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I

Leon Petrażycki’s voice in the great conversation of *Iurisprudentia* -- of those whom Justinian’s professorial compilers envisaged as earnestly seeking the relevant “knowledge of divine and human things” needed to shape adequately an “explanation of what is just and what unjust”¹-- was and is a voice at once eloquent, searching, and profound. I first heard an echo of it by the seaside in South Australia more than forty years ago, reading through Julius Stone’s *The Province and Function of Law* (1946), which reports a version of his demonstration, by *reductio* to the absurdity of an infinite regress, that sanctions cannot be what accounts for legal obligation. When Stone revised and expanded his vast survey of twentieth century legal thought, Petrażycki appeared now in the volume on the so-called *Social Dimensions of Law & Justice*, as an opponent of certain cloudy ideas that Stone favoured concerning “group convictions”, “group will” and the convergence “through certain psychological processes” of individuals’ responses to “similar environments”. You who know Petrażycki’s work well will not be surprised that I later discovered how far from adequate this antipodean rendering of it was. I am honoured to have this opportunity to make here, in a primary arena of his magisterium, a small contribution to the conversation in which he is a master.

II

¹ *Digest* q.I.10: iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia.

The term “public reason” enters English discourse, so far as we can see,² on the lips of Satan, at one of the pivotal moments in England’s greatest epic poem, *Paradise Lost*. The poet John Milton wrote it, for the most part, while a leading public servant of the 11-year Commonwealth, the regime of the godly, the Puritan and Republican victors in our civil war of 1642-49. Satan, under the black form of a cormorant high in a tree, surveys the harmonious paradise soon to be lost to human beings by his stratagems. His heart, he professes in his soliloquy, “melts” when he contemplates the endlessly cruel revenge he is about to take on the “harmless innocence” of our first parents. But he is compelled, he says, to this revenge -- a deed that otherwise even he would “abhor”. Compelled by what? “*Public reason just*”, that is, “Honour and empire [rulership] with revenge enlarg’d / By conquering this new world” – the human world from “now” down to the world’s end. And there his soliloquy ends. The poet’s immediate comment is more famous with us: “So spake the Fiend, and with necessity, / The tyrant's plea, excus'd his devilish deeds.” (Book iv, ll. 380-94)³

Public reason thus makes its bow (among us in England) as a primary component in a sophisticated mask for motivations one could accurately call private, however widely they may be shared: motives of revenge, will to power, and personal “honour”, all of them passion(s) yoking reason to their service, and by it masked and glamourized (“rationalized”) as reasons. This particular mask, “public reason”,

² *Postscript*: Looking harder, we can see that it had entered English public discourse a few years earlier, in chapter 37 of Hobbes, *Leviathan* (1651), where Hobbes asserts that the question whether it may be taught that miracles occur, e.g. that transubstantiation occurs in the Mass, is one “In which ... *we are not every one to make our own private reason or conscience, but the public reason*, that is the reason of God's supreme lieutenant, *judge*; and indeed we have made him judge already, if we have given him a sovereign power to do all that is necessary for our peace and defence. A private man has always the liberty, because thought is free, to believe or not believe in his heart those acts that have been given out for miracles.... But when it comes to confession of that faith, the private reason must submit to the public; that is to say, to God's lieutenant” (that is, Hobbes holds, to the secular sovereign) (emphasis added).

³ “...Hell shall unfold,
To entertain you two, her widest gates,
And send forth all her kings; there will be room,
Not like these narrow limits, to receive
Your numerous offspring; if no better place,
Thank him who puts me, loath, to this revenge
On you, who wrong me not, for him who wrong'd.
And, should I at your harmless innocence
Melt, as I do, yet public reason just--
Honour and empire with revenge enlarg'd
By conquering this new world--compels me now
To do what else, though damn'd, I should abhor.’
So spake the Fiend, and with necessity,
The tyrant's plea, excus'd his devilish deeds.”

John Milton, *Paradise Lost*, iv, 380-94

belongs in the same semantic and associational zones as “*raison d’état*”, or (analogously, not identically) as “People’s Democracy” in the usage of the mid- to late twentieth century.

“Public reason” has little currency in English, outside Milton’s epic, until John Rawls put it into academic circulation in launching what he called “political liberalism”. In his book *Political Liberalism* (1993, 1996), Rawls proposed a principle of legitimacy: political questions which touch on constitutional essentials or basic questions of justice will be settled legitimately only if the decision-makers reach their decisions using only *public reason(s)*. Public reason is the set of reasons -- principles and ideals – that all citizens “*may reasonably be expected to endorse*”, the set of reasons, that is, which are acknowledged as good reasons by an “*overlapping consensus* of all reasonable people”. The question whether the opinions that overlap in this consensus are correct or true, and whether those reasons are valid or sound, is to be set aside by public reason, i.e. in decision-making on the fundamental questions of political life and legislation. This drastic restriction of public reason’s content and grounding is asserted and defended by Rawls as an implication or requirement of the *principle or criterion of reciprocity*, viz. that the reasons employed and decisions accordingly made must be reasons and decisions that the decision-makers believes *could reasonably be accepted by other people* as free and equal citizens. This principle of reciprocity is, indeed, the source of the (liberal) principle of legitimacy.

The obvious proximity of the inter-related principles of legitimacy and reciprocity to the Golden Rule of fairness is one of the reasons why those principles, and the corresponding “idea of public reason”, are at first sight attractive. And that attractiveness is enhanced by the considerations which in Rawls’s first expositions of these ideas had much more prominence than fairness or reciprocity, namely, the desirability of avoiding religious wars such as ravaged Europe in the sixteenth and seventeenth centuries. “Comprehensive doctrines”, making and testing truth-claims on religious or philosophical grounds, are not within the overlapping consensus and are therefore no part of public reason(s), and can therefore be simply set aside, neither relied or acted upon in the most important public arenas and affairs nor, therefore, contested or fought over in those arenas.

But this initial plausibility and attractiveness has been purchased at a ruinous price: ambiguities so irresolvable as to amount to incoherence; an intolerable

truncation of reason's resources; and a capitulation of conscience in the face of at least some radical injustices.

The ambiguities are at the heart of Rawls's account of "public reason". Like its sister concept "overlapping consensus", public reason is defined by reference to the idea of propositions to which "all reasonable people can be expected to agree". The phrase or its virtual equivalent is repeated scores of times, from beginning to end of the book and in even the last expositions of the theory in 1999. But Rawls never seems to notice its radical ambiguity. "Expected" can be normative or predictive – normative when we say you're expected to come (meaning roughly "should come", come punctually and be polite to the guests); predictive when we say that about ten of the twelve guests invited are expected to come (meaning "anticipated" or "likely" or "probably will come"). If Rawls's argument is to be coherent, the phrase "all reasonable people can be expected to agree to" should not be normative, since if it were, it would presuppose that there is some standard other than consensus, a standard of truth or inherent reasonableness by which to assess the agreement, the reasonableness of those party to it, and the reasonableness of their willingness or unwillingness to assent to the propositions in question. And so the theory would lose its point: citizens and philosophers alike would be looking to the standard, to the truth about the questions arising in public life, rather than, as the theory proposes, to the overlapping consensus as a consensus. Yet on the other hand, Rawls cannot easily admit that his phrase "can reasonably be expected" is merely predictive, since then the content of public reason would be hostage to the dissent of virtually everyone, at least of everyone who has some reasonable views. When you attempt an exegesis of Rawls's text, by tabulating its uses of the phrase and assigning them, in virtue of their context, to either the predictive or the normative interpretation, you finish up with two columns each equally long (with some passages left over, where it is simply impossible to detect one meaning rather than the other).

Still, the link to "overlapping consensus of reasonable people" certainly favours a predictive understanding of "public reason". If so, however, public reason's incipient opposition to *reason* – sound reasons -- is evident and unacceptable. Reasonable people can and do (all of us) subject their understanding and reasoning on one or another matter to the distorting (unreasonable) influence of self-interest or one or another of the many passions that can (sub-rationally but very influentially) motivate. There is no need to resort to mysteries of "group will" to explain the

mutual reinforcement of one person's selfishness by another's, and by small- or large-scale social arrangements, patterns and structures of expectation (anticipation and reliance), and so forth. So a former and reasonable consensus that infanticide is simply to be excluded can be overridden, on Rawls's conception, by a substantial minority of (otherwise) reasonable people whose convenience has suggested to them that it is reasonable to hold that children have no rights until they are aware of and concerned to continue their existence.⁴ Or a majority of those who have crossed the threshold into self-aware, and self-directed life can come to hold that it is reasonable to bring into being other human individuals as resources for experimentation and organ-"donation", provided they are kept unconscious of their existence and fate. And so forth. In both cases, efforts by majorities or minorities or lone individuals to maintain or re-enact the prohibition of infanticide and reproductive slavery would be ruled "illegitimate" by the Rawlsian criteria of public reason as overlapping consensus. Although Rawls himself holds that children get the benefit of the criterion or principle of reciprocity from birth, his theory itself prevents him from advancing any reason why that should be so. (And of course he lamely accepts the historic legal convention, now starkly unreasonable, that birth itself marks the moment before which no rights, not even the right not to be deliberately killed, can be possessed.)

And more generally, it is especially unreasonable that the truncation of reason's reach, of conscience's judgment, by the requirement of consensus should apply precisely in relation to the *most important* political matters, such as *basic* human rights such as the right to be counted an equal member of one's community, notwithstanding one's immaturity or debility.

III

So, despite the good intentions of its author, the phrase "public reason" in Rawls's usage is no more fit for use in a philosophy of political communities or their law than it was in the Miltonic Satan's. Nonetheless, it seems a phrase suitable for summarily conveying the gist of at least four features of classical political thought as expounded by (say) Thomas Aquinas:

⁴ This view is extensively defended by e.g. the Rawlsian philosopher Jeffrey H. Reiman in his book *Critical Moral Liberalism: Theory and Practice* (Lanham, Maryland: Rowman & Littlefield, 1997).

(1) The proper function of the state's law and government is limited. In particular, its role is not (as Aristotle had supposed) to make people integrally good but only to maintain peace and justice in inter-personal relationships.⁵ In this respect, the public realm, the *respublica*, is different from certain other associations such as family and church, associations which, albeit with limited means, can properly aspire to bring it about that their members become integrally good people. As Rawls says, "public reason" is contrasted not with "private reason"—"there is no such thing as private reason"⁶ -- but with the ways of deliberating appropriate to all nonpublic associations, i.e. all associations other than the political community. But then we should add, in line with the best of Western political thought, that what shapes and limits the deliberations of the political community as such – i.e. of its rulers, including voters, as such – is that their compulsory jurisdiction concerns the requirements not of every human good, but of the interpersonal goods of justice and peace which Aquinas regularly names "public good".⁷

(2) Moreover, in determining and enforcing the requirements of public good, the state's law-makers and other rulers (including voters) are entitled to impose as requirements only those practical principles which are accessible to all people whatever their religious beliefs or cultural practices. These are the principles (*communia principia rationis practicae*)⁸ called in the tradition "natural law", on the understanding that they are "natural" because, *and only because*, they are rational—requirements of being practically reasonable—and thus accessible to beings whose nature includes rational capacities. This *accessibility*, I add, is not a matter of assessing/predicting what judgments would be made, and opinions adopted, by people with the cultural formation and stock of prejudices they actually have. Rather, accessibility corresponds to one of the principal "marks" (not a criterion!) of truth: if

⁵ "...kings are constituted to preserve inter-personal social life {ad socialem vitam inter homines conservandam}; that is why they are called 'public persons', as if to say promoters or guardians of public good. And for that reason, the laws they make direct people in their relationships with other people {secundum quod ad alios ordinantur}. Those things, therefore, which neither advance nor damage the common good are neither prohibited nor commanded by human laws": Aquinas, *Opera Omnia*, vol. 14, p. 46* col. 1. See likewise *Summa Theologiae* I-II q. 96 a. 3c; q. 98 a. 1c; q. 100 a. 2c

⁶ John Rawls, *Political Liberalism*, paperback ed. (Columbia University Press, 1996), 220. The long introduction to the paperback edition incorporates the substance of a contemporaneous article in the University of Chicago Law Review, which in turn is substantially reproduced with new touches, as the last chapter in Rawls, *The Law of Peoples* (Harvard UP, 1999).

⁷ See John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998), ch. VII.

⁸ Aquinas, *Summa Theologiae* I-II q. 94 a. 4c.

one holds a proposition to be true, one holds that, at least under ideal epistemic conditions (contextual, evidential, and personal), that proposition would be judged true by everyone – and in that sense is accessible to everyone -- even by those whose temperament or circumstances, as one confidently and reasonably predicts, will in the non-ideal, factual world prevent them from judging it true, or make it unlikely that they will

(3) The central case of government, for Aquinas, is the rule of a free people, and the central case of law is coordination of willing subjects by law which, by its fully public character (promulgation),⁹ its clarity,¹⁰ generality,¹¹ stability,¹² and practicability,¹³ treats them as partners in public reason.¹⁴ I shall return to this at the end of this lecture.

(4) In Aquinas's repeated words of advice to would-be disputants, teachers and professors: "Any activity is to be pursued in a way appropriate to its purpose. ... One sort of academic disputation is designed to remove doubts about *whether* such-and-such is so. In disputations of this sort you should above all use authorities acceptable to those with whom you are disputing... *And if you are disputing with people who accept no authority, you must resort to natural reasons.*"¹⁵

IV

By "authorities", in that passage, Aquinas meant, especially, religious authorities such as the Bible, the Church Fathers, and past and present teachings of the Church he judged to be a teacher of truth. And here we touch upon the primary motivation of Rawls's two inter-dependent constructs, (i) liberalism understood as "political" in the special sense that its fundamental political and legal decisions are made according to (ii) the "public reason" of an overlapping consensus that includes no foundational claims to be justified and true (since all such claims are, he assumes, controversial). The motivation is to avoid religious wars and more or less theocratic oppressions such as have injured European political communities too often, whether

⁹ I-II q. 90 a. 4c.

¹⁰ I-II q. 95 a. 3 c (laws lacking clarity in expression {manifestatio} are harmful).

¹¹ I-II q. 96 a. 1.

¹² I-II q. 97 a. 2c.

¹³ I-II q. 95 a. 3c (disciplina conveniens unicuique secundum suam possibilitatem).

¹⁴ Aquinas thus pointed to all the main features of the Rule of Law, as Lon Fuller, *The Morality of Law* (Harvard U.P. 1969), 242 observes.

¹⁵ Aquinas, *Quodlibetal Questions* IV q. 9 a. 3c.

as that kind of “direct rule of the godly” as was attempted by the government of which Milton was a member, or as forms of political order professedly more secular but in fact ecclesiastically dominated or at least theologically guided.

This primary motivation of the Rawlsian constructs is articulated plainly enough in the passage where he says that “political liberalism [his technical name for his theory of legitimacy] starts by taking to heart the absolute depth of [the] irreconcilable latent conflict” which is introduced when a salvationist, creedal and expansionist religion “introduces into people’s conceptions of their good a transcendent element not admitting of compromise.”¹⁶ Four comments seem appropriate.

First, it is possible for a salvationist, creedal, and expansionist religion to respect liberty, including the liberty of religions which, if it is true, cannot also be true. The religion whose beliefs and practices are in large measure articulated in the documents of the Second Vatican Council, 1962-1965, is such a religion. That Council’s teaching on religious liberty is of particular importance for public reason, for any attempt to develop a sound understanding of the idea of public reason, and of the place of religion in or in relation to public reason. The teaching is proposed in two distinct parts. The first expounds the reasons, discernible independently of any divine revelation or religious faith, why one -- everyone -- is entitled to be free from state coercion directed against one’s religious beliefs and one’s activities expressive of religious belief (including honest and non-coercive missionary preaching) provided that those activities are compatible with “public order”, that is to say, with the rights of other people, public peace, public morality. The primary reason is nothing other than the importance of authentic personal search for the truth about this world’s real origin and subsisting order. Another reason is the state’s limited function and competence. Then the other part of the Council’s document on religious liberty shows that the teaching’s is a harmonious development, a drawing out of the true implications, of the Christian belief, held continuously from the beginning, that no-one must ever be coerced into faith or profession of faith. Here, then, is an “admitting of compromise”, without compromising the creed of this religious faith, its proclaimed necessity for salvation, or its missionary purpose.

¹⁶ *Political Liberalism*, xxvi.

Second, it is not only “salvationist” religions, indeed it is not only religions, that “introduce into people’s conceptions of their good a transcendent element not admitting of compromise”. Every sober and attentive investigation of atheistic revolutionary movements, from the French revolution through Marxism (Bolshevist or otherwise) and Nietzscheanism (National Socialist or otherwise), will find abundant evidence of such “elements” and their psychological and political consequences.

Third, Rawls can be asked whether there are sufficient grounds for an uncompromising adherence to human rights, and particularly to the radical equality and fraternity of all human beings, once it is denied that the existence of human persons begins and is lived in radical dependence upon a utterly transcendent and freely creative intelligence and providence, as is taught by the creed or creeds that Rawls has in mind.

Fourth, if we suspect that those creeds are less “salvationist” and “expansionist”, indeed less “creedal”, than once they were even a generation or two earlier, we should not explain the phenomenon by reference to their embracing and teaching a political human right of religious liberty. On the contrary. Instead, we should reflect that the creedal message of salvation needs to give unbelievers *reasons* to become believers, and needs to give believers reasons to judge that what it teaches about right and wrong in human individual and social life is true – this truth being necessary (albeit not by itself sufficient) to warrant any decision to give political or legal effect to the content of those teachings and judgments about right and wrong. If a creed’s leaders and approved theologians cease to point unbelievers and believers alike towards the rational grounds for accepting that creed in preference to any and all others, then, though it does not thereby lose its entitlement to religious freedom from governmental coercion, its teachings lose the claim they had to legitimacy as grounds for reasonable action by you or me. If that creed’s claim to acceptance as true asserts that it has been revealed by a divine communication at some historical time or times, the credibility of the revelation’s prophet(s), recipients, and witnesses must continue to be shown in the face of every reasonable quest for reason to prefer belief to doubt. That divine revelation is in this sense “public” is essential to its claim to be a legitimate guide to anyone involved in the conduct of the public business of legislation and other political decision-making. (To repeat, this question of legitimacy is distinct from the question of religious freedom from coercion, and

different also from the question of constitutional entitlement to have one's votes counted, an entitlement that – within limits -- does not rest on the reasonableness of the grounds on which it is exercised.)

One mark – a quasi-necessary condition -- of a religion's credibility and legitimacy as a source of reasons for public action is this: that it is willing to sponsor institutions devoted at least in part to maintaining forums and facilities for open, informed, and argumentatively and factually conscientious public discourse, discussion and debate about the foundations (rationally accessible and warranted grounds) of this religion, of any religion, and of human responsibilities of every kind.

V

Analogously, no political or legal philosophy or theory is rationally acceptable or warranted unless (a) all its theses are compatible with the worth of discourse, and (b) it includes some theses – they are likely to be foundational – that not merely are compatible with but also help account for, situate, and confirm that worth. This necessary condition was articulated in the political-philosophical work of Plato, particularly in his dialogue the *Gorgias*, which explores the nature and good (worth) of dialogue, and does so in face of the indifference, skeptical doubts, and proto-Machiavellian or Nietzschean contempt of some of Socrates' interlocutors. The ambition of this short dialogue, the *Gorgias*, is to show the foundations, the sources (*principia*) of natural right, or moral law, by showing how the human interaction of discourse embodies and depends upon that right, and how the equally significant action of private reflection and judgment depends upon, and makes manifest, those same *principia*.

The framework of the dialogue satisfies the procedural conditions for fruitful discourse. The parties – Socrates and Gorgias, Polus, Callicles, and Chaerophon -- are equals in freedom of status and of speech,¹⁷ unconstrained by any pressure for proximate decision and action, united in the degree of mutual comprehension afforded

¹⁷ They meet and discourse in the city where there is “more freedom of speech than anywhere in Greece” (i.e. in the world): *Gorgias* 461e. Note: In general I quote from the translation by R.E. Allen, *The Dialogues of Plato* vol. I (Yale University Press, 1984). Allen's prefatory Comment on the *Gorgias* (ibid., 189-230) is valuable, not least his demonstration of the wide philosophical superiority of Plato's Callicles (not to mention Callicles' philosophical superior, Socrates!) to Nietzsche: ibid. 219-221; and his showing (206) that the fallacies in Socrates' arguments often denounced by modern commentators (cf. Terence Irwin, *Plato: Gorgias* (Oxford University Press, 1979) v) are liable to be in the eye of the beholder.

by a shared and highly articulate and reflective culture, and assembled among free and equal fellow citizens who similarly have a similar cultural unity and (unlike, say, the audience for Socrates' *apologia*) are unconstrained by the artificial rules of court procedure. And from the outset, and again and again, Socrates points to further conditions for fruitful discourse.

The first of those further conditions,¹⁸ the one most overtly articulated, is that the parties to discourse shall set aside speech-making and engage only in *discussion*,¹⁹ in which answer follows and responds to question and is not employed to block further questions.²⁰ But there are other conditions, and Socrates, while indicating them here and there throughout the dialogue, states them most summarily them on the occasion when he also articulates the formal relation – which I have already mentioned -- between *truth* and *consensus under ideal conditions of discourse*. Persons engaged in discourse *will agree*: that is a mark of truth.²¹ The conditions are three: “knowledge, good will, and frankness”²² – (i) a sound, wide-ranging education, (ii) good will towards the other parties to the discourse/discussion (indeed, the kind regard one has towards one’s friends), and (iii) willingness to speak frankly (even when that involves admitting one’s mistakes, self-contradictions, and self-refutation), and not to feign agreement.²³ In the absence of these conditions, even universal assent to a proposition would be no evidence (let alone a guarantee) of its truth.²⁴ These indispensable conditions for worthwhile discussion can be reduced to respect-and-concern for the two human goods which Socrates/Plato keeps tirelessly before the attention of the reader of the *Gorgias*: truth (and knowledge of it), and friendship (goodwill towards other human persons). These conditions are rich and powerfully exclusive. The reader cannot fail to observe what Socrates never *explicitly* affirms: many of the participants in *actual* discourse-communities, not least (and not most) in wealthy democracies, do not meet those conditions. It is therefore impossible, I

¹⁸ *Gorgias* at 461d: “observe one *condition*... bridle that long answer method”.

¹⁹ Discussion: *dialegethai* (447c – contrasted with “a performance”; 449b – contrasted with “that lengthy kind of discourse (*logōn*) Polus began”; 453c – discussion as discourse motivated by desire to *really know* its subject matter).

²⁰ Especially 449b.

²¹ 486e5-6; also 487e, 513d. On “marks of truth”, see the discussion of Wiggins in Finnis, *Fundamentals of Ethics* (Oxford University Press, 1983) 63-4.

²² *Gorgias* 487a2-3: *epistemē, eunoia, parrēsia*

²³ 487a-e; see also 473a, 492d, 495a, 500b-c, 521a.

²⁴ See e.g. 472a, 475e. One must add what is not so often noted by those who speak of the “burdens of judgment” and the “fact of pluralism”, that in non-ideal conditions (i.e. all actual and foreseeable conditions) the *absence* of universal assent to, and the existence of widespread dissent from, a proposition is no evidence of its falsity.

suggest, to justify Jürgen Habermas’s “discourse ethics”, which “adopts the intersubjective approach of pragmatism and conceives of practical discourse as a public practice of *shared, reciprocal perspective taking*: each individual finds himself compelled to adopt the perspective of everyone else in order to test whether a proposed regulation is also acceptable from *the perspective of every other person’s understanding of himself and the world*”.²⁵

You will notice the convergence between Habermas’s requirement of adopting everyone’s perspective and Rawls’s theory of legitimacy’s dependence upon consensus. The proposal that in discourse, and equally in choosing “regulations” of social life generally, we should “adopt the perspective of every other person’s understanding of himself and the world” is incoherent. That is, it refutes itself in the manner that the Socrates of the *Gorgias* explores and comments upon.²⁶ For: some participants in discourse and in social life generally, perhaps many participants, *understand themselves* in more or less uncritical conventional patterns of thought picked up from the surrounding culture (perhaps under comforting descriptions such as “pious”, “traditional”, “enlightened” or “modern”).²⁷ And some, perhaps many, understand themselves just like Polus and Callicles, in their different ways: as more or less covert admirers and desirers of power’s gratifications and rewards, which they prefer to any interest in truth or friendship; they understand themselves as unconcerned, *on principle* (so to say), with the interests or perspectives of other people as such. “Perspectives” such as these should not be adopted, but rather rejected for the sake of discourse (not demagoguery), truth (not mendacious or myth-ridden propaganda), friendship (not self-seeking flattery), and the *real* interests of all

²⁵ Habermas, *Justification and Application: Remarks on Discourse Ethics* (trans Ciaran P. Cronin, MIT Press, 1993), 154 (emphases substituted). Habermas himself from time to time observes that “discourse ethics” envisages “ideal conditions...including...freedom of access, equal rights to participate, *truthfulness on the part of participants*, absence of coercion in taking positions, and so forth”: *ibid.* 56 (emphasis added), and (*id.*) a “cooperative quest for the truth”.

²⁶ E.g. *Gorgias* 495a, 509a.

²⁷ Habermas himself, of course, is well aware of this, and from time to time emphasises it strongly. But I have failed to discover the basis on which he supposes that this fact is compatible with reaching moral conclusions by the method he recommends (*scil.* of adopting the perspective of every other person’s understanding of himself and the world). It is one thing to favour the true interests of each and every person, quite another to favour or adopt the self-understanding of those who do not know or do not care what is truly in their interests.

(including those wrongly interested in adhering to and acting upon their immoral “perspectives”).²⁸

Yet Plato/Socrates remains willing to discourse on friendly terms with Polus and Callicles, these inward admirers of tyranny. Is that performatively inconsistent? By no means. While they are at all willing to listen, he can and will try to illustrate and explain, to them as well as to any bystanders of goodwill, the *worth* – the desirability -- of a friendship (including a public politics) based on shared acknowledgement and respect for intrinsic human goods such as truth and (such) friendship. *Such* goods can be elements of a *common good*.

That the good of truth, and of getting to know it for its own sake, is one among these basic aspects of that human well-being which can be truly common (a *koinon agathon*)²⁹ is a truth which Socrates finds dozens of ways to assert. If his assertions leave Polus and Callicles unimpressed, they perhaps do not fail to move the old sophist Gorgias.³⁰ Indeed, as Plato intended and in some measure foresaw, they are appeals over the heads (and under the guard) of unreasonable people to anyone willing to listen. (And the division between unreasonable and reasonable people is also a division *within* one’s own – in practice, everyone’s -- individual mind-and-will.)

Considered as the benefit to be gained or missed in a discussion (or a course of reflection), truth is a property of the judgments to be made by those (or the one) engaged in the common (or solitary) inquiry. So, existentially, it is the good of understanding and knowledge. Its intelligible goodness, its character as not merely a possibility but also an *opportunity*, is grasped, in practice, by anyone capable of grasping that the connectedness of answers with questions, and with further questions and further answers, is that general and inexhaustible possibility we call knowledge. This grasp of a field of possibility as a field of *opportunity* originates in an act of that kind of undeduced (though not data free!) understanding which C.S. Peirce, in

²⁸ So we must read with due reserve Aquinas’ (Aristotle’s) generous-minded praise of his opponents in discourse; it is due only on the assumption of their goodwill, an assumption often falsified in other contexts. *Sententia super Metaphysicam* XII lect. 9 n. 14: *Since*, in choosing what to believe and what to reject, we ought to be guided more by truth’s groundedness than by affection or illwill towards those who hold an opinion, *so* we should love both those whose opinion we follow and those whose opinion we reject – for they each were seeking to inquire after truth, and each assisted us to do so.

²⁹ *Gorgias* 505e6.

³⁰ See 506a.

common with the tradition originated by Plato, calls *insight*.³¹ The insight is practical, since an opportunity is something *to be achieved* by action. And when the insight is articulated it has the form of a principle, a practical principle; for instance:

“knowledge is a good (for me or anyone) to be pursued (by me or anyone), and its contrary is to be avoided.” In the tradition, such undeduced but perspicuous and foundational practical principles, first principle of practical reason, have the label “(first principles of) natural law or natural right”. Their “is to be”, gerundive and normative, not predictive, is the prototype and indeed source of all other normativity which pertains to any possible action of ours (including the action of judgment). The ur-normativity expressed by that “is to be” of practical first principles is the source, too, of any and every obligation.

Plato presents Callicles, Socrates’ principal interlocutor, as a would-be tempter – we could transpose him as a kind of Satan or disciple of Satan:

Dear friend [Socrates], be persuaded by me. Cease from refutation (*elenchōn*) and practise the music of affairs (*pragmatōn*). Practise that which will make you *seem* wise (*doxeis phronein*). ... Do not emulate men who practise refutation (*elenchontas*) in these petty matters, but rather those who possess life and glory [reputation] (*doxa*) and many other goods.³²

Callicles loves and flatters both the *demos* and his lover Demos (481d, 513b-d), while Socrates takes care not to let the shifting opinions of his own beloved Alcibiades

³¹ See e.g. Buchler, *The Philosophy of Peirce* (1940) 304, a passage in which Peirce, italicising the word “insight”, speaks of “the abductive suggestion [which] comes to us like a flash” as “an act of *insight*”. Peirce’s emphasis on the fallibility of the thought which thus emerges is entirely compatible with the Aristotelian thesis (e.g. Aquinas, *Summa Theologiae* I q. 85 a. 6) that insight (*nous, intellectus*) is *intrinsically* infallible; for in every particular instance, what strikes one as sheer insight (which could not but understand matters as they are) may in fact be a mere “bright idea”, distorted by oversight, imaginative fantasy, and/or prior or subsequent fallacious reasoning. Always, bearing this possibility of error in mind, one must go beyond simple insight to judgment (itself a matter of insight into the fulfilment of conditions of adequacy to the data, validity of argumentation, etc.). Even basic insights into first principles are appropriately reviewed and defended by what the tradition calls “dialectic”. So “wisdom” is a matter not only of drawing conclusions from, but also of making judgments about, indemonstrable first principles, and of rebutting (*disputando*) those who deny them: Aquinas, *Summa Theologiae* I-II q. 66 a. 5 ad 4; Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998) 88. (Underlying Kant’s allegedly “good grounds for abandoning the Aristotelian concept of judgment” (*Justification & Application*, 17) is “the vestigial empiricism so often denounced in Kantian thought”: B.J.F. Lonergan, *Insight* (1958), 154, 339-42; cf. Finnis, “*Historical Consciousness and Theological Foundations* (1992), 16. R.E. Allen, *The Dialogues of Plato* vol. 1, 220, puts the root of the matter straightforwardly – though “insight” is a better term than “intuition” --: “Assuming without argument the nonexistence of intellectual intuition, on which the classical tradition in metaphysics is based, [Kant] undertook to prove that what he called theoretical reason is powerless in metaphysics and ethics...”)

³² *Gorgias* 486c-d.

deflect him from the unchanging arguments of philosophy, his (Socrates') weightier love (482d). Or again: Callicles says that one should dismiss philosophy ("spending one's life whispering with three or four kids in a corner": 485e) in favour of the "free, important, sufficient" affairs of the courts, public and private business, and "human pleasures and desires", the whole voluptuous "music of affairs": 484d, 485e, 486c. He confidently thinks that Socrates will in the end make this realistic choice. *We* like Plato know that Socrates will not. The attractiveness of Socrates' choice – that is, of a conception of human good such as Plato is here expounding with every resource of his art – is the deepest source of one's understanding of obligation. It wrenches an admission even from Callicles, late in the discourse: "I don't know why, but you seem to me to make sense, Socrates. Yet I suffer the affection of the multitude ["the public", we might say] . I don't quite believe you": 513c.

Plato thus makes vivid the tension between "public" and "reason", even as he also makes vivid the intrinsically public character of reason. Just insofar as one has the affection, the passion, of wanting the approval or collaboration of an audience, a "public", of persons who themselves prefer something(s) other than truth – perhaps something labeled Truth or "the truth", or "realism", perhaps something shamelessly sub-rational – one will have set aside, if not lost sight of, the intelligibility and reasonableness that are, as I have said, the root of all obligation, and of the authentic common good or public interest.

VI

It may be helpful to track the general argument one more time, but this time attending a little more to the other of the two basic human goods identified in the *Gorgias*, the good of friendship. For “friendship” is the intelligible core of what Leon Petrazycki calls “love” and, as I understand it, makes foundational to his theory of law when in his early *Die Lehre vom Einkommen* (1893, 1895) he affirms that “the whole of human civilization, in all its positive achievements, is nothing other than a crystallization of love.”³³ And again, a few pages earlier, “Love, under one aspect, manifests itself as reason, and reason, under one aspect, manifests itself as love.”³⁴ With this one should agree, provided that neither reason nor love are reduced to, or even understood primarily in terms of, the emotional, but emotions are understood as naturally aligned or alignable to the intelligible, and supportive of it.

In understanding the intelligible goodness, the intrinsic worth, of truth and knowledge of it, one understands that it is a basic good not only for oneself but for anyone like oneself – a basic *human* good. Moreover, knowledge is not the only human possibility which, by insight into the data of one’s inclinations and capacities, one grasps as an opportunity, an intrinsic good. Friendship, the sharing in human good with another or other persons each *for their own sake*,³⁵ is another such good. For each and both of these reasons, one cannot reasonably seek a fulfilment which is only one’s own. Because there is more than one intrinsic human good, and also because one’s pursuit of any basic human good is not only supported by emotions but also threatened by them in their manifestation as more or less chaotic subrational desires, aversions, and inertia (“licentiousness”³⁶), one needs look to establishing and confirming order in one’s soul: a temperate (including courageous)³⁷ will and character. Because one’s pursuit of fulfilment would be unreasonable and self-mutilating if it were indifferent to friendship and to the worth of the instantiation of human goods in the lives of other people, one needs look to putting in order one’s

³³ Vol. ii, p. 477, quoted in Georges Gurvitch, “Une Philosophie Intuitionniste du Droit”, *Archives de Philosophie du droit et de Sociologie juridique* 1 (1931) 403-20 at 404-5.

³⁴ Vol. ii at 468-9; Gurvitch, p. 405.

³⁵ Not to be confused with the unilateral “altruism” introduced by Comte. Since friend A wills the good of friend B for B’s sake, and B the good of A for A’s sake, A must will also his own good (for B’s sake) and B his own good (for A’s sake), so that each is raised to a new standpoint, concern for a truly *common* good. See Finnis, *Natural Law & Natural Rights* 142-4, 158; *Aquinas* 111-17.

³⁶ 507d.

³⁷ 507b-c.

relations with one's fellows, one's communities. The name for that order, *and* for one's constant concern for it, is justice.³⁸

The recognition of human equality which (as Plato/Socrates makes plain) is the core of a just will³⁹ consists or at least manifests itself first in the recognition that basic human goods are realisable as much in the lives of other human beings as in my own life. To refuse that recognition is to be buried in untruth. If one is thus enslaved to error, one cannot intelligently think oneself happy, really flourishing; to think so would be to bury oneself deeper in untruth, untruth about what fulfilment is. Properly (rationally) understood, knowledge, friendship, fulfilment, and justice are inter-defined.

One cannot, then, have order in one's soul (will) without anticipating and doing what one reasonably can to promote and respect an order of equal justice in one's societies, one's associating or communion with one's fellows. And it would be folly to expect justice and friendship to exist in any society whose members are not concerned to promote and maintain such rational, desire-integrating order in their individual souls (wills). Moreover, just as no-one could intelligently call a society good whose members treat each other as robbers treat their victims, so no-one could intelligently call good the life of an individual who is enslaved to his subrational desires for gratification and thus, too, cut off from the reality, as opposed to spurious imitations, of friendship. In each type of case – the individual and the society – the order in question is good because it is intelligent and reasonable, and the corresponding forms of disorder are so far forth unreasonable and bad. And this appropriateness of good order in the individual and society is not something we just invent; rather, it *becomes clear to us* by experience, thought-experiment, discussion, rational judgment.

So, both because its desirability is discovered rather than dreamed up and because being reasonable is central to what we find ourselves to be (*in potentia*) and

³⁸ “I hold these things so and I say that they are true. But if true, then he who wishes to be happy must, it seems, pursue and practice temperance, and each of us must flee licentiousness as fast as our feet will carry us... This seems to me the mark at which we ought to look and aim in living; so to act as to draw everything of our own and of the city toward this, that justice (*dikaiosynē*) and temperance (*sōphrosynē*) shall be present to him who is to be happy. He must not permit unchastened desires to exist or undertake to fulfil them, for then an endless, aimless evil will be his, and he will live the life of a robber...dear neither to god nor to any man, for it is impossible to live in association (*koinōnein*) with him, and where there is not association (*koinōnia*), there is no friendship.” 507c-e.

³⁹ See e.g. 489b1 (*dikaion to ison*); 508a6 on geometrical equality as informing principle of justice.

reasonably want to become and remain (in act), we can call this reasonable order in the soul and in society “*natural*” – something *naturally* good. And since in each type of case the good, reasonable, natural order can and must be picked out in the form of normative propositions directing one towards individual and social choices promotive and respectful of good order, the relevant directive propositions are appropriately called *laws*.

Thus Socrates/Plato transforms the Calliclean opposition between nature (*physis*) and law/convention (*nomos*) into the recognition of a *natural law* – the set of propositions which pick out (i) the goods (such as knowledge and friendship)⁴⁰ to be pursued and (ii) the principles of reasonableness in realising goods in the life of oneself and one’s fellows – the principles of justice and the other virtues.⁴¹ The Calliclean/Nietzschean⁴² proposal to consider natural and therefore choice-worthy (“just by nature”)⁴³ the rule of the stronger, in ruthless pursuit of the desires they happen to find within themselves,⁴⁴ ends in incoherence and self-refutation. For if the weak, in concert, are naturally stronger than the strong and can subject him to their law and conventional wisdom of equality-based justice,⁴⁵ does their natural strength *entitle* them to rule? Does anyone’s? The “inference” from “is” to “ought” is obviously fallacious.

⁴⁰ For attempts to identify a more or less full list of basic human goods and reasons for action, see Finnis, *Natural Law and Natural Rights* (Oxford University Press, 1980), 59-99; Finnis, *Aquinas* (Oxford University Press, 1998), 80-86; Germain Grisez, Joseph Boyle, and John Finnis, “Practical Principles, Moral Truth, and Ultimate Ends”, *American Journal of Jurisprudence* 32 (1987) 99 at 106-115.

⁴¹ “...proper arrangement and good order of the soul have the name of lawfulness and law, whence souls become law-abiding and orderly; and this is justice and temperance... [and] the rest of virtue...”: 504d, e. “...there is a certain order properly present in each thing, and akin to it, which provides a good naturally suited to it...” Any authentic exercise of practical reason, such as a true art (*technē*) like medicine as distinct from a mere pleasure-oriented knack (*empeiria*) like pastry-cooking (500e5) or cosmetics or rhetorical-sophistic politicking-by-flattery (463b), “considers the nature (*physin*) of the person it serves and the cause [and nature (*physin*): 465a4] of what it does, and is able to render an account (*logon*) of each” (501a1-3).

⁴² For a careful documentation of the close relationship between Callicles and Nietzsche, see E.R. Dodds, *Plato: Gorgias: A Revised Text with Introduction and Commentary* (Oxford University Press, 1959) 387-91; for a brief but deeper philosophical assessment of Dodds’s pages, and of the differences which are rooted in Nietzsche’s post-Kantianism, see Allen, *The Dialogues of Plato*, vol. I, 220-221.

⁴³ *kata physin...dikaion*: 483e1 (and therefore *kata nomon...physeous*: e3); also 484b1 (*physei dikaion*), 488b2-3.

⁴⁴ 482e-484b.

⁴⁵ 488d.

Again, proposing the “principle” (traditionally also the *principium* of Satan’s fall) that a worthwhile life consists in freedom from subjection to others turns out to be performatively inconsistent. For, as Callicles is brought to admit, the proposal implies that one should live by flattery and demagoguery, and conform more or less slavishly (if only for personal safety) to the desires of the many.⁴⁶ And the “principle” that the content of the emancipated life is the search for satisfaction of all one’s desires deprives Callicles of any *basis for* his own judgment that, say, the catamite’s pathetic slavery-to-desire is unworthy.⁴⁷ Its incompatibility, moreover, with the conditions of reasonable discussion (discourse) is made manifest, for readers of Plato’s dialogue to contemplate at leisure: the speech-making, the surliness, the sulky abdication from the to-and-fro of debate, the not too veiled warnings that, outside the discussion, and after a trial by rhetoric -- a public pseudo-reason -- not truth, Socrates’ property may well be confiscated and he himself exterminated.

VII

Socrates was killed “in accordance with law”, and such things happen to this day. So those of us who profess the law have the duty, in reason, to teach it always in its duality, as fact and as reason, calling attention to the tension as well as the interdependence.

Law is at its weakest when it exists simply as the massive social fact of enforced decisions, past and present. For then the decision-makers and decision-enforcers are least likely to acknowledge and abide by the proclaimed rules they purport to be enforcing. The rule of forms of law is far removed from the rule of law. Law is at its strongest and most real when it actually shapes and spans and links the thoughts of the decision-makers to the thoughts of all whom it addresses, including the decision-makers themselves in their subsequent actions. Then law is public reason which is most public and most reasonable precisely because it is shaping the private reasoning of every decision-maker, “public” or “private”. It is most factual when its empirically palpable, “positive” manifestations are understood as evidence – albeit also formative -- of its more actual reality as the set of normative propositions (reasons for action) *made true* by reasonable decision, constantly reaffirmed, to consider the social facts of legislation, adjudication, etc., as having an intelligent and

⁴⁶ 521a-b with 518a-d.

⁴⁷ 494c-e.

reasonable relationship with the strategic moral truths that we need rule by law in order to preserve and promote our common good as persons all needing friends in the face of both anarchy (private force and fraud) and “official” force and fraud.

There can be no other sound explanation either of law’s obligatoriness or of its worth.⁴⁸ Such a set of normative propositions thus made true, and understood and acted on in this way, has a good title to be called public reason in a sense that denotes a systematic and ongoing resistance to Satan, rather than a promotion of evil under the mask of good. And Jurisprudence, *Iurisprudentia*, is entitled to the high status accorded it in that ecstatic sentence of the *Digest*, if it understands its object (subject-matter) of inquiry as to make fresh and meaningful, in every social and political context, the justice of such a relationship between, on the one hand, past and present facts and, on the other hand, present and future human good; and the injustice of mistaking or exploiting that relationship..

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⁴⁸ See further John Finnis, “On the Incoherence of Legal Positivism” *Notre Dame Law Review* 75 (2000) 1597-1611; more fully, “Natural Law: The Classical Tradition”, in Jules Coleman and Scott Shapiro, *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press, March 2002), 1-60; more directly, “Law and What I Truly Should Decide”, *American Journal of Jurisprudence* 48 (2003) 107-130.