authority* (Milton Park: Routledge 2015) 36-43.

legality flourishes like never before: Odysseus's men, *rehumanized* after having been reduced to swine, are also rejuvenated and made handsomer, more perfect specimens of their kind.

## **D Antinous**

After Odysseus concludes the tale of his adventures, the Phaeacians arrange for his safe return to Ithaca, the island where he ruled as king. Having deposited him there while he is asleep, together with bountiful gifts, the Phaeacian crew sets sail homeward bound (only to be struck by Poseidon's ire). Upon waking up, Odysseus – not recognizing the mist-shrouded surroundings – recites the familiar refrain: “Man of misery, whose land have I lit on now? What *are* they? Violent, savage, lawless? or friendly to strangers, god-fearing men?”<sup>113</sup>

His first encounter in Ithaca is with Athena disguised as a shepherd boy. Odysseus's appeal to the stranger is to be treated “kindly – no cruelty, please”. Coming from a war-tempered veteran (whose strength has been replenished by the Phaeacians' pampering and by recent sleep), Odysseus's appeal of “no cruelty, please” to a shepherd boy may seem incongruous. But it has the effect of underscoring that the duty of hospitality is owed as a matter of principle, and is not contingent on prudential considerations on the part of the duty-holder: strangers' physical superiority may make our refusal of hospitality to them imprudent, but this is not the reason why we owe them and they demand kindness. In addition to being spared cruelty, Odysseus also asks for assistance: “Save these treasures, save me too.”<sup>114</sup> The broader significance of this reference to both positive and negative obligations has to do with the fact that the duty of hospitality is, as I have argued, paradigmatic of the requirements of justice and of the existence of a legal order.

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<sup>113</sup> Homer, *The Odyssey*, 293.

<sup>114</sup> *Ibid.*, 294.

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As Odysseus is soon to discover, however, legal order has all but broken down in Ithaca during his absence. Power-thirsty suitors, vying for the queen's hand, are camping out in the royal palace, abusing her hospitality and depleting the royal stocks – so that “the land is in the grip of reckless, lawless men”.<sup>115</sup> Athena changes Odysseus into an aged-looking stranger and, thus disguised, he tests the suitors. What could the test be, if not that they should prove themselves willing to perform the duty most emblematic of the requirements of justice? As a stranger and suppliant – an old and destitute one at that – Odysseus begs the suitors for food. Antinous, one of the high born suitors, not only refuses, but crashes a stool on Odysseus's back. Witnesses to the scene are horrified, and quick to label Antinous's act a “crime”.<sup>116</sup>

Penelope, the queen, in her desire to give a “warm welcome”<sup>117</sup> to this “luckless stranger”, “hard-pressed by need”<sup>118</sup> and mistreated by Antinous, shows herself as the precarious custodian of the values of justice and the rule of law. She does so again later, when reproaching her son Telemachus for letting the stranger “be so abused”<sup>119</sup> when he was allowed to have a fight with a tramp well known on the island. Before accepting the tramp's challenge, Odysseus had vainly tried to reason with him: “What damage have I done *you*? ... This doorsill is big enough for the both of us – you've got no call to grudge me what's not yours.”<sup>120</sup> In attempting to defraud Odysseus of the most fundamental of law's rights – the right of supplicant strangers – the vagrant is a tragic accomplice in injustice and lawlessness. But the tramp is egged on by Antinous for his and the other suitors' entertainment. Indeed, Antinous goes to the lengths of rewriting the rules of the tramp's challenge to Odysseus, with the other suitors' acclaim: the winner of the fight will henceforth feast with the suitors in the

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<sup>115</sup> Ibid., 477.

<sup>116</sup> Ibid., 370.

<sup>117</sup> Ibid., 371.

<sup>118</sup> Ibid., 370.

<sup>119</sup> Ibid., 383.

<sup>120</sup> Ibid., 376.

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royal palace, and all other future beggars will be turned away.<sup>121</sup> As a prospective rule of general application, publicly approved and promulgated by the leading suitor in the king's (apparent) absence, the prescription that all beggars be rebuffed has as strong a claim as any to be recognized as law in a formal, quasi-positivistic, sense. But the narrative invests this rule precisely with the opposite connotations: it is a rule that spells out Ithaca's descent into lawlessness, for nowhere is lawlessness more extreme than where men show not "a care for the wrathful eyes of god or rites of hospitality."<sup>122</sup>

Penelope, in her concern for the stranger, stands up as a pillar of law and right as these very things seem to crumble all around her. It is the broader significance of her conduct that explains the first words Odysseus – his true identity still disguised – addresses to her when they confer together: "[Your] fame [is] like a flawless king's who dreads the gods ... who upholds justice ... thanks to his decent, upright rule ... the people flourish."<sup>123</sup>

On the next occasion of the suitors feasting in the royal hall, the contest between law and lawlessness is further enacted in Telemachus's making a point of announcing that the stranger – whom he now knows to be his father in disguise – shall not be denied his share of victuals. In response, one of the suitors, Ctesippus, hurls an oxhoof at Odysseus as a "proper guest-gift".<sup>124</sup>

### **E The Rule of Law Restored in Ithaca**

The symbolism of what comes next – a pre-meditated orgy of violence in which Odysseus and Telemachus, led by Athena, slaughter the suitors and their followers – is more open to interpretation. That the bloodbath restores the rule of law is unquestionable. But does

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<sup>121</sup> Ibid., 377.

<sup>122</sup> Ibid., 425.

<sup>123</sup> Ibid., 394.

<sup>124</sup> Ibid., 420.



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Odysseus restore the rule of law *in* or *by* killing the suitors? Is the violence part of the restored legal order or a cathartic prelude to it?

In support of the view that Odysseus's violence is rightful and lawful is Odysseus's own characterisation of it: he sees it as making the suitors pay "for all [their] crimes." True, the crimes committed by the suitors ("carving away the wealth, affronting the wife of a great and famous man")<sup>125</sup> fall well short of what befalls *them* – death. But Odysseus, when travelling to Hades after leaving Aeaëa, had learnt from the very lips of Agamemnon (commander of the Achæans during the war with Troy) of the fate that he had met upon his return home: he had been murdered by the traitor Aegisthus in concert with Agamemnon's own wife Clytemnestra.<sup>126</sup> And Penelope's suitors had revealed their character, fundamentally incapable of justice, in the way they treated the supplicant stranger, when Odysseus had tested them in disguise. So Odysseus could be justified in assuming that he, like Agamemnon, might well be the victim of treason.

Penelope's analysis of the suitors' fate – before she realizes it was her husband who has been the instrument of it – lends support to the view that their punishment was lawful: "They'd no regard for any man on earth – good or bad – who chanced to come their way. So, thanks to their reckless works, they die their deaths."<sup>127</sup> The treatment of strangers appears once again as the ultimate test case for deciding whether one is on the side of lawlessness and injustice. If Odysseus's violence is then only apparently disproportionate – if Agamemnon's warning, Odysseus's own putting the suitors to the test, and Penelope's words make it more akin to a form of pre-emptive self-defence – then there is a case for considering the violence the act *in*, rather than merely *by*, which law and justice are restored.

On the other hand, speaking to the lawlessness of Odysseus's violence are its scale and the apparent bloodthirstiness that characterizes it. These recall precisely the savage frenzy and

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<sup>125</sup> Ibid., 482.

<sup>126</sup> Ibid., 262-263.

<sup>127</sup> Ibid., 457.

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excessiveness that Odysseus himself has constantly associated with lawlessness during his journeys, when he used to ask if the inhabitants of a foreign land were “violent, savage, lawless”. It does not help that, after Odysseus has slain the suitors’ leader Antinous, he flatly refuses Eurymachus’s suggestion that the other suitors should be spared on condition that they make generous reparations for depleting the palace’s wealth.<sup>128</sup> Finally, Odysseus’s violence is on the point of inaugurating a new and apparently endless cycle of violence and revenge, for Antinous’s father Eupithes, in the aftermath of the slaughter of the suitors, is ready to lead an armed attack on Odysseus and his men. Zeus, however, considers that it is time for peace. Athena then descends on the ground of the incipient battle and in “a piercing voice that stopped all fighters cold” commands them to “shed no more blood” and “make peace at once” – cowering the attackers into retreat.<sup>129</sup> If, in the absence of divine intervention, Odysseus’s violence would have caused yet more, potentially unstoppable, bloodshed, it is hardly plausible to look at the his killing of the suitors as the new act *in* (rather than *by*) which legal order is re-established.

Odysseus’s violence, then, seems to be of a hybrid nature: it partakes of the law to the extent that it is retribution for, and stops, the suitors’ injustice; but it also partakes of lawlessness because of its excessive quality and the potentially uncontrollable character of its consequences. Indeed, where Athena orders the fighters to “hold back from *brutal* war”,<sup>130</sup> her words suggest that violence, because of its very nature, can never be fully lawful and just, no matter what its circumstances or justifications are.

Despite this recognition of the precariousness of human affairs – as the very violence that re-establishes law threatens, were it not for divine intervention, an even worse descent into lawlessness – the message is not that humans can substitute law, justice and peace for

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<sup>128</sup> Ibid., 441. Furthermore, two of the suitors are killed, it has been argued, on the basis of “guilt by association” rather than because of their own misdeeds. Allan, “Divine Justice and Cosmic Order in Early Greek Epic,” 24-25.

<sup>129</sup> Ibid., 485.

<sup>130</sup> Ibid., 485 (emphasis added).

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lawlessness, war and violence *only if the Gods force them*. It is the very way in which Athena carries out – or fails to literally carry out – Zeus’s injunction to stop the incipient battle that suggests this. Zeus instructs Athena as follows: “Now that royal Odysseus has taken his revenge, let both sides seal their pacts that he shall reign for life, and let us purge their memories of the bloody slaughter of their brothers and their sons.”<sup>131</sup> Athena, however, does not go to the battlefield to *erase* the insurgents’ memory of the slaughter of their dear ones: the reason why the attackers give up their violent plan to take revenge on Odysseus is not that they suddenly find themselves unable to explain why they are geared up and ready for battle. Rather, Athena uses her divine authority to make the attackers *knowingly* decide to renounce revenge and violence. Her manner is suitably peremptory, but her words appeal to normative justifications about the brutality of violence and the undesirability of bloodshed.

Likewise, when her protégé Odysseus is ready to pursue the retreating attackers and Zeus has just signified his displeasure by crashing a lightning bolt at the Goddess’s feet, she bids Odysseus to stop and not to “court the rage of Zeus”.<sup>132</sup> In obeying her, Odysseus is “glad at heart”:<sup>133</sup> relieved, perhaps, at the break he finally gets from these demanding displays of aggressive masculinity, but also inwardly rejoicing in the knowledge that in agreeing to stop the violence he is on the side of law – a “god-fearing” man, fearing the very god (that “Zeus of strangers”) whose demands operate as the litmus test for justice.<sup>134</sup>

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<sup>131</sup> Ibid., 483.

<sup>132</sup> Ibid., 485.

<sup>133</sup> Ibid., 485. Deneen – albeit otherwise aware of the complex relationship in Homer between divine determinism and human will – downplays (unwarrantedly, in my opinion) the significance of this expression in his reading of this passage, concluding that the “institution of justice among humans ... is instigated *perforce* by the gods” (emphasis added). Deneen, *The Odyssey of Political Theory: The Politics of Departure and Return*, 67.

<sup>134</sup> It is significant that the duty of hospitality is an obligation imposed by Zeus rather than some other deity, for, as Segal demonstrates, in the *Odyssey* Zeus (together with Athena) embodies the superior form of divine morality (contrasting with Poseidon’s more archaic orientation towards personal revenge and “pure wrath”). Charles Segal, “Divine Justice in the *Odyssey*: Poseidon, Cyclops, and Helios,” *The American Journal of Philology* 113 (1992): 489, 510. Brown disagrees, on the ground that the validity of Segal’s reading is contingent upon a non-existent unity of discourse between two Hesiodic poems that form the model for Segal’s interpretation. Brown, “In the Cyclops’ Cave: revenge and Justice in *Odyssey* 9,” 18-19, note 50. But Brown’s argument inexplicably assumes that, on Segal’s reading, the treatment of justice in the *Odyssey* must necessarily reproduce a purportedly unitary Hesiodic model, rather than simply sharing or echoing certain elements present in Hesiod’s work.

## 6 Conclusion

Raz quips: “If the rule of law is the rule of the good law then to explain its nature is to propound a complete social philosophy. But if so the term lacks any useful function. We have no need to be converted to the rule of law just in order to discover that to believe in it is to believe that good should triumph.”<sup>135</sup> Raz is right – assuming one’s aim is to provide an account of the rule of law that makes it conceptually distinctive, and that draws attention to the excellence of law in a way that reconciles it with positivists’ insistence that law and justice are not co-extensive. If however our aim is, say, to capitalize on the rhetorical appeal of the rule of law<sup>136</sup> in order to promote normatively desirable goals, then it is warranted to turn to an examination of substantive conceptions of the rule of law, particularly perhaps those that can boast a degree of historical sedimentation.<sup>137</sup>

A study of the *Odyssey* reveals the ancient pedigree of some of the ideas that characterize western thinking about the law. These include some assumptions that have had pernicious consequences, such as the propositions that “primitive” societies don’t have law and that law is unconcerned with the private sphere of family bonds. It is an attractive account of the meaning and normative desirability of being governed by laws vis-à-vis being lawless, however, that is particularly prominent in the epic – so much so that it stands out as the epic’s moral lesson, and endows Homer’s narrative with closure.

It has been argued by others that in Homer’s work, in respect of “such institutions as ... guest-friendship, ... the gods’ concern for their own [honour] is simultaneously a concern

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<sup>135</sup> Homer, *The Odyssey*, 211.

<sup>136</sup> Brian Z. Tamanaha, “The History and Elements of the Rule of Law,” *Singapore Journal of Legal Studies* [2012]: 232; Mathew D. McCubbins, Daniel B. Rodriguez and Barry R. Weingast, “The Rule of Law Unplugged,” 1460-1464.

<sup>137</sup> Interestingly, even Raz considers the fact that his conception of the rule of law is not novel to be a reason for recommending that conception. Raz, “The Rule of Law and its Virtue,” 211.

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for justice”.<sup>138</sup> I have gone further and argued that respect for guest-friendship is paradigmatic of the requirements of justice in Homer’s epic. There are good symbolic reasons for why compliance with the duty of friendliness to strangers acts as the litmus test for judging whether law and justice rule. Contact with a foreigner – a suppliant traveller – is an extreme example of power asymmetry between insiders who can count on the protection and benefits of their community and outsiders who are at their mercy. The outsider status of the foreigner is one of the most egregious examples of vulnerability. The insider’s duty not only to refrain from “cruelty”<sup>139</sup> and abusing the power asymmetry, but to compensate for it through gift-giving and the rites of hospitality points to an unequivocal and demanding standard of justice. True, at least on one occasion the rationale for the duty of hospitality seems to be presented as a matter of self-interested prudence (hospitality being offered on the basis of an expectation of reciprocity) rather than other-oriented justice.<sup>140</sup> But this understanding of the duty of hospitality does not square with Zeus – a third party to the insider/outsider encounter – being consistently represented as the source of the hospitality requirement. One does not offer hospitality merely in the prudence-based hope of future reciprocity, but to abide by divine commands;<sup>141</sup> and though one abides by divine commands partly out of prudential considerations (in order, that is, not to excite divine retribution), one is also “glad at heart”<sup>142</sup> in doing so – glad to be doing the right thing, and standing on the side of justice.

This deontological structure of the duty of hospitality, together with the (generally) stark power asymmetry characterizing those encounters that activate the duty, explains why it is paradigmatic of the requirements of justice. To the extent that friendliness to strangers, thus understood, stands in opposition to lawlessness, it is also symbolically representative of a state of affairs where law rules. Like Aristotle and Plato, then, Homer’s text firmly places the

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<sup>138</sup> Allan, “Divine Justice and Cosmic Order in Early Greek Epic,” 32.

<sup>139</sup> Homer, *The Odyssey*, 294.

<sup>140</sup> *Ibid.*, 477.

<sup>141</sup> Lloyd-Jones, *The Justice of Zeus*, 5.

<sup>142</sup> Homer, *The Odyssey*, 485.

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ideal of the rule of law within a natural law framework. Contemporary formal accounts of the rule of law, in trying to make sense of the idea that state power that credibly conforms with rule of law principles is – quite apart from the substantive goals pursued – automatically better than its alternative, run up against the original logic of the rule of law ideal.