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Plato's Pragmatic Project: A Reading of Plato's Laws

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Two seemingly distinct uses of history are contemplated here, in the juxtaposition of Del Mar's essay and Getzler's. One represents an epistemological refinement, a sharpening of the conceptual tools of legal theory in a manner seemingly innocent of polemical intention. The other represents a doctrinal innovation, a bid to insinuate specific possibilities into the contemporary law of obligations by recourse to a relatively remote past, in a manner which foregrounds the failings of a predominant theoretical school and challenges its ascendancy without going on to prescribe a distinct alternative. Both of these essays stop short of aligning themselves with the historical school of jurisprudence whose renewed salience this volume seems to indicate. And indeed it may be that these three developments remain distinct and separable: the sharpening of legal theory's tools, the sounding out of possible new paradigms in the law of obligations, the revival of interest in the "historical" school represented by Savigny, Maine and Mannheim. Readers of this volume are left with work to do to join the dots; an effect of the novelty and boldness of the enterprise, but one which nevertheless gives this volume a provisional and uneven feel. But alongside earlier interventions by Brian Tamanaha ("The Third Pillar of Jurisprudence" (2015) 56 Wm. & Mary L.Rev. 2235) and contributors to a 2015 *Virginia Law Review* symposium (Charles Barzun and Dan Priel, "Jurisprudence and (Its) History" (2015) 101 Va.L.Rev. 849), this volume would seem to indicate fairly emphatically that change is afoot in understandings of modern jurisprudence. There have not been two pillars of modern jurisprudence – to borrow Brian Tamanaha's metaphor – but three. And it is certainly arguable that the uptake of an updated historical school of jurisprudence might form the basis for both the tool-sharpenings Del Mar envisages and the doctrinal innovations Getzler contemplates.

"There is nothing like foregrounding change over time," Del Mar writes here, "as a solvent for conceptual habits." That is certainly one of history's powers. But the historical school of jurisprudence in its nineteenth and twentieth-century iterations has been a means not of *dissolving* extant categories (modern economic rationality needs no assistance with that) but of *reconstructing* extant categories out of which to build legal and social forms by making the old new again. That is a much more difficult task, a much more contentious business – as Karl Mannheim knew all too well. "One cannot understand history," Mannheim wrote, "without wishing something from history." If contributors to this volume waver between regarding history as a mild empirical corrective to certain forms of theoretical myopia and thinking about history as the engine of a more profound reconstitution of modern jurisprudence, they represent a wider ambivalence. What, in re-opening this "neglected dialogue" with history, are legal theorists wishing for? Answers to that question will determine where this increasingly momentous push to integrate the historical school into contemporary jurisprudence goes next.

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Plato's Pragmatic Project: A Reading of Plato's Laws. By Myrthe L. Bartels. [Stuttgart: Franz Steiner Verlag, 2017. 251 pp. Softcover €49.00. ISBN 978-3-515-11800-2.]

If, as Alfred North Whitehead quipped, all philosophy is a footnote to Plato, then the *Laws* has proven the most troubling subject for such footnoting. One of the final

dialogues, it lacks many of the qualities usually associated with Plato's corpus. The *Laws* communicates much of its content through long didactic passages rather than dialogue between speakers; it rejects pursuit of the transcendent good in favour of wisdom derived from cautious experience; and it prefers authoritative legislation to rule by an elite legitimised by special moral expertise. Consequently, it has endured atypical critical treatment for a major Platonic dialogue. Scholars often interpret the *Laws* primarily in order to gain additional perspective on the *Republic*, or deploy aggressive glosses that suggest the *Laws* says much more than it seems to.

In contrast, *Plato's Pragmatic Project* approaches the *Laws* from the premise that the text deserves to be considered on its own terms. Ironically Bartels's reliance on "the principle of charity" to interpret the text does less to demonstrate that the *Laws* is a rewarding text when considered on its own terms than to vindicate the dominant contextualising approaches. Her analysis exposes a Platonic scheme with anomalously Aristotelian overtones. In the *Laws*, a well-structured society uses context-dependent laws to instil virtue less "essentialist" than typically "Platonic" adherence to transcendent reason; this virtue is characterised by moderation between extremes. To support this revision of statecraft and human excellence, Bartels offers a holistic analysis of the *Laws*' substantive content and of its structure. Substantively, she argues that the granular discussion of codes in the *Laws* is a type of training or practice for legislating rather than definitive real-world instruction for designing a government. Bartels further argues that the interlocutors' own discussion of governance is important primarily as an exercise in virtue-instilment, and exemplifies the type of repeated practice citizens must undertake to achieve a morally sound condition. Practically, no pre-emptively designed law code could accurately predict the array of challenges rulers must actually face; thus experience must play a central role in setting specific codes. To support this reading Bartels closely interprets both the unusual composition of the *Laws*, such as the weaving in and out of a dialogic format, and adopts strong positions on particular puzzles, such as the identity of the Athenian Stranger (whom to Bartels is decidedly *not* Socrates, for his expertise draws from something closer to divine inspiration than any access to metaphysically distinct knowledge).

Bartels's treatment of the *Laws* reveals a work with features of both Platonic and Aristotelian philosophies, but the inexhaustible richness of neither. In basing governance in authoritative norms, the *Laws* retains a defining characteristic of Platonism. In rejecting transcendent reason as the source of this authority in favour of practiced moderation and responsiveness to conditions, the *Laws* commits to an Aristotelian concept of virtue as particularised and developmental. Yet this blended treatment is ultimately dissatisfying, because the *Laws*' moral theory lacks an integral justification. The most explicit instance of this arbitrariness, as Bartels concedes, is the mysterious and oracular basis of the authority of the lawgiver and the Athenian Stranger. Conversely, the moral expertise of the philosopher-kings of the Republic is congruent with rationality, and thus self-justifying and capable of external critical examination. Likewise, because the *Laws*' substantive rules are only one example of how a specific code might be constructed, they do not comprise a general scheme of legal construction. The scheme presented in the *Laws* is less systemically useful than the universal concept of entelechy that undergirds Aristotelian philosophy. In Bartels's reading, the *Laws*' deeper justification of its method is left frustratingly vague and its broader philosophical ramifications remain dubious.

In contrast, classical Platonic philosophy has rich appeal because it captures the challenging implications of the claim that individuals can attain true knowledge of justice. In the formulation of the *Republic,* the moral knowledge of the *Republic*'s

philosopher-kings is universal and indisputable. This doubly validates the legitimacy of their rule, for their access to reason grants philosopher-kings both the technical skills to guide the polity and the self-abnegating wisdom to serve the community rather than their own interests. Plato thereby draws out the anti-democratic paradox at the root of any claim that politics can be informed by definitive moral knowledge. If the possibility of such knowledge is taken seriously, only those with this special moral expertise should govern. Yet if the possibility of such knowledge is rejected, any claim to moral certitude, and thus to infallible political legitimacy, must be denied. Plato describes a whipsaw of moral realism: it either condemns undifferentiated self-governance as mob rule, or necessitates the rejection of the assertion that moral certitude can guide politics.

Conversely, the Aristotelian model emphasises morality as temperate character developed through practice. Aristotle's description of a just polity as the shared governance of equals, each member ruling and being ruled in turn, realises this in the sphere of politics. Such a conception of politics denies that an elite subset of the population (the philosopher-kings of the *Republic*'s regime) should rule, and creates space for *every* citizen to flourish through the exercise of political capacity. By validating mutualistic, distributed self-rule and its pivotal role in individual happiness, Aristotle provides an alternative – perhaps *the* alternative – to Platonic politics as the hierarchical imposition of moral truth. Yet by individuating virtue so that it hangs on the telos of any given entity, Aristotle leaves unresolved how to identify right action or authoritatively define an entity's telos – the very question the formula of Platonic moral realism so elegantly solves.

It is difficult to contest that the political scheme described in the *Laws* falls between these two visions, and Bartels's parsing of the text does nothing to dispel that conclusion. Yet the archetypal Platonic and Aristotelian models have captured attention across disciplines for two millennia because they epitomise two alternative worldviews of morality, politics and law. The *Laws*, taken alone, is of no such general interest. It is unsurprising that most contemporary scholars have tried to explain the *Laws* in relation to one of these two models, typically as a compromise or derivative of absolutist Platonism. Bartels's treatment breaks free of this by treating the *Laws* independently. However, her analysis reduces the *Laws* to a historical curiosity that does nothing to comment on either the lasting appeal or the chilling consequences of the traditional (and extreme) Platonic conception of just rule.

In this respect, *Plato's Pragmatic Project* reflects a lost opportunity. Had Bartels more thoroughly integrated the core puzzles of Platonic philosophy into her sedulous analysis, she might have offered something of greater general interest (though her work would thus have more in common with the typical contemporary scholarship on the *Laws*). Instead she painstakingly describes a scheme of limited, mostly historical, interest for generating legislation. The most satisfying part of Bartels's account is the conclusion, where she provides a more incisive comparison of the politics and metaphysics of the *Laws* to the views of typical Plato (though this comparison reinforces the suggestion that the account of the *Laws* is less interesting). Had Bartels adopted such an approach from the beginning, it might have yielded a text that provided a new perspective on the classic and influential Platonic view. In particular, Bartels's identification of lawgiving as a process of unceasing revision could be used to moderate or adapt the anti-democratic features of rule by experts. This could be linked to the softening of transcendent virtue to reflect an organic flourishing rather than rigid adherence to moral truth. Such an approach would require engagement with the *Laws'* metaphysical reliance on an inexplicable, exogenous divinity to legitimise rule, which makes the schema of the *Laws* less

compelling (because it lacks the internally self-justifying nature of reason in the *Republic*).

Such critique may be absent because Bartels steadfastly adheres to the analytic spirit she declares at the beginning of the book. She states in the introduction that she will read the *Laws* on its own terms, and unsurprisingly she brushes away scholarly attacks on its value, its provenance and its textual integrity. Likewise, she appears insistent felicitously to resolve any problems in the text so as to generate a single coherent reading, even if this demands rather artificial or thin interpretation. This commitment to redemption is especially apparent in her insistence that the "blended" character of the *Laws* as dialogic and non-dialogic is a function of clever design.

Were Bartels to extract intrinsically and independently engaging philosophical content from the *Laws*, her decision to champion the coherence of the text might be validated. However, her analysis ultimately produces relatively little to recommend sustained engagement with the *Laws*. What emerges is a derivative scheme of citizens imbued with virtue by repeat practice, and who are guided by signposts (the lawgiver and the laws themselves). The signposts derive their original moral authority from a mysterious divinity, whose final basis of validity is unclear. The *Laws* may offer a model for constituting a polity, but it is not one that has much to recommend it upon critical reflection other than the fact that it is attributed to Plato. This may explain why most other scholars, in examining the *Laws*, have attempted either to relate it to other works in the Platonic corpus, or, if reading it in isolation, to extract from it a deeper meaning with some echoes of Platonic or Aristotelian thought.

Bartels's style, which is characteristic of a converted PhD thesis, exacerbates this lack of a critical edge. Her organisation is highly structured and somewhat conservative, as each chapter obeys the same format of identifying a specific subject matter in the *Laws* for analysis, and then linearly processing such matter (often breaking it down into smaller chunks that receive discrete treatment, as in her chapters on the nocturnal council and the Athenian Stranger), followed by a rote summary conclusion. The result is a segmented work. Beyond Bartels's observation that the text is more dialogic than most critics have observed, the work does not advance a unified thesis. While Bartels shows admirable familiarity with the scholarship on the *Laws*, her treatment of it is similarly compartmentalised, acknowledging rather than engaging with other scholars. One exception is Bartels's intriguing invocation of H.L.A. Hart. Bartels indicates a relationship between Hart's concept of a web of law which is necessarily incomplete at the fringes and the *Laws*' unique (in the Platonic corpus) predilection for perpetual revision. Both accounts recognise the necessary incompleteness of codification (a point that the mainstream Platonic conception of expertise would necessarily reject). This is a promising opportunity to generalise the analysis that Bartels does not pursue further. It is the type of synthetic analysis that, if further developed, could either catalyse a broader criticism of Platonic philosophy in light of contemporary jurisprudential thinking, or demonstrate how the ideas of the *Laws* are worthy of contemporary attention.

The virtues of *Plato's Pragmatic Project* may make it of greater significance to philologists or those looking for a careful parsing of the *Laws* to aid in their own close engagement. Bartels is attentive to the translation of ancient Greek, including changes in the meaning of particular diction from elsewhere in Plato's writings. The compartmentalised nature of the book also makes it useful to those looking for a signposted guide to the text. It may also aid scholars of law and classics who are seeking to criticise, revise or reinterpret the Platonic idea of moral expertise. However, it will require a significant leap of creativity to demonstrate that the

Laws is, in and of itself, a work that, on the terms Bartels treats it, could provide inspiration to generalist students of jurisprudence or philosophy.

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Provisional Measures before International Courts and Tribunals. By CAMERON MILES. [Cambridge University Press, 2017. lxiii + 517 pp. Hardback £95.00. ISBN 978-1-107-12550-9.]

The law of provisional measures before international courts and tribunals has been the subject of intense academic scrutiny. Since 1932, when Edward Dumbauld published the first monograph on the topic, commentators have written numerous books on provisional measures in English, French, Italian and German and other languages. Nevertheless, the scope of such endeavours has been limited. While provisional measures are a feature of proceedings before most courts and tribunals created by states as a means peacefully to settle international disputes, academic writers have tended to focus on one jurisdiction, usually that of the International Court of Justice (ICJ), or on one international legal régime, such as human rights adjudication. Exceptionally, Shabtai Rosenne's 2005 monograph, *Provisional Measures in International Law*, analysed both the ICJ and the International Tribunal for the Law of the Sea.

Since international dispute settlement organs have proliferated at a sustained pace since 1945, a comparative study of the law of provisional measures is overdue. Cameron Miles's book *Provisional Measures before International Courts and Tribunals* is a welcome addition to the existing literature on this important aspect of international procedural law. Miles's self-avowed purpose is to "argue that not only is there a common and comparative body of principles with respect to the grant of interim relief in international law but that it has rapidly developed in scope and complexity". Miles's comparative study expands on the argument made in earlier monographs, such as Chester Brown's 2007 book, *A Common Law of International Adjudication*, according to which there exists a body of international law applicable to the procedure before international courts and tribunals. While Brown's study responded to concerns over the alleged fragmentation of international law, Miles's enquiry does not discuss such concerns. Through their jurisprudence, international courts and tribunals have shown that the purported threats of fragmentation are less problematic than had been foreshadowed.

Provisional Measures is the product of deep reflection on obvious parts of procedural law, but also on lesser-known historical developments of international law in this area. The book begins by describing the purpose of provisional measures and by detailing the author's scope of enquiry (ch. 1). Three parts follow the opening chapter. Part I, entitled "Preliminary Matters", centres on the historical evolution of the law of provisional measures (ch. 2) and on the constitutive instruments and procedural rules of the international courts and tribunals concerned (ch. 3). Part II, dedicated to "Provisional Measures in General", examines the substantive aspects of a request for provisional measures. Such aspects include prima facie jurisdiction and prima facie admissibility (ch. 4), the plausibility of the rights claimed on the merits and the link between such rights and the measures requested (ch. 5), and the existence of a real and imminent risk of irreparable prejudice to such rights (ch. 6). Part II also discusses the binding character of provisional measures, as