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LAW IN ARISTOTLE'S ETHICAL-POLITICAL THOUGHT

by

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A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE
DOCTOR OF PHILOSOPHY

APPROVED. THESIS COMMITTEE

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Houston. Texas

May, 1998
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Darren Weirnack

1998
ABSTRACT

Law in Aristotle’s ethical-political thought

by

Darren Weirnich

Proclaiming that man is a political animal, Aristotle overcame the Sophists’ opposition between law and nature. My dissertation looks at whether the law successfully promotes the human good in Aristotle’s political philosophy.

Aristotle believes law should inculcate the virtues of character. In Chapter One, I argue habituation to virtue through laws does not unacceptably undermine citizens’ autonomy. Aristotle intends the law to inculcate virtue in coordination with other parts of the social fabric, including the household and social customs. Yet Aristotle also believes laws, including laws about moral education, should conform to the goal of the constitution. Many constitutions do not aim at a life of virtue correctly conceived. In Chapter Two, I argue that by promoting the virtue of the citizen in deviant regimes, Aristotle’s lawgiver risks inculcating moral vice.

Chapter Three looks at the basis for the law’s authority in the practical wisdom of the lawgiver. Aristotle identifies legislative wisdom as a form of practical wisdom, and speaks of the lawgiver as a sage. But just as absolute kingship is unlikely, so too is a lawgiver sage. Aristotle’s more realistic account of legislative activity, as conducted by citizens who are often not practically wise, shows Aristotle still values the rule of law for the constraints it places on human bias.
Chapter Four analyzes Aristotle's conception of equity. Because practical affairs are only 'for the most part,' dikasts deciding particular cases in court need to take into account exceptional circumstances. In the light of Athenian judicial procedure, equity is inconsistent with the rule of law. The tension between the two must be tolerated because of the nature of practical affairs.

Chapters Five and Six revisit the question whether Aristotle is a natural law theorist. According to *Nicomachean Ethics* V.7, only the best constitution provides a standard of natural justice. Other passages usually thought to indicate Aristotle held a natural law view either are poor sources for Aristotle's view or have little to do with natural justice. Natural justice provides no specific guidance as is found in later natural law theorists, e.g., invalidation of or disobedience to positive law.
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# TABLE OF CONTENTS

List of Abbreviations ............................................................... vii

Preface ......................................................................................... viii

Introduction ................................................................................... 1

**Chapter One: Law and Virtue** ..................................................... 8
1. The need for νόμων—habitation ................................................. 10
2. Law and Choice ........................................................................ 13
3. Other domains for moral habitation ........................................... 26
4. Conclusion ................................................................................. 31

**Chapter Two: Law and Virtue in the politeia** ............................ 33
1. The Conformity Thesis .............................................................. 34
2. Education in the politeia ............................................................. 40
3. Concluding Assessment ............................................................. 49

**Chapter Three: The Lawgiver and the Authority of the Law** .... 55
1. Legislative wisdom as phronēsis ............................................... 56
2. Lawgiver sages ....................................................................... 57
3. Citizen legislators .................................................................... 64
4. Law and stability ...................................................................... 72
5. Conclusion ................................................................................. 75

**Chapter Four: Equity and the Rule of Law** ................................. 76
1. The Rule of Law as the Mechanical Application of the Law .... 77
2. The need for equity ................................................................... 79
3. Equity and the Mechanical Application of the Law .................. 83
   3.1 Indeterminacy ..................................................................... 84
   3.2 Correcting the law on the basis of its normative consequences 90
4. Equity as practiced by dikasts ................................................... 92
5. Concluding Remarks ................................................................. 96
Chapter Five: Natural Justice. Part I (Nicomachean Ethics V.7) ........................................ 99
1. Three Views of the Relation between Natural and Legal Justice .......... 102
2. Double Aspect ................................................................. 103
   2.1 Double Aspect on the wide sense of 'political justice' ............... 104
   2.2 Double Aspect on the restricted sense of 'political justice' ....... 106
3. Mutual Exclusion ............................................................. 111
4. Partial Overlap ............................................................... 114
   4.1 Positive Law and Political Justice .................................. 114
   4.2 Positive Law and Legal Justice ...................................... 118
   4.3 The 'Variability' of Natural Justice .................................. 122
      4.3.1 Natural Variation .................................................. 124
      4.3.2 Corruption ......................................................... 127
      4.3.3 Against Natural Variation, part 1: natural
            right-handedness .................................................. 129
      4.3.4 Against Natural Variation, part 2: the best politeia ........... 130
      4.3.5 Implications of the Corruption view .......................... 133

Chapter Six: Natural Justice. Part II ........................................ 139
1. Difficulty in using the Rhetoric as a source for Aristotle's views ...... 140
2. The context of Rhetoric I.10 and I.13 .................................. 141
3. Differences between Rhetoric I.10 and I.13 .............................. 146
4. The common law in Rhetoric I.15 ....................................... 149
5. Equity and natural justice ................................................ 151
6. 'Primary' justice ............................................................. 155
7. Unwritten laws ............................................................... 156
8. Natural inequality ........................................................... 159
9. Conclusion ................................................................. 162

Conclusion ................................................................. 166

Bibliography ................................................................. 169
### LIST OF ABBREVIATIONS

**Aristotle:**

<table>
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<tr>
<th>Short Form</th>
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PREFACE

The present study has benefitted greatly from the renewed attention to Aristotle's Politics in the past decade. Along with several collections of essays have appeared a number of new translations, commentaries, and books devoted to the analysis and explication of the texts. When added to Newman's masterful commentary written over a century ago, the student of Aristotle's Politics cannot be at a loss for assistance in his or her attempt to better understand Aristotle's political thought.

My impulse to study law in Aristotle's ethical-political thought arose partly from an interest in how Aristotle's various reflections on law's place in political life fit together, and partly from curiosity about how much Aristotle's esteem for the rule of law draws upon elements of the human condition that still ring true for us today. Whatever one's views about the ultimate coherence of Aristotle's Politics, I have found that Aristotle's writings on law, taken as a whole, complement rather than contradict one another, and so little attempt has been made to consider a developmental approach in the context of this study.\(^1\) In any case, to the extent that oppositions emerge from the texts, they seem amenable to a philosophical account.

In translating passages from Aristotle's works, I have generally consulted the Oxford edition as revised by Barnes (1984), as well as Lord's translation of the Politics (1984). But I have not been reticent to alter translations, where I thought it would make Aristotle's terminology more plain and bring out connections between passages which would otherwise remain obscure. For citations from the Greek, I have made use of Ross's

\(^1\) On the developmental approach and the unity of the Politics, see Jaeger (1948). Cf. also Rowe (1991); Bodéüs (1993); Kahn (1990); and Stocks (1927).

Walzer and Mingay's edition of the *Ethica Eudemiu* (1991), and Kassell's edition of the

*Ars Rhetorica* (1976) for Aristotle; and for Plato's works the five volume edition by

Burnet.
**Introduction**

We live in a world where laws help structure and define our modes of interaction with one another. In countless ways, laws forbid, command, and permit, with the attendant benefits (and sometimes the costs) of social coordination. Even when people disobey the law on moral grounds, they usually do so against the grain, acknowledging the rule of law’s value by its breach.¹

The ancient Greeks were the first to enshrine the rule of law as a value. Whatever ‘the rule of law’ has come to mean today, its origins as an ideal lie in the attempt to overcome the factional struggles which destabilized the *polis*.² In those struggles, the very validity of law and custom (νόμος) was put in question. It fell to Plato and Aristotle to provide a theoretical resolution to the challenge various Sophists posed to the conventions of the *polis*. Aristotle in particular employed the terms of the φύσις-νόμος antithesis in a Hegelian *Aufhebung*.³ No longer were the conventions of the *polis* at odds with human nature: human beings were ‘political’ by nature, born to live and realize their good within the *polis* under its customs and laws.

Because the circumstances leading to the praise of law were particularly fresh in Aristotle’s time,⁴ it is instructive to return to Aristotle for an assessment of the law’s

¹ There are exceptions of course, e.g., anarchists (or at least morally principled anarchists).

² See Ostwald (1986).

³ For Plato, see especially *Leg.* X.888d-892c.

⁴ For a brief overview of the circumstances, see Jaeger (1960). For the development of and multiplicity of influences on the idealization of the law, see de Romilly (1971).
value. Despite Hobbes’ unjustified criticism, Aristotle was well aware that laws were made by men and backed by men’s willingness to enforce them. Nor was Aristotle blind to the fact that laws were made for selfish reasons as well as noble ones. Although νόμοι could refer to social customs and mores in addition to positive laws, Aristotle did not require the lenses of legal positivism to see the problems laws created or to understand their limits. Weaving together the strands of political argument, empirical studies of constitutional forms, and the philosophical reflections on politics which came to fruition in Plato’s Academy, Aristotle identified the problems and the possibilities of law within the broader study of political affairs which we read today in his *Ethics* and *Politics*.

My aim is to see how Aristotle thinks laws promote the human good, and how he handles the difficulties that arise when laws conflict with the good. In a way, this study is an attempt to understand better how Aristotle believes human beings are political animals by nature. If, as Aristotle thinks, laws can promote the human being’s highest ends, it is also true that they may frustrate those ends. While Aristotle believes the law ought to foster the best possibilities of human nature, Aristotle’s attitude to the law in less ideal circumstances reveals not only Aristotle’s belief in the value of the law as a force for a stable social order, but also the extent to which Aristotle is willing to temper the pursuit

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5 *Leviathan* (IV.46.377-378): “And therefore, this is another Error of Aristotles Politiques. that in a well ordered Common-wealth, not Men should govern, but the Laws. What man, that hath his naturall Senses, though he can neither write nor read, does not find himself governed by them he fears, and believes can kill or hurt him when he obeyeth not? Or that believes the Law can hurt him: that is, Words, and Paper, without the Hands, and Swords of men?”; cf. Laird (1943, 12-15).

6 On Aristotle’s claim that human beings are political by nature, see Kullman (1991); Cooper (1990); Brandt (1974); Mulgan (1974).
of human perfection via politics.

The aim of reconstructing Aristotle’s analysis of law and its value raises a second aim. Properly pursued, the study of history is not an exercise in mere intellectual curiosity, but an attempt to reflect on who we are, on what we have in common with our predecessors as well as what distinguishes us from them. Like Aristotle, we hear people praise the rule of law. Unlike Aristotle, we live in large nation-states under a hierarchical network of laws of ever increasing complexity and scope. Despite the continuity of the rule of law as an ideal, it is impossible to ignore the great differences in social conditions. This continuity in the face of social change raises the question whether ‘the rule of law’ is not so much an ideal as a slogan. If it is an ideal, it is one which must be evaluated in light of the prevailing conditions. Underlying the historical bent of this study, then, is ultimately a desire to understand whether Aristotle’s regard for the rule of law as an ideal holds up in spite of our changed circumstances, whether his estimation of the law is based on persistent features of the human condition rather than the contingencies of time and place.

Any attempt to study law in Aristotle must begin with the fact that none of the extant writings of Aristotle is devoted to a systematic analysis of laws or legal systems as such. According to the catalog of Aristotle’s works preserved by Diogenes Laertius, Aristotle composed a work in four books entitled “Laws,” but we have no evidence of its contents.7 While Aristotle tells us at the end of the Nicomachean Ethics that the

investigations to be undertaken in the *Politics* are "about legislation" (X.9.1181b13), he plainly intends his inquiry to be about the political regime (*politeia*), not about laws or legal systems in their own right (cf. *Pol*. III.15.1286a2–4).

Nonetheless, in a number of lengthy passages, Aristotle devotes considerable attention to the purpose of law, the justification of its authority, and the philosophical and practical problems to which the rule of law gives rise. Unfortunately, modern scholarship has paid insufficient attention to the interrelations between these discussions. In part this is because, like Being *qua* Being, the various discussions of law in Aristotle’s thought seem to fall immediately into genera. But just as there are focal relations among the categories of Being, so too Aristotle’s various treatments of the law’s purpose and authority bear on one another in ways one cannot easily see were one to consider those discussions in isolation from one another. While the passages in Aristotle discussing law neither stem from a systematic organizing framework nor admit of being woven into a narrative unity, taken together they offer a fuller picture of Aristotle’s vision of the promise and pitfalls of law, and of politics more generally. In the remainder of the Introduction, I hope to indicate the way my dissertation tries to unveil the nature of this vision.

In Chapter One, I examine the way in which laws aim at human happiness or well-being (*eúdoaimovía*), according to Aristotle. Since human happiness consists in a life of

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8 The most comprehensive treatments of Aristotle's views on law remain those of Cairns (1949) and Hamburger (1951). To these works may be added a number of shorter studies: Wormuth (1948); von Leyden (1967; cf. 1985); Aubenque (1980b); Schroeder (1981); Yack (1993, chapter 6).
virtuous activity, and the *polis* aims at human happiness. Aristotle thinks the laws should help foster the virtues of character. Against those who criticize Aristotle for supposing that laws are an effective means to inculcate the virtues, I argue that Aristotle was right to think laws could effectively promote the virtues. In particular, through a process of habituation, laws can help citizens form the moral habits which are the precondition of the virtues, so that citizens later come to choose virtuous activity for its own sake. In addition, I argue, Aristotle presupposes that the noncoercive aspects of the law are necessary ingredients if habituation through law is to take root in citizens.

However, many regimes fail to aim at a life of virtuous activity, and the lawgiver must enact laws in service of the ends of the political regime for which he legislates. In Chapter Two, I argue that the lawgiver does not simply give up on the virtues in favor of stability; rather, laws inculcating the virtues are adjusted to the characteristic aims of inferior regimes. As a result, the virtue of the citizen may often fall short of full moral virtue, sometimes so much so that it shades into moral vice. But the adjustment of laws and education to the aims of the regime reflects the lawgiver's recognition of the limits of the coercive power of the law, by itself, to instill full moral virtue.

In Chapter Three, I turn to the justification of the law's authority in virtue of the lawgiver's practical wisdom. When coupled with the ancient Greek's tendency to identify the lawgiver as a sage, Aristotle's picture of the lawgiver as a practically wise agent invites an explanation of the law's authority as deriving from the original lawgiver's wisdom. Yet Aristotle was as aware of the practical difficulties of such an account as he was of the actual foibles of contemporary legislative assemblies. Where the
lawgiver’s wisdom is lacking, the law still retains authority due to features of the legislator’s role. Specifically, the law’s generality and its greater distance from the particularities of individual cases reduce the influence of biased judgment. Although ordinary legislators do not usually live up to the picture of a lawgiver sage, the checks that laws place on rulers’ inclination to rule in their own interests make the rule of law preferable to the unconstrained judgment of men.

Despite the importance of using laws to guide human judgment, Aristotle is sensitive to the inflexibility of legal rules. In Chapter Four, I consider how Aristotle attempts to mitigate the law’s inflexible character in his doctrine of equity. Equity is needed because the lawgiver cannot take into account all the possible circumstances when formulating a law. However, I argue that equity permits those judging in particular cases too much freedom to dispense with or interpret the law in accordance with their biases and inclinations. By allowing equity as a remedy for the law’s inflexibility, Aristotle weakens the ideal of the rule of law as a constraint on judgment.

No study of law in Aristotle’s thought would be complete without an account of the famous passages concerning natural justice and its relation to law. In the final two chapters of my dissertation, I assess the value of the evidence for the assertion (and the denial) that Aristotle believes standards of justice inherent in nature permit citizens to disobey or invalidate the law if the law should conflict with those standards. Chapter Five takes up Aristotle’s compressed and obscure discussion of natural justice and legal justice in *Nicomachean Ethics* V.7. Against two trends in recent scholarship which deny traditional natural law interpretations of Aristotle’s discussion, I contend that Aristotle
thinks laws may conflict with naturally just norms. But in contrast to natural law
theorists. I argue that in *EN V.7* the standard of natural justice is the best constitution, the
norms of which are inapplicable in most circumstances. In the following Chapter, I
consider the evidence elsewhere in the *Corpus Aristotelicum* which suggests that
naturally just norms apply in societies other than those under the best regime. I claim that
in these passages Aristotle does not endorse setting aside or disobeying the positive law
because it conflicts with the just by nature. Despite the role the just by nature may play in
the evaluation of positive laws as just or unjust. While natural justice may serve in a
reformative role, Aristotle's support for the rule of law in inferior regimes precludes him
from advocating an appeal to natural justice as a grounds for civil disobedience.
Chapter One: Law and Virtue

Aristotle believes laws should promote the virtues of character. Modernity has not been kind to this belief, and not merely for its paternalist implications. For example, over a century ago. T.H. Green objected that the law's "business is to maintain certain conditions of life--to see that certain actions are done which are necessary to the maintenance of those conditions, others omitted which would interfere with them. It has nothing to do with the motive of the actions or omissions, on which, however, the moral value of them depends" (1986, 19). Laws could not prescribe morality, for moral action consists in acting for the sake of the act itself, or what Green calls "the disinterested performance of self-imposed duties" (22). Thus the view that laws could make people good "rests on a misconception of morality" (22).

Is Aristotle wrong to believe that laws can effectively promote moral dispositions? And is he insensitive to the problem that laws promoting virtue often have unintended negative consequences which far outweigh the good they might otherwise do, for example, by creating resentment or resistance? ¹ I will argue that Aristotle had it right in thinking laws can be effective ways to foster the virtues of character, and that Aristotle constructs a powerful case in favor of using laws to bring about virtuous citizens.

Before I turn to Aristotle's reasons for thinking laws can make us virtuous, it is necessary to consider the objection that Aristotle's views are simply inapplicable to modern societies because of the enormous differences in social conditions. The objection here is not merely that Aristotle had in mind a time-bound conception of the moral virtues

which were best exemplified in activities peculiar to the *polis*. for example, equipping a chorus. If we do not share Aristotle's particular conception of the virtues, many of us nonetheless value excellence of character as part of a good life. So if Aristotle's list of virtues does not fully coincide with our list (or lists), one could still agree with Aristotle that laws should promote the virtues of character.

Rather, the objection is that (as Gerson writes) the modern state "is at best a locus of potential *poleis" (1987, 224).² The *polis* was a smaller, more closely-knit society, with a lesser degree of differentiation in ways of life and views of the good, and constantly vulnerable to attack by expanding empires and neighboring cities.³ Social pressures encouraging virtuous action were more likely to reinforce, and be reinforced by, laws promoting the good in a *polis*. *Nomos*, the Greek word for law, reflects this greater cohesion of the *polis*. for *nomos* could refer to social custom as well as to written law.⁴ As a matter for interpreting Aristotle, the duality of *nomos* means we need to be careful whether Aristotle has in mind *nomos* as social custom or as written law. But even more importantly, we must be careful about generalizing from the political community of which Aristotle speaks to our own. As I will argue, Aristotle presumes laws promoting the good require an adequate foundation in social norms and practices if they are to achieve their aim.⁵ Because the modern state plays the role of umpire in the face of a


³ See Holmes (1979). Note that this is a comparative claim and should not be exaggerated. The *polis* was hardly a perfectly harmonious community. See Yack (1993, 71-85).


⁵ Cf. Pol. IV.5.1292b10-21
diversity of conceptions of the good life. we cannot assume that Aristotle's presumption holds good for ourselves.⁶

A final point about modern conditions: according to many contemporary liberals, particular conceptions of the good are beyond the state's legitimate sphere of action. For Aristotle, by contrast, the political community aims at the most authoritative (κυριωτάτη) of all human goods (Pol. I.1.1252a5-7; cf. EN I.2.1094a21-b7). The polis "comes into being for the sake of living, but it exists for the sake of living well" (Pol. I.2.1252b29-30).⁷ Living well consists in human happiness or well-being (εὖδαιμονία) (cf. EN I.4.1095a19-20), which Aristotle defines as an activity of soul in accordance with virtue (I.7.1098a16-17).⁸ Thus, for Aristotle the political community has as its goal the virtuous activity of its citizens.⁹ It would be interesting to imagine how Aristotle might defend this view of the political community against the charge that it violates the neutrality condition. But I shall not attempt that task here.

1. **The need for νόμοι—habituation**

Aristotle addresses the connection between law and virtue in the final chapter of the EN. Having just studied the contributions of friendship, pleasure, and the virtues of

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⁸ Cf. EE II.1.1219a26-35; Pol. VII.1.1323b41-1324a2.

⁹ For the purposes of this discussion, I leave aside questions about the different ways in which the virtues of character and the intellectual virtues contribute to human happiness. On both the "inclusive end" interpretation of εὖδαιμονία and the "dominant end" view, the virtues of character contribute to the good life. That is sufficient reason to focus on the way in which law is supposed to inculcate these virtues.
character and intellect to human happiness or well-being (εὐδαιμονία). Aristotle reemphasizes that the goal is not "to study and recognize the various things, but rather to do them" (EN X.9.1179a33-b2). The point is to "try to have and use" virtue, not just to know what it is (EN X.9.1179b3). We acquire the virtues of character through habituation. One becomes virtuous by performing virtuous acts (II.1.1103a31-b2: b13-25). The repeated performance of such acts habituates the agent to perceive the morally salient features of a situation, to feel the appropriate emotions in particular circumstances, and to feel pleasure and pain in the right circumstances and in regard to the right things. Since "the noble and pleasant things vary according to each person's state of character," it is important to practice virtuous activities and abstain from vicious ones, so that one comes to delight in the pleasures proper (οἰκεία) to virtuous activities and to perceive vicious activities as painful (EN III.4.1113a22-b2). What is good and pleasant to the virtuous person may not seem pleasant or good to one who has not practiced virtuous acts and abstained from vicious ones.

Because habituation strongly influences an agent's conception of the good.

10 Cf. EN I.3.1094a4-6; II.2.1103b26-30; EE I.5.1216b20-25

11 See, e.g., EN II.1-4; II.9; X.1.1172a19-25. These aspects of Aristotle's ethical theory have been much discussed. See Broadie (1991); Nussbaum (1990, 1986); Sherman (1989); Burnyeat (1980); Sorabji (1980a); Kosman (1980); Annas (1980); and Fortenbaugh (1975).

12 Cf. EN VII.5.1148b15-18; VII.12.1152b26-32; 1153a2-7; X.5.1175b24-29; 1176a3-29; X.9.1179b13-16; b29-31; EE VII.2.1237a1-9; Pol. VIII.3.1338a5-9.
Aristotle holds that arguments and speeches (λόγοι) are unlikely\textsuperscript{13} to persuade those who have been brought up in bad habits:

argument (λόγος) and teaching, we may suspect, are not powerful among everyone, but the soul of the listener must be cultivated beforehand (προδεικτίργάσθαι) for enjoying and hating in a noble way, just as earth which will nourish the seed. For he who lives following passion would not listen to a dissuasive speech, nor would he understand it if he did listen. And how is it possible to change by persuasion one who is disposed in this way? Generally, passion seems to yield not to reason but to force (βία). The character, then, must somehow be present beforehand (προϋπάρχειν) with a kinship for virtue, desiring the noble and hating what is base.\textsuperscript{14}

\textit{(EN X.9.1179b23-31)}

If human beings are to become good, it is crucial that they be trained to practice virtuous acts. Without such preparatory training (as implied by the "προ" in "προδεικτίργάσθαι" and "προϋπάρχειν"), human beings do not identify their own good with what is truly good (that is, with what seems good to the virtuous agent), so that they are unlikely to be persuaded to act virtuously given their own conception of the good. The threat of punishment is needed to prod those with bad habits to practice acts of virtue, so that they may come to appreciate the value of virtuous activities by their repeated performance, with fear eventually giving way to understanding.

In response to the need for habituation in the virtues of character, Aristotle claims that laws should serve as the instruments of that habituation: "it is difficult to get from youth up a correct training for virtue if one has not been brought up under correct laws"

\textsuperscript{13} On Aristotle's view, reason may sometimes persuade contrary to habit: "nature, habit, and reason must be in harmony with one another: for they do not always agree: men do many things against habit and nature, if reason persuades them that they ought" (\textit{Pol. VII.13.1332b6-8}).

(EN X.9.1179b31-32). Note that Aristotle clearly means written laws here, as he emphasizes the fear of punishment and the compulsive power of nomos (EN X.9.1180a4-5; a8-14: a21). Moreover, Aristotle does not mean that laws only provide a stable framework in which an education in the virtues of character may take place by other means. By prescribing the proper upbringing (τροφή) and practices (ἐπίτηδευματα), laws are supposed to have an effect on the character of those who live under them.15 As Aristotle says elsewhere. "lawgivers make the citizens good by forming habits in them" (EN II.1.1103b3-4).

2. **Law and Choice**

If the polis may use laws to promote the virtues of character through a process of habituation, it does not follow that laws are an effective way in which to enable citizens to become virtuous. First, laws seem to be appropriate instruments for the enforcement of good behavior, but not of virtuous motives. For example, D. J. Allan writes.

> the various provisions of the law do not require men to be courageous, temperate and so forth, but only to display the behavior of courageous and temperate men, whether they really are so or not, on pain of unpleasant consequences.

(1965. 69)

Thus one may argue that laws cannot really promote virtue, because virtue is a disposition of character and not mere external behavior. As Hurka puts it. "Because Aristotelian perfection is largely inner, it is not open to the public inspection that effective regulation requires. How could a government be certain how nuanced a citizen's intentions were, or whether he intended his acts as parts of a unified life? Given this uncertainty, how could

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15 EN X.9.1179b34-35.
laws requiring such inner states be enforced?” (1993. 152-3). Laws may effectively regulate actions, but not motives.  

Aristotle is certainly aware that one can obey the law without having a virtuous character. In the first place, he holds that "the many obey necessity rather than argument and punishments rather than what is noble" (EN X.9.1180a4-5). Furthermore, Aristotle states that  

just as we say that some people who do just acts are not necessarily just. for example, those who do the acts ordained by the laws either unwillingly or owing to ignorance or for some other reason and not for the sake of the acts themselves (although they do indeed do the things they ought and as many things as the good man ought), so is it. it seems, that in order to be good one must be in a certain state when one does the particular acts; I mean, i.e. [that one must do the acts] through choice and for the sake of the acts themselves.  

(EN VI.12.1144a13-20)  

So Aristotle clearly recognizes that we are not acting virtuously simply by acting in conformity to the law, and Allan seems right when he points out that Aristotle says that the law commands that we do the deeds (εργα) of the virtuous person, not that we be virtuous (cf. EN V.1.1129b20). As we should expect, doing what the law says is not sufficient for virtue. One could do everything required by the law and yet lack a virtuous character.  

However, it does not follow that the law cannot effectively habituate citizens by commanding them to act in the ways which the law requires. If one accepts that the polis  

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16 Lawgivers are of course concerned with the voluntariness of an action in order to assess moral responsibility (EN III.1.1109b30-35; Rhet. I.13.1374b2 ff.). As Allan points out, this shows only that once "a culpable action has been done, it does become necessary for the sake of legal redress to decide whether it was done voluntarily" (1965, 69).
has for its end citizens with virtuous characters, then the issue is whether by requiring deeds laws do not also habituate. Since "we become just by doing just acts, moderate by doing moderate acts, brave by doing brave acts" (EN II.1.1103a34-b2). Aristotle has reason to think that by repeatedly performing some acts and refraining from others people can develop the traits of character by which they become virtuous. Once habituated, they will value virtuous action, so that they do not resent its prescription. In this, written laws do not differ from social customs or parental commands inasmuch as they enjoin acts of specific sorts. As long as one accepts that habituation can take place through the repeated performance of or abstinence from actions of certain types, the mere fact that laws cannot effectively enforce motives or attitudes in no way rules out that the law may indirectly bring about virtuous states of character in citizens.\(^\text{17}\) The law may actually specify the sorts of acts which one must perform or from which one must abstain. Thus the law prohibits the performance of cowardly acts such as casting away one's arms or abandoning one's station in battle (EN V.3.1129b20-21).

Moreover, the law may foster moral habituation in other ways than commanding virtuous acts. Insofar as laws express norms accepted in the political community, they are forms of approval and disapproval which may influence citizens' views of right action as surely as social customs and traditions. Indicative of the law's connection with social approval is the sense in which justice corresponds to the lawful (EN V.1.1129b11-1130a13; V.2.1130b18-29). For Aristotle, justice in this sense is "not part of virtue but

\(^{17}\) In terms of the classification scheme set out by Raz (1979c), the habituative aspect of the law is one of the law's indirect social functions.
virtue entire" (V.1.1130a9). The lawful, which includes written law, is thus an expression of goodness as conceived in the political community, and as such will affect citizens' conception of the good.\textsuperscript{19}

In addition, laws may create or support social frameworks in which habituation is likely to occur through other means, marshaling social customs or channeling human activities in ways more likely to encourage virtuous activity. For example, following Spartan and Cretan practice. Aristotle recommends the institution of common meals in the best regime (\textit{Pol. VII}.10.1330a3-4). As Morrow notes.

There is probably no better way of confirming a man's convictions than having him break bread regularly with persons of the same beliefs. . . . When these groups are small, as they were in Crete and Sparta, and when the exchanges that take place at table are protected by a tradition of secrecy, as we are told they were at Sparta, they provide unique opportunities for learning the character of one's fellows and being influenced by them.

(1960b. 392-3)

So laws may still have as their intended purpose the moral habituation of citizens, without being concerned with the enforcement of motives.

Many laws may also be designed either to check behavior that tends to cause faction and undermine social bonds, or to require behavior that is thought to be necessary for or highly beneficial to the continued existence of the political community. But this does not imply that some laws (even the same laws) could not be used to habituate. If the law bids us "not to desert our station or take to flight or throw away our arms" in military

\textsuperscript{18} See Allan (1965).

\textsuperscript{19} Cf. Plato, \textit{Leg.} 644c-645c.
campaigns. it might serve both to keep the polis from harm and to encourage citizens to be courageous. To be sure, acting courageously merely out of fear of the law's penalties or out of fear of shame or social reproach is not true courage, i.e., it is not to act for the sake of what is noble, but is rather "political courage" (EN III.8.1116a17-b3; EE III.1.1229a13; a29-30; 1230a16-21). Laws often serve the purposes both of the polis's survival and of the moral habituation of its citizens. Citizens might develop true courage by performing acts of "political courage." They might learn to act for the sake of the noble by first acting out of fear of punishment or social reproach.

Fear of the law's penalties leads us directly to a second issue, namely, whether acting in conformity to law hinders an agent's ability to act in accordance with choice (prohairesis). Choice is an essential component of a virtuous character (EN II.6.1106b36; III.2.1111b5-6): one condition for being a virtuous agent is that one "must choose the acts, and choose them for their own sakes" (EN II.4.1105a31-32). If laws turn out in practice to prevent people from choosing to perform virtuous acts for the sake of the acts themselves, then the lawgiver would be mistaken to use laws to promote virtuous states of character, though he might use them to prevent bad behavior and encourage good.

There are at least two ways in which one might argue that an act enjoined by the law "may stifle prohairesis." The first is suggested by Barker:

Neither Plato nor Aristotle allows weight to the fundamental consideration

20 Though it should be noted that the form of "political courage" is said to be due to virtue and is most like true courage in that it is due to shame and a desire for honor, since honor is noble (καλόν) and disgrace ignoble (αἰοχρόν): EN III.8.1116a27-29.

21 The phrase is from Allan (1965).
that moral action which is done ad verba magistri ceases to be moral. The state should indeed promote morality; but the direct promotion of morality by an act of state-command is the destruction of moral autonomy. The good will is the maker of goodness; and the state can only increase goodness by increasing the freedom of the good will.

(1946. li)

This seems to imply that to do an act enjoined by the law is to be deprived of one's "moral autonomy," i.e., the ability to act according to one's own choice.\textsuperscript{22} However, Aristotle's account of choice does not imply that one cannot choose to perform an act enjoined by the law for the sake of the act itself, as well as for the sake of obeying the law. Choice involves a deliberative desire to perform an action that is in one's power (\textit{EN} III.3.1113a10-11). One need not choose to act in conformity to the law simply in order to avoid its penalties, but out of any number of motives, some noble and others not. To assume that any act of obedience to law involves the "destruction of moral autonomy" implies that no law-abiding act is compatible with choosing that act for its own sake—which is plainly false.\textsuperscript{23} The virtuous possessor of the ring of Gyges may

\footnotesize{\textsuperscript{22} It would of course be both anachronistic and a philosophical mistake to identify Kant's conception of moral autonomy with Aristotle's conception of prohairesis. But Barker's main point can be recast into Aristotelian terminology without losing its force. Cf. Polansky (1979).}

\footnotesize{\textsuperscript{23} As Barnes rightly notes (1990, 252). Irwin recognizes that one "must realistically allow the virtuous person more than one motive for her action" (1988a, 419). But he then goes on to claim that Aristotle cannot endorse this view with regard to the compulsion of the law, drawing an analogy between a lack of leisure and compulsion: "The best activities must be chosen when they are not necessary; for we want our rational agency to make an actual difference to our lives, to shape them without the pressure of necessity. If this is Aristotle's view of leisure, should it not also be his view about moral education? Should he not, therefore, require a degree of freedom that precludes public enforcement of moral education?" (419). Thus Aristotle's view of choice would seem to remain inconsistent with legal compulsion. Irwin tries to resolve the inconsistency by claiming that civic friendship involves an extension of virtue friendship to all citizens, so that a "common moral education is not a disagreeable constraint or an arduous burden. Virtuous citizens welcome it as part of the good that they choose for the ideal state" (421). This seems to me problematic in several ways: the rationale for having leisure, the}
choose not to steal because she considers stealing unjust. In so choosing, she acts as the law commands, but also according to choice.

There is a second, more plausible way in which one might argue that the law hinders choice: one might say that because the law involves the threat of punishment, agents will be less likely to consider other reasons for obeying the law. The threat of coercion restructures the choice situation so as to magnify the relevance of non-virtuous motives such as fear, obscuring appeals to nobler reasons. Thus agents would be less likely to perform a virtuous act for the sake of the act itself.\footnote{Cf. Hurka (1993, 154).}

To the extent that motives can be assessed, this seems to be an empirical matter. Aristotle could argue as a counter-hypothesis that people would actually be more likely to perform good acts from a virtuous disposition when they have received moral training from youth. Modern practice does not seem to differ much in regard to children. We do not assume that the threat of punishment prevents children from coming to learn the value of good acts as they grow older. A child’s fear of punishment helps her to learn what sort of actions and motives are appropriate and what sort inappropriate. Over a period of time, the initial fear may give way to an ingrained feeling that certain sorts of action and motives are good or bad. Later still, as the child grows older and develops her powers of reflection, she may come to see the good life as including or excluding certain sorts of actions and motives. So \textit{prima facie} it does not seem ineffective to use the threat of comparison between a lack of leisure and compulsion, and the extension of civic friendship into a type of virtue friendship. This would take me far afield from my main task, however. On problems with making civic friendship a kind of virtue friendship, see Annas (1990).
punishment as an aid to developing the moral habits from which people will come to act virtuously for its own sake.

If laws may have a place in the moral education of children, it does not follow that they ought to play a role in the continuing moral habituation of adults. Children have not yet developed their rational capacities. Aristotle thinks that adults should also\textsuperscript{25} be compelled by laws to practice virtuous acts:

\textit{But perhaps it is not enough that those who are young receive a correct upbringing and care, but since those who have become men also need to practice and be habituated in the same things.\textsuperscript{26}} we would need

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\textsuperscript{25} Depew argues that "at \textit{EN} X.9.1180a1-19 \ldots the context \ldots is explicitly restricted to the uneducated many" (1991. 373). But while laws habituating adults might aim especially at those in whom habituation in virtue has not taken root, such laws apply to all citizens, and so include the educated just as the uneducated.

\textsuperscript{26} Whether we should read "\textit{αὐτὰ}" ("the same things") with the manuscripts or "\textit{ἀὐτὰ}" ("them") with some commentators (see Gauthier and Jolif (1959); cf. Burnet (1973); Stewart (1892) \textit{ad loc.}) is not crucial to my analysis of this passage, although "\textit{αὐτὰ}" strengthens the point. What is more important is that adults still need to be habituated in virtuous activity after having received moral education in their youth. Lord wants to retain the manuscript reading, on the grounds that "[throughout] this passage Aristotle stresses the continuity between the 'practices' required of the young and those required of older men" (1982, 153-4) (for a similar remark, cf. Stewart (1892)). We should note, though, that this "continuity" need concern only habituation in noble acts \textit{qua} noble, not the specific content of such training. Thus there is no need to presume, as Gauthier and Jolif do, that if we retain "\textit{αὐτὰ}" Aristotle is saying that adults must practice the very same activities as children.
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laws about these things too, and generally about the whole of life.

Here laws are needed to train the emotional and desiderative dispositions of adult citizens, not only those of children. But this is problematic. For example, Barker objects that "Plato and Aristotle perhaps treated their contemporaries too much as if they were 'always children'" (1946. lli). More recently, Hurka has argued that habituation "is less effective with adults, who usually have fixed values and interests and are therefore harder to lead to new ones. What is more, they tend to resent directives about their private lives and to obey them at best grudgingly: Their attitude at the start of habituation is precisely not ripe for developing intrinsic choosing" (1993. 155).

Aristotle clearly does not think those who are habituated are unduly influenced by the threat of punishment. To repeat: "argument (λόγος) and teaching, we may suspect, are not powerful among everyone, but the soul of the listener must be cultivated beforehand for enjoying and hating in a noble way, just as earth which will nourish the seed" (EN X.9.1179b23-26: cf. b4 ff.). This implies that those who have been brought up

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27 Allan thinks the optative mood in the apodosis implies that Aristotle himself does not endorse the apodosis. He translates: "it may be that laws covering an entire life are required" (1965. 76; his emphasis). He therefore thinks that the subsequent reference to what "some think" at 1180a6 shows that Aristotle did not think that laws for the whole of life were needed. But Allan's translation omits without indication the sentence which comes between the apodosis and the description of what "some think," although he quotes the Greek correctly only a few pages earlier (cf. 72). The omitted sentence ("for the many obey necessity rather than argument") is clearly Aristotle's opinion (EN X.9.1180a4-5: cf. 1179b10-13) and is intended to justify the assertion made in the apodosis. Moreover, the use of the optative mood seems unimportant: Aristotle uses the optative mood again in the apodosis of the sentence at EN X.9.1180a17-18 which Allan admits is "the language of someone resuming his own deliberation" (76). (The revised Oxford edition treats 117-18 as a continuation of the protasis, presumably because of the "δε", but see Stewart (1892, II.463 with I.10) and Grant (1885, I.423) on Aristotle's use of "δε" in the apodosis.)
in good habits are likely to be persuaded. Aristotle expands on this in a subsequent reference to what "some think." and in particular to what Plato\textsuperscript{28} thinks:

some think that lawgivers ought to summon [men] to virtue and exhort [them] for the sake of the noble, on the assumption that those who have been advanced decently in habits will listen: and that [lawgivers ought] to impose corrections and punishments for those who are disobedient and of an inferior nature, and that [lawgivers ought] to completely banish those who are incorrigible. For [they think] that the decent man, as he lives with a view to the noble, will be obedient to argument (λόγῳ), but the worthless fellow, as he desires pleasure, is corrected by pain just like a beast of burden.

\textit{EN X.9.1180a5-12}

Those who have been well brought up listen to argument or exhortation,\textsuperscript{29} whereas those who desire pleasure are influenced by fear of punishment. Aristotle seems to expect \textit{nomos} to operate on two levels. "Those who have been advanced decently in habits" are

\textsuperscript{28} Commentators have often noted that Aristotle refers to Plato here. See Burnet (1973, 470); Dirlmeier (1991, 601); Gauthier and Jolif (1959, II.902). See also Allan (1965); Lord (1982). Cf. \textit{Leg.} 644c-d; 645a: 713e-714a; 718b-723d: 854e-855a: 857c-859a: 862c-863a: 880e-881a: 890b-d; \textit{Prot.} 325a-b.

\textsuperscript{29} Given the Platonic allusions in this passage, it is worth noting that Bobonich argues that in the \textit{Laws} "Plato is advocating that the laws engage in rational persuasion" (1991, 366). The preludes do not always consist in emotional appeal or propaganda. See also Cohen (1993). (For a contrary view, see Stalley (1994).) Even so, it is worth asking whether laws provide the best mechanism for persuasive education. See Feinberg, who criticizes the attempt to combine persuasion and force in the (criminal) law: "there remains a kind of tension between the parts of the statute meant to persuade and the parts that categorically prohibit and threaten penalties for disobedience...Strictly speaking, there is no paradox or contradiction between the two parts, but psychologically they might get in each other's way. The nice guy—tough guy alternation might suggest to the skeptical reader that the argument as a whole rests ultimately on the arbitrary threat of force: 'Behave in the required way because we will beat you if you don't.' I should think it would be preferable to separate functions altogether" (1988, 197-8). It is unclear how separating the functions helps if the threat of legal punishment remains, however. Will the atheist in \textit{Leg. X} be more easily persuaded to believe in divine providence when educational functions (i.e., the "preludes" to the laws) are stripped from the laws against atheists, even though those laws remain in force? To separate the functions might increase the sense of arbitrariness, since the rationale for having the law might become wholly disassociated from the law's existence and in time forgotten. Having failed to convince others with a sound argument that the rationale for a particular law is mistaken, one might not blame the law so much as those who are not persuaded.
influenced primarily by exhortation and argument, rather than by the coercive aspect of the law.  

Aristotle's allusion to Plato's *Laws* raises the question how Aristotle thinks lawgivers use laws to summon and exhort men to virtue. (Some discount the importance of *EN* X.9.1180a5-12 as a statement of Aristotle's views, pointing to the fact that at 1180a14 Aristotle resumes in his own name (εἰ δὲ οὖν). But it is important to place these lines in the context of the discussion. As we have seen, Aristotle makes a division in his own name, between "most people" or "the many" on the one hand and those who desire the noble on the other. This division corresponds to a fundamental difference in psychological motivation, emphasized throughout 1179b4 ff., viz., whether one obeys primarily out of fear or out of desire for the noble. These same distinctions regarding psychological motivation carry through to the report of Plato's views.) But Aristotle nowhere tells us what he thinks of Plato's primary exhortative device, viz., the preambles (*Leg.* 722d: προοίμια νόμων). One reason for this, I suggest, is that Aristotle believes the noncoercive elements of the law are generally sufficient influences, so that explicit attempts at persuasion are unnecessary. Aristotle does not believe laws will meet with resentment, for example. To be sure, Aristotle thinks that people tend to resist when compelled, for "people hate men who oppose their impulses, even if they oppose them rightly" (*EN* X.9.1180a22-23: cf. *Rhet.* 1.11.1370a9-13). But according to Aristotle people are less likely to resist the law's commands: unlike the opposition of men, "the law

in its ordaining what is good is not burdensome" (*EN X.9.1180a23-24*).\(^\text{31}\) Two features of the law stand out in this context. First. "the law has no strength with respect to obedience apart from habit" (*Pol. II.8.1269a20-21*).\(^\text{32}\) The importance of habit indicates just how weak the law's coercive power by itself is in securing obedience. A law whose influence on citizens was based solely or predominantly on the threat of punishment would ultimately fail. Second, following Plato,\(^\text{33}\) Aristotle holds that the law combines elements of reason and force: "the law has compulsive power. while it is an account (λόγος) proceeding from a certain practical wisdom and understanding (νοῦ)" (*EN X.9.1180a21-22; cf. a18*). Aristotle points to the source and character of the law as the basis of its rationality: the law is a rational account (λόγος) which proceeds from (ἀπό) a certain practical wisdom and intelligence (*EN X.9.1180a21-22*). Here the law is rational in two ways. First, it is rational in the sense of the content of its prescription. since a lawgiver qua practically wise will presumably legislate what it is practically wise to do. Second, it

\(^{31}\) Allan (as well as Barnes (1990)) does not consider this aspect of Aristotle's view when he suggests that "to command a thing may provoke men of independent spirit to do the opposite, even when the thing commanded is reasonable" (1965, 68-9). Cf. Polansky (1979, 44).

\(^{32}\) Although Aristotle does not analytically distinguish the two, the habit in question is a habit to obey the law in general, and a habit to obey particular laws. There are two reasons to think Aristotle means a habit of obedience to law as such. First, Aristotle considers the alteration of the laws a danger to "the power of the law" (*Pol. II.8.1269a22-24*), and not just to the habit to perform particular sorts of lawful acts. Second, Aristotle recognizes the value of law-abidingness: general justice consists in law-abidingness (see supra). But it would be wrong to assume that a habit to obey the law as such had no foundation in habits to obey particular legal norms. For example, during a change in regime citizens may remain attached to the habits under the previous constitution (*IV.5.1292b11-21*). This is a reason to think Aristotle means a habit of obedience to particular sorts of laws in addition to law in general. For if citizens valued obedience to law as such, regardless of its content, a change in laws would not be much of a danger. whereas if they valued obedience to particular sorts of laws, a change in laws would weaken both the habit to obey those laws and the habit to obey the law as such.

\(^{33}\) *Leg.* 644c-d; 645a. See *Pol. III.16.1287a32.*
is rational in terms of its source, given that the lawgiver possesses a certain practical wisdom and intelligence. (But the law is not rational in terms of its method: the law is not akin to Socratic dialectic.) If citizens believe that law is a logos proceeding from a certain practical wisdom, they will have reason to obey the law insofar as they accept the authority of the lawgiver as a practically wise agent.\textsuperscript{34} Michael of Ephesus suggests that the law is accepted because it is perceived as deriving from a lawgiver who laid down laws long ago. Lacking knowledge of the particular individuals to whom the law will later apply, the lawgiver presumably sets down laws for their advantage and does not bear ill-will toward them.\textsuperscript{35} In addition, laws are stated in universal terms which do not refer to particular individuals (\textit{EN} V.10.1137b13 ff.; \textit{Pol.} II.8.1269a9-12; \textit{Rhet.} I.1.1354b6). Thus it is easier to suppose that the lawgiver lays down his code for the good of the citizens and not out of bias towards particular people. Whatever coercive power the law has, Aristotle presumes that noncoercive aspects of law must be present to secure willing obedience over time. (This is, moreover, one reason behind Aristotle's association of the rule of law with the rule over willing subjects.\textsuperscript{36})

What about those in whom habituation has not taken root? Aristotle clearly relies on the threat of coercion to bring about virtue in "the many". As he puts it, "the many obey necessity rather than argument, and punishments rather than what is noble" (\textit{EN} X.9.1180a4-5). Insofar as most people obey out of fear, they do not choose virtuously.

\textsuperscript{34} On the lawgiver as a practically wise agent, see Chapter Three.

\textsuperscript{35} Michael of Ephesus (1892, \textit{CAG} XX.609.29-37).

But Aristotle is entitled to use fear if those motivated by it may later come to appreciate the nobler reasons to act virtuously. The threat of force serves two roles: it prevents bad acts and it helps keep those tempted towards vice away from activities likely to reinforce their aversion to virtuous action. They are hindered from acting on baser motives or out of foolishness, and thus from the detrimental consequences of those actions. In addition, even if someone never comes to choose the good for its own sake, he may still acquire the degree of virtuous motivation of which he is capable given the circumstances. As Aristotle says, "Perhaps we should be content if, when all the influences by which we are thought to become good are present, we get some tincture of virtue" (EN X.9.1179b18-20). "Political" courage is not as valuable as true courage, but is nonetheless better than cowardice. Finally, if we reject Aristotle's pessimism about the moral capacities of hoi polloi, then the case for promoting virtue through laws becomes that much stronger. If Aristotle is wrong about the necessity of leisure as a prerequisite for a virtuous life, and its attendant inegalitarianism, the prospects for virtue appear brighter.

3. **Other domains for moral habituation**

A further question is whether Aristotle accords too little importance to other domains in which moral habituation occurs, and in particular to the household and social customs. One might think that the household (oikos) is the appropriate arena to teach standards of behavior and appraisal. Likewise, one might want to rely on social customs to shape the attitudes and habits of citizens rather than positive laws.


When Aristotle holds "it is best that there be public care (κοινήν ἐπιμέλειαν)" of upbringing and practices (ἐν X.9.1180a29-30), he is not denying the role of the oikos. Aristotle objects to care or superintendence of children on a private basis (κατ' ἴδιαν), in which each "teaches [his own children] that private instruction which seems best to him" (Pol. VIII.1.1337a24-26; EN X.9.1180a26-29). Public education ensures that all the citizens are trained appropriately. Otherwise, a citizen's education is determined largely by the peculiarities of individual households, in which "the father may fall short of full virtue" (Sherman 1989, 156). Thus Aristotle wants legislation to regulate not merely the subjects but also the content and goals of education. Nor does Aristotle seem to think that the polis should confine itself to regulation while leaving it to the household to implement that education: "For common things the training too should be made common" (Pol. VIII.1.1337a26-27). "That there must be legislation about education and that this must be made common (κοινήν) is evident" (Pol. VIII.2.1337a33-34). In this vein, Aristotle praises Sparta for its provision of common training (Ἐν

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39 Swanson overstates Aristotle's case for private education. She rightly holds that an education in the household is necessary for the pursuit of unqualified virtue alongside public education: "Education by the laws and institutions of a regime is indispensable for citizens, particularly from the point of view of the regime. . . . But each citizen should also receive a private education" (1992, 17). But on Swanson's view, "[an] activity qualifies as private, if it cultivates virtue without accommodating or conforming to common opinion" (10). In terms of the goals which govern an education in the virtues, however, there is no evidence of which I am aware for the view that Aristotle thinks there is a "private" aspect to virtuous activity that should not be subordinate to the goals of the polis. On the contrary, Aristotle explicitly says that the education of household members ought to look to the political regime (Pol. I.13.1260b13-20). Cf. Kraut (1997, 172-173).

40 Consider, e.g., the prescriptions concerning gymnastic and musical education in Pol. VIII.4 and VIII.7.

X.9.1180a24-26: *Pol.* VIII.1.1337a31-32), despite the fact that he criticizes the aims of Spartan education and finds its methods ineffective for their intended goal. So it seems that his praise of public attention to education also implies his acceptance of an education in common. But this hardly implies that the household plays a less important part in the inculcation of virtue, as some seem to think. Aristotle clearly recognizes the value of the household in moral habituation. In the first place, Aristotle does not think that publicly provided education is optimal in every respect. Private instruction has certain advantages over public (*EN* X.9.1180b3-13). The father's kinship and benefactions make his "speeches and habits (λόγοι καὶ τὰ ἔθη)" more effective. "for children start with a natural affection and disposition to obey" (X.9.1180b3-7). The "father's speeches and habits" are contrasted explicitly to the city's "customary laws (τὰ νόμιμα) and customs (τὰ ἡθη)" in that the former have "more strength" due to the bonds of affection (ἐνισχύει...καὶ ἕτει μᾶλλον). In addition, private education permits greater attention to the particular needs of the individual: "It would seem that the detail is worked out with more precision when the care is particular to individuals: for each is more likely to get

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43 Spartan boys left the household and lived in companies from age seven onwards. Although MacDowell notes that "a father's legal authority over his son was not wholly transferred to the community" (1986, 58). Nonetheless, the community was given quite extensive authority over children. For a review of the evidence for the Spartan ἀγωγή or system of common (military) education, see MacDowell (1986).

44 See George: "Although Aristotle was correct in observing that parents sometimes require the assistance of the general and impersonal force of the law to provide their children with a sound moral upbringing, he was wrong to ascribe to the law the role of primary moral educator... Law, as a more or less impersonal guide, must aspire to nothing more than a supporting or secondary role" (1993, 46-47).
what suits his case" (X.9.1180b11-13: also b7-11). More importantly, Aristotle recognizes the importance of familial affection (φιλία) as a component of the good life. e.g., when he rejects Plato's proposal in the Republic to extend this sort of familial affection to all citizens as a "watery friendship" (Pol. II.4.1262b15: cf. EN IX.10.1171a15-20; VIII.12.1161b12-15). Given the importance of familial ties, parents will be concerned about the upbringing of their children and will have great influence in shaping their character (cf. VIII.12.1162a12-14: 1161b16 ff.). Aristotle's considered view, then, is that the oikos plays an important role in moral education, but that that education should be set within the wider frame of an education in common.

Similarly, Aristotle thinks social customs should aid in moral habituation. Let us recall that "nomos" could also refer to social custom or unwritten law, "enforced" by a sense of shame (Rhet. I.14.1375a14-17).\(^{45}\) Aristotle accords the sense of shame (αἰδώς: αἰσχὺν) an important role\(^ {46}\) in the moral training of youth: "young people ought to be prone to shame because they live by passion and therefore make many mistakes, but are restrained by shame" (EN IV.9.1128b17-18). The sense of shame develops in connection with nomos, in that a conception of which things are noble and which are not is instilled by it: the young tend to be "modest" or "prone to shame" (αἰσχυντηλοῖ), "for they do not yet suppose different things to be noble, but they have been educated by nomos (ὑπὸ τοῦ

\(^{45}\) Cf. Thucydides II.37.3.

\(^{46}\) Since we are praised for our virtues and blamed for our vices (EN II.5.1106a1-2), praise will also play an important role in moral education, but Aristotle is not as explicit about the relation between praise and nomos. On the importance of shame in shaping identity and character, see Williams (1993), especially pp. 75-102 and pp. 219-223.
νόμου) alone" (Rhet. II.12.1389a29-31). So Aristotle gives nomoi as social customs an important place in education and habituation. and we ought not to suppose that nomoi in their educative function are always positive laws enacted by a recognized legislative power. Aristotle intends both sorts of nomoi to play an educative role and help instill habits. Thus Aristotle holds that a lawgiver ought to "enact (τιθεμένοις) laws. both unwritten and written, which will encompass above all what preserves regimes" (Pol. VI.5.1319b40-1320a2). Lawgivers "enact" unwritten laws insofar as they can by their authority influence and shape the citizens' traditional practices, beliefs, and attitudes. Unfortunately, Aristotle does not tell us how the lawgiver should bring his influence on social customs to bear. But he agrees with Plato that they ought to be a concern of the lawgiver (Leg. 793a-d). Although these traditional customs may at first appear "petty" or "small" (793d), they are in fact the "bonds of the entire regime" which serve as a foundation for the written laws (793b: cf. 788a ff.). Aristotle records a similar sentiment when reporting an argument in favor of the rule of law: "laws based on customs are more authoritative and about more authoritative matters than written laws, so if it is safer for a human being to rule than written laws, this is not the case for laws based on custom" (Pol. III.16.1287b5-8). If Aristotle does not instruct lawgivers on the force of moral example and the use of the 'bully pulpit'. it is nonetheless clear enough that he thinks social customs play an indispensable role in shaping character.

47 The connection between the sense of shame (αἰδώς or αἰσχύνη) and "modesty" or being prone to feel shame (αἰσχυντηλός) is strong. Cf. NE IV.9.1128b20-1. Roberts' translation of αἰσχυντηλός as "shy" at Rhet. II.12.1389a29 is therefore somewhat misleading.

48 See Cope (1867, 243); Ostwald (1973, 95-6). Cf. Plt. 295a; Demosthenes XXIII.70.
4. **Conclusion**

Aristotle’s view that laws can effectively inculcate the virtues of character does not fall prey to some objections commonly leveled at it. Aristotle does not think that using written laws to inculcate the virtues prevents citizens from coming to choose virtuous acts for the sake of the acts themselves. While Aristotle does not expect citizens to be virtuous simply because they follow the law, *nomoi* may nonetheless operate indirectly through habituation to help citizens develop virtuous states of character. Moreover, habituation through law requires the right social conditions. In particular, habituation can occur when the law’s commands are embedded within the values of the *polis*, where the fear of punishment can give way to an appreciation of the good. Nor does Aristotle rely on law as the sole or predominant means to virtue. Aristotle recognizes the importance of domains such as the household and social customs in the formation of a virtuous citizenry.

The Aristotelian position is a deep and well-conceived view of the role of the law in influencing character. We may, however, disagree with Aristotle about the lawgiver’s prospects for success. In particular, Aristotle believes in the reciprocity of the virtues: in order to possess a virtue of character in the strict sense, we must possess all of them.\(^{49}\) The problem here is not simply that we think it possible for a person to "have already acquired one [virtue] when he has not yet acquired another" (*EN* VI.13.1144b35). It is, in addition, that sometimes the full development of one virtue goes hand-in-hand with the

\(^{49}\) *EN* VI.13.1144b30-1145a2. For internal difficulties in Aristotle’s account, see Irwin (1988b) with Kraut (1988).
failure to develop another. This may not always be an insurmountable problem for the lawgiver, but it is a difficulty which can be solved only by looking closely at the circumstances and contemplating the possible effects. Even if paternalist objections to the promotion of virtue through laws can be overcome, the lawgiver may need to limit the sphere of the law's application in order to allow the full range of virtues to flourish.

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Chapter Two: Law and Virtue in the politeia

According to Aristotle, one needs to learn the wisdom of the lawgiver, in order to make men virtuous (EN X.9.1180b23 ff.). The acquisition of this wisdom consists, in large part, of a study of the various forms of "regime" or politeia and their laws (EN X.9.1181b12-22). When we turn to the Politics, however, we find that Aristotle instructs lawgivers to enact laws suited to regimes, even those which do not aim at the common good (Pol. IV.1.1289a11 ff. with III.7.). What becomes of virtue here? Do these disparate aims fit together? One very practical answer is simply that they do not—that the lawgiver's ultimate aim to promote virtue simply gives way to the more pressing aim of stability. However, some interpreters believe that by relativizing laws to constitutions Aristotle also relativizes virtue.¹ One sense of justice, after all, is the lawful, or "complete virtue in relation to another" (EN V.1.1129b11-1130a13). The lawgiver's ultimate aim does not give way by suiting laws to regimes: rather, it gets worked out in particular conditions.

Both in truth and as an interpretation of Aristotle, the relativized view of virtue is false. But it suggests that the practical answer attends inadequately to the question how suiting laws to the constitution might affect character formation and the realization of

¹ Wormuth argues that every "state will have its own ethics, and virtue will become conventional" (1948, 61). Kelsen (1960) holds that Aristotle leaves the standards of ethical behavior up to lawgivers and the actual moral code of a society, since Aristotle's views on justice are (so he thinks) purely formal. For a mitigated form of relativism, closer to the view I advance below, see Bodéis: "la nécessité de rapporter l'éducation et, par elle, la moralité aux principes de la constitution politique engendre la légitimité de différentes morales constitutionnelles, inégalement conformes aux exigences de la moralité définies absolument" (1991c, 131). Cf. also Vander Waerdt (1991).
virtue. For if laws should promote stability, it does not follow that the lawgiver should not be concerned with character. An ideal route to stability is for citizens to accept the constitution and its aims, to make the values of the polity their own.

But how does suiting laws to the constitution impact character, and thereby the ability of citizens to realize the human good in virtuous activity? I begin in Section One by looking at the claim that laws should suit the constitution (the "Conformity Thesis"), arguing that it is intended to encompass the distinctive aims of the constitution. Then, in Section Two, I show that on Aristotle's view the Conformity Thesis as applied to citizen virtue in inferior ("deviant") constitutions may lead the lawgiver to promote moral vice. Because the moral habits and attitudes of citizens should look to the aims of the regime, the practical answer incorporates character. By inculcating citizen virtue the lawgiver makes citizens as virtuous as most of them are capable, given their habits and lack of receptivity to full virtue.

1. The Conformity Thesis

In the Politics, Aristotle maintains that "laws should be laid down with a view to the regime": δεὶ πρὸς τὴν πολιτείαν κείσθαι τῶν νόμων (III.11.1282b10-11). Let us call this the Conformity Thesis. The explicit justification of this thesis comes at Pol. IV.1.1289a11 ff.:

it belongs to this same practical wisdom [viz., legislative wisdom] to look at both the best laws and those which suit each of the politeiai. For laws should be enacted—and all are in fact enacted—with a view to (πρὸς) the politeiai, and not politeiai with a view to the laws. For a politeia is an arrangement in cities connected with offices. [establishing] the manner in

\(^2\) Cf. IV.1.1289a12 ff.; VI.5.1319b40-1320a2; Rhet. I.4.1360a30-33.
which they have been distributed. what the authoritative element of the
politeia is, and what the end of each community is, whereas laws, being
distinct from the things that are indicative of the politeia (οἱ
κεχωρισμένοι τῶν δηλούντων τὴν πολιτείαν), are those according to
which the rulers ought to rule and guard against those transgressing them.
So it is clear that it is necessary to have a grasp of the varieties of each
politeia and their number with a view to the enactment of laws as well.

But the Conformity Thesis is not immediately clear, in particular because it is not
clear what the force of "with a view to" ("πρὸς") is. Does Aristotle mean merely that
laws must for practical reasons presuppose a constitutional framework, i.e., a defined
structure of offices which are invested with the power to enforce and apply the laws? Or
does he mean, more strongly, that laws should uphold the aims of the constitution,
whatever those aims may be?

It is often thought that Aristotle simply means to distinguish between
constitutional laws and ordinary laws, where constitutional laws are limited to defining
the types of offices and the manner of their distribution.¹ For example, when Aristotle
criticizes Plato's Laws on the grounds that "the Laws deals for the most part with laws.
and little is said about the politeia" (Pol. II.6.1265a1-2). Morrow defends Aristotle's
criticism by invoking a distinction between "broad" and "narrow" senses of politeia:

In the broad sense of politeia, as including the whole organization of a
city's life, Aristotle's statement is clearly unjustified, for all of the Laws
from the end of the third book is concerned with the politeia of Plato's
Cretan city in this sense of the term. But in the technical sense in which
politeia is contrasted with nomoi, politeia means the offices or officers
(archai, archontes) in the state. nomoi the rules assigned to these officers
to enforce. . . . Plato himself refers to this distinction on three occasions
(735a, 751a, 768e), and it underlies Aristotle's discussion in Book III

¹ Thus Tricot: "Distinction de la nomothesia et de la politeia. C'est la distinction actuelle entre les
Now it is in this narrow sense that Aristotle is using the term here. and in this sense it is true that of the twelve books of the *Laws* only the first half of Book VI and a few short passages elsewhere (particularly in Book XII) are concerned with the establishment of offices. (1960a, 147-148)

However, in delimiting the elements of the *politeia*, Aristotle mentions not just offices and their distribution, but also the goal or end (*τέλος*) of the political community (*Pol. IV.1.1289a17*). This is clear, for example, in the very passage Morrow discusses.⁴ After saying that the *Laws* is concerned mostly with laws rather than the *politeia*, Aristotle compares the *Republic* (i.e., the *Politeia*) to the *Laws* as follows:

> Apart from the community of women and property, the other things he assigns it are the same⁵ for both *politeia*: education is the same, as is the life of abstention from necessary tasks, and about the common messes in the same way, except that in this [the *Laws*] he says there ought to be common messes for women as well.⁶ and that the number of those possessing arms should be five thousand, whereas it is a thousand there [the *Republic*].

(*Pol. II.6.1265a4-10*)

Unless Aristotle switches without indication between a broad and narrow sense of

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⁴ I see no reason to assume that the sense of *politeia* in *Pol. II.6* is not Aristotle's own. In the first place, Aristotle nowhere signals that Plato uses the concept *politeia* in a way different from the way he himself uses it. Although the concept *politeia* allows for philosophical elaboration, it is not used in a specially loaded sense in either author. There is little reason to think that Aristotle is commenting on Plato’s concept of *politeia* in the way he might discuss Platonic Forms. In the second place, even if Plato has a more restricted notion of the *politeia* as the arrangement of offices, it is not at work in Aristotle's discussion at 1265a1 ff.

⁵ See Morrow: "Aristotle is speaking in general terms, not intending to assert a detailed identity between institutions that are generally similar" (1960a. 160).

⁶ Aristotle means that in the *Laws* there are common messes for women apart from men, whereas in the *Republic* the common messes include both men and women from the guardian class. Cf. *Leg. 780e-781d; 806e: Rep. 458c-d; Morrow (1960a. 148).*
politeia, it seems that he includes aspects of the city's way of life in the notion of politeia. even when he wants to distinguish between a discussion of laws and a treatment of the politeia. Education, an abstention from necessary tasks, and common messes have little to do with offices and officers, but much to do with the city's very way of life. So we cannot say that when Aristotle distinguishes between the politeia and the laws, he means the former in the narrow sense of the structure of political power. Although the notion of politeia includes the description of offices, it also incorporates distinctive patterns of life in the city.

The structure of offices helps to explain the inclusion of a telos in the idea of the politeia. Because laws are those things "according to which the rulers ought to rule and guard against those transgressing them." laws will need to be accepted by the rulers (not to mention made by them), and so will need to take into account the sorts of things that rulers will be willing to enforce. For example, if the wealthy form the ruling class, they

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7 Thus Saunders: "Aristotle distinguishes laws and constitution confusingly: for there are (1) laws prescribing a constitution. (ii) the kind of laws apparently meant here [1265a1-10], those administered under a constitution, which is a 'system of offices'" (1995, 127). Aristotle does, of course, distinguish between politeia as the genus "constitution" and as one of the species of that genus, viz., "polity". See Pol. III.7.1279a38-39; EN VIII.10.1160a33-35. The wider and narrower senses with which I am concerned here involve politeia only in the generic sense.

8 Most of Aristotle's criticisms of lawgivers in book II of the Politics, for example, concern the goals and way of life of the polis (e.g., Sparta's focus on military virtue; see infra) or the means employed to realize those goals (e.g., the requirement that everyone, even the poor, contribute to the common meals at Sparta increases inequality and oligarchical tendencies instead of fostering a democratic spirit and an equality among citizens.) See Bodéüs (1991d), who analyzes in detail Aristotle's criticisms of actual and arm-chair lawgivers in book II of the Politics. The proper way to interpret Aristotle's criticism that Plato's Laws is concerned mostly with laws and not the politeia (Pol. II.6.1265a1-2; see supra), is to understand by politeia not simply the city's whole way of life, but what is distinctive about the city's way of life as a result of the telos expressed or considered in its organization.
are unlikely to enforce (much less pass) laws redistributing property from the wealthy to the poor. Moreover, according to Aristotle, the predominating views among the rulers will affect the views of the other citizens: "Whatever the authoritative element conceives to be honorable will necessarily be followed by the opinion of the other citizens" (Pol. II.11.1273a39-41). The telos of a politeia, then, partly flows from the conception of the good held by the ruling class. As Ober notes, "the term politeia embraces not only the constitution (legal arrangement of governmental institutions), but the ideology (the system of beliefs by which actions are organized) and social practices promoted by the dominant subsociety within the polis" (1996b. 165). This is why each sort of politeia has its own defining principle: "the defining principle of aristocracy is virtue, as that of oligarchy is wealth, and of democracy freedom" (Pol. IV.8.1294a10-11). So the politeia includes the aims which are expressed in the associations and ways of living in which citizens participate, aims based on the view of the good of the ruling elements.9

To be sure, not all laws will look to the special advantage of the rulers. The telos of the politeia will include features that are not peculiar to any constitution (e.g., forbidding violence among citizens), in addition to those which express the ideology of the ruling class. So while all laws are enacted with a view to the constitution (Pol. IV.1.1289a14), some laws concern what would be useful in a variety of forms of regime rather than what is particularly beneficial to an oligarchy as opposed to a democracy. For

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9 Cf. Pol. IV.11.1295a40-b1: "the politeia is a certain life of the city": Grimaldi: "The politeia of a city-state is antecedent to the constitution which is meant to express and give shape to the politeia" (1980, I.98). Cf. Robinson (1995, xv-xvi); Strauss (1964). Keyt implausibly argues that Aristotle's concept of politeia is "virtually identical" to the modern conception of "constitution" by contending that the modern notion "is also a way of life" (in Robinson 1995, 133).
example. Aristotle declines to consider whether permanent generalship is advantageous for cities (\textit{Pol.} III.15.1285b38-1286a1), because to investigate about this sort of generalship has the form [of an investigation] of laws rather than of a constitution. for it is possible for this to come about in all constitutions. . . .

\textit{(Pol.} III.15.1286a2-4; cf. III.16.1287a3-8)

For Aristotle, an investigation of laws as laws implies that the phenomena investigated are not peculiar to a particular type of constitution.\footnote{It is this fact, combined with the fact that the Conformity Thesis applies to all laws, that rule out recent translations (e.g., Lord (1984, 256 n. 3); Lévy (1993. 84); Simpson (1997. 171)) which construe "τῶν δηλούντων" at \textit{Pol.} IV.1.1289a18 as a partitive genitive: "there are distinct laws among the things that are indicative of the \textit{politeia}." If such a translation were correct, then Aristotle's discussion would narrow suddenly from all laws to just those laws that conform to the distinctive aims of a particular \textit{politeia}! The traditional interpretation of "τῶν δηλούντων" as a genitive of separation therefore seems correct, given the overall context of \textit{Pol.} IV.1.1289a12 ff. (Cf., e.g., Jowett (in Barnes 1984): "laws are not to be confounded with the principles of the constitution": Barker (1946): "Laws, as distinct from the frame of the constitution . . .": Robinson (1995): "the laws which are separate from those defining the constitution . . .": Welldon (1912): "laws, as distinct from the institutions which express the character of the polity . . .": Aubonnet (1971): "les lois, au contraire, distinctes des dispositions caractéristiques des la constitution . . .": Tricot (1987): "Mais de simples lois sont distinctes des dispositions constitutionnelles . . .": Schütrumpf (1996): "Verschieden von den (Bestimmungen), die (den Charakter der) Verfassung angeben, sind dagegen die Gesetze. . . .")}

By contrast, an investigation of constitutional forms concerns the study of the features which make a particular constitutional type what it is, i.e., the distinctive characteristics of the \textit{politeia}. Since generals and military officers are needed in any constitution,\footnote{Note, in passing, that generalship is a type of office (\textit{Pol.} VI.8.1322a29-b6: V.9.1309a33-b5; V.1.1301b17-20; II.11.1273a30: a36-37). Were an investigation of constitutions one of offices, then a study of the office of generalship would count as part of an investigation of constitutions. An investigation of constitutions concerns whatever is distinctive of a constitution, whether that be its goal, its structure of offices, the social practices which foster common habits and attitudes, or its laws.} permanent generalship
turns out not to be a form of constitution at all.\textsuperscript{12} It is with the same contrast between law and constitution that Aristotle distinguishes "craftsmen of laws only" from "craftsmen of constitutions" (\textit{Pol. II.12.1273b32-34: 1274b15-16: b18-19}). So at least some laws are not distinctive of a type of \textit{politeia}. And this is what we should expect, since some laws (e.g., forbidding violence among citizens) would seem necessary in any constitution, at least if the constitution is to have any stability. A study of \textit{politeiai} will often involve a discussion of laws peculiar to a specific \textit{politeia}, but a study of laws need not involve a discussion of \textit{politeiai}.

2. \textbf{Education in the \textit{politeia}}

Laws concerning an education in the virtues fall among the laws that vary in accordance with the distinctive aims of the \textit{politeia}, rather than among the laws that (like laws concerning generalship) could be roughly the same in \textit{politeiai} of all sorts. As Aristotle puts it:

But the greatest of all the things that have been mentioned with a view to making \textit{politeiai} lasting--though at present they all neglect it--is education with a view to the \textit{politeiai}. For there is no benefit in the most beneficial laws, even when they are approved by all those engaging in politics, if they are not going to be habituated and educated in the \textit{politeia}--if the laws are democratic, in a democratic way, if oligarchic, in an oligarchic way. For if

\textsuperscript{12} Is there a principle which determines \textit{a priori} whether a type of regulation or institution must concern the specific aims of the ruling class, rather than more general aims such as survival and the necessary minimum of social order? Aristotle does not give us one, and it is not clear that he could. Perhaps there could be a \textit{politeia} in which permanent generalship is needed because it best upholds the aims peculiar to that form of \textit{politeia}, rather than (or in addition to) more general aims such as the best way to defend the \textit{polis} from invading armies. But while in principle some such circumstances might arise, in many cases it is clear whether aims specific to the ruling class and its particular view of the good are at stake, or only more general ends such as social peace.
there is incontinence for an individual person. there is also [incontinence] for a city.

(Pol. V.9.1310a12-19)

In the incontinent city. citizens lack the habits conducive to the ends of the politeia.

Citizens thereby fail to obey the laws which express or give shape to those ends. just as the incontinent person fails to act in accordance with what he considers right.\(^\text{13}\) Because the incontinent city breeds instability, the lawgiver needs to educate citizens in the aims of the politeia. in order to preserve the politeia:

No one would dispute that the lawgiver ought to be concerned above all with the education of the youth; where this does not happen in cities it harms the politeiai. One should educate with a view to each sort [of politeia], for each politeia contains a peculiar character (ηθος) which originally establishes it and which is accustomed to safeguard it—the democratic character a democracy, for example, or the oligarchic an oligarchy: and always the better character is responsible for a better politeia.

(Pol. VIII.1.1337a11-18)

So different sorts of politeia require citizens with different sorts of character (ηθος).

However, because the virtue of a citizen is conditioned by the goal of the preservation of the politeia, the good citizen will not necessarily be a good man:

although citizens are dissimilar. the preservation of the community is their task (ἐργον). and the politeia is [this] community; thus it is necessary that the virtue of the citizen be with a view to the politeia. So if there are several forms of politeia, it is clear that it is not possible for there to be a single. complete virtue of the excellent citizen. But we say that the good man is [good] according to a single. complete virtue. That it is possible. then, for an excellent citizen not to possess the virtue according to which he is an excellent man. is apparent.

(Pol. III.4.1276b28-34)

All that is necessary for the stability of the constitution is civic virtue. So when the

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\(^\text{13}\) Cf. Pol. IV.5.1292b11-21; IV.8.1293b42-1294a4; EN VII.10.1152a20-24.
lawgiver educates citizens in the spirit of the politeia in order to safeguard the constitution. He need not bring about fully virtuous human beings.

But if the citizen need not possess the virtue of the good man, is it the case that "being a good citizen in some constitutions might require one to be a bad man"?\textsuperscript{14} Against this view, some scholars argue that even in bad regimes the virtue of a citizen cannot be a form of moral vice. For example, Irwin argues:

> Justice and temperance relative to an oligarchy are not justice and temperance as oligarchs conceive them, but the degree of justice and temperance that are consistent with the preservation of an oligarchy.... The virtues of a citizen are not tactics for adaptation to the constitution, but the proper way to exercise the genuine virtues in these political systems.

(1988a, 458)

According to this line of reasoning, civic virtue in a deviant politeia is never moral vice, but rather a certain degree of genuine virtue. Although a good citizen in a bad regime may not possess the degree of virtue of character necessary to be a good man (i.e., "complete virtue"), he nonetheless exhibits virtue of character to some extent. Thus, on this argument, the lawgiver's ultimate aim, to bring about fully virtuous individuals, would not conflict with his practical aim to preserve deviant politeia when a correct constitution is not feasible.

Unfortunately, it is incorrect to say that civic virtue is never a form of moral vice. Although Irwin rightly holds that for Aristotle virtue of character is not defined however one likes (e.g., as the democrat or oligarch conceives it), Aristotle nevertheless believes that the good citizen in deviant politeiai may exhibit moral vice. To be sure. Aristotle

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\textsuperscript{14} Adkins (1991, 89).
wants proponents of deviant constitutions to modify their conceptions of justice so as to mitigate the more extreme elements in those conceptions. For example, Aristotle says "one should not consider as characteristic of democracy or oligarchy something that will make the city democratically or oligarchically run to the greatest extent possible, but something that will do so for the longest period of time" (Pol. VI.5.1320a2-4; cf. V.9.1310a19-22). But that is merely to lessen the extent to which democratic or oligarchic justice is a form of injustice; democratic and oligarchic justice so conceived are still forms of injustice, albeit milder ones. Justice relative to a deviant politeia falls short of standards of justice considered absolutely. Aristotle does not tire of pointing out that proponents of democracy, oligarchy, and aristocracy all agree on the fact that justice in distribution must be according to worth, but disagree as to what the standard of worth should be: "democrats identify it with the status of freeman, supporters of oligarchy with wealth (or with noble birth), and supporters of aristocracy with virtue" (EN V.3.1131a27-29). One of the distinctive qualities of democratic (or oligarchic) justice is that it ignores some of the claims that deserve to be included in the conception of worth according to which goods (e.g., offices) are distributed in the polis (Pol. III.9.1280a7-25; cf. III.13.1283a23-42; V.1.1301a25-39). This is not absolute justice merely limited by the goal of a deviant politeia, but rather a perversion of justice. If Aristotle indicates that oligarchs and democrats should modify their conceptions of justice so as to make oligarchy or democracy more stable, it is not to redefine oligarchic or democratic justice as a form of absolute justice consistent with the constitution's preservation, but rather to mitigate the harsher elements in the conceptions of oligarchic and democratic justice and
bring it closer to (without thereby transforming it into) the true conception.

If the lawgiver winds up promoting moral vice by inculcating the virtue of a citizen in deviant regimes, that is not to say that the lawgiver intends to promote vice as such. The lawgiver inculcates the virtue of a citizen in order to preserve the community (Pol. III.4.1276b28-29). Where the virtues of the citizen in a deviant constitution shade into moral vice, the vices thus inculcated cannot increase factional strife, for they would then not even count as citizen virtues. Qua virtues, the qualities of civic character promoted by the lawgiver serve the end of preserving the polis, and this is so even if they rely on habituating citizens to commit injustice and to approve of it.

Yet if the lawgiver does not mean to promote vice as such, deviant regimes may nonetheless consider, as praiseworthy and beneficial to the polis, states of character which are in truth defective or vicious. Sparta and Carthage exemplify constitutions whose distinctive aims distort citizens' conception of the good in the direction of moral vice. In the case of Sparta, Aristotle contends that

one may criticize the presupposition of the [Spartan] lawgiver, in the way Plato criticizes it in the Laws: the entire organization of the laws is with a view to a part of virtue—warlike virtue: for this is useful with a view to domination. Yet while they preserved themselves as long as they were at war, they came to ruin when they were ruling through not knowing how to be at leisure, and because there is no training among them that has more authority than the training for war. This error is no slight one. They consider that the good things [people] generally fight over are won by virtue rather than vice, and rightly so; but they conceive these things to be better than virtue, which is not right.

(Pol. II.9.1271a41-b10: cf. VII.14.1333b4 ff.; VII.15.1334a39 ff.)

In Aristotle's view, the Spartan lawgiver failed to educate citizens in all the virtues appropriate to the enjoyment of leisure, especially justice and moderation (Pol.)
VII.15.1334a26-34). Because "it is with a view to wars that education and the greatest part of the laws are organized" (Pol. VII.2.1324b8-9), citizens overestimate the worth of some virtues while underestimating others (cf. Pol. VIII.2.1337b1-3). As a result, citizens value external goods more highly than a life of virtuous activity.

Nor is it only laws governing education which may foster a mistaken conception of the good life. For example, Aristotle criticizes the Spartan method of nominating members of the Council of Elders (γρόντες), a method which calls for the prospective Elder to ask for the office himself:

As it is, the lawgiver is evidently doing what he has done with respect to the rest of the constitution; it is with a view to making the citizens ambitious that he has used this in the election of Elders—no one would ask for office unless he were ambitious. And yet most voluntary acts of injustice among human beings result from ambition or greed.

(Pol. II.9.1271a13-18)

By encouraging ambition, the lawgiver winds up promoting vice in citizens. Likewise, Aristotle criticizes Carthage for requiring that the election of rulers take place on the basis of wealth in addition to virtue. Such a law makes wealth something more honored than virtue, and the city as a whole greedy. For whatever the authoritative element conceives to be honorable will necessarily be followed by the opinion of the other citizens. Where virtue is not honored above all, there cannot be a securely aristocratic constitution. And it is reasonable that those who have bought [an office] will become habituated to profiting [from it], since they spent so much in order to rule.¹⁵

(Pol. II.11.1273a37-b3)

The Carthaginian method of selecting rulers encourages rulers to prize wealth overly much, and citizens to share the conception of the good held by the rulers, so that the

¹⁵ Cf. Polybios 6.56.4 (cited by Newman (1887. II.367)).
entire city comes to value wealth more than virtue.

Thus, laws may promote a conception of the good in which virtue is not seen as good for its own sake, or in which some virtues are not fully appreciated. If the lawgiver ought to enact laws with a view to the aims of a constitution, and if the constitution has as its dominant aim, say, external goods such as wealth, the lawgiver, far from cultivating virtue in citizens, will be inculcating vices.

Despite the law's distorting effects on character, one could argue that citizen virtue does not influence character enough to make full virtue difficult to achieve. Practical wisdom and the moral virtues in the strict sense imply one another (EN VI.13.1144b1-1145a6). The good citizen qua ruled does not need practical wisdom: "Practical wisdom is the only virtue peculiar to the ruler. The others, it would seem, must necessarily be common to both rulers and ruled, but practical wisdom is not a virtue of one ruled, but rather true opinion" (Pol. III.4.1277b25-29).¹⁶ Because the virtue of the ruled citizen does not require practical wisdom, the virtues of character which the good citizen exhibits need not be the moral virtues "to the highest degree"—for if the good citizen needed to possess the moral virtues in the strict sense he would also need practical wisdom.

Yet a lesser degree of virtue does not of itself imply that the soul is affected to only a small extent. Rather, a lesser degree of virtue implies that, although a person possesses some of the traits of character which make a person virtuous, those traits are

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¹⁶ Clearly the claim that practical wisdom is a virtue peculiar to the citizen qua ruling does not imply that all citizen rulers are practically wise. Tyrants, and oligarchs who value wealth over virtue, are not practically wise, even if they are rulers. Aristotle's point in saying practical wisdom is a virtue peculiar to the citizen qua ruler is that good citizens qua ruler do not need practical wisdom to count as good citizens, whereas good citizens qua rulers do.
not tied to an adequately fleshed-out conception of the good and to the psychological abilities (e.g., deliberative capacities) necessary to live according to that conception. Nonetheless, the virtues of a citizen are genuine virtues in the sense that they include dispositions of the soul that are tied to certain "spheres of experience."¹⁷ In this sense, Aristotle will say that people have natural virtues (EN VI.13.1144b1-17). Likewise, although they are not fully virtuous, slaves, women, and children possess the virtues of character, the virtues of each varying with the different task or function (ἔργον) each is to perform (Pol. I.13.1260a14-17):

the ruler must have complete virtue of character (for a task belongs simply to the master craftsman, and reason (λόγος) is a master craftsman), while each of the others [viz., the ruled, slaves, and women] must have as much as falls to them. It is thus apparent that virtue of character belongs to all those mentioned, and that the moderation of a woman and a man are not the same, nor their courage or justice, as Socrates supposed, but that there is a ruling and a serving courage, and likewise with the other virtues. (Pol. I.13.1260a17-24)

In the same way, Aristotle distinguishes between virtues characteristic of the rulers and those characteristic of the ruled in his discussion of whether the good man and the good citizen are the same:

if there is a different kind of moderation and justice characteristic of ruling, as there is [a different kind] for one who is ruled but free,¹⁸ it is clear that there is not a single virtue of the one who is good, e.g., his justice, but there are different forms according to which he will rule and be ruled, just as moderation and courage differ in a man and a woman. For a man would be held a coward if he were as courageous as a courageous

¹⁷ The phrase is due to Nussbaum (1988). For purposes of this discussion, I ignore the problems that arise when Aristotle speaks of justice in this way, for which see Williams (1980) with O’Connor (1991).

woman, and a woman talkative if she were as modest as the good man.

(Pol. III.4.1277b13-25)

Neither a ruled citizen nor a woman (Aristotle thinks) require practical wisdom. But just as the virtues of a woman are surely important aspects of her character, so too the virtues of a citizen may be of his. For example, as we just saw, the Spartiates developed a form of courage influential enough to lead them to overvalue external goods and disvalue virtuous activity for its own sake. Moreover, Aristotle believes laws concern all the virtues: "practically the majority of the acts commanded by the law are those which are prescribed from the point of view of virtue taken as a whole: for the law bids us practice every virtue and forbids us to practice any vice" (EN V.2.1130b22-24). Most people need the reinforcement of (written and unwritten) laws in order to develop and maintain whatever extent of virtuous character of which they are capable. Of course, for any regime, there could be some who are truly virtuous despite strong countervailing social pressures, and Aristotle in fact sometimes identifies the virtuous as a distinct group among other groups (the wealthy, the poor) in various forms of inferior constitution.19

There are limits on how much a deviant constitution may influence the conception of the good of at least some citizens, those with a natural affinity for virtuous activity (EN X.9.1179b20-23). But most of us "must be content if, when all the influences by which we are thought to become good are present, we get some tincture of virtue" (EN X.9.1179b18-20). The law's effect on the virtue of the citizen will be extensive. If laws are so crucial to the formation of virtuous character for most people, laws which could

19 Pol. III.9.1281a4-8; III.13.1283a37-40; III.15.1286a38-b7; III.18.1288a34-36; IV.3.1289b40-1290a3; IV.7.1293b3-7; V.1.1301a39-b1; V.4.1304b4-5; VII.8.1328a37-41)
orient citizens towards the good could also direct them away from the good. This result, we might add, is the flip side of Aristotle's assumption in the *EN* that laws effectively inculcate virtue (see Chapter One). Those lacking a natural affinity for the truly good who would become truly virtuous under good laws would be more likely to fail to become fully virtuous in a deviant regime, and those who could acquire at best "some tincture of virtue" would be less likely to attain even that much of virtue.

3. **Concluding Assessment**

An education with a view to the *politeia* has a great enough influence on the character of most people that it is reasonable to worry about the Conformity Thesis as applied to education in a deviant *politeia*. Since deviant constitutions aim at misguided conceptions of the good, education which upholds those aims will orient citizens away from the good.

A natural question at this point is why a practically wise lawgiver will adhere to the Conformity Thesis. Unlike a legislator who shares the aims of a deviant constitution, the practically wise lawgiver wishes to reform the constitution so as to bring it closer to the best constitution and the realization of virtue.\(^{20}\) And the most natural answer is

\(^{20}\) According to Bodéüs, the legislator who shares the aims of the deviant constitution also possesses practical wisdom: "Si la vertu du citoyen varie selon les formes de régime politique (*Pol. Π4*, 1276b30-31), la φρόνησις, propre au chef (1277b25-26), varie elle aussi selon les régimes, puisqu'elle est liée à la vertu (Cfr. *EN Z*13, 1144b32)" (1990, 107 n. 45). But citizen virtue is a virtue akin to natural virtue, which does not require practical wisdom, so the mere fact that citizen virtue is a trait of character does not establish that the virtue of a citizen requires practical wisdom. On the contrary, as argued above, because full virtue and practical wisdom imply each other, whereas a good citizen need not be a good man, the virtue of a citizen can be present without practical wisdom. Thus a legislator who shared the aims of a deviant constitution would not be practically wise, although he might be skilled at discovering what conduces to his adopted end (cf. *EN VI*1.9.1142b18-21; 12.1144a20-29).
simply that, as a practical matter, the lawgiver must temper the quest for the best political order in favor of political stability. In general, I think this is correct. The lawgiver must legislate so that citizens will accept the laws, and different populations will abide by different laws in accordance with their characteristic aims. If the lawgiver's wisdom is needed to promote virtue, his ability to make men good is limited by the "matter" at his disposal, including the nature of the people for whom he is to legislate, their dispositions, and their outlooks (Pol. VII.4.1325b40-1326a8: VII.7). The ways of life and conception of the good which the various groups of citizens in a polis share help determine the type of politeia that is appropriate for the city. As Aristotle puts it:

Since happiness is the best thing, and this is the actualization of virtue and a certain complete practice of it, and since it happens that some persons are able to share in it while others are able to do so only a little or not at all, it is clear that this is the cause of there being several kinds and varieties of city and several sorts of politeia. For it is through hunting for this in a different manner and by means of different things that they create ways of life and politeiai that differ.

(Pol. VII.8.1328a37-b2)

If citizens already possess a mistaken conception of justice, the lawgiver will need to take into account, and perhaps bow significantly to, that conception, in order to avoid the greater danger of instability and factional strife (stasis). It is more important, in Aristotle's view, to enact laws which the citizenry are able to obey, if one must choose between enacting laws which are good in theory but disobeyed in practice, and enacting laws which are less than optimal but are nevertheless accepted by the citizens (Pol. IV.8.1294a3-9).

But this practical answer should not obscure two normatively important features
about the Conformity Thesis' contribution to the good. Partial compliance theory may reveal aspects of a normative account which strict compliance theory overlooks. First, consider Aristotle's claim (discussed in Chapter One) that "the law in its ordaining of what is good is not burdensome" (*EN X.9.1180a23-24*). The lawgiver's adherence to the Conformity Thesis in deviant constitutions verifies that Aristotle presumes *nomoi* inculcating the virtues should have a foundation in the social customs and ways of life of the citizens. Laws conforming to the good as conceived in the deviant constitution rather than the best are necessary when a sufficiently strong plurality of citizens are inclined to resist or simply not recognize better laws. Given the habits of the citizens for whom he legislates, the lawgiver may face opposition if he tries to inculcate the virtues in a way the citizens cannot understand. In Sparta, for example, "they say Lycurgus attempted to bring the women under the laws, but they were resistant, and he gave it up" (*Pol. II.9.1270a6-8*). More generally, because habits are not easily altered (*EN VII.10.1152a30-33*), the lawgiver must proceed with care. So by advocating that the practically wise lawgiver adhere to the Conformity Thesis. Aristotle acknowledges constraints on the power of laws to promote full virtue.

Second, if laws ought to be oriented towards the goal of the *politeia*, and if the *politeia* in its guiding aims and way of life makes it more difficult for citizens to become truly virtuous. then Aristotle's desire at the close of the *EN* that laws should make people good, must fail to be satisfied in most circumstances. from the standpoint of the very

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21 Unlike Aristotle, who claims "we are not investigating whom to excuse or whom not" (*Pol. II.9.1270a9-10*). Plato blames "the legislator's failure to be firm" (*Leg. 781a*).
legislative expertise which Aristotle wishes to impart in the *Politics*. If the prospects for full virtue are so bleak, Aristotle's motivation to study constitutions as expressed at the close of the *EN* appears inadequate. If politics is as bound to fail in its aim to promote full virtue, we might well believe Aristotle should consider other means to virtue in addition to an account of the best constitution.

But here the practical answer becomes too practical, for it overlooks how the virtue of the citizen may be better than any available alternative, even if it falls so far short of full virtue that it is compatible with moral vice. To see this, consider Aristotle's endorsement of public education. From the standpoint of a citizen who might become fully virtuous, public education oriented towards an improper conception of the good life seems to be worse than the case where the city neglects education. While Aristotle's praise of Sparta for its provision of public education implies no more than praise simply for having a system (see Chapter One), the dictum that laws and education should be oriented towards the goals and preservation of the *politeia* implies an acceptance that in deviant *politeiai* citizens' conception of the good will likely be distorted. In a *polis* where education is not in common, citizens may not happen to share a common conception of the good life, but at least the possibility remains for individuals to receive an education in virtue in the household. Yet the Conformity Thesis creates this problem for public education only in deviant *politeiai*, where the predominating class' misconception of the good holds sway. In such constitutions, education in the household will--in general--fail to inculcate full virtue, since most citizens will not value virtue for its own sake (if it is valued at all). So laws inculcating civic virtue may actually do a better job of inculcating
some degree of virtue than the household. even if citizen virtue is tinged with moral vice. Public education will make it more difficult for someone to become fully virtuous. but the lawgiver will have his eye on what is best on the whole. not the rare exception (cf. Plato. *Plt.* 294d-295b). While the Conformity Thesis will diminish the prospects for full virtue. it will also aid citizens in living the best life it is possible for them to lead. compatible with the stability of the *polis*.

Finally. we should note the way Aristotle’s interest in the reform or correction of existing regimes qualifies the lawgiver’s adherence to the Conformity Thesis. Considered by itself. the Conformity Thesis tells the lawgiver to enact whatever laws will best preserve the existing regime. But the more unjust the regime. the more inherently unstable it is. This is why “no regimes are so short-lived as oligarchy and tyranny” (*Pol.* V.12.1315b11-12). As we noted earlier. Aristotle tries to get partisans of oligarchy and democracy to modify their conceptions of justice by encouraging them to take the stability of the regime into account: “one should not consider as characteristic of democracy or oligarchy something that will make the city democratically or oligarchically run to the greatest extent possible. but something that will do so for the longest period of time” (*Pol.* VI.5.1320a2-4; V.9.1310a19-22). In effect. then. Aristotle counsels partisans to transform their regime into a less unjust. more moderate (and consequently more


23 Extreme democracy. which “cannot be borne by all cities. and will not last long unless well regulated by laws and customs” (*Pol.* VI.4.1319b1-4). is more stable than oligarchy or tyranny because of its numbers. Cf. *Pol.* VI.6.1321a1-4.
inherently stable) form of regime, rather than to maintain the current regime at all costs. Thus the Conformity Thesis gives way to the need for reform, for the sake of the stability of the *polis* even though contrary to the preservation of the existing regime. The reforms are those which “men, starting from their existing regimes, will be both willing and able to adopt, since there is quite as much trouble in the reformation of an old regime as in the establishment of a new one” (*Pol. IV.1.1289a1–4*). Consistent with his ability to persuade the citizenry, the lawgiver will work to modify the aims of deviant regimes in favor of those which more closely approach the just regime, and thereby bring the regime closer to one in which citizen virtue and full virtue coincide.

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24 Cf. Mulgan (1977, 134); Collins (1997, 222). See also *Pol. V.11.1313a28-33*. 
Chapter Three: The Lawgiver

A crucial problem for normative political philosophy is how to justify the authority of the law. One response to the problem—and there are others (e.g., consent-based theories, rule utilitarianism)—appeals to the law's goodness. Citizens will have reason to follow the law if they believe the laws come about in a way that normally produces good laws. Aristotle held a version of this thesis: the law is authoritative because it "proceeds from a certain practical wisdom and intellect" (EN X.9.1180a21-22).

If Aristotle's response appears odd today, it is because he had to solve the problem without the resources available to us. Modern constitutional states often use procedural devices (e.g., checks and balances, divided government, and rigorous requirements for constitutional change) to prevent ill-conceived legislation. Aristotle did not have such well-developed mechanisms at his disposal. To be sure, a few of these devices have their predecessors in ancient Greece, some of which Aristotle canvasses in the Politics. ¹ But it is no accident that the Lyceum served as a school for legislators, or that Aristotle thought legislative expertise to be a form of practical wisdom (EN VI.8.1141b25). Aristotle had to rely far more heavily on the lawgiver's wisdom. Good laws were the products—the erga (EN X.9.1181a23)—of good legislators.

If Aristotle relies on legislative wisdom to bring about good laws, how well does his conception of legislative wisdom find its proper place in real political communities? How is practical wisdom embedded in legislative practice? Recent accounts of Aristotle's

political philosophy neglect these questions.\textsuperscript{2} The lawgiver becomes a placeholder for the recipient of Aristotle's teachings, as if he lacked special qualities \textit{qua} lawgiver. One reason for this neglect may be that legislative activity is thought of primarily in terms of citizen assemblies. Yet the familiar picture of Aristotle's good citizen participating in political affairs obscures another, more exalted figure in Aristotle's writings. This is the lawgiver Rousseau would laud as "in every respect an extraordinary man in the state"--an idealized, quasi-mythical persona Barker describes as "particularly Aristotelian in character" (1959, 521). On Aristotle's account, each sort of lawgiver, the sage and the citizen, suffers from his own set of problems. But when legislative wisdom fails, the law still possesses authority from its ability to restrain bias and passion and ensure political stability.

1. \textbf{Legislative wisdom as \textit{phronēsis}}

How does legislative wisdom as a form of practical wisdom (\textit{EN VI.8.1141b25}) secure the law's goodness? As a practically wise agent, the lawgiver also possesses the virtues of character, since "with the presence of the one quality, practical wisdom, will be given all the virtues" (\textit{EN VI.13.1145a1-2}). According to Aristotle, it is not possible to be practically wise without moral virtue (\textit{EN VI.13.1144b31-32}). We must therefore attribute to the lawgiver a desire for the noble, and that on a grand scale, as "it is finer and

\textsuperscript{2} A recent exception is Bodéüs (1990); (1991b); (1993). Bodéüs' studies concern the intended audience of Aristotle's ethical-political writings, and the epistemological differences between the practical wisdom of the legislator and the philosophical study of politics (on which see also Berti (1993)). The present study asks how well the lawgiver's practical wisdom succeeds in supporting the authority of the law, taking its cue from some suggestive subdivisions of legislative expertise in Bodéüs (1990).
more divine to attain [the human good] for a nation or for *poleis*" (*EN* I.2.1094b10).

The fact that legislative wisdom is a form of practical wisdom provides an important basis for the authority of the law. The law becomes a substitute for the practically wise person, the *phronimos* (cf. Plato, *Plt. 295c-e*). As a *phronimos*, the lawgiver should enact laws which prescribe what the practically wise, morally virtuous agent would do. Since we should act as the *phronimos* would act, we should obey the law insofar as it "is an account (*logos*) proceeding from a certain practical wisdom and intellect" (*EN* X.9.1180a21-22).

The foregoing offers an idealized picture of the lawgiver's wisdom, and a correspondingly idealized justification for the law's authority. To the extent that actual legislators fall short of this ideal, the lawgiver's wisdom will not provide a reason for citizens to obey the law. How well do actual legislators fare in comparison with the idealized picture? In the next two sections I consider the answer to this question by focusing on Aristotle's two types of legislator, the lawgiver as sage and the citizen legislator.

2. **Lawgiver sages**

Sometimes Aristotle's account of legislative wisdom seems to mesh well with a conception of the lawgiver as a sort of sage. By a sage I mean a rare individual who is preeminently wise in comparison with the other members of a city. Aristotle sometimes

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3 This is not to say that there would be no need for laws if everyone were practically wise. A society of *phronimoi* might require publicized norms simply to ensure the benefits of social coordination. Cf. Raz (1990, 159-160).

speaks as if there is, was, or could be such an individual. In the *Rhetoric*, he writes that "to find one man, or a few, who are sensible and capable of legislating and administering justice is easier than to find many men" (I.1.1354a34-b1). In Aristotle’s review of lawgivers in *Politics* II.12, Aristotle attributes the regimes of Sparta and Athens as being due to one man (Lycurgus and Solon, respectively) (1273b32-34). Although people have a natural impulse towards political association. Aristotle says that "the one who was first to establish [it] is responsible for the greatest goods" (*Pol*. I.2.1253a30-31).

In this, Aristotle seems to follow most of his contemporaries, for the Greeks often conceive of the lawgiver as a rare individual who supplies the *polis* with the framework in which its citizens will live thenceforth. Plato, for example, has Protagoras describe laws as "the inventions of good lawgivers of ancient times" (*Prot*. 326d). In the *Statesman*, judges are said to judge in accordance with the laws which they "inherited from a legislator king" (305b-c: 294a). Plato brings out this conception of the lawgiver even more vividly in the *Laws*. While Kleiniyas and Megillus ascribe the origin of the laws of Crete and Sparta to gods (624a), the predominant conception throughout the dialogue is of a small group of lawgivers who lay out the general scheme for the city’s way of life. The very action of the dialogue emphasizes the point: Kleiniyas with nine others has been entrusted with the founding of a colony (702c), and the interlocutors then

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5 Some scholars think that *Pol*. II.12 is not written by Aristotle. At the very least, it does not follow the program that Aristotle sets upon at the beginning of book II, but this is not sufficient reason not to attribute the chapter’s authorship to Aristotle. See Keaney (1981) for a recent review of the difficulties.

6 See Bonner and Smith (1930, I.67 ff.); Meier (1990, 40-52).
attempt to determine the bulk of the laws that the new colonists should use. Here the conception of the lawgiver is rooted both in traditional ascriptions of the constitution to the agency of one person and in the historical practice of founding new colonies.

How well does the idea of a lawgiver sage hold up in political practice? The conception of the lawgiver as a sort of sage suffers from a number of difficulties. First, it simply does not seem historical. The way of life of a people develops over a long time in response to many factors: to attribute all or most aspects of a political regime to one man is thus unrealistic. As Barker states, "The customs which had grown by quiet accretion from many minds, the institutions which the accidents of war and it might be conditions of climate had fashioned, the manners and habits which luck had suggested and imitation made inveterate—all these were to Greece the laws of a Lycurgus, or still more primitive Minos" (1959, 9). This is not to deny that an individual lawgiver could recognize the customary patterns by setting up a normative framework which explicitly regulates them. Moreover, there could be some adjustment or coordination of customs, or an attempt to reconcile customs which are in tension with one another. But ultimately the norms established by such a lawgiver must take into account what the citizens will follow given their nature and habits.⁷

Second, the lawgiver as sage must satisfy the same claims to distributive justice as the absolute king, with the result that a sage is no more likely than an absolute king, given the relative equality of citizens. Distributive justice demands that

in the case of persons similar by nature, justice and merit must necessarily

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be the same according to nature. . . . Hence it is no more just [for equal persons] to rule than to be ruled, and it is therefore just [that they rule and be ruled] by turns.

(Pol. III.16.1287a12-18)\(^8\)

Those who are equal ought to rule by turns, in accordance with the claims of distributive justice. Thus, in order to merit the extraconstitutional office of lawgiver—that is, an office which, as Rousseau says in the Social Contract, "constitutes the republic" but "does not enter into its constitution" (II.7)—the lawgiver would need to surpass other people in virtue. Those who are outstanding in virtue will be done injustice if it is claimed they merit equal things in spite of being so unequal in virtue and political capacity: for such a person would likely be like a god among human beings. From this it is clear that legislation must necessarily have to do with those who are equal both in kind and capacity.\(^9\) and that for the other sort of person there is no law—they themselves are law.\(^10\)

(Pol. III.13.1284a9-14)

Here Aristotle is thinking primarily of whether the claim of one person to rule over others as absolute king is just (cf. Pol. III.17.1288a15-29 with Pol. III.13.1284b22-34). But what goes for the absolute king should hold as well for the lawgiver sage: each should excel in virtue like "a god among human beings" (Pol. III.13.1284a10-11). No one who

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\(^8\) While this passage occurs in a chapter in which Aristotle does not speak in his own name, he clearly endorses it in the next chapter (Pol. III.17.1287b41-1288a5).

\(^9\) One must keep the locus of legislative authority distinct from the people who are covered by legislation. A lawgiver could set down laws for a people who are equal and yet have the rightful title to legislate for them, e.g., if he is from another polis.

\(^10\) It is possible to construe "they themselves are law" in an ideal sense, such that one who holds absolute power in the state nonetheless wields it virtuously, as if he always or usually adheres to general rules. Cf. Pol. III.15.1286a16-22. But at Pol. III.13.1284a13-14 Aristotle may have in mind more simply that the decisions of rulers who are vastly superior in some respect (e.g., power, wealth) in comparison to the other members of the polis are supreme, just as the law is supreme. Cf. III.13.1284a20-21.
possessed a more ordinary sort of virtue "would assert that there should be rule over such a person: this is almost as if they should claim to rule over Zeus and divide the offices among them" (Pol. III.13.1284b30-31).

But a god among human beings is evidently unlikely, as Aristotle makes clear when he asks "if the rulers and the ruled should be different or the same throughout life" (Pol. VII.14.1332b13-15):

Now if the ones were as different from the others as we believe gods and heroes differ from human beings, much exceeding them in the first place in body, and then in soul, so that the preeminence of the rulers is indiscputable and evident to the ruled, it is clear that it would always be better for the same persons to rule and the same to be ruled once and for all. But since this is not easy to assume, there being none so different from the ruled as Scylax says the kings in India are, it is evident that for many reasons it is necessary for all in similar fashion to participate in ruling and being ruled in turn. (Pol. VII.14.1332b16-27)

In sum, just as Aristotle holds that absolute kings are rare, so too he should hold that lawgiver sages are rare.

It should not be surprising, then, that actual lawgivers do not live up to the picture of the lawgiver as a morally virtuous, practically wise agent. Among most peoples, the majority of legal matters are in a state of confusion (Pol. VII.2.1324b5-6). Sometimes lawgivers fail to see that particular laws hinder the goals which they are trying to realize. For example, the Spartan lawgiver is criticized for not coordinating laws promoting population growth and laws concerning property distribution. As a result of this neglect, many of the citizens are poor (Pol. II.9.1270a39-b6; cf. II.7.1266b8-21). More seriously, some lawgivers do not promote the good life correctly conceived: in Sparta, "the entire
organization of the laws is with a view to a part of virtue, warlike virtue." so that citizens value the external goods acquired by domination more than virtuous activity itself (Pol. II.9.1271a41-b10: VII.14.1333b5 ff.; VII.15.1334a34-b5). Thus actual lawgivers fail both to select the proper means to promote their chosen ends\(^{11}\) and to have an adequate conception of the good life. Both of these sorts of failures are due to a deficiency in practical wisdom and virtue (cf. EV VI.9.1142b31-33; VI.12.1144a20-33).

If Aristotle nonetheless persists in singling out certain individuals as lawgivers for cities, it is perhaps because such lawgivers are thought to have legislated in the distant past. This is, I think, confirmed if we look at Aristotle's account of heroic kingship: "there were probably kingships in the past because men surpassing in virtue were few," whereas later "many persons equal with respect to virtue arose" (Pol. III.15.1286b8-9: b12; cf. III.14.1285b3-19: V.10.1313a3-10). According to this developmental picture, the king of heroic times exceeded his subjects in virtue because his subjects were rather primitive in their degree of virtue and prudence (cf. Pol. II.8.1268b39-1269a8). Later, people approached the level of virtue of the heroic king, so that all were relatively equal, with none "so outstanding as to match the extent and the claim to merit of the office" (Pol. V.10.1313a6-9). So perhaps Aristotle would say that while an ancient lawgiver also exceeded his contemporaries in virtue, he would not qualify as a "god among men" in Aristotle's own time, when (Plato's Protagoras tells us) virtue is more widespread.\(^{12}\) Just as there are no longer kingships, there are no longer people who are considered lawgiver

\(^{11}\) Bodéüs (1991d).

\(^{12}\) Plato, Prot. 322b-328a.
sages: because all are relatively equal in virtue, the capacity to legislate belongs to all the citizens.

Before turning to citizen legislators, we should note that a student trained in Aristotle's school, Demetrius of Phalerum, did not sufficiently take to heart these parallels between the absolute king and the architectonic lawgiver sage.¹³ Demetrius came to rule Athens as Athens fell more firmly under Macedonian hegemony after Aristotle's death. Demetrius took it upon himself to become an architectonic lawgiver: "As soon as he assumed power he began the task of drafting a new law code or constitution for the city, which evidently was completed and went into effect in 315-14. According to tradition he was known as the third great law-giver of Athens" (Wood and Wood 1978, 250).¹⁴ Here we see that Aristotle's conception of the lawgiver as a sort of sage was not without practical effect. But Demetrius was no sage. Just as "the citizens guard kings with their own arms, while a foreign element guards the tyrant" (Pol. III.14.1285a25-27). Demetrius' constitution was no more lasting than the Macedonian might on which it was based: Athens restored its democratic constitution as soon as Demetrius was forced to abandon the city a decade after assuming power.¹⁴

¹³ On Demetrius and his rule, see Ferguson (1911), Dow and Travis (1943), Wood and Wood (1978), and Williams (1987).

¹⁴ For the "tradition", see Syncellus. 521 (cited in Ferguson (1911, 40 n.3)). Cf. Dow and Travis: "Altogether there can be no reasonable doubt that Demetrios interpreted the masters to mean that one of the first duties of a philosopher upon securing power was to become a νομοθέτης. The fact that he was the sole holder of this position and that the whole process was different would distinguish him sufficiently from the large democratic boards of νομοθέται" (1943, 159).

¹⁴ For the events, see Ferguson (1911).
3. **Citizen legislators**

Aristotle also speaks of legislative activity as taking place among a body of citizens who come together to consider, propose, enact, or ratify legislation, including constitutional provisions. It is well that he does, for the picture of the lawgiver sage setting up a constitution invites the question as to how citizens are to change the laws once the founding lawgiver has left the scene. (It is, of course, theoretically possible for a lawgiver to set up a regime without providing a mechanism or procedure for reform. But even Plato, who in the *Laws* suggests that after an initial ten year period the laws and customs of Magnesia should be made unchangeable (772a-d), allows for legislative reforms through the powers of the Guardians of the Laws and the Nocturnal Council (770a-c: 968c-969c).) There is clear evidence in the *Politics* and in the *Rhetoric* of this more practical view of legislative activity and, correspondingly, of the lawgiver. In the first place, even in the case of "craftsmen of regimes." Aristotle does not think that every aspect of the regime is attributable to a single lawgiver." Secondly, it was simply a fact that citizens legislated in deliberative bodies. The citizen in the strict sense is "whoever is entitled to participate in an office involving deliberation or judgment" (*Pol.* 1.64b 10-11).

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10 For example, Aristotle corrects those who believe that Solon was responsible for the council of the Areopagus and for the election of officials: "Solon found these things existing previously--the council and election to offices--and did not dismantle them, but established the people by making the courts open to all" (*Pol. I.12.* 1273b41-1274a3). Likewise, he realizes that Lycurgus was not responsible for all Spartan institutions. In particular, he believes that the power of the Spartan kings was diminished later with the addition of a new group of officials: "Theopompus moderated it [=the kingship], among other things by establishing in addition the office of the Ephors" (*Pol. V.11.* 1313a26-28; cf. Plutarch, *Cleomenes* 10: Lycurgus 7). Note also that in Aristotle's discussion of the Ephorate in *Pol. II.9*, he specifically does not attribute its genesis to "the lawgiver," but says that "whether it was through the lawgiver or by chance that this came about, it is advantageous for their affairs" (1270b19-20).
III.1.1275b18-19), and the deliberative part of the regime has authority concerning laws
(Pol. IV.14.1298a3-5). So, as we would expect, at least some citizens who participate in
political deliberation have the power (rightfully or not) to legislate. For example, in
democratic regimes, all the citizens meet together regarding the enactment of laws and
matters concerning the regime (Pol. IV.14.1298a17-18; a20-21). Likewise, we find
Aristotle advising the student of rhetoric who intends to speak before the assembly "to be
knowledgeable about legislation"—by which he means that "it is necessary to know how
many forms of regime there are and what is conducive to each and by what each is
naturally prone to be corrupted" (Rhet. I.4.1360a18-23). These citizen-legislators and
speakers in deliberative bodies are to perform their task on the basis of a knowledge of
the various types of constitutions that have existed (Rhet. I.4.1360a20-23; a30-37)—the
same matters the architectonic lawgiver must study in the Politics. Thirdly, there is a
more pragmatic feature: Aristotle’s political writings are intended for potential legislators
who must "be able to find remedies for the defects of existing regimes" (Pol.
IV.1.1289a1-7). This point is twofold. First, a "god among men" would be unlikely to
need Aristotle’s instruction! Second, Aristotle sees the reform of laws and constitutions
as justified in some circumstances. Aristotle knows that one argument in favor of the rule
of law is that citizens "make corrections on the basis of their experience in cases where
they hold something to be better than the [laws that are] laid down" (Pol. III.16.1287a27-
28). Sometimes traditional laws and customs "are exceedingly simple and barbarous"
(Pol. II.8.1268b39-40). While "a readiness to change from old to new laws enfeebles the
power of the law" (Pol. II.8.1269a22-24). Aristotle seems to allow that there are
situations where the benefit of a change in the law would greatly outweigh the risk that legislative change poses to the habit of obedience to law (*Pol. II.8.1269a13-22*).

But is there reason to think the laws are good when they are made by ordinary legislative bodies? Aristotle seems to think not. His praise for the rule of law shows that he thinks ordinary citizens often lack sufficient virtue to rule wisely. Aristotle advocates the rule of law in order to restrain citizens from ruling in accordance with their biases, emotions, and desires:

one who bids the law to rule is thought to bid god and intellect (νοῦν) alone to rule, but one who bids man [to rule] adds the beast. For appetite is of this sort, and spiritedness perverts rulers, even the best of men. Thus law is intellect without desire.

(*Pol. III.16.1287a28-32*)

The argument is used to overturn "the example of the arts" (*Pol. III.16.1287a32-33*). In the example of the arts, the craftsman should not be bound by written rules, but by whatever accords with his best judgment (*Pol. III.15.1286a9-16*). If ruling were a craft, the political ruler would need the same flexibility as the craftsman, eschewing laws in favor of his own judgment. But in an important respect ruling is not like a craft: ordinary craftsmen "do nothing contrary to reason on account of friendship . . . whereas those in

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17 Robinson notes that "Filmer, who favored absolute kingship, was careful to point out that the chapter does not adopt these arguments against kingship but merely reports them" (1995, 61). But in fact Aristotle endorses this argument at *EN V*.6.1134a30-b1: "justice exists [only] between those whose mutual relations are governed by law. . . . This is why we do not allow a man to rule, but law (νόμον), because a man behaves thus in his own interests and becomes a tyrant." (Some of the manuscripts read λόγον ("reason") instead of νόμον at 1134a35, but even on that reading the context of the passage clearly warrants the identification of reason and law, inasmuch as "there is justice [only] for those whose mutual relations are governed by law.") For more about 1134a30 ff. on the relation between law and justice, see Chapter Five.

political offices are accustomed to acting in many matters with a view to spite or favor" (Pol. III.16.1287a35-38).

If rulers may be led astray by bias, passion, or selfishness when they do not rule in accordance with laws, it is unclear why the same dangers do not arise when the rulers have the power to make or amend the law. As Aristotle puts it in an aporetic passage.

"Someone may say that it is bad in any case for a man, subject as he is to all the accidents of human passion, to have the supreme power, rather than the law. But what if the law itself be democratic or oligarchical, how will that help us out of our difficulties?" (Pol. III.10.1281a34-38).

The distinction Aristotle draws between laws and decrees elucidates the dangers he thinks arise when citizens rule. Laws are formed in general terms (EN V.10.1137b13). Decrees, by contrast, are confined to particular situations or particular people. (A decree that all able-bodied male citizens over the age of eighteen must perform military service in a particular war against Sparta is a decree rather than a law because it is limited in time and action to a particular war against a particular city, even though it specifies the individuals who are to take part in that war in general terms.) In the worst forms of political regime, all decisions are made through decrees. The guidance provided by the generality of the law is rejected; the biases of the rulers prevail in each situation. For example, Aristotle writes, "Popular leaders err in democracies where the multitude has authority over the laws: by always fighting with the well-off they make the city two cities" (Pol. V.9.1310a3-5)." On Aristotle's view, the rule of law greatly reduces the

chances for conflict and a breakdown in civil order. So integral is the rule of law to the preservation of political communities that

where the laws do not rule there is no politeia.\textsuperscript{20} The law should rule over all [matters], while the officials should rule over particular cases, and one should judge this to be a politeia. So if democracy is one of the sorts of politeia, it is apparent that such a system [as extreme democracy], in which everything is administered through decrees, is not even democracy in the strict sense, since no decree can be universal.

\textit{(Pol. IV.4.1292a32-37)}

Here the rule of law, whereby the decisions of political authorities are "guided by open and relatively stable general rules" (Raz 1979b, 212-213), is a necessary condition for a city to have a form of constitution. Because of the order which law imposes,\textsuperscript{21} decisions about particular matters, including decrees, need to be subordinated to laws.\textsuperscript{22} (The idea of subordinating decrees to law is also embodied in the legal norms of Athens in the fourth century B.C.E., for (in theory, at any rate) no decree could be passed which contradicted a law.\textsuperscript{23})

The distinction between law and decree is mirrored by the greater importance of the legislator's role in comparison to the other actors upon the political stage. Aristotle distinguishes \textit{πολιτική} in its architectonic, legislative sense from a subordinate form of

\textsuperscript{20} Cf. Pol. IV.2.1289b1-2 and IV.8.1293b27-30 on tyranny as a form of politeia.


\textsuperscript{22} Aristotle does not appear to consider the possibility that some laws could be so specific that they would essentially function like decrees. For example, the state could collect as much revenue by changing laws about taxation every few years, as by periodically enacting decrees.

\textsuperscript{23} For the evidence, see Hansen (1983b) and (1983c). Cf. also Ostwald (1986). It is not important for the purposes of this chapter whether the theory was carried into practice. Aristotle, at any rate, did not think that it was, on which see Strauss (1991).
πολιτικῇ (E.V. 8.1141b25-26: b32-33). The subordinate political art is concerned with particulars (φρόνησις ὡς καθ' ἐκαστα). More specifically, this subordinate type of πολιτικῇ is concerned with action and deliberation (E.V. 8.1141b27), and is further subdivided into deliberative and judicial forms of prudence (E.V. 8.1141b32-33). We are evidently to think of the role of the assemblyman and the dikast here, since it falls to them to deliberate and to judge (cf. Pol. III.1.1275b16-17). Now a member of the assembly, we might think, may act in a legislative capacity, since legislation also involves deliberation (Pol. IV.14.1298a3-5). But in the context of E.V. 8, Aristotle clearly intends to distinguish the deliberative role of the subordinate political art from the role of the legislator. for Aristotle immediately glosses the way in which the subordinate political art is concerned with action and deliberation as follows: "for the decree is concerned with action as the last thing to be done" (E.V. 8.1141b27-28). Here Aristotle relies on the distinction between law and decree to confer a greater dignity upon the legislative task: "Thus they say that these [i.e., political men] alone take part in politics (πολιτεύεσθαι). for these alone do things as handcraftsmen do things" (E.V. 8.1141b28-29; cf. Plato. PIt. 259c-260a). The comparison of the subordinate political man to a handcraftsman diminishes the importance of the one who partakes in politics, not simply because it indicates someone of lower social status, but because the

21 I follow Burnet (1973), Stewart (1892), and Gauthier and Jolif (1959) in omitting τὰ: cf. E.V. III.1.1110b33. On the difficulty of the text, see Cooper (1975. 35 n. 45).

22 Although the revised Oxford translation says that this subordinate form of πολιτικῇ is related to the directive form "as particulars to their universal," Aristotle does not make this subordinate form a particular instance of political expertise qua architectonic, as Kallias and Socrates are particular men in relation to the universal Man: "καθόλου." the word for "universal" is not in the text.
architectonic legislator sets up the overall structure in which subordinate political men operate. Unlike the master craftsman, the manual worker, *qua* manual worker, lacks knowledge of the scope and importance of his task in the overall scheme:

we think also that the master workers in each craft are more honorable and know in a truer sense and are wiser than the manual workers, because they know the causes of the things that are done (we think the manual workers are like certain lifeless things which act indeed, but act without knowing what they do).

(Met. 1.1.981a30-b2)

Now the assemblyman and the dikast stand in a subordinate relation to the architectonic lawgiver in that they must make their decisions in accordance with the law (*Rhet.* 1.1.1354a31-32; b12-16; *Pol.* IV.4.1292a32-34). To the extent that they must deliberate and judge in accordance with the law, they are much like workmen taking instructions from a master craftsman. The political man attends to the details that arise from day to day, using the laws as guides, whereas the lawgiver sets out the general framework, just as handcraftsmen carry out the plan set in motion by the master craftsman.

If citizen rulers in their subordinate political role require the restraints provided by the rule of law, then it would seem that citizens will often legislate unwisely, if not disastrously. But the political ruler's need for wisdom mitigates the danger of citizens' legislative activity: because the political ruler must use the laws as guides, he too should have some grasp of the legislative task. There must be some continuity between the role of the architectonic lawgiver and the task of the subordinate political ruler, a continuity from constitution-founding to tinkering with the constitution, and from minor legislative changes to issuing decrees or pronouncing verdicts that adhere to (or at least do not go
against) the laws. The political ruler *qua* subordinate also (ideally) possesses a form of practical wisdom (*E.V I.8.1141b24-26: b30-33*), so that the comparison of the ruler to the manual artisan must be qualified.²⁶ There must be an awareness of the law and its value in order to stay within its confines or to apply it faithfully. The equitable person serving as a dikast must "say what the legislator himself would have said had he been present, and would have put into his law if he had known" (*E.V V.10.1137b23-24*). The member of the assembly and the magistrate must understand the law in order to rule in accordance with it and ensure that they do not pass measures which contradict the established laws. Indeed, one could argue that the state of mind of the subordinate political ruler and that of the architectonic lawgiver should be identical, and not merely on a continuum. Inasmuch as the citizen ruler does not possess the lawgiver's wisdom, it is always possible that he may err, whether by misconstruing the application of a law to the facts of a particular case, misunderstanding the purpose of a law or the circumstances in which it is needed, failing to recognize the relation between a law and other enactments, or simply lacking the moral virtue to apply the law appropriately.²⁷ There is no way to rule out that in some cases only the architectonic lawgiver's degree of wisdom is sufficient for citizens to carry out the 'instructions' with enough understanding. But this should not lead us to exaggerate: in many situations, the citizen need not possess the


²⁷ Cf. Plato, *Leg.* 876b-e
sage's wisdom, for it is easier to carry out instructions than to create the master plan.²⁸

4. **Law and Stability**

When the quality of the laws suffers in the absence of wise legislators, Aristotle can still rely on features of the law itself to secure (justified) obedience to law. Insofar as the legislative activity of citizens exists along a continuum between the lawgiver sage and subordinate political rulers, the citizen's legislative activity may avoid the pitfalls inherent in the latter's concern with particulars without requiring the former's wisdom. Aristotle seems to think that the greater danger of bias arises in the case of the subordinate political role in comparison to the lawgiver's role. As Aristotle puts it.

> laws are made after long consideration, whereas decisions in the courts are given at short notice, which makes it hard for those who try the case to satisfy the claims of justice and expediency. The weightiest reason of all [that laws should specify as many things as possible] is that the decision of the lawgiver is not particular but prospective and general, whereas members of the assembly and the jury find it their duty to decide on definite cases brought before them. They will often have allowed themselves to be so much influenced by feelings of friendship or hatred or self-interest that they lose any clear vision of the truth and have their judgment obscured by considerations of personal pleasure or pain.

*(Rhet. I.1.1354b3-12)*²⁹

Two features make the rule of law important in this passage. First, laws are decided upon after a longer period for careful deliberation. Second, laws are general and less removed from particularities which may lead to bias. Both of these features belong to the

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²⁸ Cf. Rousseau: "But if it is true that a great prince is a rare man, what about a great legislator? The former merely has to follow the model the latter should propose to him. The latter is the engineer who invents the machine; the former is merely the workman who constructs it and makes it run" (1987, 163).

lawgiver's role. That is, the features apply to both citizen legislators and the architectonic lawgiver simply because they both legislate. Where careful deliberation is combined with abstraction from particular circumstances, citizens are less prone to go astray.

We may infer from these two conditions of legislative activity that Aristotle thinks that, when it comes to a mass of citizens in a position of rule, the danger of laws which are biased in favor of a group of citizens, e.g., the rich or the poor, is less a threat to the stability of a polis than citizens ruling without the guidance and constraints which laws impose upon their judgments and decisions about particular matters, e.g., whether to go to war or to condemn a citizen to death. Here the law gains its authority from its contribution to political stability, not necessarily from its source in practical wisdom. The importance of the rule of law for political stability partly explains why Aristotle ranks forms of democracy and oligarchy in which the law does not rule as the worst of their respective types of regime.\(^{30}\) The rule of law is valuable even if the laws of one's state are not optimal. As Aristotle puts it,

\[\text{good management (εὐνομία) does not exist where the laws are well enacted yet are not obeyed. Hence one should conceive it to be one sort of good management when the laws are obeyed as enacted, and another sort when the laws being upheld have been finely enacted (for it is possible that even badly enacted ones will be obeyed).}\]

\[\text{(Pol. IV.8.1294a3-7)}\]

Even if biased legislation is better than rule unconstrained by law, Aristotle should be concerned to ensure that citizens legislate as wisely as possible. Sometimes a mass of citizens may deliberate as a collective body just as well as one virtuous person.

\[^{30}\text{Pol. IV.4.1292a4-37; IV.5.1292b5-10; IV.7.1293a1-10; a30-34; II.10.1272b7-15.}\]
"for each individual among the many has a share of virtue and practical wisdom, and when they meet together, just as they become in a manner one man, who has many feet, and hands, and senses, so too with regard to their character and thought" (Pol. III.11.1281b4-7). But the rarity of wise legislators leads to the need for legislative restraint. Because procedural mechanisms were relatively undeveloped in ancient Greece, Aristotle had to fall back upon the habit of obedience to the law, so that citizens would be less willing to introduce legislative changes. Here the "rule of law" may serve as a powerful ideal. Citizens who have internalized a respect for the law will be more reluctant to alter it. The benefits of legislative reform need to be balanced against the potential damage to citizens' habit of obedience to law: "law has no strength with respect to obedience apart from habit, and this is not created except over a period of time" (Pol. II.8.1269a20-21).

Ultimately, for Aristotle and for us, citizens must be willing to abide by the procedures which constrain their deliberative powers. We are perhaps less worried about the wisdom of our legislators, confident that procedural devices will restrain legislative unwisdom. Our confidence is not always justified. Nor is it utopian enough. Divided government and a system of checks and balances often help us avoid the worst excesses of partisan zeal: they do not secure the blessings of the extraordinary lawgiver's detached

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1 See Waldron (1995).

12 Though its importance should not be exaggerated: cf. Raz (1979b). For the development of the ideal in Athens, see Ostwald (1986).

beneficence. Political systems can do more to approach the conditions of the ideal legislator—for example, by designing institutions so that they select for wisdom. We need not require the services of an idealized Solon or Lycurgus to profit from Aristotle's lawgiver sage.

5. **Conclusion**

If legislative wisdom is ideally a form of practical wisdom, Aristotle is hardly blind to the fact that laws are often made by agents who are less than practically wise. Given the parallels between the lawgiver sage and an absolute king, lawgiver sages are unlikely at best, and actual individual lawgivers do not, on Aristotle's account, legislate wisely enough. Since citizen rulers are prone to bias and passion, citizen legislators also are not likely to legislate well. However, Aristotle's remarks about the rule of law indicate that citizens rule better under the guidance of laws, on account of the law's generality and greater remove from factors which may lead to biased judgment. While legislative bias remains a problem, the law retains its authority because it helps keep in check the biases and passions of human beings. Were lawgivers always sages, there would be no need for a *Politics.*
Chapter Four: Equity and the Rule of Law

Aristotle believes that, in practical affairs, the ultimate determination of what should be done in a particular situation falls to the insight of a practically wise person (φρόνιμος). At the same time, in political affairs Aristotle supports the rule of law, according to which political actors must, as far as possible, abide by rules constraining them from acting on bias and passion. If we put these two positions together, there is a potential conflict between the practically wise person’s insight and the dictates of the law. Aristotle acknowledges the potential conflict between the rule of law and practical insight in his analysis of absolute kingship. The absolute king possesses the wisdom and the virtue to rule wisely without being bound by rules. Because absolute kingship is exceedingly rare, Aristotle appears to favor the rule of law in most circumstances.

However, in his account of equity, Aristotle reopens the door to practical judgments that are sensitive to the features of particular cases which the laws cannot take into account. Operating within the domain of adjudicative procedure, equity allows for the “correction of law” (En. V.10.1137b26-27). The question I want to consider is whether, by allowing equitable judgments, Aristotle subverts the ideal of the rule of law as “intellect without desire” (Pol. III.16.1287a32). I shall argue that although equity and the rule of law may coexist in practice, the principles underlying each push in opposite

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1 For general accounts of practical wisdom and particularism in Aristotle’s thought, see, e.g., Sherman (1997; 1989); Louden (1991); Nussbaum (1990); Devereux (1986); Engberg-Pedersen (1983); and Monan (1968).


directions. Because equity relies on the moral judgment of the dikast, it diminishes the
ability of law to constrain the dikast's powers of decision, contrary to the ideals implicit
in Aristotle's praise for the rule of law.

1. **The Rule of Law as the Mechanical Application of the Law**

In the *Rhetoric*, Aristotle presents the rule of law as a way to restrain the biased
judgments of political actors. Because dikasts are prone to passion and bias, the role of
the dikast ideally ought to be limited to the determination of facts:

> it is appropriate for correctly enacted laws to define all they possibly can
> and for as little as possible to be left to those deciding. . . . The most
> important reason of all [that laws should define all they can] is that the
> decision of the lawgiver is not about a particular case but about what lies
> in the future and in general, while the member of the assembly and the
> dikast actually decide about present and definite cases. For them,
friendliness and hostility and individual self-interest are often involved,
with the result that they are no longer able to see the truth adequately, but
their private pleasure or grief casts a shadow on their judgment. In other
matters, then, as we have been saying, the one deciding should have
authority to determine as little as possible. But about whether something
has happened or has not happened, will or will not be, is or is not the case.
It is necessary to leave to those deciding: for it is not possible for the
lawgiver to foresee these things.

(*Rhet.* 1.1.1354a31-b16)

Call this the mechanical model of rule application. On this model, the dikast needs to be
limited as much as possible to the determination of factual matters because of his inability
to judge fairly in particular cases.¹ Let the lawgiver, removed from the particularities that
allow bias to hold sway, decide what sorts of actions are right or wrong. It falls to the
dikast simply to see whether a defendant's actions happen to fall under the umbrella of
the legal norm.

The mechanical model of rule application is a caricature of what actually happens in the legal arena. As Hart puts it, "Particular fact-situations do not await us already marked off from each other, and labeled as instances of the general rule, the application of which is not in question: nor can the rule itself step forward to claim its own instances" (1994, 126). The dikast’s decision whether a law applies to a particular situation requires judgment about the law’s meaning and purpose. It also often depends on the ability to disentangle a complicated web of allegations, admissions, and evidence, in order to form a clearer picture of the facts themselves. Moreover, whereas today jurors are instructed to determine the facts using the law as it is “found” for them by a judge, in Athenian judicial practice “there was no sharp distinction between decisions on law and on facts” (Harrison 1971, II.134).

Does the dikast’s need for discretion undermine the ideal that lies behind the mechanical application of the law? Aristotle intends the mechanical model as a way to avoid biased judgment when dikasts issue their verdicts. Although the claim that the law should be as specific as possible does not by itself conflict with the dikast’s need for discretion, there is a danger that the degree of discretion required might give the dikast too much leeway to interpret and apply the law in accordance with his biases and passions. In order to see whether the dikast is permitted too much discretion, we need to look at Aristotle’s doctrine of equity, for it is there that the dikast’s powers of discretion come to the fore.
2. **The need for equity**

Aristotle bases the need for equity (ἐπιεύκεια) on a lack of fit between the nature of the law and the nature of practical matters:

    every law is universal, but about some things it is not possible to speak universally in a correct manner. In these cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case (ὅς ἐπι τὸ πλεον), though it is not ignorant of the possibility of error. And it is nonetheless correct: for the error is not in the law nor in the lawgiver but in the nature of the thing. For the matter of practical affairs is of this kind from the start.

    (EN V.10.1137b13-19)

The claim that practical affairs are only "for the most part" is a metaphysical claim about the variability or contingency of the matters with which human action and deliberation are concerned. Aristotle holds that there are "things whose first principles cannot be otherwise" and other things that are variable or can be otherwise (EN VI.1.1139a7-8).

"Among things that can be otherwise are included both things made and things done" (EN VI.4.1140a1-2), and hence practical affairs fall within the domain of the variable.

The way in which the need for equity arises has a counterpart in the domain of scientific explanation. Allowing general statements about matters that are only "for the most part" to play an important role in scientific explanation is parallel to specifying that judges should decide particular cases in accordance with laws that are general in scope.

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' ἐπιεύκεια is usually translated as "equity", which has associations with the English courts of equity. To avoid this association, ἐπιεύκεια is sometimes translated as "fairness" or "decency". While we ought not to associate Aristotelian equity with the English courts of equity, I shall nonetheless generally use "equity" rather than "fairness" or "decency", because "equity" contains a closer connection with judgment in the judicial contexts in which Aristotle's discussion of ἐπιεύκεια finds its relevance than "fairness" or "decency" do.

Aristotle allows statements about what is only "for the most part" a place in demonstration and hence in 'scientific knowledge' (cf. *An. Post.* 1.30.87b19-26: II.12.96a8-18; *Met.* VI.2.1027a15-28; *An. Pr.* 1.27.43b32-36). That is, general statements about matters that are only "for the most part" play an important role in scientific explanation. For example, the general statement that men grow chin whiskers as they grow older may be used to explain why the teenage Socrates is beginning to look scruffy. If Socrates asks his father why he is growing whiskers, Sophroniscus might tell him that all or most men grow chin whiskers as they grow older. Socrates would probably not be fully satisfied with this explanation: he will also want to account for the cause of the general claim. But the general claim is a start. Just as general statements can play an explanatory role in accounting for natural phenomena that are only "for the most part", so too prescriptions in the form of laws can play a justificatory role in regulating

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1 I do not wish here to enter the debate as to whether Aristotle abandons his strict conception of 'science' in these passages. According to Aristotle, "there is no demonstration of things whose first principles can be otherwise" (*EN* VI.5.1140a33-34; cf. *An. Post.* I.4.73a20-23; I.6.74b5-21; *Met.* V.5.1015b7-9). Thus there is no 'science' (ἐπιστήμη) of practical affairs, for science involves demonstration, whereas the principles of practical affairs may be otherwise (*EN* VI.5.1140a33). *Prima facie* this interpretation would also rule out scientific explanations of natural phenomena that are only "for the most part". For the view that Aristotle can include "for the most part" statements as a part of scientific demonstration only by abandoning the claim that the objects of science must be necessary, see Barnes (1994, 192); cf. also Mignucci (1981) and Judson (1991b). Ferejohn (1991) argues that even in *Posterior Analytics* I.4 Aristotle includes "for the most part" propositions among the premises which could serve in demonstration, inasmuch as "for the most part" propositions count as one kind of *per se* predication. According to this view, "for the most part" statements derive their necessity from the fact that they are "general statements expressing causal connections" (122).

4 For the importance of "universals" in explanation see *An. Post.* 1.31.88a5-6. See also *Met.* 981a24-b6, b10-13. As Devereux points out, "Not all facts which can be expressed universally will count as 'universals' in the explanatory sense (1986, 490). For an important example, see *An. Post.* I.13.78a30-78b2: the nearness of the planets explains why they do not twinkle, not vice versa, even though one could construct a syllogism with the claim that the planets do not twinkle as a premise and the claim that the planets are near as a conclusion.
human behavior, by explaining the basis for a decision in a particular case. If the dikasts in Plato's Magnesia condemn a young intellectual for his atheism, the young atheist may be referred to the law as a justification for his punishment. An intellectually sophisticated atheist will no doubt want a justification for the existence of the law, but the law is a first step in the justification of his punishment. Now one must also take into account the other side of the coin: just as the statement that men grow facial hair is true only "for the most part" (An. Post. II.12.96a10-11), so too the law that (to use an old example) "foreigners may not climb the city wall during time of war" should be prescriptive only "for the most part". Some men do not grow facial hair, and some foreigners ought to be rewarded if they climb the city wall in time of war. viz., if they somehow greatly benefit the city by doing so. The general statements used in scientific explanations of natural phenomena, and the general prescriptions of the law, admit of exceptions.

In Aristotle's two extended discussions of equity in En. V.10 and Rhetoric I.13, he makes plain that equity is necessary because lawgivers cannot foresee and incorporate in their laws all possible excepting circumstances. At En. V.10.1137b22-24 Aristotle says it is right for the dikast "to say what the lawgiver himself would have said had he been present, and would have legislated if he had known." Aristotle's brings out the aspect of limited information again in the passage on equity in the Rhetoric:

Its [equity's] existence partly is and partly is not intended" by lawgivers: not intended, where they have noticed no defect in the law: intended.

* Shiner's (1994) suggestion to translate ἐκόνωτον and ἄκόνωτον as "wishingly" and "unwishingly" seems to me worse than the Oxford translation of "intended" and "not intended". Unlike "not intended", "unwishingly" implies a level of awareness such that one wishes that something will not be the case.
whenever they find themselves unable to define things exactly, but it is necessary to speak universally, while it is not [universal] but for the most part: and for as many things as it is not easy to define exactly because of endlessness (ἀπειρία). e.g., wounding with an iron [instrument] of a certain size or kind. For a lifetime would not be enough for the one enumerating [them]. If, then, precision is impossible, but one ought to legislate, it is necessary to speak simply, so that if a man has no more than a finger-ring on his hand when he lifts it to strike or actually strikes another man, he is liable for a criminal act according to the written law and acts unjustly: but in truth he does not act unjustly, and this is equity.

(1.13.1374a28-b1)

There are a number of features here which give rise to the need for equity, all of which are important because of the practical limitations they place upon the powers of human cognition. First, as Aristotle notes, sometimes the lawgiver will simply fail to consider the circumstances adequately enough, even if one takes into account that practical affairs are only "for the most part": the defect is "not intended" by the lawgiver. It would be possible for future legislators to amend the law so that it better conforms to what is "for the most part".

Second, Aristotle also says that sometimes the lawgiver knows when he enacts a law that there will, on occasion, be cases in which the circumstances are different from those in which the law was intended to apply, but he is nevertheless unable to specify such exceptional circumstances in a legal rule. If the lawgiver finds himself "unable to define things exactly" because practical affairs are only "for the most part," it is due to the fact that "that which is neither always nor for the most part, we call accidental" (Met.

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10 Or perhaps "because of inexperience" with Grimaldi (1980). ἀπειρία could mean either "inexperience" or "infinity" (endlessness). I prefer "endlessness" both because it implies a certain lack of experience without the negative connotations of "inexperience" (since the cases go on and on, a finite mind could not have experience of them all) and because the subsequent γάρ clause refers to enumeration (διὰ τὸ μοῦντα).
VI.2.1026b32). Just as there is no scientific explanation of the accidental (Met. VI.2.1027a20-28), there is no way for a lawgiver to foresee via a general rule when that which is "for the most part" will not obtain in human affairs. Aristotle points to the practical difficulty that to make the law specific enough would be an endless task.\footnote{Cf. Plato, \textit{Plt.} 294d-295b.} The lawgiver needs to limit the information he will consider in enacting a law to that which is "for the most part". even if it is possible to consider over a longer period of time the many unusual circumstances which would dictate a judgment different from that specified by law. Here it is clearly important to balance the need to craft laws so that they conform to the demands of justice with the need to enact rules for the good of the community.

3. \textbf{Equity and the Mechanical Application of the Law}

Aristotle's discussion of equity suggests two ways in which the dikast might misuse discretion in deciding particular cases. Each of these ways is in significant tension with the ideal implicit in the mechanical model of legal decision. In the first way, the law's terms are general in the sense that they are vague or imprecise in their application to particular cases. Because the law is formulated in general terms, there is a certain indeterminacy in the law's meaning and in its purpose which may permit the dikast to construe the law's terms in accordance with his biases. On the second way, because the lawgiver cannot foresee all possible exceptions, there may be some cases in which a law, if applied, would create an injustice, despite the fact that its terms clearly cover the facts of the particular case. In such cases, it would be best if dikasts could decide to dispense with the legal norm. However, once dikasts are allowed the power to
dispense with the law in some cases, it becomes unclear what prevents biased dikasts from using their power in order to deliver biased verdicts. Let us look at each way more closely.

3.1 Indeterminacy

On the first way, the general terms of the law are vague, abstract, or indeterminate in their application to some cases. Aristotle raises the problem in the *Rhetoric* with the example of “wounding with an iron [instrument] (τὸ τρώοσατ σιδήρω)" (I.13.1374a32). In context, an iron instrument (σιδήρος) plainly means a weapon made of iron, such as a sword, knife, etc. However, practical constraints of time as well as the endless complexity of possible cases prevent the lawgiver from defining precisely which iron objects he means to include within the scope of a law (I.13.1374a31-34). For example, the lawgiver does not intend to include an iron finger-ring in the scope of his law: “if a man has no more than a finger-ring on his hand when he lifts it to strike or actually strikes another man, he is liable for a criminal act according to the written law and acts unjustly: but in truth he does not act unjustly, and this is equity” (I.13.1374a35-b1).

It is important to realize that sometimes the meaning of a law must be left fairly indeterminate. This is easier to see if we distinguish between the law’s “generality” and its “universality”. What Aristotle says is that the law is καθόλου. Sometimes Aristotle contrasts the καθόλου with ‘particulars’ (τὰ καθ’ ἐκαστὰ), where ‘particulars’ mean ‘individuals’.\(^\text{12}\) On this meaning of καθόλου, laws are universal: they refer to types of

\(^{12}\text{Cf. } \textit{Met.} 1.1.981a15-20; \textit{III.4}.999b33-1000a1; \textit{EV X}.9.1180b13-23. Cf. Devereux (1986); Miller (1984).\)
acts, not to named individuals or to particular acts to be performed in singularly specified circumstances. That is, laws state that all persons meeting such-and-such conditions ought or are entitled to perform actions of a certain type, etc.¹³ For example, the law does not state. “Jean Valjean ought not steal bread this Sunday night in 1795 when his family is hungry”; rather, it declares that no one should steal the property of another. the law applying equally to all.

By contrast, generality concerns how widely or narrowly a universal term applies to individuals and the actions they perform. In this sense, Aristotle sometimes contrasts the καθόλου with the particulars, where particulars mean ‘the (relatively) more specific’.¹⁴ Laws may be more or less general depending on how widely they apply to people or circumstances. “All native-born male citizens over the age of 40 who have served in the military are entitled to vote by secret ballot for candidates for the office of general” is formulated in universal terms. but is very specific as to the class of people to whom it applies and the action which they may perform. Laws forbidding murder, on the other hand, are very general in the class of people to whom they apply (everyone) and the action from which they must refrain. Just because a law is formulated in universal terms, then, does not mean that it cannot be quite specific.¹⁵

¹³ Hart (1994, 20-22). In this sense, laws contrast with decrees, which concern named individuals or singularly specified circumstances. See Hansen (1983b: 1983c), and Chapter Three.

¹⁴ For example, in the Eudaimoniav, Aristotle states that “in accounts concerning actions the universal ones are common to more cases, while those which are particular are more true, since actions are concerned with particulars” (II.1.1107a29-31). Cf. An. Post. II.13.97b28-31: 1.5.74a5 ff. with Barnes (1994, ad loc.); Eudaimoniav.1.1141b14-22 with Cooper (1975, 30-32).

Aristotle sometimes indicates that equity is needed because the law is general, and not merely because it is universal.\textsuperscript{16} For example, Aristotle writes:

this is the nature of the equitable. a correction of law, insofar as it is defective (ἕλειπεν) on account of universality. This is the reason why not all things are determined by law, because about some things it is impossible to lay down a law, so that a decree is necessary. For when something is indeterminate (ἀσφαλεία τοῦ) the measure also is indeterminate, like the lead measure for the Lesbian building: for the measure is adapted with a view to the form of the stone and does not remain the same, and so too the decree is adapted with a view to the circumstances.

\textit{(E.N.V.10.1137b26-32)}

In this passage, decrees need to be used because of the variable nature of practical affairs. Like a yardstick, laws are too rigid to fit all possible circumstances.\textsuperscript{17} If universality were all that necessitated equity as a correction of law, it would always be possible to supplement, correct, or amend the law to make it fit the rare, unusual circumstances.

Indeed, the need for equity as a correction of law might diminish as laws were changed to accommodate unusual circumstances which the original lawgiver simply could not foresee because of limited knowledge and time.\textsuperscript{18} But Aristotle seems to think that for

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\textsuperscript{16} Barden notes that “Aristotle does not analyze the difference between his two distinctions: the universal and the particular, or the usual and the exception” (1981. 358). Barnes remarks that “Aristotle muffs the distinction between universal/singular and general-specific (1994. 83).

\textsuperscript{17} Similar remarks apply to the dispute over whether the rule of law is preferable to the rule of an absolute king at \textit{Pol.} III.15.1.1286a9-24 and III.16.1.1287a23-28: b15-25. In these passages, there are “some matters that the law is unable to determine” because in some situations matters are too complex or unusual for specific rules to apply adequately to them. The Platonic sources from which Aristotle draws in the “king or law” debate clearly show this, e.g., the analogy to the doctor who knows when to depart from a fixed set of rules when circumstances are “contrary to expectation” (\textit{Plt.} 295c-e with \textit{Pol.} III.15.1.1286a12-14).

\textsuperscript{18} With continually changing conditions, of course, legal modifications based on equitable considerations might become too rigid, thereby requiring equity in its turn. See Pound (1905); Cairns (1949. 109).
practical reasons some matters are best handled using decrees, rather than coming up with laws of greater and greater specificity. Many laws may need to be left at a more general level of description for the same reasons that a precise account of practical affairs cannot be given:

This must be agreed upon beforehand, that the entire account of practical affairs must be given in outline and not precisely, as we said at the beginning that the accounts we demand must be in accordance with the subject-matter: matters concerned with actions and that which is advantageous have no fixity, just as matters of health have none. When the universal account is of this sort, the account about particulars is even more lacking in precision: for it does not fall under any art or set of instructions (παραγγελίαν), but it is always necessary for the ones acting to consider what is appropriate to the occasion, as happens also in the art of medicine or of navigation.

(EV II.2.1103b34-1104a10)

In this passage, Aristotle denies that a precise account of practical affairs is a practically realizable goal. Just as the educated person must not expect more precision from an account of ethical matters than the subject admits (EV I.3.1094b11-1095a2), so too we should not expect too much specificity from the laws. When there are many exceptions and unusual situations, it may be impossible to be specific in a practically useful way. For example, if political affairs "exhibit much variety and fluctuation" (EV I.3.1094b15-16), the exceptions to a rule might require yet more exceptions, ad infinitum. Thus it would be better to leave the law at a very general level of description, just as it is better to give an account of practical affairs "in outline and not precisely."\(^{11}\) By doing so

\(^{11}\) Aristotle could not foresee another problem with the increasing specificity of the law. The proliferation of specific laws to cover cases of numerous types may require a highly specialized (and expensive) legal profession. See Raz (1994b). Such was not the case in ancient Athens, where an ordinary citizen would conduct his own prosecution or defense in front of a body of citizens who performed functions akin to those of both judge and jury in a modern legal system.
the lawgiver would leave much room to the dikast to interpret the general terms of the law and apply them to particular cases. This is why the equitable dikast must look behind the surface meaning of the law to understand its purpose, to "say what the lawgiver himself would have said if he were present" (EV V.10.1137b22-23).\(^2\)

However, dikasts are not lawgivers. Not only must they decide particular cases in which their biases are more likely to come into play, but they are also (in Aristotle's view) less likely to be practically wise (Rhet. I.1.1354a34-b1).\(^3\) This is a problem for those who argue that equity "does not refute the rule because the rule has the exception already built into it" (Shiner 1994. 1260). Someone as practically wise as the original lawgiver might understand the purpose of a rule, and be able to discern all the contexts in which the rule is supposed to apply. But for someone who is less practically wise than

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\(^2\) Cf. Rhet. 1374b11-13: "And it is equity to look not to the law but to the lawgiver and not to the word but to the intent of the lawgiver." This should not be taken to imply that Aristotle believes that dikasts are to discover the intent of the historical lawgiver of their polis. Triantaphyllopoulos holds that in Aristotle the "manner in which equity is found is historical, because what is looked for is the opinion of the particular historical legislator, such as Solon in Athens. The question was what this legislator would have legislated then, had he been aware of the particular case adjudicated in the present" (1989. 53). It is possible that Aristotle would have approved of this where the original lawgiver was practically wise. But it is not clear that this is Aristotle's meaning. Barden seems closer to the truth when he writes that "the legislator is a metaphor for the sense of justice for it is impossible to know what the legislator would have said except by knowing the sense (\(dunoo\)) of what has already been said" (1981. 360). Dikasts will be educated in the spirit of the law (cf. Pol. III.16.1287a25-27: b25 ff.), but this is a far cry from trying to enter the mind of (for example) Solon centuries after his death. That is not to deny that appeals to the original lawgiver' intention are made. Sometimes such an appeal is due more to rhetorical purposes and to attempts to explain the circumstances for which the law was made, than to a theory of judicial intent (e.g., Lysias XIV.4). Cf. the Athenian debate over a 'return' to the patrios politeia, by which the appeal to tradition was joined to competing ideological programs for constitutional change (see Finley (1971); Ostwald (1986)).

\(^3\) See Chapter Three.
the original lawgiver it is not always an easy matter to understand what the rule is or when a case should count as an exception. Because the legislator’s words may admit much room for interpretation, they do not always provide sufficient guidance. In this sense to say the rule implicitly includes the exception is of little help.

As a result, judicial bias becomes a more serious problem. For example, Aristotle or a member of his school asserts that Athenian juries effectively have sovereign power: "the people have made themselves masters of everything, and control all things by means of decrees and jury-courts, in which the sovereign power resides with the people" (*Ath. Pol.* 41.2). When the general terms of the law are vague and the dikasts' verdicts are not subject to appeal, one might reasonably expect Aristotle to worry that juries would be too prone to interpret the law in accordance with their biases and partisan interests.

The writer of the *Athēnaiōn Politeia* maintains:

> because his [Solon’s] laws were not written simply and clearly, but were like the law on inheritance and heiresses, it was inevitable that many disputes should arise and that the jury-court should decide all things private and public. Some people think that he made his laws unclear deliberately, in order that the power of decision should rest with the people. However, it is not likely that he was unclear for that reason, but rather because it is impossible to define what is best in general terms.

(*Ath. Pol.* 9.2)

The law on inheritance is unclear in that it specifies conditions under which a bequest is invalid, namely where the testator is “insane or senile, or under the influence of a woman” (*Ath. Pol.* 35.2). These excepting conditions give rise, we are told, to “malicious prosecutors” who are able to persuade juries that the excepting conditions hold in the case

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22 McDowell (1979).
at hand. When the Thirty came to power in the tumult marking the end of the Peloponnesian War, they removed the excepting conditions from the law. because they regarded the vague terms as giving too much power to juries and the people who were willing to pander to them.

3.2 Correcting the law on the basis of its normative consequences

Even if the law must often be left in general terms. Aristotle recognizes that sometimes it is beneficial to make laws more specific. When Aristotle advises the equitable person to say what the lawgiver “would have legislated, if he had known” (EN V.10.1137b23-24), he seems to suggest that the law may be amended to take into account excepting conditions. As Aristotle puts its elsewhere. the law permits citizens “to make corrections in cases where they hold something to be better than the existing [laws] on the basis of their experience” (Pol. III.16.1287a27-28). For example, features relevant to the assessment of blame could be incorporated into the law’s formulations—although lawgivers do not always accurately do so (EE II.10.1226b36-1227a2). Because the law would often leave out extenuating circumstances, equity was associated with a sympathetic or forgiving attitude (συγγυνώμη). Thus Aristotle makes a distinction between mistakes, misfortunes, and unjust actions, a distinction based on the agent’s

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23 Rhet. I.13.1374b4-19; EN V.10.1138a1-2; VI.11.1143a19-24; M/M I.1.1198b26-34; II.2.1198b34-1199a3. On the association of equity with a forgiving attitude. see especially Nussbaum (1993). Cf. also Brunschwig (1996); Georgiadis (1987); Hamburger (1951). Equity as a sympathetic or forgiving attitude is meant to apply to the arbitrator (Rhet. I.13.1374b 19-22) as well as to the possible prosecutor: the equitable person is the one who “is no stickler for justice in a bad sense but tends to take less than his share though he has the law on his side” (EN V.10.1138a1-2).
knowledge and intentions (cf. *Rhet.* 1.13.1374b5-9; *Ev* V.8.1135b11-25).²⁴ As more excepting conditions are discovered, they may be incorporated into the laws.²⁵ So it is not surprising that Aristotle recognizes the value of amending and supplementing the laws.

As he puts the argument in favor of changing the laws:

> it is better not to leave the written laws unchanged. For just as in the other arts, so also with respect to the political order, it is impossible for everything to be written down precisely. For it is necessary to write in universal fashion, but actions are concerned with particulars.

(*Pol.* II.8.1269a8-12)

In this passage, "Le progrès de la législation consistera.... non à remplacer une loi universelle par une autre loi universelle de même niveau, mais à déterminer la loi existante de façon plus précise, de façon à l'adapter aux circonstances imprévues sans lui ôter son caractère d'universalité" (Brunschwigg 1980, 525). By making laws more specific, one may make them more attuned to the demands of equity and simultaneously limit the discretion of dikasts as much as possible to decisions on facts alone.

However, as we saw in the last section, increasing specificity may court its own peculiar inadequacies. Even if the law is made more specific, it cannot account for all excepting conditions. As Aristotle says, "a lifetime would not be enough to enumerate [them]" (*Rhet.* 1.13.1374a33). Once the terms of the law come to take on more definite meaning in their application to particular cases, the danger arises that laws whose terms

²⁴ According to Sorabji, Aristotle’s main contribution to legal theory "lies in his whole enterprise of trying to classify the different kinds of excuse and of culpability... Aristotle’s new enterprise enabled him occasionally to lay down foundations for the later system of Roman law" (1980b, 290-291).

indisputably cover a case before the court might also lead to an unjust verdict in that case. At the same time, the increasing specificity of law may make the law's terms clearer and easier to apply, with less need for judgment (even if the dikast must be allowed a modicum of discretion to subsume a particular case under those terms). If we put these facts together, the dikast may need to use equity to depart from the law in favor of justice even though the law's terms are specific enough to apply clearly in a matter before the court.

In this way the mechanical model breaks down, at least if its purpose is to secure just verdicts. Because of unforeseen circumstances that were not taken into account when the lawgiver formulated the law, equity is needed as a correction of law. Yet equity thereby permits dikasts the latitude to dispense with the law if they believe its application leads to injustice in a particular case. Not only do the rules fall short of the mechanical model's intent by failing to guide the judgment of the dikast in some cases: they also lack the authority to bind the judgment of the dikast. In this respect the dikast has the same power as an absolute king: "that laws must exist, is clear; but they must not be authoritative insofar as they deviate [from what is right], though in other matters they should be authoritative" (Pol. III.15.1286a22-24). The laws become akin to summary rules of thumb, which need not be followed when dikasts judge that the rules are inadequate in a particular case.

4. Equity as practiced by dikasts

Despite the discretion Aristotle's account of equity affords dikasts, one might

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26 See Nussbaum (1990); Sherman (1997); McDowell (1979).
argue that in practice equity does not undermine the spirit behind the rule of law and the mechanical model. When the law can be made more specific in the future, the principles which are reflected in equitable judgments may be incorporated as amendments to the law. And when the law must remain general, dikasts may be educated sufficiently in the telos of the regime by the laws to render verdicts unbiased by the particulars. One might say that in judging equitably “the judge should be guided by the general principles and goals of the existing law” (Georgiadis 1987, 164). As Aristotle puts it.

as regards those things which law is held not to be capable of determining, a human being could not recognize them either. Rather, the law educates especially for this, and hands over what remains [undetermined by law itself] to be judged and administered ‘by the most just judgment’ of the rulers. . . . [E]very ruler decides well if he has been educated by the law.


However, a look at judicial procedure in Aristotle’s time confirms the problems which equity poses to the mechanical model of rule application. In the first place, the ancient Greeks—or more specifically, the Athenians, given our relative lack of information about Greek law in other cities—did not give reasons for their verdicts: they simply voted in favor of the prosecutor or the defendant. Thus “there is no attempt (nor even the possibility of an attempt) to isolate and follow the ratio decidendi of a previous court’s decision. No panel of dikastai can bind its successor, for every such panel is supreme and cannot be called to account” (Todd 1993, 61). Since dikasts made no attempt to account for the reasons which influenced their collective decision, they could

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essentially ignore the law if they felt their best judgment was a better guide. 28

In the second place, Athenian dikasts were not able to fix penalties. In some
cases, the penalties were specified by law; in others, the dikast could choose only between
a penalty proposed by the prosecution and one proposed by the defendant. 29 (The trial of
Socrates is a notorious example of the latter.) So in practice equity amounts to this: in
cases where the dikast must choose between two proposed penalties, the dikast should
vote for whichever penalty comes closer to an equitable verdict, while in cases where the
penalty is fixed by law, the dikast should vote to convict or acquit according to whether
the penalty or acquittal is closer to what the defendant deserves. 30 The dikasts' inability to
fix penalties leads Hippodamus to propose

that the decisions of the courts ought not to be given by the use of a voting
pebble, but that everyone should have a tablet on which he might not only
write a simple condemnation, or leave the tablet blank for a simple
acquittal; but, if he partly acquitted and partly condemned, he was to
distinguish accordingly.

(Pol. II.8.1268a1-5)

Hippodamus objects that the dikast must vote for one of two predetermined outcomes.
even though the dikast believes neither would be an equitable result. Depending on
penalties fixed by the law or by others, a simply equitable verdict was sometimes not

28 I do not mean to suggest that dikasts would not take their judicial oath seriously. On
the force of the oath and the persuasive (as opposed to binding) function of laws in the Athenian

29 Harrison (1971, II.166; II.80-82); MacDowell (1978, 253-254); Todd (1993, 133-134).

30 By 'closer', I do not mean quantitatively closer, but rather 'closer to what is just'. If a
wealthy defendant deserves to pay the plaintiff three drachmae, but the penalty fixed by law is 7
drachmae, it might be closer to what is just to convict the defendant, rather than acquit him
because he does not deserve to pay 7 drachmae.
possible under Athenian judicial procedure. But Aristotle does not indicate a desire to change the way dikasts decide cases. To Hippodamus' proposal he objects that "the dikast becomes an arbitrator" (1268b6), as well as the practical difficulty that dikasts will assess different penalties. As Saunders puts it, according to Aristotle "equity should be taken into account in reaching an eitheror verdict... whereas Hippodamus believes that equity should as it were constitute the verdict" (1995, 145).

Because dikasts could not fix a penalty themselves, information about the possible penalty the defendant might suffer would influence the dikasts' verdict, so that the law would not determine the verdict even where the law clearly applies. In cases where dikasts have to choose between two proposed penalties, the judgment as to the guilt of the defendant is rendered before the penalty phase. At first glance, it is easy to separate out the question of whether someone has violated the law from that of what penalty the convicted defendant deserves, and one might suppose dikasts would allow the law to determine as much as possible whether a defendant was guilty. However, the litigants did

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11 Equity applies to the judgments of arbitrators more than to those of dikasts: "an arbitrator goes by the equity of a case, a dikast by the law, and arbitration was invented with the express purpose of securing full power for equity" (Rhet. 1.13.137a20-22). But it is false to infer from this passage that equity plays no role in the judgments of dikasts. See, e.g., Meyer-Laurin (1965, 51-52; 41). Aristotle clearly thinks that appeals are made for dikasts to judge equitably as well (cf. Rhet. 1.15.1375a27-32; 1.12.1372b15-19).

12 Saunders thinks that "Hippodamus' proposal deserves more sympathy than Aristotle gives it" and regards Aristotle's rebuttal of Hippodamus' suggestion "a brusque dismissal of an intelligent and surely justified suggestion" (1995, 144-145). With hundreds of dikasts sitting in judgment on a single case, I find Aristotle's arguments more convincing—especially in cases that do not involve monetary sums. How do you "add up the figures and divide by the number of the jurors," as Saunders suggests, when the choice of penalty is between death and disfranchisement? While Hippodamus' intent may deserve more sympathy than Aristotle gives it, the proposed remedy is highly impractical.
not always wait for the penalty phase to mention penalty proposals (or at least to intimate the penalty they would propose). And matters are even worse where the penalty is fixed by law. Suppose an arbitrator is brought to court on the charge of misconduct in his duties as arbitrator, and the penalty, fixed by law, is disfranchisement. If the facts of a case unequivocally show that the arbitrator’s actions fall under the definition of misconduct, then a vote for conviction automatically means disfranchisement. But there will be hard cases, in which the misconduct might seem negligible or irrelevant to the decision that was reached. Disfranchisement might seem too heavy a penalty in such circumstances, and a dikast might be tempted to vote for acquittal, not because he does not think that the arbitrator committed misconduct, but because the penalty is thought to be too severe. Such a judgment would depart from the rule of law, for the dikast may find it equitable not to allow the law to determine his verdict.

5. Concluding Remarks

I conclude that if equity is combined with the procedures of law in Aristotle’s time, equity poses significant dangers to the rule of law. Legisgurers may reduce the risks by trying to educate citizens in the spirit of the law. The theoretical tension between the rule of law and equity can be minimized in practice where the citizens value the rule of law, or have a strong allegiance to the laws and regime. So long as citizens are inculcated in the telos of the regime, and the laws are laid down in accordance with that telos (see Chapter Two), citizens will decide cases in the same spirit that prevails in the regime.

Yet Aristotle recognizes that many citizens’ sense of justice may depart from or

be at odds with the spirit of the law. To be sure, in some cases Aristotle thinks that the many.

of whom none is individually an excellent man, nevertheless can when joined together be better—not as individuals but all together—than those [who are best]. . . . For because they are many, each can have a part of virtue and practical wisdom, and on their joining together, the multitude, with its many feet and hands and having many senses, becomes like a single human being, and so also with respect to character and mind. (Pol. III.11.1281a42-b7)

Yet this is true only "of a certain kind of multitude" (Pol. III.11.1281b20-21). and we should not be surprised that Aristotle is sometimes more pessimistic: “Let the multitude be free persons acting in no way against the law, except in those cases it necessarily leaves out. This is certainly not easy for the many...” (Pol. III.15.1286a36-38).

Aristotle therefore suggests several devices to lessen the inducements for dikasts to decide cases in biased ways. For example, to counteract the demagogues, who, “seeking to win the favor of the people, undertake many confiscations through the courts” (Pol. VI.5.1320a4-6). Aristotle recommends that in democracies confiscated property should become sacred property, so that it is not at the disposal of the poorer classes from whom dikasts are predominantly chosen. “Those acting unjustly will be no less cautious.” Aristotle says, “for they will be fined in the same way, but the mass will less frequently vote against those who are being tried, as they are not going to get anything out of it” (Pol. VI.5.1320a9-11). ¹⁵


¹⁵ Cf. Pol. V.5.1304b20-1305a7. See also the suggestion to use oligarchic devices to increase the numbers of the wealthy among the dikasts in order to reduce the numbers of dikasts biased against the wealthy. Pol. IV.14.1298b16-19; IV.13.1297a21-24.
Aristotle's limited remedies to preserve the rule of law against the biases of dikasts seem feeble in comparison to the procedural rules of modern jurisprudence. Despite the occasional spectacle afforded by too much publicity, modern democracies cannot say that "the judicial courts are wretched and inarticulate, keep hidden their opinions, deliver their judgments in secret." and "aren't silent but are full of noise just like a theater, judging each of the orators in turn with shouts of praise and blame" (Plato. Leg. 876b). But if Aristotle cannot fully harmonize equity with the rule of law, it seems right to attribute this to the fact that there are competing values which cannot be completely reconciled: abiding by rules so as to filter out biases and passions, and judging equitably, taking all features of a situation into account. And so it also seems right to say that here the fault lies not in Aristotle, but in the nature of practical affairs.
Chapter Five: Natural Justice, Part I

Introduction

Aristotle’s views on natural justice have long been a subject of controversy. Large amounts of ink have been spilled on Aristotle’s most extended treatment of the topic—a notoriously obscure passage of twenty-three lines in Book V, Chapter 7, of the Nicomachean Ethics. Along with some scattered passages in the Rhetoric and Politics, EN V.7 served as a germ for the natural law tradition, most particularly in the thought of Thomas Aquinas. Despite all the ink, there is no agreement on the proper way to interpret EN V.7, much less Aristotle’s remarks on the subject as a whole. One need not go back to Aquinas to find interpretations of Aristotle’s writings couched in natural law terminology. Barker, for example, finds in Aristotle’s political thought a “natural law” which “deals with the eternal and universal duties of man” (1959, 327), and Miller has argued more recently that Aristotle offers “a distinctive theory of natural law and justice which has important implications for his political philosophy” (1991, 306). Others, rejecting the natural law framework as an interpretation of Aristotle, invoke pluralism to fill the void. Aubenque, for example, maintains that “Aristote refuse de reprendre à son compte une conception opposant la ‘loi naturelle,’ qui serait ‘commune’ . . . et ‘la loi qui, pour chaque peuple, a été définie relativement à lui’ (1980a, 218). Rather, Aubenque claims that, for Aristotle, “la nature . . . justifie à la limite tout ce qui est suffisamment enraciné dans les mœurs, dans ce que Hegel appellera la Sittlichkeit, la moralité concrète” (1980a, 220; 1980b, 157).

Does a coherent doctrine of natural law lie behind the brevity and opacity of
Aristotle’s treatment? I take as a basic tenet of a natural law theory that legal norms ought to conform to norms whose standards are provided by human nature.\(^1\) My guiding question will therefore be. "Does Aristotle think legal enactments ought to instantiate naturally just norms?" I will argue that for Aristotle natural justice finds its proper application in a particular strain of utopian political thought, best constitution theory. As a result, I will claim, natural justice has no direct implications for political practice in inferior ("deviant") constitutions. In particular, laws cannot be disobeyed or invalidated simply because they conflict with the laws that would be in force in the best constitution. Still—contrary to interpretations of Aristotle which claim that nature justifies the plurality of actual conditions—natural justice provides an absolute standard for the evaluation and criticism of laws.

It is important to distinguish this inquiry from a conceptual approach (evident in modern philosophy of law), in which the main issue is whether a law, simply to be a law, must be just. Cicero and Augustine were not the first to imply that an unjust law is not a law. Plato’s Socrates gets Hippias to state that “in precise speech” those who try to set down the laws while being mistaken about what is good also make a mistake about what is lawful (\textit{Hip. Maj.} 285d-e). In the \textit{Minos}, Socrates corrects the view that law is “the official opinion of the city” on the grounds that, whereas some official opinions are wicked, the law is not (314d-e; cf. 317c-d). Here the law necessarily embodies the demands of justice and the good: a law which fails to satisfy those demands is not really a

\(^1\) There is, of course, great variety in doctrines of natural law throughout history. Despite the variety, most doctrines either hold or imply something akin to what I call a “basic tenet”. See, e.g., Sigmund (1971, viii); Finnis (1980, 23-24); Kelsen (1991, 128-129).
law, although many wrongly persist in calling it one.\(^2\)

Aristotle has the conceptual resources to follow these Platonic musings. For example, a city that does not aim at virtue is not really a city (Pol. III.9.1280b6-8). But so far as I am aware, Aristotle does not deny that an unjust law is a law. He can say that a law redistributing the possessions of the few to the many is not just (Pol. III.10.1281a21) and that laws of an unjust constitution are unjust (Pol. III.11.1282b8-13). If a natural law theory requires the conceptual claim that unjust laws are not really laws at all, Aristotle is not a natural law theorist. But natural law need not be a theory of the semantics of ‘law’: its most important claims concern political obligation, e.g., whether an unjust law should be disobeyed because it is unjust by nature. Even if we do not withhold the name of ‘law’ to a law that fails to promote the good, we only have to think of the Antigone for an example of disobedience to an official pronouncement of the city on the grounds that there is a higher, unwritten law.

My inquiry will proceed in two parts. In this chapter, I offer an interpretation of Aristotle’s presentation of natural justice in Book V, chapter 7, of the Nicomachean Ethics. Against recent scholarship, I reject the view that for Aristotle any conflict between natural justice and legal justice is impossible. Because the best constitution is the exemplar of natural justice, the legally just may fail to conform to natural justice, viz., when the constitution is ‘deviant.’ In Chapter Six, I analyze other passages in the Rhetoric, Ethics, and Politics which might seem to support philosophical positions

\(^2\) Cf. also Plato, Leg. IV.715b; Cicero, De legibus II.v.11-13; Augustine, De libero arbitrio I.v.33.
consistent with natural law theory. Some of these passages, I claim, provide no evidence of a natural law position, and those that do offer no principles to link them to political practice.

**Natural Justice in Nicomachean Ethics V.7**

1. **Three Views of the Relation between Natural and Legal Justice**

In *Nicomachean Ethics* V.7, Aristotle states that “political justice is partly natural, partly legal” (1134b18-19). Scholars have understood the ensuing discussion in an extraordinary number of different ways, some of which deny that natural justice ever conflicts with legal justice. In the face of so many divergent analyses, it helps to consider the relation between legal and natural justice in logical space. Take everything in the realm of political justice that may be called ‘naturally just’ and everything that may be called ‘legally just.’ Then ask: how could they be related to each other? On the most general level, there are three possibilities:

- **Mutual Exclusion:** Anything politically just is either naturally just or legally just, but never both.

- **Double Aspect:** Everything politically just is at once both naturally just and legally just.

- **Partial Overlap:** Some politically just things are naturally just and legally just. Others are naturally just but not legally just, or vice versa.

In the commentaries and scholarly literature, one can find each of these interpretations!

If either the Mutual Exclusion or Double Aspect view is correct, then the categories of natural law will not apply to Aristotle’s discussion. Natural law theory, in its traditional formulation, is a version of Partial Overlap, for it holds that some laws
prescribe actions that could conflict with natural justice. By contrast, according to Mutual Exclusion, a legally just prescription can never be naturally just: because natural justice and legal justice exclude each other, there is no room for conflict between them. Likewise, on the Double Aspect view, everything politically just is both naturally just and legally just, and never otherwise: here too there is no possibility for conflict, no room for natural law as a corrective of the legal.

I will argue that Partial Overlap is the correct view, and that to this extent natural law theory has it right as an interpretation of Aristotle. But I will then claim that natural law is the wrong species of Partial Overlap to account for Aristotle’s distinction between natural and legal justice. In order to see how the Partial Overlap view is correct, though, it will help to consider the faults of the Mutual Exclusion and Double Aspect interpretations, for each view fails in instructive ways.

2. **Double Aspect**

According to the Double Aspect view, when Aristotle says “political justice is partly natural, partly legal.” he means that everything in the realm of political justice is both naturally just and legally just. Double Aspect relies on the concept of specification to explain how natural and legal justice coincide. Bodéüs explains:

> Jamais . . . Aristote (contrairement aux Stoïciens, héritiers, en cela, des sophistes) ne se réfère à la nature comme critère du juste. Les aspects naturel et légal du droit . . . ont une portée très différente. Ils représentent, respectivement, ce qui, dans les lois, s'impose naturellement ou

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1 Aquinas (1993); Finnis (1980); Kelsen (1991).

2 In Aquinas, the concept of specification appears under the term *determinatio*. See Aquinas (1964, V.I.XII.1023-1024; 1993, Q. 95, A.2, c.).
spontanément au législateur et ce que le législateur lui-même commande
dans les termes précis de la loi, afin de traduire sous forme de droit ce qui
s'impose à lui comme naturel. Le légal (nomikon), c'est l'ensemble des
précisions qui ajustent en somme le naturel aux circonstances et qui
définissent le droit (ensemble de nomima).

(1989, 387)

Here the lawgiver uses the legally just to specify the naturally just. The legislator, for
example, will recognize that it is naturally just to worship the gods, but will tailor the
practices of worship differently for different communities.

In order for specification to support Double Aspect, however, it must be the case
that everything politically just is also naturally just. Here the Double Aspect view can go
astray in two different ways, depending on the scope of "political justice."

2.1 Double Aspect on the wide sense of "political justice"

Consider first the case where "political justice" applies to most political orders.

Right before Aristotle divides political justice into natural and legal justice, he says that
political justice exists for those who share in common a life with a view to self-
sufficiency, who are free and either proportionately or arithmetically equal,
so that between those who do not fulfill this condition there is no political
justice, although there is a certain justice by similarity. For justice exists
[only] between those whose mutual relations are governed by law; and law
exists for those between whom there is injustice. For adjudication is
discrimination of the just and the unjust.

(EN V.6.1134a26-32)

Aristotle associates political justice with a number of features, including rule by law.

Forms of political rule not sharing these characteristics will not contain forms of political
justice. So not all political regimes are forms of political justice. Thus, Aristotle
continues, "we do not allow man to rule, but law, because a man behaves thus in his own
interests and becomes a tyrant” (E.V.V.6.1134a35-b1). But if tyranny and other lawless
regimes are not forms of political justice, that still leaves a large number of constitutions
that are forms of political justice. And, once ‘political justice’ is given a wide
interpretation, all these constitutions must be naturally just according to the Double
Aspect view. As Ritter puts it, the just by nature

est présent sous la multiplicité du juste politique et lui confère ainsi une
valeur universelle en soi. . . . Aristote pense que les lois et les
constitutions écrites de la cité, qui s’appuient sur la multiplicité des ordres
éthiques et institutionnels, sont fondées en même temps sur un principe
universel qui leur est immanent en tant que ‘juste par nature’. C’est
pourquoi le juste par nature n’est pas pour lui un ‘droit naturel’
s’opposant à la loi positive. Comme concept et norme, il existe dans la
réalité vivante, éthiquement formulée, de la cité que le législateur ordonne
par la loi et la constitution.

(1969, 447-448: emphasis in original)

For textual support of this version of Double Aspect, one might argue that,
because Aristotle says that the polis is by nature (Pol. 1.2.1253a25), justice in the polis is
also by nature.¹ Shortly after arguing that the polis is by nature, Aristotle states that “just
as a human being is the best of the animals when completed, when separated from law
and justice, he is the worst of all” (Pol. 1.2.1253a31-33). In this argument, “[law] and
political justice are necessary for human beings to realize their natural human ends”
(Miller 1991, 295). Insofar as political justice is a condition which helps human beings to
realize their natural ends, political justice would be natural.

The problem for the Double Aspect view on the wide interpretation of political
justice is this: Aristotle clearly thinks some forms of constitution under the rule of law are

unjust according to nature. Aristotle holds that oligarchy, democracy, and tyranny are all forms of deviant constitution (Pol. III.7.1279b4-10), which are simply speaking unjust because they do not aim at the common good (Pol. III.7.1279b4-10 with III.6.1279a17-21). They are also contrary to nature (Pol. III.17.1287b39-41). There are many deviant regimes under the rule of law (Pol. IV.4.1291b30-1292a4: IV.6 in toto), all of which could be said to have a certain justice (Pol. III.9.1280a21-22). And so they are forms of political justice. But since these constitutions are unjust simpliciter and contrary to nature, they could not be called "naturally just." Otherwise an unjust constitution with wicked laws could be naturally just!"

2.2 Double Aspect on the restricted sense of 'political justice'

In order to avoid this result, the Double Aspect view needs to limit political justice to 'correct' political regimes which aim at the common good (cf. Pol. III.7.1279a28-31). Bodēüs takes just this position: "Aristote se fait du droit (ΠΔ) [=politikon dikaion, political justice] une conception très restrictive. Il ne régit que les rapports entre citoyens, pour autant que ceux-ci soient libres et égaux et qu'ils vivent sous une constitution 'correcte'" (1989, 385). As a result, Bodēüs sees no potential for conflict between natural justice and what is according to law.

To understand whether the restrictive account of political justice is correct, we must return to the context of EN V.6, where Aristotle describes political justice as existing among individuals who are free and equal and share a common life with a view


* Cf. also Bodēüs (1996, 71-72).
to self-sufficiency. Bodeüs argues that only political communities that *strictly* meet the condition that its citizens are free and equal and live with a view to self-sufficiency contain forms of political justice. Take freedom first: in deviant regimes, the relation between rulers and ruled is despotic:

It is evident then that those regimes which look to the common advantage are correct regimes according to what is just *simpliciter* (ἀπλῶς δίκαιον), while those which look only to the advantage of the rulers are all errant and deviations from the correct regimes: for they are despotic, but the *polis* is a community of the free.

(*Pol.* III.6.1279a17-21)

While some deviant regimes may be ruled by law, they do not meet the qualifications of political justice, because they look only to the advantage of the rulers and so are forms of mastery.⁸ Thus neither democracy, oligarchy, nor tyranny can contain forms of political justice.

Consider next self-sufficiency: self-sufficiency is a formal feature of the human good (*Ev* I.7.1097b6-16). Although there is a level of self-sufficiency that pertains to the acquisition and use of basic necessities, the most important sense of self-sufficiency, for Aristotle, is in regard to living well (cf. *Pol.* VII.4.1326b3-9), and living well consists in an activity of the soul in accordance with virtue. So one could say that political justice does not exist in communities where the citizens do not live with a view to virtue. Once again, this would prevent us from attributing forms of political justice to deviant regimes, since oligarchies aim at wealth, democracies at freedom, and tyrannies at the tyrant’s own pleasure, profit, and power.

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If we take the notions of freedom and self-sufficiency together along the lines just examined, we could draw the following conclusion: political justice applies to only two of the correct forms of regime: aristocracy and polity."

The strategy of the preceding argument is this: look at the qualities associated with political justice, take those qualities as much as possible in an idealized way such that deviant regimes are excluded, and then claim that political justice must apply only to correct regimes with the associated qualities. The problem with this approach is that it is unwarranted by the context in which Aristotle discusses political justice. At this point in the EV, Aristotle has nowhere stated that by πολιτικόν justice he is limiting his meaning to specific forms of regime. He has not even distinguished the different forms of regime. By discussing freedom, Aristotle need mean no more than that the political community is restricted to free persons in the ordinary sense that it does not include slaves. By living with a view to self-sufficiency, Aristotle need mean no more than that people live with a view to the good life as they themselves conceive it." And in his discussion of proportionate equality preceding that of political justice, Aristotle has already included oligarchy and democracy as containing conceptions of justice, even if misguided ones

" Bodéüs (1989, 381-385). Bodéüs even goes so far as to say that "l'adjectif politikon, dans l'expression ΠΔ [=politikon dikation], ne se réfère pas au nom politeia en tant qu'il désigne généralement toutes les sortes de constitutions, mais en tant qu'il désigne spécifiquement une sorte de constitution, celle qui porte le nom commun à toutes... et tend ainsi à représenter le régime par excellence" (1989, 381 n.54). This would exclude even aristocracy, for which reason Bodéüs is forced to argue that "sauf à l'occasion (lorsqu'il s'agit, par exemple, de distinguer le régime correct où le grand nombre gouverne et le régime correct où gouverne le petit nombre), Aristote n'est pas enclin à faire de grandes différences entre ces deux régimes" (1989, 385 n.70).

" All plausible conceptions of the human good include the claim that the human good is something self-sufficient. See EV I 7.1097b6-23.
The only regime ruled out by Aristotle's description of political justice is tyranny, since it is not according to law. As we saw earlier, Aristotle clearly wants to exclude tyranny from political justice: "we do not allow man to rule, but law, because a man behaves thus in his own interests and becomes a tyrant" (EV V.6.1134a35-b1). So the context requires a weaker interpretation of political justice than the idealizing strategy suggests. The sense of πολιτικόν Aristotle is using is neither so broad as to encompass every political community (e.g., tyrannies and extreme democracy), nor so narrow as to designate only that form of regime known as polity. Just as different types of regime are better or worse, so too we can say that different forms of political justice are better or worse inasmuch as they approach the stricter conceptions of freedom, equality, and self-sufficiency.

The only other textual evidence by which to identify political justice with justice simpliciter in Aristotle's discussion of political justice in the EV comes at V.6.1134a24-26: "that which is being sought is both justice simpliciter and political justice." One could thereby connect political justice with only the correct forms of constitution, since

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11 Presumably similar considerations rule out forms of democracy and oligarchy where law does not rule. Cf. Pol. IV.4.1292a30-38. Bodeas' arguments would also rule out absolute kingship as a form of political justice, since by definition an absolute king rules without the restraint of laws. However, there are two reasons not to rule out absolute kingship as a form of political justice. First, Aristotle identifies the best regime as best by nature (and thereby just by nature) (EV V.7.1135a5), and absolute kingship fits Aristotle's description of the best regime (cf. Pol. IV.2.1289a30-33; see infra at 4.3.4). Second, the absolute king will govern in accordance with general rules, except where the law fails owing to its generality: "that it is necessary for him [the absolute king] to be a lawgiver, is clear, and that it is necessary for laws to be laid down, but these laws must not be authoritative when they deviate" (Pol. III.15.1286a21-23). He rules "being a law in himself" (Pol. III.17.1288a3).

12 Retaining καὶ with most manuscript readings.
only the correct forms of constitution are just \textit{simpliciter} (\textit{Pol.} III.6.1279a17-21). But there are two reasons not to do so. First, far from identifying political justice with justice \textit{simpliciter} in \textit{EV} V.6, Aristotle in fact contrasts them. Aristotle states, "How reciprocity is related to the just, has been spoken of earlier, but one ought not to forget that that which is being sought is both justice \textit{simpliciter} and political justice" (\textit{EV} V.6.1134a23-26). In the previous chapter Aristotle had explicitly related justice \textit{simpliciter} to justice as reciprocity: "Some think that reciprocity is justice \textit{simpliciter}, as the Pythagoreans said: for they defined justice \textit{simpliciter} as reciprocity" (\textit{EV} V.5.1132b21-23). So at \textit{EV} V.6.1134a23-26, justice \textit{simpliciter} is to be related once again to reciprocity, of which Aristotle has already spoken, in contrast to political justice, of which Aristotle has yet to speak.\textsuperscript{13} Aristotle's reference in the \textit{Politics} back to this passage seems to provide further evidence, inasmuch as there Aristotle finds it necessary to explain how reciprocity holds cities together \textit{even when} citizens are free and equal (\textit{Pol.} II.2.1261a29 ff.). Second, even if political justice is identified with justice \textit{simpliciter} at \textit{EV} V.6.1134a23-26,\textsuperscript{14} there is no reason to assume that justice \textit{simpliciter} means anything more than justice as found in a city under some form of \textit{politeia}. Aristotle contrasts political justice with "justice according to a similarity," by which he means justice as found in other types of community or association, e.g., a household, in which there is the justice of a master and of a father (\textit{EV} V.6.1134b8-18).

\textsuperscript{13} This of course in no way implies that justice as reciprocity is not exemplified in the \textit{polis}. Cf. \textit{EV} V.5.1132b33-34; \textit{Pol.} II.2.1261a30-31.

\textsuperscript{14} See, for example, Grant (1885, II.124). Cf. Jackson (1973, 101).
So political justice as discussed in EN V.6-7 does not concern merely justice as instantiated in the correct regimes, aristocracy and polity. Political justice refers to the various forms of justice found in the various regimes, including democracy and oligarchy. If so, then the Double Aspect view under the restrictive sense of political justice is false.

3. **Mutual Exclusion**

Yack (1990: 1993) defends the view that, for Aristotle, natural justice and legal justice are mutually exclusive. Because Aristotle describes legal justice as that which is "originally indifferent," Yack posits a dichotomy between natural and legal justice. Legal justice "concerns those actions whose justice or injustice we determine by looking to the mere fact of agreement *rather than* to good judgment" (1990, 220: my emphasis). By contrast, natural justice concerns "all of our judgments about the justice of all matters about which mature and relatively reasonable individuals would not be indifferent" (1990, 220).\(^5\) So, Yack reasons, natural and legal justice "represent two *kinds* of justice found in the political community rather than higher and lower *standards* of adjudication" (1990, 220: emphasis in original).

While there is no quarrel that natural and legal justice are two different types of justice, the question is whether they differ as coordinate species, or in some other way. In order for Yack to conclude that "Aristotelian natural right does not represent a higher standard of justice whose image we should seek ... to realize in our laws" (1990, 234).

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\(^5\) On Yack's view, there is no need that people agree on matters of natural justice: it is sufficient that people are not indifferent: "there are, for Aristotle, no truly *correct* answers to questions about justice. ... Aristotle's virtue-centered understanding of justice provides no single, absolutely correct standard or judgment" (1990, 233). Yack adduces no evidence for the view that Aristotle believes *phronimoi* may disagree about questions of justice.
he assumes that the naturally just and the legally just concern different sorts of matters. In

For example, he suggests,

We are hardly indifferent about the kinds of actions prescribed and proscribed, for example, by criminal law. Nor are we indifferent about the political questions settled by constitutional law. Because Aristotle divides political right into natural and conventional right, and our judgments on these matters do not fit into the category of conventional right, it seems that we must treat them as part of natural right.

(1990, 220; 1993, 143)

However, if we look at Aristotle’s notion of legal justice, there is little reason to think that a legally just prescription cannot also be evaluated as naturally just. When Aristotle describes legal justice as “that which is originally indifferent, but when it has been laid down is not indifferent,” he provides examples—“that a prisoner’s ransom shall be a mina, or that a goat and not two sheep shall be sacrificed” (EN V.7.1134b21-22). It should be clear from these examples that the same prescription could be naturally just at one level of description and “originally indifferent” at another level of description. For it could be naturally just to worship the gods, and legally just to do so by sacrificing in this way rather than that. As we saw with Double Aspect, legal justice may instantiate natural justice by making its norms more specific, where there are a number of ways to instantiate naturally just norms. Because a legally just prescription

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16 Jaffa may also attribute the Mutual Exclusion view to Aristotle: “Natural right is said by Aristotle to be part of political right. It is not simply correct to say that natural right is the norm for legal right, because the relation is not simply that of superior to inferior, but of parts of a whole” (1979, 182).

17 Finnis (1980, 295) is helpful on the different ways a law may be considered “indifferent.”

18 See Aquinas (1993, Q. 95, A.2, obj. 1).
specifying a naturally just norm may still be an instance of natural justice, the Mutual Exclusion view is false.19

Perhaps Yack does not mean natural and legal justice to be coordinate species divvying up the class of just actions so much as incompatible ways of describing a legal prescription as just. Consider again the norm to sacrifice a goat to the gods. One might say that such a norm is naturally just in that it prescribes the worship of divinity, but legally just in that it prescribes sacrificing a goat. It makes a difference at the outset to the well-being of the city whether or not people believe in divine entities who are concerned with people's welfare, but not whether they happen to conduct their worship in one way rather than another. Here we could modify the Mutual Exclusion claim so that it applies to aspects of a politically just norm rather than to norms themselves. On this view, a legal prescription *qua* legally just cannot be evaluated in terms of the standards of natural justice, even if the same prescription happens to be naturally just at a different level of description. But once again Aquinas's concept of *determinatio* shows the falsity of the Mutual Exclusion view. For Aquinas, *determinatio* may admit of "an admixture of some human error" (1964, V.LXII.1024). As an example of *determinatio* gone awry,

19 There is one other (slender) thread of textual evidence for the Mutual Exclusion view. Aristotle states that "the things which are not naturally just but humanly just are not the same everywhere. since political regimes are not [the same everywhere]" (EN V.7.1135a3-5). Here Aristotle contrasts natural justice with "human" (i.e., legal) justice in such a way that one might take him (by conversational implicature) to think that the two sorts of justice are exclusive. However, one could equally well understand Aristotle as implicitly contrasting what is legally just alone with what is both naturally and legally just. And Aristotle's example of legal justice, the *politeia*, favors this latter interpretation. The correct forms of political regime (e.g., aristocracy) are absolutely just and in accordance with nature, whereas deviant political constitutions (e.g., oligarchy) are unjust *simpleriter* and contrary to nature (Pol. III.7.1279a17-21 with Pol. III.17.1287b37-41).
Aquinas takes an example based on Aristotle’s text: “it is natural justice that honor be bestowed on a benefactor but that divine honor be given him—that he be offered sacrifice-arises from human error” (1024).20 In other words, people may be so mistaken about what is originally indifferent, that they fix upon specifications that contradict norms of natural justice. Thus norms of natural justice ultimately govern legal justice by fixing what is within the bounds of the originally indifferent. To this extent, we may say that legal prescriptions *qua* legally just may also be naturally just.

4. **Partial Overlap**

If Mutual Exclusion and Double Aspect are false, that does not show that Partial Overlap establishes the right interpretation of the text. Even if Partial Overlap is generally correct, Partial Overlap could have several species which could not be ruled out as implausible or unlikely on either textual or philosophical grounds. In that case, the correct explication of *EN* V.7 would be indeterminate. However, I will argue that the most satisfying interpretation of the text is in terms of best constitution theory, and that other species of Partial Overlap fail.

4.1 **Positive Law and Political Justice**

One difficulty for Partial Overlap is to explain how political justice is related to positive law, and thereby positive law to natural justice.21 Because Aristotle says political

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20 Aristotle uses the example of “sacrificing to Brasidas” (*EN* V.7.1134b23-24). (Cf. Thucydides V.11.)

21 This question has a long history. The author of the *MM* identifies legal justice with political justice, and denies that natural justice is part of political justice (1.33.1195a5-7). Michael of Ephesus and the Anonymous commentator also speak of political justice as if it were coextensive only with legal justice. Cf. Anonymous (1892, C.4G XX.232.13); Michael (1901, C.4G XXII.46.18-20; 47.2).
justice is “according to law” (EV V.6.1134b13-14). Some argue that political justice simply is positive law, and then infer that Aristotle could not intend natural justice to serve as a standard for positive law. For example, Wormuth asserts.

Book V. Chapter 7. where the account of “natural justice” occurs, is concerned with political justice, which it divides into natural and legal. Political justice has been declared in the preceding chapter to exist by and under positive law, so we cannot really be confronted here by a conflict between physis and nomos. . . . Perhaps [Aristotle’s] division of positive law into natural and legal justice is the strongest evidence that he had no conception of a natural law which annuls positive law. 22

(1948. 58-59)

But is political justice equivalent to positive law? Let us look again at the passage where Aristotle associates political justice and law. Political justice exists for those who share in common a life with a view to self-sufficiency, who are free and either proportionately or arithmetically equal, so that between those who do not fulfill this condition there is no political justice, although there is a certain justice by similarity. For justice exists [only] between those whose mutual relations are governed by law; and law exists for those between whom there is injustice. For adjudication is discrimination of the just and the unjust.

(EV V.6.1134a26-32)

Despite appearances, Aristotle does not say here that political justice is defined by the legal. By making law a condition for political justice, Aristotle seems to mean that it is only in a community ruled by law that those participating in the community can be free and equal. In particular, law serves as a check on pleonexia, preserves order in the city, and thereby prevents a citizen from getting more (or less) than he merits (EV V.6.1134a33-b8). In other words, law, as an instrument of that “most authoritative”

22 Cf. Kelsen: “Since positive law—essentially positive law alone—is just, any possibility of conflict between physis and nomikon dikaios, as essential for every true doctrine of natural law, cannot be taken into consideration at all” (1991. 140).
association, the *polis* secures the administration of justice (δίκη). This is why justice is "political" (cf. *Pol.* I.2.1253a32-39). Law, then, is an enabling condition under which citizens can make claims of justice, backed by the most authoritative community, the *polis*. None of this implies that for anything that is politically just there must be a law, either as a necessary or sufficient condition. Laws will often indicate what is politically just, but they do not constitute it. As Grant writes, "This passage does not give the origin of justice, but the signs by which you may know it" (1885, II.124).

If Aristotle's description of political justice in *EN* V.6 does not strictly say that political justice is defined by positive law, some nonetheless presume that Aristotle means political justice is defined by positive law because of his description of justice as the lawful earlier in Book V (*EN* V.1.1129b11-1130a13; V.2.1130b18-29). ²² There Aristotle notes that "justice" has two senses, the lawful (νόμιμον) and the equal (*EN* V.1.1129a31-b1). In the first sense, "all lawful acts are in a way just acts: for the acts laid down by the legislative art are lawful, and each of these, we say, is just" (*EN* V.1.1129b12-14).

However, in his description of justice as the lawful, Aristotle indicates that justice incorporates moral features, so that justice does not ultimately depend on enactment (in the case of written νόμιμα) or customary acceptance (in the case of unwritten νόμιμα). In particular, when Aristotle explains how the just is the lawful, he ties laws to the common good: "laws in their enactments on all subjects aim at the common advantage either of all or of the best or of those who hold power or according to some other such

way" (EV V.1.1129b14-17). The reference to "the common advantage... of those who
hold power" introduces two elements which dissociate the lawful as such from the just.
First, by connecting the laws to the common advantage, Aristotle endows the law with
moral goodness, a quality emphasized at length in the rest of Aristotle's discussion of the
just as the lawful. The just as the lawful comprises "complete virtue--not simply, but in
relation to another" (EV V.1.1129b26-27): "nearly the majority of the lawful acts are
those which are commanded from the point of view of virtue as a whole: for the law
commands us to practice every virtue and forbids us to practice any vice" (EV
V.2.1130b22-24). Once the laws must aim at virtue, a standard external to law
determines whether and to what degree a law is just, and not the mere fact that it is a law.
Second, Aristotle makes clear that the laws may aim at the advantage of "those who hold
power." Here Aristotle subtly raises the problem of education in deviant regimes, which
do not aim at the common good. While Aristotle holds that "the things that tend to
produce virtue as a whole are those of the lawful things which are legislated about
education with respect to the common [advantage]" (EV V.2.1130b25-26), he continues
by indicating that "perhaps it is not the same in every case to be a good man and a good
citizen" (EV V.2.1130b28-29) (pointing to his treatment of the subject in Politics [II.4]).

Even if political justice were equivalent to justice as constituted by positive law, it
would not follow that there could be no conflict between natural justice and positive law.
Suppose that when Aristotle says that political justice is "partly natural, partly legal" (EV
V.7.1134b18-19), he means that justice as constituted by positive law is partly naturally
just. Even if many positive laws are naturally just, what makes something just by nature
is independent of positive law. Otherwise, Aristotle could not say that natural justice “does not exist by being thought or not” (EV V.7.1134b20). Furthermore, Aristotle does not limit natural justice to the realm of political justice. It is false to assume that in the EV “Aristotle treats natural justice as part of, rather than prior to, political justice” (Miller 1995, 122; emphasis added) simply because Aristotle says political justice is “partly natural, partly legal.”24 By itself, the division of political justice into natural and legal does not imply that natural justice is confined to political justice. For all Aristotle says in EV V.7, natural justice may exist between people of different political communities or outside of political communities proper (e.g., the household).25

4.2 Positive Law and Legal Justice

Aristotle’s division of political justice into natural and legal justice might be taken as a division between natural and positive law. On this view, legal justice may conflict with natural justice, since justice as defined by the laws [=legal justice] may conflict with the just by nature. When Aristotle describes natural justice as that which “does not exist by being thought or not” (EV V.7.1134b20), he implies that legal justice (by contrast) comes into existence by being adopted or posited. If this were all there were to legal justice, we could equate justice as constituted by positive law with legal justice.

However, a serious problem for equating legal justice with positive law is this: Aristotle has two different ways of describing legal justice in EV V.7. In addition to

24 Strauss (1953) and Kraut (1996) rightly note that according to the division made in EV V.7.1134b18-19, natural justice could still exist outside a political context.

implying that legal justice is justice as defined by law. Aristotle describes legal justice as that which is "originally indifferent": legal justice concerns "that which originally makes no difference [whether it is] this way or otherwise, but when it has been laid down makes a difference" (E.N.V.7.1134b20-21). These two descriptions create a problem, for the originally indifferent is much narrower in scope than all positive law. While many positive laws have aspects that originally make no indifference, e.g., determining the rules of the road or the specifics of punishment, some positive laws surely are not originally indifferent, e.g., laws forbidding murder.

There are at least two ways to make original indifference coincide with the positivity of legal justice, either of which would imply that legal justice qua originally indifferent equals justice according to positive law. Aristotle seems to have intended neither connection, at least as an expression of his own view.

On the first way, if everything for which there is a law happens to be "originally indifferent," then it turns out that everything is just solely in virtue of being laid down. Clearly, though, Aristotle does not think all practical matters are "originally indifferent."

The second way argues from justice as defined by positive law to the originally indifferent. If natural justice concerns everything which is not originally indifferent, and justice as defined by law never fulfills the conditions for natural justice, then the just by law would always coincide with the originally indifferent. Aristotle appears to have this connection between the two descriptions of legal justice in mind when he reports the views of "some people":

Some people think that everything is of this sort [=legally just], because
that which is by nature is invariable and has everywhere the same power—just as fire burns both here and in Persia—while we see that those things which are just are changed.

(EV V.7.1134b24-27)

Here "those things which are just are changed" in that laws and constitutions vary from place to place (as well as from time to time in the same place). This becomes clear a few lines later: "the things which are not naturally just but humanly\(^{26}\) just are not the same everywhere, since constitutions are not [the same everywhere]" (EV V.7.1135a3-5). The people who think everything is only legally just infer that there is no natural justice because they think everything natural is invariable. If laws vary, the just is the legal, and the natural is invariable, then justice cannot be natural. Since natural justice concerns that which is not originally indifferent, it follows that the legally just concerns the originally indifferent.

Although Aristotle seems to recognize the second way of making original indifference coincide with positive law, it is not a view he holds, for the same reasons as the first way: many practical matters are not originally indifferent!

If both descriptions, original indifference and positivity, are found in Aristotle's

\(^{26}\) Are the "humanly just" things (τὰ ἀνθρώπινα δίκαια) and legal justice identical? The context unequivocally supports their identification. At EV V.7.1134b30-32, Aristotle distinguishes between that which is by nature and that which is "legal and by convention" (ποιὸν δὲ φύσει... καὶ ποιὸν οὐ ἄλλα νομικὸν καὶ συνθήκη). Then, after describing how some things can be identified as "by nature" among things subject to change, Aristotle continues at 1134b35 ff., by describing how legal justice is mutable. "τὰ δὲ κατὰ συνθήκην καὶ τὸ συμφέρον τῶν δικαίων," he says, "are similar to measures," which vary according to the type of market. He then draws out the comparison between measures and legal justice with our sentence: ὀμοιος δὲ καὶ τὰ μὴ φυσικὰ ἀλλ', ἀνθρώπινα δίκαια (1135a3-4). There is nothing else for human justice to mean here except "legal justice" or (what amounts to the same thing, given 1134b32) "justice by convention." What makes legal justice "human" is: a) legal justice consists in the fact that human beings posit what is just by making laws and other agreements; and b) the legal is mutable, in contrast to the immutability which exists among the gods (1134b28-30).
discussion of legal justice. Which one, if any, is the necessary component in his notion of legal justice? Either Aristotle means that both descriptions are necessary for there to be legal justice, or he means that only one of them is necessary. If both are necessary, then only some positive laws, e.g., regulating traffic, will be examples of legal justice. On this view there may be a conflict between legal justice and natural justice, since some specifications of the originally indifferent may wind up violating naturally just principles.\textsuperscript{27} If this is the right view, then the conflict is not coordinate with a conflict between positive law as such and natural justice, since original indifference is narrower in scope than all positive law.

The other alternative is that only one of the descriptions is necessary. But which one? Suppose, first, that original indifference is the necessary condition. In that case, we get the same result as if both descriptions are necessary, for among things originally indifferent justice is determined by convention. So once again the domain of legal justice \textit{qua} the originally indifferent is narrower than all positive law. And once again legal justice may conflict with natural justice when \textit{determinatio} goes awry.

If, on the other hand, legal justice means what is just "by being thought or not," we could get a more full-blown version of natural law theory, in which justice as determined by legal enactments may conflict with principles of natural justice.\textsuperscript{28} The

\textsuperscript{27} So Aquinas: "legal justice has its origin in two ways from natural justice in the preceding manner [viz., determination]. In one way it exists with an admixture of some human error, and in the other without such error. . . . [It] is natural justice that honor be bestowed on a benefactor but that divine honor be given him—that he be offered sacrifice—arises from human error" (1964, V.L.XII.1024).

\textsuperscript{28} There is perhaps another option: something is legally just if it is either a matter of original indifference, or if it is determined by law. However, in this case the disjunction collapses
main reason we should understand legal justice in this way is Aristotle’s remark towards the end of *E.V.V.7:* “the things which are not naturally but humanly just are not the same everywhere, since constitutions are not [the same everywhere]” (1135a3-5). It is not a matter of indifference whether a city has a correct or ‘deviant’ constitution, or whether the correct constitution it has suits the population (cf. *Pol.* III.17.1288a6-29). So some things are legally just without being originally indifferent. But if this is right, how then do we explain Aristotle’s mention that legal justice concerns the “originally indifferent”? Perhaps Aristotle simply means to point out that in some cases justice must be determined solely by enactment because there are some things which at the outset do not matter whether they are determined one way or another, so long as they are done a certain way. In other words, the originally indifferent provides an example of why justice by enactment is sometimes necessary, but legal justice is not restricted to the originally indifferent. If Aristotle’s descriptions of legal justice are to be rendered consistent, this is probably the best we can do.”

To this extent, Aristotle’s description of legal justice supports a natural law view.

**4.3 The ‘Variability’ of Natural Justice**

However, the natural law view must also account for Aristotle’s statement that

\[\text{\ldots}\]

into the second disjunct.

“9 According to Hardie, Aristotle “fails to be clear, or to make clear, what he means by the ‘legal justice’ which he opposes to natural justice. The ambiguity appears if we consider the word ‘convention’. Is Aristotle thinking of rights and wrongs created by conventions, like the rule of the road, or of conventional ideas about right and wrong, for example the idea, which might be prevalent in an oligarchy, that certain principles applied only to actions affecting other members of a class and not members of inferior classes? ... Conventional morality is not determined by convention, in the sense in which the rule of the road, or the right ransom for a prisoner, is determined by convention” (1980, 205).
natural justice is subject to change. The natural law is traditionally conceived as unchangeable. In what way is natural justice subject to change, and how does this affect its relation to legal justice?

When Aristotle first describes natural justice in *En V.7*, he says that it "has the same power (δύναμιν) everywhere" (1134b19). This implies that natural justice is immutable. However, after describing legal justice, he responds to the charge examined above, viz., that because laws are different in different places and times, justice cannot be natural:

Some people think that everything is of this sort [=legally just], because that which is by nature is invariable and has everywhere the same power—just as fire burns both here and in Persia—while we see that those things which are just are changed. This is not so, though in a way it is so. Though perhaps not at all among the gods, among us at any rate there is something indeed that is by nature, yet all is variable. But nonetheless there is that which is by nature and that which is not by nature.

(*En V.7.1134b24-30*)

Aristotle’s response is hard to follow. Having said that the natural has everywhere the same power, he seems to modify his claim by saying that "all is variable." But what is

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10 It is generally assumed that Aristotle is stating that justice exists among the gods, in express contradiction to what Aristotle says later (*En X.8.1178b10-12*). The problem is usually resolved by claiming that Aristotle is simply deferring to common beliefs (see Burnet (1973, 234); Gauthier and Jolif (1959, II.394)), or speaking hypothetically (Albertus Magnus: "loquitur ex hypothesi, scilicet quod si justitia esset in diis, verius esset, quia in ipsis non accidunt aliqua inordinata sicut in nobis" ["it is said from a hypothesis, namely that if justice were among the gods, it would be truly [i.e., truly unchanging], since among them a certain lack of order does not occur as [it does] among us"] (1968, V.XI.423=360.5-91)). But the difficulty is removed if we take Stewart’s suggestion that Aristotle is speaking more generally about the relation between the natural and the variable (1892, 1.496).

11 The train of thought is difficult. Stewart thinks "we must not expect too much logical order from the present writer" (1892, 1.496). Jackson places "This is not so... yet all is variable" in parentheses (1973, 106-107).
covered by "all" in this statement? There are two different ways to understand it.

4.3.1 Natural Variation

Most interpreters have understood the "all is variable" claim to include natural justice itself. On this view, the just by nature at one place and time may differ from the just by nature at another place and time. Let us call this the Natural Variation view.

As an interpretation of Aristotle, Natural Variation finds its supporters even among natural law theorists. For example, Aquinas draws a distinction between those actions which belong to the nature of justice and those which follow from the nature of justice:

those actions belonging to the very nature of justice cannot be changed in any way. for example, theft must not be committed because it is an injustice. But those actions that follow (from the nature of justice) are changeable in a few cases.

(1964, V.L.XII.1029)

For Aquinas, there is a natural law which is unchangeable with regard to its general precepts, but "the general principles of the natural law cannot be applied to all people in the same way because of the great diversity of human affairs" (1993, Q. 95, A.2, r.3). On Aquinas' view, when Aristotle speaks of natural justice as variable, he is not speaking of the general precepts of the natural law but of the changeable conclusions, "which for the most part have rectitude but are in some instances defective" (1993, Q. 94, A.4, r.2).\footnote{Cf. Aquinas (1964, V.L.XII.1025-1029).} (These conclusions, we might add, are not to be confused with the "determinations" by
which legal justice is derived from natural justice.\footnote{Cf. Aquinas: "Origin from natural right can occur in two ways: in one way as a conclusion from a principle, and in such a manner positive or legal right cannot originate from natural right. . . . [It] is necessary that whatever follows from natural justice as a conclusion will be natural justice. . . . In the other way something can originate from natural justice after the manner of a determination, and thus all positive or legal justice arises from natural justice" (1964, V.L.XII.1023).} The conclusions vary with the circumstances due to the fact that practical affairs are only "for the most part": "the things that are just by nature, for example, that a deposit ought to be returned must be observed in the majority of cases but is changed in the minority" (Aquinas 1964, V.L.XII.1028; cf. Aquinas 1993, Q. 94, A.4: Q. 97, A.1). At any rate, Aquinas infers this on the basis of Aristotle’s analogy between natural justice and the right hand (1964, V.L.XII.1028 with EV V.7.1134b33-35).

This “for the most part” understanding is also followed—in a very different way—by Leo Strauss. Strauss departs from the Thomistic reading of Aristotle: “When speaking of natural right, Aristotle does not primarily think of any general propositions but rather of concrete decisions” (1953, 159).\footnote{See also Gadamer: Aristotle “does not himself regard the guiding principles that he describes as knowledge that can be taught. They are valid only as schemata. They are concretized only in the concrete situation of the person acting. Thus they are not norms to be found in the stars, nor do they have an unchanging place in a natural moral universe, so that all that would be necessary would be to perceive them. Nor are they mere conventions, but really do correspond to the nature of the thing—except that the latter is always itself determined in each case by the use the moral consciousness makes of them” (1989, 320).} There is not a fixed set of rules applicable to all circumstances (see Chapter 4). But this does not mean there are not objective standards of right and wrong: they are reflected in the decisions of a practically wise agent:

There is a universally valid hierarchy of ends, but there are no universally valid rules of action. . . . [When] deciding what ought to be done, i.e., what ought to be done by this individual (or this individual group) here
and now, one has to consider not only which of the various competing objectives is higher in rank but also which is most urgent in the circumstances.

(Strauss 1953, 162)

Again, the variability of natural justice consists in the absence of a fixed set of rules that can specify what ought to be done in all situations. For Aristotle there is no such set of rules because practical affairs are only "for the most part." But since for Aristotle a set of general rules is valid "for the most part," Strauss' view in this respect must be essentially similar to Aquinas'.

The "for the most part" interpretation of EN V.7 stems partly from Aristotle's "notion of nature as a principle of change which is inherent in substances and which, in the sublunary realm at least, holds always or for the most part" (Miller 1991, 289). Aristotle holds that "natural things come about either always or for the most part in a given way." i.e., for the sake of an end (Phys. II.8.198b35-36). That which is by nature "has within itself a principle of motion and of stationariness" (Phys. II.1.192b13-14): the phrase "according to nature" (κατὰ φύσιν) is applied to all these things and also to the attributes which belong to them in virtue of what they are, for instance the property of fire to be carried upwards—which is not a nature nor has a nature but is by nature (φύσει) or

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55 Despite his emphasis on the basis of natural justice in concrete decisions, Strauss suggests that in Aristotle natural justice "has two different principles or sets of principles: the requirements of public safety, or what is necessary in extreme situations to preserve the mere existence or independence of society, on the one hand, and the rules of justice in the more precise sense, on the other" (1953, 161). Where the existence of society is not at stake, one relies on the second set of rules; where it is, one relies on the former. So even Strauss seems to give validity to some general principles.

56 Cf. MML1.33.1194b30-1195a4; Michelakis (1968, 165); Aubenque (1980b, 152-153). For a general account of the relation of Aristotle's philosophy of nature to his ethical-political thought, see Miller (1995, ch. 2); cf. Annas (1993, ch. 4).
according to nature” (Phys. II.1.192b35-193a1). Here Aristotle is primarily concerned with nature in the sense of matter. Nature is also said of “the shape or form . . . of things which have in themselves a principle of motion.” and the compound of matter and form of such things is said to be ‘by nature’ (Phys. II.1.193b2-6). Both of these sense of nature, and their derivatives ‘by nature’ and ‘according to nature’, belong to the world of things which contain within themselves a source of change. ” and nature as matter and nature as form are related in that the changes in matter of a natural composite are oriented toward the form of that thing as the goal or end. that for the sake of which the changes in matter take place (Phys. II.8.199a30-32; II.9.200a30-b9).

However, Aristotle’s teleological conception of nature cannot account for the claim that everything, including naturally just norms, are variable. The changes of natural substances that take place for the sake of an end do not show that the end or telos itself varies. Likewise, the just by nature may serve as a goal, without any implication that the standards of natural justice themselves change. One might say that the laws of a polis have improved if they are closer to the end or goal of the polis, but that does not show that the goal itself varies.

4.3.2 Corruption

But what else could Aristotle mean when he says that “all is variable” at EN V.7.1134b29-30? He could mean this: enacted norms which happen to conform to the just by nature may be abolished in particular cities because citizens possess a corrupt or weak moral character. On this view, a naturally just norm does not vary in its justice, but

human beings may nonetheless decide not to follow it. Whereas fire burns in Greece and in Persia, natural justice may be realized only in (say) Kallipolis, because human beings are capable of being corrupted and so may fail to abide by the just by nature. Let us call this the Corruption view.

The Corruption view may be found as far back as the Greek commentators. According to the commentators, natural justice is variable in the sense that those who have been corrupted in their habits and customs do not practice what is naturally just.\(^{18}\)

Michael of Ephesus explains Aristotle's meaning this way:

> If everyone were to be disposed according to nature, then what is just by nature would not change. . . . [The] determining factor (κριτικὴ) of the just by nature ought not to be made from those who are disposed badly and contrary to nature, but from those who are disposed according to nature. There is indeed then a justice by nature for us: however, all is mutable on account of the worthlessness of those who practice [it] and being disposed contrary to nature.

\(^{1901.  CI G \ XXII.47.22-23: 28-31}\)

In this vein, the commentators often make an analogy to the sweet: that which is sweet does not stop being sweet just because the sick do not find it so. So too there is the just by nature even if the wicked do not think it just. Natural justice is mutable because some people, the corrupted, do not abide by it.

Which view is correct, Natural Variation or Corruption? Unfortunately, after stating that “all is variable,” Aristotle gives few indications in the remainder of \(EN V.7\) of

\(^{\text{18}}\) The Corruption view probably goes all the way back to the author of the \(MM\), who states, “Do not suppose that, if things change owing to our use, there is not therefore a natural justice, because there is” (1.33.1195a1-3).

\(^{\text{19}}\) Heliodorus (1889, \(CI G \ XIX.102.8-9\)); Anonymous (1892, \(CI G \ XX.232.37\)); Michael of Ephesus (1901, \(CI G \ XXII.47.15-16\)).
what he means by this claim as applied to natural justice. There are, in fact, only two
pieces of evidence: his reference to natural right-handedness, and the claim that "a single
regime alone everywhere is according to nature the best" (1135a5). Both pieces tell
against Natural Variation, and in favor of Corruption.

4.3.3 Against Natural Variation, part 1: natural right-handedness

All Aristotle says in E.V V.7 about natural right-handedness is this:

What sort of thing that is capable of being otherwise is by nature, and
which is not but is legal and conventional, if both are equally (ὄμοιος)
variable, is clear. In the rest of the cases [τῶν ἀλλων] also the same
distinction will apply. For by nature the right hand is stronger, and yet it is
possible for everyone to become ambidextrous.

(E.V V.7.1134b30-35)

In and of itself, the reference to natural right-handedness is compatible with both Natural
Variation and Corruption. Even if natural justice is 'equally' as variable, it could be that
the just by nature may not be followed despite its validity for all times and places (in

31 Gadamer suggests that at 1134b32 "equally" qualifies "it is clear" rather than "variable"
(1989, 519 n. 26). But this is plainly wrong, since nothing in the lines preceding 1134b31 is clear
(nor, for that matter, is there anything which Aristotle asserts is clear). On the contrary, in the
preceding lines Aristotle is concerned to say that natural justice may be changeable, one of the
more perplexing statements in E.V V.7.

31 For the punctuation I follow Bywater (1894), Joachim (1951) and Gauthier and Jolif
(1959, II.395) (who are followed by Irwin (1985)) understand ὄμοιος at 1134b33 to govern
the sentence "in the rest of the cases also the same distinction will apply" and cast the preceding
sentence into interrogative form: "What sort of thing that is capable of being otherwise is by
nature, and which is not but is legal and conventional, if both are equally variable?". Joachim's
reason for the suggestion is that "the 'equal variability' is surely a reason for the distinction's being
obscure, not for its being clear" (1951, 156). There are two problems with this. First, with the
change in punctuation, the question is unanswered by what follows. Second, the problem of
clarity remains even with the change in punctuation. For Aristotle would then say that "it is clear
also in the rest of the cases," as if it were clear in the case of justice as well.

32 I understand "the rest of the cases" to refer to all those things which can be otherwise
outside the domain of political justice.
contrast to the way fire always burns), or it could be that the just by nature differs from place to place and time to time.

Aristotle's remark about natural right-handedness actually conflicts with Natural Variation. According to the example, the natural is changeable only in the sense that it can be superseded by the conventional: the right hand is stronger by nature, but by training the hands can be equally strong. It is the relative strength of the hands that changes, not the fact that the right hand is stronger by nature. Since ambidexterity is not a situation which exists by nature, what is by nature does not change to a new situation which also exists by nature. In other words, there is a situation, dominant right-handedness, which exists by nature, but people can alter that situation to a new one, ambidexterity, which does not exist by nature. So, at least as an explanation of how we can distinguish the natural from the conventional among things subject to change, the example of ambidexterity actually supports the Corruption view!  

4.3.4 Against Natural Variation, part 2: the best politeia

The second piece of evidence in favor of Corruption is the final sentence of Aristotle's discussion of natural justice in EN V.7: "a single [regime] only is everywhere according to nature the best" (1135a5). If there is only one regime that is best by nature, for all times and places, then the best by nature does not change. Therefore, Natural

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43 There is one important disanalogy. As Jaffa notes, "Aristotle's example could be interpreted as suggesting a possible perfection of nature: although most men are naturally right-handed (or left-handed), it might be thought better to be ambidextrous" (1979, 180-181). However, the example is intended only to illustrate that we can make distinctions between the natural and the conventional in the arena of political justice just as we do among other things subject to change, and not to indicate that the natural is better than the conventional or vice versa (pace Miller (1991: 1995); Strauss (1968)).
Variation is false. But Aristotle's claim about the best regime is consistent with Corruption. The regime which is best may be altered in the (theoretically uninteresting, but practically important) sense that people may change the constitution to a worse one because they lack virtue and education (cf. Pol. V.12.1316a1-17).

Recently, however, scholars have interpreted Ev V.7.1135a5 as a version of Natural Variation. According to these scholars, Aristotle does not mean "there is a single political regime that is, in any place you choose, the best by nature," but rather, "for any place you choose, there is a political regime that is best by nature for that place." On this view, the regime that is best by nature in a given polis will vary with the circumstances, e.g., aristocracy is best in some circumstances, polity in others, kingship in yet others. Here "le droit naturel lui-même, illustré ici par la notion de politeia, se particularise pour se conformer à la diversité de la nature" (Aubenque 1980b, 155; 1980a, 219). Since the regime that is best by nature varies from place to place, the just by nature also varies.

For textual evidence in favor of Natural Variation, one might point to Politics III.18.1288a33-37, where Aristotle says that the best constitution may be one in which one person, a family, or many persons excelling in virtue rule (Mulhern 1972, 261).[^6]


[^7]: For less compelling evidence, cf. Ev V.7.1134b25-27 with de Int. 22b36-23a4. Mulhern (1972) points out this parallel in order to distinguish rational from irrational dunamis. Whereas most irrational dunamis have the capability for only one thing, e.g., fire to heat, rational dunamis are capable of contraries. (Cf. Also Ev V.1.1129a11-17; II.5.1106a6-10). Mulhern wrongly infers from this that because natural justice involves a rational capability, there may be
These are in contrast to deviant forms of constitution, which are contrary to nature (Pol. III.17.1287b37-41).

However, there are other passages in the Politics that remove the appearance of contradiction between Aristotle’s remarks about the best regime in EN V.7 and his claims at Pol. III.18.1288a33-37. First, Aristotle says in the Politics that to study the best constitution is the same as to speak about aristocracy and kingship, because each of them is concerned with virtue provided with external goods (Pol. IV.2.1289a30-33; cf. Pol. IV.8.1293b23-27). When Aristotle speaks of the best constitution, then, he means the genus “a constitution based on [full] virtue,” which has absolute kingship and aristocracy as its species.\(^4\) One minor wrinkle: the best constitution does not comprise the third form of correct constitution, polity, in which the many rule for the common good. Since polity is a correct form of constitution, which aims at the common advantage (Pol. III.7.1279a37-39), it is difficult to say that it is not just by nature. So there is a suboptimal form of regime that is just by nature. However, polity is less optimal because it is possible

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\text{for one or a few to be outstanding in virtue, but where more are concerned it is difficult for them to be proficient with a view to every virtue, but [some level of proficiency is possible] particularly regarding military virtue, as this arises in a multitude.}
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\(\text{(Pol. III.7.1279a40-b2; cf. Pol. IV.11.1295a25-34)}\)

\(\text{\footnotesize{\text{\textsuperscript{4}}Cf. Keyt (1991, 257 n.43); Miller (1995, 191-193). For the relationship between kingship and aristocracy as forms of the best regime, see Vander Waerdt (1985).}}\)
In other words, aristocracy and kingship are ranked ahead of polity because in the latter citizens cannot achieve full virtue. Because citizens in a polity achieve a lower degree of virtue than the best constitution, we can say that polity is less just by nature, i.e., that the standards of natural justice must still refer solely to the best constitution.\(^7\)

Another piece of evidence against Natural Variation is Aristotle’s distinction between the best constitution *simpliciter* and the best constitution that circumstances allow:

> it belongs to the same science to study what the best constitution is, and what quality it should have to be what one would pray for above all, with external things providing no impediment, which constitution is fitting for which [cities]—for it is perhaps impossible for many to obtain the best, so neither the one that is the most excellent simply nor the one that is the best that circumstances allow should be overlooked by the good lawgiver and the statesman in the true sense.\(^8\)

*(Pol. IV.1.1288b22-27)*

The view that the best constitution varies from place to place is certainly true if we consider the best constitution that circumstances allow. But the best constitution *simpliciter* is the constitution that is best in the best conditions (those for which one would pray, as Aristotle would say). Since the conditions for which one would pray do not vary, the best constitution *simpliciter* does not change.

### 4.3.5 Implications of the Corruption view

I have argued that the Corruption view best accounts for Aristotle’s claims about

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\(^7\) Some recent interpreters wrongly think polity (or polity in one of its forms) is identical to the simply best constitution discussed in *Politics* VII and VIII. See Bluhm (1962), Johnson (1990), and Nichols (1992), all rightly criticized by Miller (1995, 262-263, nn. 26-27).

the mutability of natural justice. Norms of natural justice are mutable merely in the sense that people could decide not to follow them. But what are those norms, and what implications do they have for political *praxis*?

Aristotle indicates only once in *En.V.7* what he might consider naturally just: "a single [constitution] only is everywhere according to nature the best" (1135a5). Though Aristotle does not explicitly say so, presumably the constitution that is best by nature is just by nature. But many constitutions are not naturally just: "the things which are not naturally just but humanly [i.e., legally] just are not the same everywhere, since the political regimes are not [the same everywhere]" (*En.V.7.1135a3-5*). Moreover, on Aristotle’s view, the number of constitutions unjust by nature must be quite large. All ‘deviant’ forms of constitution—democracy, oligarchy, and tyranny—are "contrary to nature" (*Pol. III.17.1287b39-41*). Worse still (from Aristotle’s point of view), "it is perhaps no longer easy for any constitution to arise other than a democracy" because most cities have large populations of poor citizens who (on Aristotle’s view) lack moral virtue (*Pol. III.15.1286b20-22; cf. Pol. IV.11.1295a25-35: 1296a22-38*).

As a standard for the reform of existing regimes, the best regime allows the lawgiver to evaluate and criticize less optimal regimes and their laws as unjust by nature. The best regime may serve as a *telos* to which the lawgiver will try to guide existing regimes, so long as reform remains consistent with the preservation of the *polis*. By modifying regimes and laws at opportune moments, the lawgiver may reduce injustice and do so based on considerations of natural justice as represented by the best regime.

But reforming the constitution when citizens are prepared to accept a better one is
a far cry from a more radical use of the appeal to natural justice, viz., to advocate disobedience or the invalidation of laws considered naturally unjust. Although Aristotle does not draw out the implications of his version of best constitution theory for "civil disobedience," extrapolation from Aristotelian principles leads to rather conservative results. If it is difficult for any regime other than democracy to arise, for example, the best constitution possible in those circumstances is a form of deviant constitution.59 If the best constitution for the circumstances is a deviant regime, it will be unjust according to nature, but citizens would not be justified if they disobeyed or tried to invalidate naturally unjust laws in those conditions. And since the conditions necessary for the best regime are exceedingly rare (those for which one would pray), natural justice serves as an evaluative standard without clear application in less optimal conditions. Where those conditions cannot be altered by human effort, the polis will simply be unable to realize the absolutely best constitution. At best, natural justice dictates that a constitution and its laws should be altered in favor of laws that are as close as possible to those of the best constitution.60 even if those are laws of a deviant constitution.

59 When Aristotle says that "where the multitude of the poor exceeds the stated proportion, there democracy is natural (πέφυκεν)" (Pol. IV.12.1296b24-26), he is merely admitting that relative to the circumstances, democracy is best, not that democracy is according to nature. That is, in the circumstances, democracy is "natural" because it is the only form of constitution which fulfills the principle under investigation in the chapter, viz., that "the part of the city that wishes the constitution to remain as it is ought to be stronger than the part that does not so wish" (Pol. IV.1296b15-16). Thus 1296b24-26 is not inconsistent with Pol. III.17.1287b39-41; cf. Susemihl and Hicks (1976, 443).

60 Cf. Pol. IV.11.1296b3-9: "What the best constitution is, then, and for what reason, is evident from these things. As for the other constitutions (since we assert that there are several sorts of democracies and several of oligarchies), once the best is defined it is not difficult to see which is to be regarded as first, which second, and so on in the same manner according to whether it is better or worse. The one that is closest to this must of necessity always be better, the one that
As an interpretation of natural justice in *E.N.* V.7, best state theory might seem too extreme, for it seems to license the claim that all laws of deviant constitutions are naturally unjust. However, such a claim needs to be qualified in two respects. First, in conditions unsuited for the best regime, the force of describing a regime and its laws as naturally unjust is very weak. As a practical matter, Aristotle wants to know which regime and laws are best in the given conditions:

> good management (εὐνομία) does not exist where the laws are well enacted yet are not obeyed. Hence one should conceive it to be one sort of good management when the laws are obeyed as enacted, and another sort when the laws being upheld have been finely enacted. . . . This may be done in two ways: [they may obey] either the laws that are the best of those possible for them, or those that are the best simply.

*(Pol.* IV.8.1294a3-9)

The laws of the best regime are of little use if no one follows them. So long as the conditions necessary for the best regime are lacking, there would be little practical value in protesting that an existing regime is not just by nature. One might even say that it would be unjust were the lawgiver to institute the best regime in unsuitable circumstances. Aristotle does not go this far, so far as I am aware, but since the lawgiver aims at εὐνομία it is hard to avoid the implication. Insofar as natural justice describes the best regime in *E.N.* V.7, its role is that of an ideal towards which lawgivers should try to bring existing regimes, as far as possible. But natural justice is not simply what is best

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is more removed from the middle [constitution], worse, provided one is not judging with a view to a presupposition." The ‘best constitution’ here is really the best constitution for most places, not the best constitution simpliciter. See the beginning of *Pol.* IV.11, where the discussion is explicitly limited to less optimal circumstances (1295a25-31). Cf. Miller (1995, 262-269). However, the same principle that the one ‘closest’ to the best is always better should apply as well to the simply best constitution.
Second, not all laws of a deviant regime will be unjust by nature. According to the Conformity Thesis, laws should uphold the aims of the constitution. Only some aims of the constitution are specifically tied to the form of constitution, e.g., freedom in democracy, wealth in oligarchy (see Chapter Two). The aims of the city's preservation and the requirements of civil order, by contrast, apply to all constitutions (cf. laws concerning generalship. Pol. III.15.1286a2-5). So best constitution theory is compatible with the claim that there are laws based on nature which are applicable or necessary in all societies. Indeed, some understand Aristotle's remarks in EN V.7 to concern "a common core of laws, often unwritten, that can be seen to be part of any legal system—those laws that forbid murder and fraud, for example—and these laws prescribe what is naturally just in the sense of being a necessary part of the order of any human community (EN V.7. 1134b 17-30)" (Striker 1987, 86). In EN V.7 at least, this is not quite right, since Aristotle does not seem to mean by natural justice "laws which exist in all societies" or a ius gentium. As we have seen, Aristotle responds, to those who think that nothing is naturally just because laws vary from place to place, that "among us there is some even by nature, yet everything is variable" (EN V.7.1134b29-30). That is, he concedes that all laws are subject to change (in the sense of the Corruption view), but argues that nonetheless there are naturally just prescriptions. Had Aristotle meant by natural justice "laws that are necessarily part of any constitution," this would be the place to say it. If Aristotle does not affirm the descriptive claim that there are laws recognized in every

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^1 See also Strauss (1968, 81).
land, the Corruption view still allows him to assert the prescriptive claim that there
should be laws common to all constitutions, laws whose aims are not specific to a
particular form of constitution. But we cannot draw this conclusion from the twenty-
three lines of Nicomachean Ethics V.7. In the next chapter, I consider whether we can
draw it from other passages in the Corpus Aristotelicum.
Chapter Six: Natural Justice, Part II

Introduction

If Chapter Five is correct, Aristotle's conception of natural justice does not license a full-blown natural law interpretation. Although natural justice and legal justice may conflict, the standard of natural justice is the best regime. Because the best regime is possible only in rare circumstances, the standards of natural justice are not applicable everywhere. However, proponents of a natural law interpretation of Aristotle might argue that other passages in the Corpus Aristotelicum make plain Aristotle's natural law views. In the Rhetoric, for example, Aristotle speaks of a "common [law] according to nature," which appears to underlie Antigone's disobedience of Creon's edict (Rhet. I.13.1373b6-13). Similarly, Aristotle's doctrine of equity prescribes departing from the law when it would render an unjust verdict.

Do these passages show that Aristotle endorses a conception of natural law, the norms of which justify disobedience to or invalidation of positive laws which conflict with it? I will argue that in these passages he does not advocate appealing to natural justice in order to invalidate or disobey laws which conflict with natural justice. In the first four sections, I examine the Rhetoric as a source for Aristotle's views. Looking closely at the context of the Rhetoric, I try to show that nothing more can be established than that Aristotle thought there were norms of natural justice. In the following three sections, I turn to the passages on equity, 'primary' justice, and unwritten laws, arguing that Aristotle intends none to be identical to an appeal to natural justice which may invalidate the written law. Similarly, Aristotle's notorious discussion of natural
inequality does not indicate a role for natural justice in civil disobedience. While natural justice may be used to criticize or reform laws and regimes, it does not allow citizens to resist or disregard the law.

1. Difficulty in using the Rhetoric as a source for Aristotle's views

Although Aristotle speaks of a "common" law which is "according to nature" in the Rhetoric (1.13.1373b6: 1.15.1375a32), it does not follow that Aristotle believes the common law has a valid function in political discourse. The Rhetoric is a treatise about the available means of persuasion. On a philosophical level, there is a tension within the Rhetoric between the moral and the persuasive, a tension with roots in Plato's condemnation of rhetoric in the Gorgias, on the one hand, and in rhetoric's effectiveness (for good and ill) in Athenian politics, on the other hand. From this philosophical tension, a serious textual issue arises: Rhetoric 1.1, with its emphasis on the harmony between rhetoric and truth, has seemed to many in stark contrast to the advice offered in the rest of the Rhetoric, which sometimes appears to aim at teaching the means of persuasion without special regard for truth.

Fortunately, we can study natural justice in the Rhetoric without solving the tension more generally, so long as we keep the general issues in mind. In fact, Aristotle's comments on natural justice in the Rhetoric serve as a useful case study of the wider issues at the same time that they throw light on Aristotle's statements there about natural justice. The philosophical tension between the true and the persuasive is reflected in the

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1 See Wardy (1996); Engberg-Pedersen (1996).
differing views of scholars about the value of the Rhetoric in determining Aristotle’s own views on natural justice. According to Wormuth, “We are not obliged to believe that the Rhetoric is doing anything more than reporting the stock phrases of current oratory; and indeed the huddling together of unwritten law, universal law, natural justice, and equity is unlike the careful analysis Aristotle bestows on ideas he takes seriously” (1948, 58). Shellens holds that the “aim of the Rhetoric, in regard to natural law, is to show that the term natural law is in vogue and that from a certain point of view it is considered an advantage to make use of its emotional appeal” (1957, 81). One problem for such sweeping dismissals of the Rhetoric is that Aristotle’s discussion of equity is remarkably similar to his treatment of equity in the Nicomachean Ethics (see Chapter Four).

However, some make the opposite mistake, by treating the Rhetoric as “the consummation of Aristotle’s legal philosophy and theory” (Hamburger 1951, 65). So we will need to look at the context of each passage with more care than is usually done.

2. The context of Rhetoric 1.10 and 1.13

In Rhetoric 1.10, Aristotle does not mention natural justice directly. Instead, Aristotle speaks of a "common" (κοινός) law, which comprises "all those things which, being unwritten, are thought to be agreed to among all" (1368b8-9). This "common" law is contrasted with a "specific" (Ιδιος) law, which is the written law by which the affairs of a particular polis are administered (1368b8). In Rhetoric 1.13, Aristotle again

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1 Cf. Ritchie (1916, 30-32); Strauss (1968, 81); Winthrop (1978, 1207 n.11); Jaffa (1979, 168).

4 Cf. von Leyden (1985, 88); Sigmund (1971, 9-10).
makes a division between a common law and a specific law, and then states that the "common" law— which "all people divine in some way"— is "according to nature" (1373b6-7). Given the linguistic similarities of this division, it is not inappropriate to include the κοινός νόμος referred to in chapter 10 in our discussion even though Aristotle does not explicitly say that it is "according to nature."

The mention of a "common" law in Rhetoric 1.10 comes in the context of an attempt to define wrongdoing (τὸ ἀδικεῖν). Aristotle finds it necessary to define wrongdoing in order to discuss the motives involved in wrongdoing, the dispositions of wrongdoers, and the nature of those who are wronged, a discussion which forms part of the study of forensic rhetoric. In other words, Aristotle is laying down a definition for the purposes of the discussion to follow, and that subsequent discussion is concerned with the means of persuasion in the sense that it lays out the material from which forensic arguments may be generated. The definition is not formulated as part of an argument designed to persuade without regard to the truth of the argument.

Even so, the definition which Aristotle gives of wrongdoing, "harming voluntarily contrary to the law" (Rhet. 1.10.1368b6-7), does not appear to be meant as a philosophically precise definition. To formulate his definition Aristotle uses the hypothetical imperative. "Let wrongdoing be (ἔστω) [defined as] harming voluntarily contrary to the law" (Rhet. 1.10.1368b6-7). Cope states that we have here "a popular or merely provisional definition" (1877, I.1:88). This definition may be popular; it is not

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1 Differences between the two passages on common law will be considered in the next section.
uncommon to identify the just with the lawful. It is provisional only in the sense that it is laid down to elucidate the elements that need to be discussed in the following discussion.

What is important here is that Aristotle will not come back later to give a better definition: he leaves the definition at an unrefined level from the point of view of a philosophical discussion.

Notably, some of Aristotle's other definitions in the *Rhetoric* are of the same unrefined sort, as anyone familiar with the *Nicomachean Ethics* will discover upon reading the definition of happiness provided at *Rhetoric* 1.5.1360b14-18, where a similar hypothetical imperative is used:

Let happiness be \((\sigma\sigma\omega)\) [defined as] good fortune combined with virtue or as self-sufficiency in life or as the most pleasant life accompanied with security or as abundance of possessions and live bodies, with the ability to defend and use these things: for all people agree that happiness is pretty much one or more of these.

Now one might try to argue that such unrefined definitions could nonetheless serve as evidence for Aristotle's own view. For if the definition of happiness in the *Rhetoric* falls short of the definition of happiness in the *EN* as an activity of soul in accordance with virtue, it is nonetheless true that good fortune, virtue, self-sufficiency, pleasure, and external goods all find their proper place in the discussion of happiness in the *EN*. As Grimaldi puts it, we have here "the explanation of εὐδαιμονία as it is commonly understood by the people together with an incorporation of some of the philosophical ideas which appear in *EN" (1980, 105). On this basis, one might claim that, while Aristotle is not being philosophically precise, neither is he merely "reporting the stock phrases of current oratory." It is true that he is not attempting to refine the *endoxa* about
happiness and about wrongdoing, but *qua endoxa* the definitions hit upon the truth well enough for Aristotle to move on to his primary goal, a study of the available means of persuasion.

Although this line of reasoning provides good grounds for thinking that Aristotle's unrefined definitions in the *Rhetoric* are not mere sophistry, it is nonetheless inadequate inasmuch as it tries to allow that such definitions are evidence in favor of Aristotle's own view. All we can say, I think, is that the *endoxa* contain *something* of the truth (i.e., Aristotle's own view). Because it is left unclear how much refinement is needed in order to arrive at the truth, we cannot say whether Aristotle himself would endorse an *endoxon* as stated in the definition without appealing to other texts. This does not mean that we must entirely rule out unrefined definitions in the *Rhetoric* as clues to Aristotle's meaning elsewhere, for the passages might mutually reinforce one another. But it does make it difficult to take Aristotle's unrefined definitions at face value as evidence for Aristotle's own view."

Returning to the immediate context of *Rhetoric* 1.10, we can see that Aristotle's division between a "common" law and a "specific" law is meant to provide additional content to the unrefined definition of wrongdoing inasmuch as wrongdoing involves acting contrary to the law. Since there are two sorts of law, wrongdoing will involve acting either against the written law of one's *polis* or against unwritten norms which

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"Cf. also *Rhet.* 1.2.1355a24-29. Yack, who holds that "all we need conclude that Aristotle is saying about natural law" in the *Rhetoric* is that natural law "is very much available as a basis upon which to build persuasive arguments" (1990, 225), claims that the reputable opinions about natural law in the *Rhetoric* are refined at *EN* V.7."
"seem to be agreed to among all." What is important for our purposes is whether the unrefined nature of the definition of wrongdoing carries through to the amplification of the terms of that definition, and in particular, to the division into two sorts of law. It is worth noting that Aristotle's description of another term of the definition, viz., acting voluntarily, is quite similar to that which we find in the *En*. In the case of the division of law, we have no material outside of the *Rhetoric* with which to compare. Even so, the division of law seems to be an addition by Aristotle himself, for he finds it necessary to specify what he means by "specific" and "common": "Law is either specific or common. I call (λέγω) specific the written law under which people live in a polis, and [I call] common all those things which, being unwritten, are thought to be agreed to among all" (*Rhet. I.10.1368b7-9*). Were Aristotle simply relying on unrefined *endoxa*, it would be unlikely that he would find it necessary to clarify his meaning in terms of a systematic classification scheme that he himself introduces. In other words, it is likely that he is introducing his own classification scheme by which to understand the already familiar distinction between written and unwritten norms.³ And if Aristotle makes such a division in his own name, we ought not dismiss it as part of an unrefined definition which cannot be attributed to Aristotle himself.

The situation regarding natural justice in *Rhetoric* I.13 is superficially similar to that which we find in *Rhetoric* I.10. Aristotle sets out to classify just and unjust actions.

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⁴ It is no obstacle that the content attributed to the distinction between written and unwritten varies between one author and the next. For the variation in meaning, see Ostwald (1973).
and he tells us that they "have been defined with regard to two kinds of law" (Rhet. I.13.1373b2-3). Here Aristotle uses the passive voice: "Just and unjust actions have been defined (ὁρισταὶ) . . . " (Rhet. 1373b2-3). Since the agency is unclear, we cannot know whether to attribute the definition to Aristotle or to others. But once again the division into "common" and "specific" law seems to be made in Aristotle's own name: "I call (λέγω) law on the one hand specific, on the other common. Specific [law] is that which is defined by each [people] with regard to themselves, and this is partly unwritten, partly written, while common [law] is that which is according to nature" (Rhet. I.13.1373b4-6).

So Aristotle once again seems to take up common views about the relation between justice and law in order to adapt them to his own conceptual categories.

3. **Differences between Rhetoric I.10 and I.13**

Despite superficial similarities, Rhetoric I.10 and I.13 diverge in a number of ways. The most obvious way is that in I.13 Aristotle subdivides specific law into written and unwritten law." By itself this subdivision does not contradict the division Aristotle makes in Rhetoric I.10: rather, it seems that a further distinction has been made within "specific" law, to acknowledge that some unwritten norms are relative to particular communities."

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* Ostwald (1973).

** Cf. de Romilly (1971, 47). Kennedy (1991) moves καὶ τούτον τὸν μὲν ἄγραφον τὸν δὲ γεγραμένον at 1373b5-6 so that it follows κοινὸν at 1373b4. While such a (rather drastic) transposition makes Rhetoric I.10 and Rhetoric I.13 more consistent, there is no logical contradiction to be avoided. Indeed, the classification which makes specific law partly unwritten seems to account more thoroughly for the different meanings of unwritten norms. Moreover, as I shall presently show, the philosophical differences between the passages make the need to harmonize the two passages irrelevant.
Two more serious differences emerge if we attend closely to the descriptions of the κοινὸς νόμος in each chapter. First, Rhetoric 1.13, unlike 1.10, allows for a conflict between written laws and the common law. Because the common law consists of norms "agreed to among all" in Rhetoric 1.10, written laws of particular poleis could not conflict with it: a norm simply would not count as part of the common law if it were not followed in every land. (What Aristotle seems to have in mind is a practice that is found among all peoples or nations.\(^\text{11}\) In a forensic setting, it would be useful for a prosecutor to argue that the accused did not recognize a norm which nearly all people follow.) By contrast, in Rhetoric 1.13 the common law may conflict with written laws, as the reference to Sophocles' Antigone makes evident (1373b9-13).

The second difference between the passages draws out the implications of the first difference: in Rhetoric 1.13, but not 1.10, people may disagree about what is just by nature.\(^\text{12}\) In Rhet. 1.13, Aristotle says that "there is by nature a common justice and injustice, which everyone somewhat (τι) divines" (Rhet. 1.13.1373b6-8). The claim that "everyone somewhat divines" a common justice which exists by nature leaves it open whether or not people may disagree as to exactly what is just by nature. "Divination" invites the idea that some people may perceive the norms without adequately understanding them, with the result that they may badly misconstrue their aim and

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\(^{11}\) Cf. Xenophon, Mem. IV.4.19, where the unwritten laws are said to be those things observed in every land.

\(^{12}\) This difference between the chapters is often overlooked. See, most recently, Vergnières, who sees 1.13 as making precise the foundation of the universal agreement described in 1.10 (1995. 199-200).
application to particular situations. And once we look at Aristotle’s examples, it is obvious that people can misunderstand. If we leave aside Antigone’s disobedience of Creon’s edict in the Antigone, the references to Empedocles and Alcidamas (Rhet. I.13.1373b14-18) make it clear that universal agreement is not a distinguishing mark of the common law in Rhet. I.13, since the eating of animals and slavery are hardly good examples of practices from which everyone agrees to refrain!11 By contrast, in Rhet. I.10, the common law refers to “all those things which, being unwritten, are thought to be agreed among all” (1368b8-9): universal practices indicate which things are part of the common law rather than vice versa. By the standards of Rhet. I.10, the fact that everyone follows the same practices indicates that it belongs to the common law, whereas in I.13 nearly universal practices could be naturally unjust! For example, slavery and the eating of animals were, if not universal, at least very widespread, but Alcidamas and Empedocles thought them unjust nonetheless.

The references to Empedocles and Alcidamas prove that Aristotle does not commit himself to any specific content for the norms of natural justice in Rhet. I.13. As Strauss notes, “two of [Aristotle’s] three examples of natural law do not agree with what he himself regarded as naturally right” (1968, 81).14 Aristotle believes that it is permissible to eat animals, contra Empedocles, and that some people are naturally suited to be slaves, contra Alcidamas. Because of the discrepancy between the examples and

11 Aristotle presumably refers to Alcidamas’ statement that “God has left all free; nature has made no one a slave.” On the absence of a citation from Alcidamas, see Grimaldi (1980, 289-290).

14 Cf. Ritchie (1916, 30 n.1).
Aristotle’s own beliefs, it would also be unwise to put much stock in the example of Antigone as a source for Aristotle’s own views. In particular, we should not assume from this passage that Aristotle thinks it permissible to disobey the laws of the city on the grounds that they conflict with a more authoritative norm of natural justice.

But this does not show what it is sometimes taken to mean: that Aristotle reports *endoxa* only to the extent that they are required to see the available means of persuasion in judicial rhetoric. Aristotle’s three examples in *Rhetoric* I.13 illustrate the important features of the just by nature for a less philosophically sophisticated audience. In particular, the common law is “by nature” because it is immutable and objective, existing “even if there is no community or covenant of people with each other” (*Rhet.* I.13.1373b8-9). There is no need that Aristotle agree with the content which others impute to natural justice in order for Aristotle to quote them in support of the view that there is such a natural justice.

4. **The common law in *Rhetoric* I.15**

In *Rhet.* I.15, Aristotle mentions an immutable “common law . . . according to nature” (1375a32), and once again quotes the famous lines from Sophocles’ *Antigone*. However, in this chapter, Aristotle instructs his audience “how laws should be used in persuasion and dissuasion, accusation and defense” (1375a25-27). The instruction consists of arguments that can be deployed against using the written law in a particular case, and then of arguments that can be deployed in favor of using the written law.¹⁴ This

¹⁴ Mirhady (1990) counts five counterbalanced arguments for and against “extra-legal argumentation,” along with an insertion at 1375b8-13 on legal interpretation.
passage, above all, accounts for the judgment that the *Rhetoric* could not indicate Aristotle's own views about natural justice. For example, Guthrie remarks, "It is astonishing how previous scholars seem to have solemnly analysed this passage as a serious statement of Aristotle's views, whereas it is one of a pair of contrasting ἀντιλογίαι to be used as occasion demands in the interests of victory in the courts" (1971, 125 n.1).

The question, however, is whether Aristotle thinks the opposing arguments each have merit as ways to focus the attention of the dikast on relevant aspects of a situation that should be considered to arrive at a just decision. It is perfectly possible that there are good arguments on both sides of a question, the value of which will vary depending on the facts to which they are supposed to apply." However, if we look at some of the arguments in *Rhet.* I.15 for and against extra-legal appeals, it appears that victory in a judicial contest overrides the importance of truth. There is no way to reconcile the first pair of counterbalanced arguments for and against using only the written law:

Against: "[say] that to use 'one's best judgment' is not to follow the written laws exclusively" (1375a29-31)

For: "one should say that 'in their best judgment' does not mean that the jury is to judge contrary to the law, but is there to provide that the

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Thus Mirhady claims that in *Rhetoric* I.15 Aristotle "does not simply present sophistic tricks, or means of making the weaker argument the stronger, but sketches lines of reasonable . . . argumentation that exist on both sides of the issues, argumentation that judges should consider before making a decision" (1990, 409). It is worth noting that Aristotle seems to do exactly this in *Politics* II.8, where he examines arguments for and against changing the laws, without deciding absolutely in favor of either position: that depends on the particular situation. (See Brunschwig (1980).) One of the arguments in *Pol.* II.8 is almost identical to one of the arguments in *Rhet.* I.15: cf. *Pol.* II.8.1269a15-18 with *Rhet.* I.15.1375b21-23.
jury not violate its oath if it does not understand what the law says” (1375b16-18).

These are not simply two valid aspects of a question to be balanced against one another in a given case. The argument against states it is permissible not to follow the written laws (though it leaves open just when we should not follow them), while the opposing argument implies that it is not permissible.17 Given such passages, we are better off not taking the argument in Rhet. I.15 which appeals to the “common law . . . according to nature” (1375a32) as independent evidence of Aristotle’s own view.

5. **Equity and natural justice**

Whether or not the references to the common law at Rhet. I.13 and I.15 indicate Aristotle’s own position, they clearly show that Aristotle allows as an *endoxon* that the common law may be used to justify either disobeying or setting aside written laws that conflict with it. Given this, it might be held that passages elsewhere in the Corpus show that Aristotle himself held this opinion. For example, Aristotle’s conception of equity (see Chapter Four) shows he has philosophical reasons in favor of allowing the written law to be set aside in particular cases. So one might understand the appeal to a common law according to nature to be identical to, or at least to include, an appeal to the dictates of equity.18 Thus the author of the *Magna Moralia* glosses Aristotle’s presentation of

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17 Nor is this an aberration: Aristotle’s advice about how to argue when the law is ambiguous seems to elevate the importance of victory over truth: “if [a law] is ambiguous, so that one can turn it around and see to which meaning it fits, whether with justice or the advantageous, one should make use of this interpretation” (1375b11-13). Aristotle does not say that one should argue thus even if one does not believe one’s own interpretation to be correct, but the implication that such an argument should be used only if one thinks it true does more credit to the moral sense of Aristotle’s reader than to the surface meaning of Aristotle’s words. Cf. Wardy (1996, 76).

18 See, for example, Pattantyus (1974).
equity by saying that the equitable person "does not fall short of what is naturally and really just, but only of what is legally just in matters which the law left undetermined for want of power" (II.1.1198b31-34). Here the equitable person departs from legal justice in favor of natural justice.

However, there are both textual and philosophical reasons not to identify the appeal to equity as an appeal to naturally just norms. The only textual evidence that mentions equity and natural justice in the same breath in Aristotle's works actually distinguishes the two:

> it is apparent that, if the written [law] tells against the matter, one should use the common [law] and equitable [considerations]\(^{20}\) as more just. . . . And [it is apparent] that the equitable always remains and never changes, nor does the common [law] (for it is according to nature).

\(^{\text{20}}\) (Rhet. 1.15.1375a27-29: a31-32)

As the second sentence (1375a31-32) makes clear, equity and the common law according to nature are distinct concepts.\(^{21}\) There is no suggestion that equity and common law

\(^{20}\) A plausible textual variant reads ἐπιτευκτικός καὶ in place of ἐπιτευκτικῶν ὡς, in which case the translation would read "one should use the common [law] and the more equitable arguments, i.e., the more just." Mihalas' argument against the variant reading—that Aristotle would be saying there are more equitable laws even though equity involves departing from the law—fails because we need not assume the omitted substantive must be "laws" (νόμος), and because it begs the question whether or not unwritten νόμος are implicitly understood (1990, 396). Brunschwig suggests λόγοι ("considerations" or "arguments") (1996, 349). But it is better to understand τοὺς ἐπιτευκτικούς as a neuter plural adjective where the understood substantive is simply 'things,' along the lines of common phrases like τὰ ἀγαθά. Cf. τὰ ἐπιτευκτικά at Rhet. 1.13.1374b2-3.

\(^{21}\) The negative conjunction at 1375a31-32 makes it difficult to maintain that the καὶ before τοὺς ἐπιτευκτικούς at a29 is epechegetical. Cf. Brunschwig (1996, 349); Grimaldi (1980, 1.319).
constitute one and the same appeal.\textsuperscript{21}

Moreover, within Aristotle’s distinction in the *Rhetoric* between specific and common law, equity finds its proper place on the side of specific law. As discussed in Chapter Four, the problem which makes equity necessary is that the law is specified in general terms which cannot take exceptional circumstances into account. This is the reason—the only reason—why Aristotle says equity is a “correction of legal (\vootou) justice” (EN V.10.1137b12-13).\textsuperscript{22} As Aristotle puts it, “the error is not in the law nor in the lawgiver but in the nature of the thing, since the matter of practical affairs is of this kind from the start” (EN V.10.1137b17-19). That is, Aristotle says absolutely nothing in his treatment of equity about dispensing with laws that are unjust in the usual cases to which they apply, nor does he say that equity in and of itself involves an appeal to considerations of natural justice.\textsuperscript{23} Were equity needed *because* a law was unjust, Aristotle would attribute the error to the law as such (and perhaps also to the lawgiver), not to the nature of practical affairs. Indeed, when the law fails on account of its generality, an equitable dikast should say “what the lawgiver himself would have said had

\textsuperscript{21} Cf. Grimaldi (1980, 1.319), Mirhady (1990, 396), and Brunschwig (1996, 348-349). Miller holds that equity and natural law are identified in *Rhet.* 1.15.1375a31-32, but that “it is probably best to take the use in 1.15 to reflect a more popular sense in which ‘equity’ is synonymous with ‘justice’ generally,” as opposed to “equity in Aristotle’s technical sense as a specific form of justice” (1991, 284-285). Prior to its revision by Barnes, the Oxford translation wrongly suggested the identification of equity and the common law: “clearly we must appeal to the universal law, and insist on its greater equity and justice.”

\textsuperscript{22} Note that this is \vootou justice, not \vootouv justice, and so should not be identified with legal justice as discussed in EN V.7.

he been present, and would have put into his law if he had known" (En.V.10.1137b22-24). Since the lawgiver, following the Conformity Thesis (see Chapter Two), will mold the laws to the aims of the constitution—even a deviant constitution which neglects full virtue—we should expect the equitable dikast to follow the spirit of the law even in a political regime whose laws are not absolutely just.

Even if dikasts generally uphold the aims of the regime when applying the law in particular cases, let us grant that in a particular case equitable judgment happens to coincide with considerations of natural justice. To judge equitably, dikasts must try to ascertain the purpose of the law and construe its terms accordingly. Here if natural justice and equity coincide, it is because dikasts are abiding by the sense of justice which already infuses the law, not because they mean to supplant naturally unjust laws with naturally just ones. Because Aristotle’s doctrine of equity asks the dikast to say “what the lawgiver himself would have said had he been present, and would have put into his law if he had known,” natural justice becomes an operative factor in equitable judgment only when the law is already naturally just in the usual cases to which it is supposed to apply. So where the spirit of the law incorporates naturally just claims, equitable judgment and natural justice coincide.

In theory, then, natural justice comes under the umbrella of the spirit of the law in cases of equity. Unfortunately, Aristotle does not address the situation where theory and practice diverge. As I argue in Chapter Four, equity permits dikasts too much room to apply the law in accordance with their biases in particular cases, thereby undercutting the rule of law’s ideal of guided judgment. If we apply these conclusions to natural justice’s
role in equitable judgment, then natural justice might work against the spirit of the law, e.g., where the laws are specific to a deviant regime. Suppose citizens in a deviant regime undergo an improvement in character, so that they consider the laws of their regime unjust by nature. In their role as dikasts, these citizens may depart from the misguided conception of justice which animates the laws of their regime in favor of the standards of natural justice. Here we are pushing Aristotle’s doctrine of equity much farther than he himself does. If citizens might use natural justice in this case to undermine the laws of the regime, the role of natural justice is subordinate to the larger philosophical and practical tension between equity and the rule of law. In other words, the problem is not natural justice per se, but rather the consistency of equity and the rule of law.

6. ‘Primary’ justice

At one point in the *EN*, Aristotle distinguishes between legal (νομικόν) and primary (πρωτόν) justice (V.9.1136b34). The contrast is sometimes taken as a distinction between legal and natural justice.²¹ For example, the author of the *Magna Moralia* glosses the passage by explaining that the person who distributes a good in error is in a way committing injustice, while in a way he is not. For in that he has not judged what is really and naturally just, he is committing an injustice, while in that he has judged what appears to him to be just, he is not committing an injustice.

(133.1196b1-3)

However, it is wrong to see natural justice lurking behind Aristotle’s ‘primary’ justice. The sense in which ‘primary’ justice is contrasted with ‘legal’ justice must be

²¹ E.g., Michelakis (1968, 155).
discerned from the context. In the EN, the distinction rests on a difference in the
distributor's knowledge or ignorance about particular facts of the case. Where the
distributor gives an unjust verdict because he is unaware of relevant facts of the case, "he
does not act unjustly in respect of legal justice, and his judgment is not unjust [in this
way]" (EN V.9.1136b32-33). So, by contrast, primary justice concerns the judgment that
the same distributor would have given had he known the relevant facts. Although
primary and natural justice will sometimes coincide, there is no necessary connection
here between them. Suppose there is an oligarchic regime, in which offices and honors
are distributed in accordance with wealth alone. We could imagine a distributor who,
ignorant of a mean-spirited citizen's great treasure, fails to accord the citizen the honors
he deserves according to oligarchic justice. Let us suppose, further, that the honors go
instead to a much less wealthy, but virtuous, citizen. In this example, the distributor
would act justly in the legal sense, but unjustly in the 'primary' sense, even though by the
standards of natural justice, i.e., full virtue, each citizen got what he deserved.

7. Unwritten laws

Like equity, Aristotle's references to unwritten laws do not show that rulers or
citizens should appeal to natural justice to invalidate or disobey the written law. In the
first place, because Aristotle divides specific law into unwritten and written types in Rhet.
I.13, one cannot simply assume that because Aristotle refers to unwritten laws he is
referring to natural justice. For example, when Aristotle states that the unwritten laws
"are more authorititative, and deal with more authorititative matters" than written laws (Pol.
III.16.1287b5-6), we cannot even be sure that naturally just norms are involved, much
less that they could be used to disobey or invalidate the positive law. Aristotle says these unwritten laws are “based on customs” (Pol. III.16.1287b6). Even if we grant that some of those customs will coincide with the common law according to nature, the reason such unwritten laws are more authoritative is not that they are grounded in nature, but that they help preserve the regime better than written laws or individual discretion: “a man may be a safer ruler than the written law, but not safer than the customary law” (Pol. III.16.1287b6-8).

In other places where Aristotle discusses unwritten laws, it becomes clear that the unwritten laws are understood as those of a specific polis, not the common law based on nature. For example, Aristotle advises the lawgiver to follow the Conformity Thesis by shaping both written and unwritten laws with a view to the preservation of the regime (Pol. VI.5.1319b40-1320a1). Similarly, in the Rhetoric Aristotle states there is an unwritten justice which

involves an abundance of virtue and vice, for which there are reproaches and praises and dishonors and honors and rewards—for example, having gratitude to a benefactor and rewarding a benefactor in turn and being helpful to friends and other such things. . . .

(Rhet. I.13.1374a21-25)

At first glance one might classify this sort of unwritten justice as part of the common law according to nature. The norms identified—e.g., gratitude to benefactors—would seem to

25 For the sense in which the lawgiver ‘enacts’ unwritten laws, see Chapter One and Cope (1867).

26 Most commentators take just this line. See e.g., Grimaldi (1980, 297-298); Cope (1877, I.254-255). Cf also Rhet. ad Alex. I.1421b36-1422a2. For exceptions, see Ostwald (1973) and Brunschwig (1996). Ostwald understands this sort of unwritten law as part of the specific law on the grounds that “gratitude etc. at 1374a23-25 are identifiable acts, whereas κοινός κατὰ φύσιν does not presuppose a κοινωνία πρὸς ἄλληλους . . . μηδε συνθήκη
be required by any community. Indeed, gratitude to benefactors is listed among the
unwritten laws "uniformly observed in every land" in Xenophon (Mem. IV.4.24).

However, if the lawgiver shapes unwritten laws promoting the virtues of character in
service of the goal of the regime, it is more sensible to see these unwritten laws as part of
the specific law. The understanding of virtue and vice will vary from one polis to another
inasmuch as its unwritten laws vary; the punishment for transgression of these norms
consists of social sanctions. As Brunschwig points out, the fact that these sanctions
involve "not only praise and blame, but 'censures, honors, and decorations'. 1374a22-23"
shows that "each city will leave the imprint of its own values on the distribution of such
rewards and punishments" (1996, 147). The fact that moral virtue is not at stake is
confirmed by another passage, in which Aristotle describes the friendship corresponding
to this sort of unwritten justice as the "moral" (ηθική) subdivision of utility friendship
(EN VIII.13.1162b21-23), not friendship based on moral virtue. In friendships of utility,
because the friends "use each other for their own interests they always want to get the
better of the bargain" (EN VIII.13.1162b16-17). (What makes some utility friendships
"moral" instead of "legal" is that the participants do not specify the terms of their deal in
writing, but rather trust in each other's character.)

There is a sense in which some unwritten laws may be used to reform or criticize
the written law as being naturally unjust. As argued in Chapter Five, the best regime

(1373b8-9)” (1973, 79 n.27). But the point in saying that the common law does not presuppose a
community or covenant is that the norms do not derive their force from agreement, not that the
people to whom the common law applies lack any interaction with one another. For the common
law to be a useful idea, its norms need to apply to identifiable acts.
serves as an unwritten normative ideal, on the basis of which other regimes may be criticized as unjust. Suppose the regime or its laws are brought closer to the ideal, in the sense that the laws are the best possible and that citizens are willing to accept them (cf. Pol. IV.8.1294a3-9). Here we could say that the legislator reformed the regime or its laws looking to unwritten laws based on nature. However, these unwritten laws are specific to the best regime, which can be realized only in very particular circumstances. These are not the unwritten laws Aristotle has in mind when he says that unwritten laws based on customs are more authoritative, or that unwritten laws should aim at the preservation of a regime.

8. **Natural inequality**

If the unwritten law fails to indicate Aristotle’s view on natural justice, his discussion of natural rule and natural inequality is more forthcoming. First, different sorts of people are “by nature” suited to different sorts of correct regime, and Aristotle says that “this is both just and advantageous” (Pol. III.17.1287b37-39). Here Aristotle bases the justice of a form of constitutional rule on the suitability of a regime to the nature of the people it governs. Similarly, citizens merit rule just in case they are equal “by nature”: “in the case of persons similar by nature, justice and merit must necessarily be the same according to nature” (Pol. III.16.1287a12-14).

The best example in Aristotle’s works of judging the legally just by the standards of natural justice is the natural inequality between master and slave. Aristotle infamously holds that some people are free by nature while others are slaves by nature (Pol. [Page:159])
I.5.1255a2). One could say much about Aristotle's position:27 I want to limit my remarks to the contrast Aristotle makes between the slave by nature and the slave according to law (Pol. I.6.1255a5-7: a21-23). Those who think that there should be slaves by law, Aristotle says, think that "the law is a kind of agreement in which they say that the things conquered by war belong to the conquerors" (Pol. I.6.1255a6-7). The law here is not that of a particular polis, but presumably the laws of particular cities will recognize this "international" law inasmuch as they allow those captured in war to be treated as slaves under the laws of the polis.

Aristotle, however, disagrees with those who think slavery is just simply by force of convention. Such people maintain that slavery in war is just because the lawful is just: "Some people cling wholly—as they suppose—to a kind of justice (for the law is a kind of justice), and claim that slavery by war is just" (Pol. I.6.1255a21-23). Aristotle quickly argues that it is perfectly possible to imagine that virtuous or 'nobly born' people can be taken as slaves after being defeated in a war unjustly begun by the conquering city. So some people defeated in war could be unjustly enslaved, even on the view of those who believe slavery by war is just because there is a sort of 'international' convention permitting slavery through war.

If Aristotle thinks slavery by convention can be unjust, it is because for Aristotle many people are free by nature. Here it is a short step from the claim that there are people who are free by nature to the claim that it is unjust by nature to enslave them (Pol.

27 See, for example, Smith (1991).
Thus the just by law can conflict with the just by nature. Moreover, Aristotle’s assertion that some people are naturally slaves belongs to the realm of the common law according to nature, just as much as Aleidamas’ condemnation of slavery as naturally unjust at Rhet. 1.13.1373b18 belongs to it. The cognitive and deliberative capacities of the natural slave which (Aristotle holds) distinguish the natural slave from the naturally free imply that an individual with the capacities of a natural slave will be such in every land. Here the just by nature applies in all times and places, although people may fail to recognize its justice (in accordance with the Corruption view in Chapter Five).

If the naturally free person is by nature free in every land, Aristotle should address the question of what should be done when a naturally free person is enslaved. Unlike in the case of the best regime, in the case of the naturally free the standards of natural justice are immediately applicable in every regime. Yet Aristotle draws no consequences from the potential for conflict. One reason for this may be that since Aristotle thinks some people are justly enslaved, he also thinks laws recognizing the possession of slaves are not simply unjust, so that it would be left to individual judgment and social pressure to ensure that the unjustly enslaved are set free. This is insufficient, of course, since

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28 Contra Yack, who argues that the appeal to nature in the justification of slavery “does not provide us with a higher set of standards of natural right according to which we can measure the justice of political acts and opinions. Instead, it provides us with a guide to determine who is capable of making judgments about ‘natural right’” (1990, 230; emphasis added). There is no reason why we should exclude the issue of “who is capable of making judgments about ‘natural right’” from the domain of the justice of political acts and opinions. Many of our judgments about the (in)justice of social institutions and the laws enforcing them require it.

29 Aristotle also claims that war against those who are natural slaves is just by nature (Pol. 1.8.1256b25-26; cf. 1.7.1255b37-39).
individual judgment will often fail, and social pressures are often too weak, distorted, or corrupted. One consequence Aristotle should be able to draw is this: if he thinks that Greeks are not natural slaves, then he should (ceteris paribus) support laws forbidding the enslavement of Greeks (though see, for example, Pol. 1.6.1255b3-4). More generally, if Aristotle identifies natural slaves as those possessing (or lacking) feature X, then he should support laws forbidding the enslavement of those who lack (or possess) feature X. For example, if the natural slave is distinguished by the absence of the capacity for deliberation, then Aristotle should support laws forbidding the enslavement of those capable of deliberation. Or, if he cannot support such laws hic et nunc because they would destroy the polis if enacted, he should at least hold that the practice of enslaving the naturally free should be eliminated as soon as reasonably possible because it is unjust by nature. But given Aristotle’s relative silence on this topic, all we can say is that the just by nature may serve as a standard by which to evaluate the justice of particular social institutions and laws as just or unjust. In a case immediately applicable to all societies, Aristotle draws no specific consequences from the possibility for conflict between the just by nature and the just by law.

9. Conclusion

The example of the natural slave confirms the indications in the Rhetoric that Aristotle believes there are norms of justice existing independently of agreement, i.e.:

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50 Notoriously, Aristotle thinks both that the natural slave cannot deliberate, and that he can still listen to reason and engage in limited forms of virtuous activity. See Pol. 1.13.1260a12 with 1260a33-b7; 1.5.1254b14-1255a3; VII.7.1327b23-38. On whether these claims are consistent, see Smith (1991); Ambler (1987); Fortenbaugh (1977).
norms which are just 'by nature.' Whereas *Nicomachean Ethics* V.7 does not indicate a role for natural justice outside best constitution theory, elsewhere in Aristotle's works it appears that at least some of the norms of natural justice hold across political regimes. In no society, for example, would it be naturally just for the law to permit the enslavement of people who are capable of deliberating about how to realize the human good. So the example of natural slavery, as well as the illustrations of natural justice in *Rhetoric* I.13 and I.15, establish that the naturally just and the legally just may conflict, and that this conflict is not limited to the realm of best constitution theory.

If natural justice and legal justice may conflict, then naturally just norms provide a guide for the lawgiver to reform existing regimes and the laws. Since the lawgiver is concerned with the preservation of the *polis*, he will sometimes forego reforming the regime or laws: "the easy alteration of existing laws in favor of new and different ones weakens the power of law itself" (*Pol*. II.8.1269a22-24). But sometimes the lawgiver will be able to introduce reforms which citizens are persuaded to accept (*Pol*. IV.1.1289a1-5). In these cases, the danger to the rule of law will be slight compared to the benefits of reform.

However, none of the evidence suggests that Aristotle endorses setting aside or disobeying the positive law when it conflicts with the just by nature. The examples usually cited as evidence in this connection, viz., unwritten laws, equity, and primary justice, are not concerned to establish that the just by nature prescribes measures to override the written law. The equitable dikast will depart from the law because its generality fails to account for exceptional circumstances, not because it conflicts with the
norms of natural justice. Similarly, primary justice is primary and not merely legal because a distributor’s decision is made in full knowledge of the particular circumstances. Finally, when Aristotle describes the unwritten laws as higher and “more authoritative” than the written laws, they are such because of the importance of social customs in binding the community together. Although such customs may coincide with natural justice in many cases, Aristotle does not ascribe their higher authority to their conformity to naturally just norms, but to their role in fostering social cohesion, as his advice to lawgivers (viz., to shape unwritten norms to the aims of the regime) shows.

While the just by nature may serve as an evaluative standard for positive law, then, Aristotle is silent about more radical uses for natural justice in the face of unjust laws and regimes. The importance of political stability may explain this silence. If the “law has no strength with respect to obedience apart from habit, and this is not created except over a period of time” (Pol. II.8.1269a20-21), then natural justice, as an appeal to invalidate or disobey unjust laws, is a destabilizing force. Whatever harms the just by nature might prevent or lessen, the damage to citizens’ habit of obedience to the laws would itself be threatened were ordinary citizens to regard an appeal to natural justice as a useful concept in political debate. So although the just by nature allows for the evaluation of regimes and laws as just or unjust, it could undermine the possibility of a stable social order if it gained general currency in the daily affairs of politics. As a political doctrine, appeals to natural justice could threaten the polis as much as Hippodamus’ proposal to reward those who discover anything advantageous for the polis (Pol. II.8.1268a6-8; 1268b22 ff.). Thus the dangers of natural justice’s misuse entail its
relative absence from Aristotle's political philosophy. And this is not because Aristotle does not believe in a natural justice by which to judge laws and regimes, but because he does.
Conclusion

Because Aristotle’s analyses of the law arise in the setting of the *polis*, his vision of the law’s contribution to human well-being reflects the contingencies of that setting. We have seen this in several ways: in his recommendation that laws foster the virtues of character through habituation; in his picture of the lawgiver as sage; and in his portrait of the best regime as the standard of natural justice. In large, pluralistic political communities, where the distinction between state and society becomes so much sharper, the pursuit of virtue through politics transmogrifies more readily into partisan zeal and paternalistic interference. Likewise, whatever reverence we may accord the founders of our constitutional orders in our national narratives, they appear also as all-too-human, as fallible and capable of moral error, in the very moments they produced works of genuine value imbued by moral principle. Finally, in our more egalitarian age, Aristotle’s aristocracy of the virtuous few goes strongly against the grain of the cherished political ideals of liberty and equality for all.

However, the contingent features of Aristotle’s praise of law should not obscure the realism lying underneath. For Aristotle as for us, the rule of law connotes the attempt to limit and check the effects of human bias and partisan interests, as well as the benefits of order and stability. While an orderly social arrangement under the rule of law (*εὐνομία*) is not a sufficient condition of the best political order, it is a necessary one (cf. *Pol*. IV.8.1294a3-7).¹ Thus Aristotle recommends that lawgivers guide the virtues of the

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¹ On *εὐνομία*, see Andrewes (1938, 91); Ostwald (1969); on the rule of law as a necessary but insufficient condition of a just political order, see Raz (1979b).
citizen to the aims of the regime, even where those aims make the acquisition of full virtue more difficult, recognizing the importance of habit in securing obedience to law. Nor does he countenance the appeal to standards of natural justice as a way for citizens to invalidate or disobey the laws of the city where the laws conflict with the naturally just.

At the same time, in his account of equitable judgment, Aristotle is sensitive to the law's inflexibility. I have argued that Aristotle's attempt to mitigate the law's inflexible character through equitable judgment has the potential to undermine the principle of guided judgment implicit in his praise for the rule of law. But ultimately it was suggested that this attempt reflects Aristotle's recognition of competing values which in particular circumstances may not be easily reconciled—of the law's potential to lead to injustice when applied rigidly, and of the need for guided judgment to avoid the dangers of bias. However much modern political systems try to invent procedural mechanisms to bring these two aims into better harmony, the tension between the rule of law as a constraint on biased judgment and the need for flexibility in particular circumstances remains.

In conclusion, while Aristotle's evaluation of the law arises in the context of the polis, his realism about the law's possibilities stems from features of the human social order which extend beyond the confines of that context. Such realism applies as much to the contingent aspects of Aristotle's view of law as to those which we readily recognize as valuable in our own time. Moreover, some of the contingency is more apparent than real. The greater fragility of the polis led Aristotle to see with clarity the importance of law as a force for human well-being. Without abandoning the pursuit of human
perfection. Aristotle recognized the law as the bulwark of social order. Like the polis, the fabric of our own social orders can fray. Between beast and god, we still require law to realize our good as political animals.
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