Aristotle, Law and Justice: The Tragic Hero

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Abstract:
Aristotle was the greatest scientist in western history. He established the scientific paradigm and the instruments thereof (materialism and logic). His work covered all the basic sciences: Astronomy, Botany, Logic, Mathematics, Meteorology, Philosophy, Psychology, Political Science, Rhetoric, Zoology. Aristotle's conception of justice pervades the law and heavily influences the Anglo-Saxon court system to this very day. Yet, the mark of a hero in Greek tragedy is his tragic flaw, the failing that makes the hero human, all too human. Aristotle was racist, sexist and homophobic. He thought slavery was natural and good and that a woman’s place was in the home. Because Aristotle is so influential his tragic flaw has likewise distorted western thought ever since. In order to cure the disease we must understand its cause. This essay describes Aristotle's theory of justice and law in order both to show just how pervasively his thought influenced the common law and to help overcome the obvious biases that still mark the world. We can and should reject the dark shadow of this great scientist whilst enjoying the greater and better part of his work.
I. INTRODUCTION: TWO PROPOSITIONS

1. Aristotle was racist, sexist, and homophobic and believed slavery was natural, inevitable and good.
2. Aristotle was the greatest scientist in human history.
Both propositions are true.

For good and ill, Aristotle's thought permeates western thinking, influencing it in countless ways both evident and hidden. This is because, though Aristotle was simply wrong on race, sex, and gender he was right about most everything else he wrote - and he wrote so much and about so many topics. Aristotle basically invented logic, a theory of rhetoric and wrote the first extant works on political science, psychology, botany, astronomy and meteorology. He was the first to systematically study the natural world scientifically and in detail, or at least the first whose works are (mostly) extant. Though others preceded Aristotle in individual fields, most of the pre-socratic works are sadly fragmentary. Plato basically limited himself to drama, philosophy and (pseudo?), his thought is not systematic, unlike Aristotle’s. Surely, Aristotle built on these thinkers but sadly, excepting Plato, we only know of them indirectly and fragmentarily.

Because Aristotle is so influential he remains relevant -- all the more so because of the contradiction between his scientificity and his racism, sexism and homophobia. How could one man be so wrong and so right at the same time? And how exactly does Aristotle influence the common law?

II. ARISTOTLE’S CONTRIBUTIONS TO LEGAL SCIENCE

1 “It is normal that the Greeks command the barbarians” Aristotle, Politics 1252 b 7 and 1237 b 23-32.
2 “in discussing women, Aristotle leaves no doubt about their subordinate and domestic role. he states clearly that men are better fitted to command than women (1259b2) W.W. Fortenbaugh, ”Aristotle on Slaves and Women” Articles on Aristotle (1977) Duckworth, London. Page 137.
3 Aristotle, Politics 1255 a 1.
4 Aristotle, Niomachean Ethics; Aristotle, Politics.
A. Logic and Dialectical Reasoning

Aristotle was a materialist and thus his was really the first empirical testable science. I regard Aristotle as a monist. Certainly, dualities appear in Aristotle's thought but his materialism (he was certainly a materialist) constrains such apparent dualism into some greater unified whole - apparent dualisms can be contained within monist thought because the apparent duality is part of a higher unity. To be exact, that happens through dialectical synthesis of competing oppositions. And Aristotle, like Heraclitus, was a dialectician. Aristotle is clearly a materialist and I that commits all dualities eventually to some greater unified whole -- materialism implies monism.

Aristotle invented philosophical logic, the systematic study of right and wrong reasoning. Cicero believed law was logic in action. If law is logic in action then Aristotle dominates the law just on that basis. Of course, there is the alternative voluntarist thesis that law is nothing but an armed command, the "bad man theory" that law relies ultimately on force. But in that case criminals would also be law givers. Voluntarism leads straight to the law of the jungle with no exit. Yet, as Aristotle noted, it is precisely the fact that humans live in States and not as savages that marks human society and separates it even from the other social and specialized animals such as bees or wolves. Other animals are social. But human society is the most complex. Poetically, Aristotle notes that he who lives outside the state is either a brute beast or a God. Because humans are rational, political (social)

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5 That's particularly true of Heraclitus who is only available in fragments.
7 "True law is right reason in agreement with nature; it is of universal application, unchanging and everlasting ... And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and all times, and there will be one master and ruler, that is, God, over us all, for he is the author of this law, its promulgator, and its enforcing judge." MARCUS TULLIUS CICERO, *DE REPUBLICA* III, xxii, 33 (Clinton Walker Keyes. Ph. D., trans. 1928) (51 B.C.).
10 "The proof that the state is a creation of nature and prior to the individual is that the individual, when isolated, is not self-sufficing; and therefore he is like a part in relation to the whole. But he who is unable to live in society, or who has no need because he is sufficient for himself, must be either a beast or a god: he is
animals with the gift of speech\textsuperscript{11} we live in Cities and not as savages.\textsuperscript{12} Thus our laws are higher than those of a dagger wielding thief. This is why Aristotle's thinking is powerful: He reaches the correct result on most questions of social science with one exception: The (supposedly) genetic nature of inequality.

Logic wasn't the only thing Aristotle invented or discovered. He also invented botany, zoology, grammar and advanced existing knowledge in astronomy. His taxonomies, the first ever really, are still the basis of much good science. His philosophical logic, extended by the scholastics, is still the linguistic representation of what is now also modeled using the mathematical logic pioneered by Boole. Boole took Aristotle as his starting point, recasting propositions of natural language into mathematical form. Boole's calculus at once clarifies certain issues, making certain problems explicit - for example, order of precedence of operators) and solvable. But Boole also obscures others, most notably, the paradox of material implication, which was clear in philosophical logic but is obscured by mathematical logic. Boole's ideas, building on Aristotle, are the basis of computer science including logic theorem proving computer programs such as prolog.

Aristotle influences legal science first and most broadly through the idea of logic and then by his influence on Cicero. Cicero correctly recognized that law is living logic. We can also trace the idea of separation of powers to Aristotle.\textsuperscript{13} Equity courts too find their roots in Aristotle.\textsuperscript{14} In Aristotle's schema of justice the idea of equity (aequitas) plays the roles as "backstop" to ensure that the deliberative legal reasoning (the formal content of words) remains within the bounds of fairness.

Universal social truths are very rare. Social sciences are dominated by probabilistic and

\textsuperscript{11} See Aristotle, \textit{Politics}, Book I Part II (Translated by Benjamin Jowett) (350 B.C.) available at: http://classics.mit.edu/Aristotle/politics.1.one.html
\textsuperscript{12} Aristotle, Book I, Part 2.
\textsuperscript{14} "This is in fact the nature of the equitable; it is a rectification of law where it fails through generality." Teamsters & Employers Welfare Trust of Illinois v. Gorman Bros. Ready Mix, 139 F.Supp.2d 976, 978 (C.D.Ill.) (Apr 17, 2001). (Citing: ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE, Bk. 5, XIV, p. 172 (J.E.C. Weldon trans., Macmillan and Co., Ltd.)(1930)).
not by deductive reasoning. This understanding that there is both deductive reasoning which is necessarily and inevitably true in all times and in all places and at the same time that there is a probabilistic practical reasoning that is more likely true than not that holds true in most places and at most times is also an explicit feature of Aristotelian thought. Both deductive and probabilistic reasoning are used by courts to this day. Aristotle clearly distinguishes between between practical reasoning (phronesis) -- which includes probabilistic reasoning -- and deductive reasoning. And this clarity influences the law where we see that probabilistic and deductive reasoning are used to compliment each other in pursuit of the just result.

B. Tort Law: Causality is Rooted in Aristotle's Thought

Aristotle influences tort law heavily in the idea of varieties of causation. In tort law we see the idea of cause in fact and proximate cause. Aristotle discusses material, formal, efficient and final causality. Each of these concepts has a corresponding influence in the law.\textsuperscript{15} Final cause is teleology. The idea of teleological cause (final cause) influences the law through the idea of teleological interpretation.\textsuperscript{16} Material and formal cause are cause in fact. And proximate cause is efficient causality.\textsuperscript{17}

Teleological reasoning, the idea of final objectives of the law, is also a hallmark of Aristotelian thought. Teleology runs throughout the law -- laws always serve some purpose and it is normal to argue that the law should be interpreted consistent with its' purpose.

Though Aristotle's ideas on causality, equity and logic heavily influence the law, Aristotle's greatest influence in the law is likely from his theory of justice which we now examine.

\textsuperscript{15} See, e.g., \textit{State ex rel. Sayad v. Zych}, 642 S.W.2d 907, 916 (Mo., Dec 03, 1982).
\textsuperscript{16} Law itself is a teleological endeavor, and that its purpose is to guide people as they go about their daily activities. As such, the law should be clear and understandable, for how can people follow its dictates if it is not? If you take away that clarity to a sufficient extent, it is proper to question whether you are dealing with law at all, as opposed to raw power. In that regard, see, Lon J. Fuller, \textit{The Morality of Law}, (Yale University Press, 1964)." 21. \textit{U.S. v. General Dynamics Corp.}, 644 F.Supp. 1497, 1500; 33 Cont.Cas.Fed. (CCH) P 75,070, (C.D.Cal.,1986).
\textsuperscript{17} See, e.g., Robinson v. City of Detroit 613 N.W.2d 307, 330; 462 Mich. 439, 484; State Farm Fire &
III. ARISTOTLE AND JUSTICE

Aristotle's has a particularly well developed definition of justice, one that goes well beyond Plato's rudimentary efforts. For Plato, justice essentially boils down to each person in society holding their appropriate position -- in other words, platonic justice is all about being in one's caste. So when I criticize Aristotle for being sexist, racist and homophobic it is with the contextual awareness that he was much less caste-oriented than Plato. Paradoxically however Aristotle was homophobic, whereas Plato was not. This shows that progress is not linear but cyclical, that human society takes two steps forward but one step back. Today we know that Plato was right about homosexual persons and that we ought to be tolerant of homosexuals and that Aristotle was wrong in his idea of the "natural" slave. Yet Aristotle was progress overall relative to Plato because Aristotle was a materialist and, in my opinion, a monist. But above all Aristotle was progress because Aristotle did not believe people should be so rigidly trapped within their castes as did Plato.

Aristotle divides the world into exact (natural) and inexact (human) sciences. Per Aristotle, the political is an imprecise subject. Thus its elements at times belong to tekhne, (art - the art of politics), where opinion reigns rather than in episteme (science - political science) where one finds certainty. Insofar as the political is thus a subject of dialectical reasoning I would like to criticise the ideas of Aristotle in order to improve our practice through the exchange, comparison and synthesis of ideas in relative

Casualty Co. v. Slade, 747 So.2d 293, 313 (Ala. 1999).
18 Plato, Republic, Book V.
19 Recall here that Aristotle considers there is less certitude in human sciences than in natural sciences, that the human sciences are the exact than natural sciences and that we should only search for the amount of precision that he subject allows.EN 1094 b 24.
21 Episteme concerns invariable things that are true in all places and times. “those thigns which cannot be other than they are” Aristotle, Nicomachean Ethics,1139 b20-23. In contrast tekhne (art) is concerned with “things that can be other than they are” Aristotle, Nicomachean Ethics, 1140 a 1.
22 According to the commentator, logikos or dialektikos concerns the generalities, opinions, and thus is connected to tekhne. By way of contrast, phusikos concerns itself with real facts which are certain and thus is linked to episteme Aristotle, Nicomachean Ethics, Translated by J. Tricot, Paris: Librairie Vrin (1959) page 108 note 1.
23 According to the commentator the objective of praxis is to work on one's internal constitution. Aristotle,
opposition. That's dialectics.

A. Political Justice -- A Relation

Aristotle distinguishes between acts which are either just or unjust, people who are just or unjust and justice and injustice generally. 24 But all these ideas are contextualized by the idea of a relationship between the citizens of the Polis which is called political justice. The relation between citizens (their political role in The City) is not only ontologically central it is also teleologically key, 25 being the highest expression of human development and the finality of the Polis. 26 For Aristotle, justice can only exist among equals 27 – that is, among adult freemen. 28 Aristotle divides the political justice (the relation of of citizens among each other) into natural justice and legal justice, 29 the former being universal geographically, the other being unique to each Polis (State). To determine this relation, one must describe the Polis, and analyse 30 the Polis from its parts toward the whole. 31

1. Elements and Origins of the Polis

a) The Family

The family is the material cause of the Polis in the thought of Aristotle. The family is the “atom” of the Polis in that the Polis grows from the individual to the family, from the family to the village, and from the village to the Polis. 32 The character of the Polis as the inevitable means to live and the necessary means to live well 33 indicates that it is prior to

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24 "one can do an injustice without for all that being unjust" Aristotle, Nicomachean Ethics, 1134 a 5-16
25 Other sources of the distinction between the just act, the just man, and justice are found at Aristotle, Nicomachean Ethics, 1129 a 31-1129b 7, 1136 a 25-3, 1135 b 25, 1135 a 16, and 1133 b 29-1134 a 1.
26 "the just is that which is susceptible to create or preserve in whole or in part the well being of the political community." Aristotle, Nicomachean Ethics, Book V, Chapitre 1, verse xii, 1129 a 18-20.
27 "Things are always defined by their function and potential” Aristotle, Politics, 1253 a 22-23.
28 Aristotle, Nicomachean Ethics, 1134 a30-32.
29 Aristotle, Politics, 1275 b 22-24, 1275 b 7-8, 1275 b 14-16.
30 Aristotle, Nicomachean Ethics, 1134 b 18-20.
31 Aristotle, Politics, 1252 a 16-24. See also Politics, 1252 a 24-25 re: analysis.
32 The idea that the City (Polis; state) develops from the extension of the family is seen in Aristotle, Politics, 1252a 26; 1252b 15-16; 1252b 27.
33 Aristotle, Politics, 1252 b 26-30.
the individuals who constitute it.\textsuperscript{34}

b) The Individual

i) Dependance

Aristotle holds that the individual is not sufficient unto himself.\textsuperscript{35} The conclusion from this fact of interdependence with respect to reproduction,\textsuperscript{36} economy,\textsuperscript{37} and society\textsuperscript{38} is the inevitability of the \textit{Polis} and of the political.\textsuperscript{39}

2. Inequality

Men also are, according to Aristotle, naturally\textsuperscript{40} and biologically\textsuperscript{41} unequal. This "natural" inequality creates a hierarchy according to abilities.

male freemen, female freemen, male children of freemen, female children of freemen and slaves.\textsuperscript{42} Aristotle justifies this hierarchy as being for the benefit of all.\textsuperscript{43}

a) The Condition of Slaves

The fact that Aristotle is inegalitarian is seen most clearly in his analysis of slavery. The inequality which creates and justifies slavery is, for Aristotle, natural\textsuperscript{44} and biological.\textsuperscript{45} For all that he hesitates to postulate a strict relationship between legal status and quality of

\begin{itemize}
\item \textsuperscript{34} Aristotle, Politics, 1253a 19-27.
\item \textsuperscript{35} "the individual seen in isolation is not self sufficient" Politics 1253a 27.
\item \textsuperscript{36} Aristotle, Politics, 1252 26-35.
\item \textsuperscript{37} Aristotle, Politics, 1252 a 31-35.
\item \textsuperscript{38} Aristotle, Politics,1252 b 26-30
\item \textsuperscript{39} "These considerations show that the city is among those facts which exist naturally, and that man by nature is a political animal." Aristotle, Politics, 1253 a 2.
\item \textsuperscript{40} "it is by their nature that most beings command or obey". Aristotle, Politics 1260 a 9.
\item \textsuperscript{41} Aristotle, Politics, 1254 a 20-24.
\item \textsuperscript{42} Aristotle, Politics, 1260 a9-14.
\item \textsuperscript{43} "l'enfant comme l'esclave est une <<partie>> du père et ne peut donc subir l'injustice de sa part, mais il trouve son avantage à cette relation puisque le père exerce son autorite de manière royale, pour le bien de son fils." Solange Vergnières, Ethique and Politics Chez Aristotle, PUF 1995 Page 163.
\item \textsuperscript{44} Aristotle, Politics 1255 a 1.
\item \textsuperscript{45} Aristotle, Politics, 1254 b 26-31.
\end{itemize}
being (the soul, perhaps: in his thought).\textsuperscript{46} Nevertheless he concludes that the slave is a slave for he deserves to be a slave\textsuperscript{47} naturally due to the strength of his body or deserves to be a slave because of the weakness of his soul (spirit; mind?), and perhaps both. In short, the slave is as much dehumanized and equated to an Animal.\textsuperscript{48} As well that for Aristotle the existence of a class of slaves seems to be seen as an economic necessity.\textsuperscript{49}

\textbf{b) The Condition of Women}

The fact that Aristotle is inegalitarian is also evident from his analysis of relations between men and women. Again, biological\textsuperscript{50} and natural\textsuperscript{51} inequality explains and justifies, according to Aristotle, the treatment of women as inferior to men.\textsuperscript{52}

\textbf{3. Rationality}

Despite inequalities in social relations and material interdependence man has a true power – he is gifted with reason.\textsuperscript{53} Men seek to understand, to express themselves and to reach the finality of their development as people. It is this excellence which makes of man the most perfect of animals.\textsuperscript{54}

\textbf{4. State of Nature?}

\textsuperscript{46} Aristotle, Politics 1254 b 31-32.  
\textsuperscript{47} Aristotle, Politics, 1254 b 33-37.  
\textsuperscript{48} Aristotle, Politics, 1254 b 25.  
\textsuperscript{49} Aristotle, Politics, 1254 b 25.  
\textsuperscript{50} "En posant le problème du naturel servile, Aristotle a mis le doigt sur une possible violence sociale exercée sur des hommes qui ne meritent pas d'être d'esclaves. Pour les femmes la doute n'existe pas. La femininite est marquée dans le corps de manière incontestable et la nature montre clairement le rôle subordonnée qui convient aux femmes. Cette evidence, n'empêche pas d'ailleurs une certain equivoque dans le manière dont Aristotle décrit la finalite le la nature feminine. Selon les traits biologiques, la naissance d'une femelle traduit un échec de la finalite puisqu'elle c'est provoquée par une résistance du matière à la transformation de la forme masculin. En même temps, Aristotle sait bien que l'existence des femmes est necessaire pour que la vie tout simplement reproduise." Solange Vergnières, Ethique and Politics Chez Aristotle. Paris: Presses Universitaires Francaises (1995). Page 171.  
\textsuperscript{51} Aristotle, Politics, 1254 b 10-15.  
\textsuperscript{52} "in discussing women, Aristotle leaves no doubt about their subordinate and domestic role. he states clearly that men are better fitted to command than women (1259b2) W.W. Fortenbaugh, "Aristotle on Slaves and Women" Articles on Aristotle (1977) Duckworth, London. Page 137.  
\textsuperscript{53} Aristotle, Politics, 1253 a5-15.  
\textsuperscript{54} Aristotle, Politics, 1253 a 33.
Aristotle's logic regarding the origin of the state seems to me to be very powerful. The “state of nature” (a state of existence before the existence of states) is fiction. The anthropological evidence shows that “pre-political” societies are structured around extended families. It is also true that no man is self sufficient. Thus for Aristotle the state is “natural” in the sense that the state is the inevitable consequence of the human condition. But to call the state “natural” does not mean that there is a state of nature – a human condition outside of familial or state structures (including pre-state structures). Likewise, to prove the necessary character of social organization does not prove that this society must necessarily be patriarchal or inegalitarian. Anthropologists have discovered that matriarchal societies also existed. Although Aristotle is right as to the origin and inevitability of the Polis (State) I disagree with his idea that the state must also inevitably be inegalitarian and patriarchal.  

5. The Ends of the Polis

a) The Good

In the thought of Aristotle, objects are defined as moving (kinesis) towards their own ends (telos). This finality is the nature of the object. The ends of the State (final cause) is "the good".

b) Autarchy

For Aristotle, that which contains is more perfect/complete than that which is contained – the whole is more perfect than its parts. Aristotle is a wholist. Although the parts of the Polis – individuals and families, are not autarchic regarding their development, the

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55 Robert Graves, The Greek Myths; Black Athena. Tacitus, Germanicus
56 Aristotle, Politics, 1252b30-34.
57 Aristotle, Politics, 1252 a 1.
58 Aristotle Nicomachean Ethics, 1094a 2-15
59 Aristotle, Politics 1253 20-24
60 Aristotle, Politics 1253 a 25-27.
Aristotle begins his fifth book of Ethics with a definition of justice. He affirms that justice is a polysemic term and thus he chooses to begin with a definition à contrario. If one recognizes the unjust perhaps one can understand the just by seeing it as the opposite of the unjust. The unjust man is an outlaw, unfair and greedy and in the end is suffering from a type of ignorance. Thus the just is the exact opposite of these traits – the lawful. Aristotle implies that the just and the unjust are opposites and mutually exclusive.

We have already explained the nature of political justice as being the means and ends of the whole and that political justice is divided into natural justice and positive law. Positive justice is itself further divided again in two parts: universal and particular justice.

1. The just man, justice, and just acts:

a) The Just man

Aristotle distinguishes between just acts, just men, and justice. According to Aristotle the just man obeys the laws. This kind of justice, lawfulness, appears to be seen by Aristotle as a necessary but insufficient condition for the other types of justice.

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61 Aristotle, Politics 1253 a 19.
62 Aristotle Nicomachean Ethics, 1097b 7-10.
63 Aristotle Nicomachean Ethics, 1129 a 27.
64 Aristotle Nicomachean Ethics, 1129 a 18-20.
65 Aristotle Nicomachean Ethics, 1129b 11.
66 Aristotle Nicomachean Ethics, 1129 a 31-33.
67 Aristotle Nicomachean Ethics, 1110 b 28-29.
68 Aristotle Nicomachean Ethics, 1129 33-34.
69 Aristotle Nicomachean Ethics, 1129b 11-14. Book V, Chapter 1, verse xii.
70 The thought of Aristotle is generally binary.
71 Aristotle Nicomachean Ethics, 1133 b 29 - 1134 a 3.
b) Universal Justice (the lawful)

Universal justice is that which encompasses just acts.\(^{72}\) It is in the same type of relation with just acts as the whole is to its parts.

c) Just Acts : Justice in the Particular (fairness)

The type of justice which concerns the character of acts (rather than of men) is called justice in the particulars (particular justice). Particular justice is divided once again into two sub-parts: distributive justice and corrective justice.

2. Distributive Justice (“geometric” justice)

Distributive justice is concerned with the transactions between the *Polis* and individuals. In modern terms it is called “public law” in the civilianist jurisdictions (as in: “public international law”). The question answered by distributive justice is which standards shall be used\(^ {73}\) to determine the distribution\(^ {74}\) as a geometrical,\(^ {75}\) i.e. proportional, relation\(^ {76}\) (ratio) of public goods.\(^ {77}\)

3. Corrective Justice (arithmetic justice)

Corrective Justice is concerned with the transactions of private individuals with each other.

\(^{72}\) Aristotle Nicomachean Ethics, 1130b 8-18; "The common practice, adopted in so many manuals, of appealing to these diagrams - Eulerian diagrams as they are often called - seems to me very questionable. Indeed when it is done, as it is generally done, without a word of caution as to the important distinction between the implied theories about the import of propositions, it seems to me that there can be no question as to its being wrong. The old four propositions, A, E, I, O do not exactly correspond to the five diagrams, and consequently none of the moods in the syllogism can in any strict propriety be represented by these diagrams." Venn, Symbolic Logic, Chelsea Publishing, Bronx NY (1971) (originally published in London, 1894.) Page 17 At the same time however, these diagrams show the irrelevancy of the distinction between subject and predicate. Venn, Symbolic Logic, Chelsea Publishing, Bronx NY (1971) (originally publishd in London, 1894.) Page 7.

\(^{73}\) For a listing of specific legal forms found in contractual and tort law in Aristotle's schemata see: Aristotle Nicomachean Ethics, 1130 b 30 - 1131 a 8.

\(^{74}\) Aristotle Nicomachean Ethics, 1131 a 24-28.

\(^{75}\) Aristotle Nicomachean Ethics, 1131 b 9-20.

\(^{76}\) Aristotle Nicomachean Ethics, 1131a 29-31.
In modern civilianist terms it is “private law” (as in: "private international law").
Corrective justice is determinant of just relations after the initial constitutive distribution of public goods. Private corrective transactions are again divided into two sub-parts: Voluntary transactions – (i.e. Contract law) and involuntary transactions (torts and crimes). Involuntary transactions in turn are either hidden or violent (and possibly both). Corrective justice is analogical to an arithmetic relation. Corrective justice assures maintenance of the status quo ante despite whatever material transformation. Again, one sees the idea of particular justice as an intermediate virtue between values which are either too large or too small and as addressing certain acts rather than certain men. Particular justice is very important to the state for it guaranties business and social stability, despite economic inequality.

C. Critique of the Aristotelian Theory of Justice:

1. What are the sources of Inequality?

One has seen that, according to Aristotle, the inequalities of virtues are the result of natural and biological differences including racial differences. Nevertheless, his determinism is not absolute (as would be the case in an oligarchy) and does not exclude the possibility of other influences causing inequalities of abilities and rewards. Inequality is also the result of education (or lack thereof) and of morale choices (hexis).

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77 Aristotle Nicomachean Ethics, 1131 b 30.
78 Aristotle Nicomachean Ethics, 1131 b 32-34.
79 Aristotle Nicomachean Ethics, 1131b 24 - 1132a 2.
80 Aristotle Nicomachean Ethics, 1131 b 32 - 1132 a 1.
81 Aristotle Nicomachean Ethics, 1132b 18-20, Aristotle Nicomachean Ethics, 1132a 24.
82 "the equal is the median between the greater and the lesser" Aristotle, Nicomachean Ethics, 1132 a 14.
83 Aristotle Nicomachean Ethics, 1132 a 2-4.
84 Aristotle Nicomachean Ethics, 1132 b 32-35.
85 Aristotle Nicomachean Ethics, 1133 a 5-18.
86 "It is normal that the Greeks command the barbarians" Aristotle, Politics 1252 b 7 and 1237 b 23-32.
87 “our abilities are natural to us whereas we are not born naturally good or vicious” Aristotle, Nicomachean Ethics, 1106 a 9-10.
88 Aristotle, Nicomachean Ethics, 1103 a 11 - 25
89 Aristotle, Nicomachean Ethics, 1334 a 1 - 1134 a 3.
90 habitus; activite habituelle; hexis; Aristotle, Nicomachean Ethics, 1098 b 30-35.
I do not contest that different persons have different capacities. But I am much less of a biological determinist than Aristotle and much more of an egalitarian as to the results which should follow from unequal abilities. Essentially Aristotle and I disagree on the measure of distributive justice. Aristotle favors excellence as the measure for distributive justice whereas I tend more toward equality as the best measure for distributive justice. This is because Aristotle thinks inequalities are essentially the result of genetic inheritance (good breeding) and moral choice whereas I think they are the result of pecuniary inheritance and moral choice.

2. What are the Consequences of Inequality?

a) Limitation of the development of individuals

The first injustice which results from Aristotle's presumption of natural (genetic) inequality is that it limits the teleological development of citizens of the *Polis*. The slave born a slave can never become more than a slave. This limitation expresses itself in patriarchy and the caste system. The latter links the just and the good not in the sense of correspondence but in the sense of causality.

b) Limitation of the development of the *Polis*

The second injustice which results from the supposedly natural inequality postulated by Aristotle is that it limits the development of the city itself. If one takes the contrary postulate, that inequality is not naturally inborn (genetic) then one reaches a different conclusion. The abilities of persons born to wealth are no longer inborn but rather due to luck of birth. Then the self-justifying character of the system of inequality becomes evident as viciously circular where material inequality creates unequal capacities which justifies the material inequality. The logical consequence is dynastic rule and plutocracy. The problem is that such rulership limits the development of the city and stunts healthy internal criticism channelling reform into rebellion. This leads to stagnation such as could be seen fairly clearly in the Mandarin system of feudal China or in the Satraps of India.
Alternatively it leads to social collapse as was witnessed in the Roman empire. “Natural” slaves have no interest to defend the system which enslaves them.

c) Economic Inequality

When Aristotle speaks of the determinant choice of a measure for distributive justice, he proposes excellence, birth, and citizenship.

Material inequalities are the result of social inequality. For all that these inequalities are fair according to Aristotle because it is a matter of differing capacities and virtues of different individuals.

To justify this proportional inequality Aristotle must make the presumption that different types of labor have a different value according to the quality of the laborer. For example, an hour of the labor of a physician would have more worth than that of a farmer. For Aristotle these inequalities are of a natural character either due to merit or birth.

However this inequality is contestable. If the end of the city is the survival and obtention of the good life for its citizens then the city guaranties the survival of its citizens. Thus the just state guaranties a certain minimum and maximum of income in order to prevent concentrations of power and oligarchy. The economic value of labor should be a function of the time invested in production. Thus in principle all labor time ought to be of relatively equal value. This is especially true when one recalls that manual labor is hard and dangerous risking health and life of the worker. Few physicians are maimed or killed at work whereas some farmers and more than a few miners are.

D. Global Elements of Justice: Volition and Equity

The two final elements of the Aristotelian conception of justice are volition equity. I call

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91 Aristotle, Nicomachean Ethics, 1133 a 10-14; 1133 a 16-17.
these global elements because they are "omnipresent" in the consideration of justice.

1. The Relation between Volition and Culpability: Aristotle’s influence on the concept of culpability in the common law.

Involuntary acts cannot be evaluated as either just or unjust.\textsuperscript{92} Thus one can act in an unfair way without however being an unfair person.\textsuperscript{93} Aristotle thus erects four levels of responsibility. These are found in the law to this day:

Negligence without Fault (in the law also known as mere or ordinary negligence)
Culpable Negligence (in the law known as gross negligence)
Intent without forethought (intending the act, but not the consequences)
Malice aforethought\textsuperscript{94}

These distinction are found in the law to this day.

There is a problem with this schema: The mind of another is not truly knowable. We can only observe objective actions that flow therefrom. Aristotle, and the law, seek to sanction based on mental state. But how can the law determine subjective mental states? Only by looking for objective evidence of subjective mental states. Thus law addresses acts as the objective evidence of subjective mental states.

Aristotle also influenced the law of diminished responsibility,\textsuperscript{95} the idea that the mentally retarded or insane ought not to be held to the same standard as persons of sound mind.

2. Equity

For Aristotle the unjust man suffers from the vice of greed, taking more than his fair share.\textsuperscript{96}

\textsuperscript{92} Aristotle, Nicomachean Ethics, 1135 a 15-20.
\textsuperscript{93} “one can commit an injustice without however being unjust” Aristotle, Nicomachean Ethics, 1134 b 16.
\textsuperscript{94} Aristotle, Nicomachean Ethics, 1135 b 10-25.
\textsuperscript{96} Aristotle, Nicomachean Ethics, Book V, Chapter 1, verse viii. 1129 b 1.
The just man has the opposite tendency and errs on the side of taking a bit less than his fair share, especially when in doubt. A similar characteristic is found at the level of the city – equity. The end of equity is to correct the errors of the positive law which result from strict legalism. Equity also serves to apply the will of the legislator in situations which were unforeseeable. The judge in equity places himself in the position of the legislator asking what the legislator would do had it known the facts in this case. Equity serves to render the positive law more flexible and is the final guarantor of substantive justice. Of course the equity courts in the common law are a direct result of Aristotelian thought.

**Criticisms of Aristotle**

We have examined all the forms of justice described by Aristotle to obtain the idea that the just is the summation of all virtues, the intermediate term between opposing vices and the means for obtaining the virtue of the good. In spite of the fact that this appears ambiguous and circular (justice being both an ends and the means to an end) the distinctions between just acts, just persons, just states and justice explain how the just is the means to the end of justice. My critique of Aristotle's idea of justice is not regarding his typology which I find persuasive and which clearly influences the law to this day. Rather my critique is that we select different measures for distributive justice because we have differing positions on those inequalities of ability that Aristotle regards as natural, i.e. Biological and genetic.

Regardless whether one accepts or rejects Aristotle's views on natural (biological and genetic) inequality, one sees in political science (law) a master science for the political determines allocation of goods and what other sciences are explore and developed and to what degree. But when one accepts Aristotle's genetic and biological view of natural

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97 “The fair man is inclined to take less than his due” Aristotle, Nicomachean Ethics, 1136 b 20-21.
98 Aristotle, Nicomachean Ethics, 1137 b 10 - 14.
100 Aristotle, Nicomachean Ethics, 1137 b 10-15.
101 “Justice is the sum of all virtues.” Aristotle, Nicomachean Ethics, 1129b 29.
102 Aristotle, Nicomachean Ethics, 1106b 28, 1107a 2.
103 Aristotle, Politics, 1252 a 13-16. (Royal v. Political power)
104 Aristotle, Nicomachean Ethics, 1094 a 25 - 1094 b 2.
inequality the master science also becomes the science of masters, for political science determines the relations of members of the master class (master race) to each other,\textsuperscript{105} as well as the relations between the master class (master race) and the slave class (the sub-human \textit{Untermenschen}). Although Aristotle wants to distinguish and refine the different forms of mastery,\textsuperscript{106} this does not change the essence of the relation of superior (master) and subordinate (woman/slave). Women, children and slaves are seen as being naturally that is biologically or genetically unequal to (white) males. Women, children and slaves, according to Aristotle lack the deliberative capacity to command which is the excellence of freemen. This hierarchical and patriarchal vision is dehumanising and limits the ability of the \textit{Polis} and its members to grow and attain their full capacities. Thus this idea must be extirpated in order for Aristotle's ends to be obtained. Aristotle's thought is 90\% correct but fatally flawed by essentially racist and misogynist presumptions.

There are other criticisms of Aristotle. Aristotle does not seem to address the pre-Socratic debate as to whether the fundamental nature of the universe is conflicted (which was Heraclitus's line) or whether apparent conflicts are part of a greater harmony (which was Pythagoras's line). The idea of adversarial conflict leading to truth, one key point of common law reasoning, can be traced in theory to Heraclitus.\textsuperscript{107} Aristotle seems silent on this point. With greatest reluctance I take Heraclitus's view. I simply see conflict as pervasive in nature whether between predator and prey or between competing ideas, persons or nations, though I wish it were all really harmonious as Pythagoras believes. Indeed the capitalist economic system is built on the premise that competition -- a healthy form of conflict -- leads to the best products and the best prices.\textsuperscript{108}

And this brings up the question of the marketplace. There is perhaps where I have the greatest problems with Aristotle. Aristotle wrote on the science of getting and keeping a fortune -- chremastic.* How did Aristotle recommend one acquire wealth? Not surprisingly - through slave ownership.* Though Aristotle was a slaver and thought slavery

\begin{footnotes}
\footnotetext[105]{Aristotle, Politics, 1277b 7-9.}
\footnotetext[106]{Aristotle, Politics, 1252 a 6-10.}
\footnotetext[107]{Heraclitus, Fragments.}
\footnotetext[108]{Adam Smith, \textit{Wealth of Nations} (1776).}
\end{footnotes}
a natural inevitable and good thing it was not the foundation of his advice to those who would get wealth! Rather, Aristotle recommended monopolistic commodity speculation as the route to wealth. Aristotle thought the best businessman ought to determine what good would in the future be in short supply and to aquire that good for later resale.* Aristotle saw monopoly, not economic competition, as a key to individual wealth. True, one can argue that monopoly is good because of economies of scale monopolistic production may obtain cheaper good for consumers in the short run. However in the long run when there is no threat of competition the monopolistic producer has every incentive to raise prices to obtain the highest profit possible. A deep discussion of the advantages and problems of monopoly seems absent in Aristotle's economic thought.

The much greater problem is simply that Aristotle was racist, sexist and homophobic. He was Helleno-centric and thought the Greek civilization the highest and best.* Which may have been true but the reasons for this excellence were fairly certainly seen by Aristotle as genetic. Even if Aristotle did not think that racial superiority was genetic he was perfectly clear that genetic factors determine that some people are, by nature, slavish and others are, by nature, rulers. Some are born to serve and others to rule - according to Aristotle.* Racism is just that thought of individual excellence due to birth cast onto groups. And it's simply untrue. For starters, the ruling classes have been outbred by the ruled classes for centuries if not millenia. Furthermore close inbreeding among the ruling classes leads to genetic defects of the brain or blood such as hemophilia. Finally Aristotle is forced to recognize that some persons are not natural slaves but enslaved as a result of war.109 Again however Aristotle seems to have no problem with the institution of slavery, whether the slave is one by nature or by capture.

Gender and sex relations in the thought of Aristotle are also clearly problematic. Aristotle definitely believes the nature role of woman is as subordinate to and subject of men.*** Unfortunately Aristotle does not seem to elucidate his hierarchy with perfect clarity. Such an elucidation shows it to be untenable or confused. This is likely Aristotle's hierarchy within the Hellenes:

And this is the same sort of social hierarchization that plagues social and political discourse in the United States today. For an example of the sort of confused thinking it leads to: Try to answer, within the hierarchical racist or capitalist view -- who is higher in the social hierarchy a poor white woman or a wealthy black man? This sort of question is disgusting and a very real part of social discourse. When one understands that all people are of about equal talents and basically have the same hopes and fears, needs and desires -- then the idea of hierarchy itself becomes disgusting.

VI. ARISTOTLE AND FOUGAULT

Aristotle's continuing relevance can be seen by looking at the influence he had on Michel Foucault. Though he of course influenced Cicero and Aquinas and so many others, Foucault is the most recent best example of Aristotle's continuing relevance.

Aristotle has had a pervasive influence on the structure of law, more so even than Cicero. It is for precisely this reason that we are compelled to the records of his lycaeum. Just as Foucault's lectures at the College de France were gathered by students into notebooks so too were the lectures of the Lycaeum recorded, most probably by Aristotle's son, Nicaeus* forming the corpus of his works that we enjoy to this day. The parallels between Aristotle and Foucault show that the former clearly influenced the latter.

Stylistic similarities between Foucault and Aristotle are striking. So too are
methodological similarities. Aristotle proposed the first real taxonomy of sciences, including the human sciences. Foucault, though limiting his work to the human sciences, was also working on the taxonomy of knowledge. Aristotle's focused on man and nature and their relation to each other, whereas Foucault focused on the relation between the body and knowledge, the relation between between power-knowledge and body-knowledge. Aristotle in contrast was looking at the world of nature to understand the nature of Man.

Foucault's delimitation of the field of inquiry is perfectly understandable -- natural science, though working from the basic foundations of Aristotelian thought and the atomists has advanced incredibly in two thousand years and grown correspondingly complex. One time theoretical debates over whether matter and energy are convertible are now empirically solved. Human sciences too have advanced – economics has become empirical and scientific, for example. But progress in human sciences has not been as great as progress in natural sciences. Thus, both Aristotle and Foucault worked on the unsolved problems of their times and did so by thinking of ideas and things in structures. Foucault considered himself to be a post-structuralist. But he worked from the starting point of the structure of knowledge to critique the implications of structuring knowledge. Aristotle built hierarchies and taxonomies. Foucault studied structure and hierarchy to deconstruct them. Aristotle and Foucault are each other's mirror image, one looking outward the other inward, one looking to create power, the other to defuse it, yet their discursive writing styles and method are so similar – despite being separated by two thousand years.

Post-structuralists like Foucault have influenced the law somewhat, notably through the critical legal studies movement which seeks to deconstruct discourses about power to elucidate the power relations that shape those discourses. However Aristotle had a much much greater influence on the law: essentially the post-structuralists are trying to deconstruct the hierarchies of knowledge and power that Aristotle described and created --

110 See Michel Foucault, Language, Counter-Memory, & Practice: Selected Essays & Interviews 199-217 (Donald F. Bouchard ed., 1977) (discussing the interrelation of knowledge and power, often in tandem with the work of Gilles Deleuze) [hereinafter Language, Counter-Memory, Practice].

111 See generally Michel Foucault, Discipline & Punish: The Birth of the Prison (1979) [hereinafter Discipline
and that has and will prove to be no mean feat. By exposing Aristotle's thoughts on justice and pointing out some of his influence on law I hope to help critical scholars work more effectively. We must study Aristotle because no one else has influenced the structure of law and of social science so much. Moreover, we must look at Aristotle because his racist, sexist and homophobic thought should be extirpated from the law in the interest of justice.

I more or less take a post-structuralist approach to Aristotle: I seek to expose how his thought is structured by his views on gender, race and sex to create self-justifying hierarchies of power. At the same time, I wish to expose the concepts deployed through these vectors of power. This separation allows us to salvage Aristotle's ideas on logic, justice and causality which pervade the law. Thus rather than being trapped in disembodied Platonic dualism, sterile positivism or powerless post-modernism, critical scholars obtain conceptual instruments used to wield state power. Rather than rejecting Aristotle outright -- which is likely impossible since he created logic -- I try to resituate his discourse within the terms of equality. If Aristotle's ideas can be cured of pervasive racism, sexism and homophobia then they can become useful.

CONCLUSION

The Left finds itself struggling within systems of hierarchy against hierarchy. But this is not because of the idea of value choices nor of hierarchy per se. Moral relativism is not the answer to struggling against existing hierarchies. The Left must reject moral relativism to advance the idea of equality. The Left finds itself struggling against hierarchy because hierarchy is essentially opposed to the idea of substantive equality. But the choice of equality is the value sine qua non is itself a hierarchization of one value over others. Thus it is social hierarchies and not hierarchy per se that the Left should oppose.

& Punish].