The Metaethics of Law: Book One of Aristotle’s Nicomachean Ethics

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The meta-ethics of law: Book One of Aristotle’s *Nicomachean Ethics*

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Abstract

Traditional scholarship has approached Aristotle’s *Nicomachean Ethics* mostly as a system of positive ethics. Less attention has been paid to the work’s meta-ethics – the claims Aristotle makes about what any system of positive ethics must say or do in order to count as an ethical theory. In this article, Book One of the *Nicomachean Ethics* is read not simply as an introduction to Aristotle’s system of positive ethics, but as a statement of distinct meta-ethical principles, which can be evaluated independently of any view that might be taken of his positive ethics. Insofar as Aristotle inscribes his legal theory within his ethical theory, those principles stand as a meta-ethics of law. Under Aristotle’s legal meta-ethics, law necessarily presupposes: (1) a concept of the ‘good’; (2) purpose; (3) dialectics; (4) objectivist ethics; (5) a best constitution; (6) a positive ethics; and (7) a concept of the ‘human’.

Introduction

When Aristotle refers to ‘the good’ as ‘that at which all things aim’ (NE I.1.1094a1–2), he announces more than just another system of positive ethics. He heralds a meta-ethics: a theory about what ethical reasoning is and how it proceeds. Scholars have long noted the foundational character of Book One of the *Nicomachean Ethics*. Most view it as a preliminary to his positive ethics, often noting Aristotle’s methodological points (e.g. Kraut, 2006, pp. 76–95), but without considering its meta-ethical character, which sheds some light upon his approach to law.

A system of meta-ethics theorises the necessary assumptions of any system of positive ethics (e.g. Houser, 1993; Sayre-McCord, 2007). Susan Houser describes meta-ethics as enquiry into ‘what we can know concerning morals’ (Houser, 1993, p. 1139). Similarly, according to Geoff Sayre-McCord:

‘Meta-ethics is the attempt to understand... presuppositions and commitments of moral thought, talk, and practice. As such, it counts within its domain a broad range of questions and

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1 I am indebted to the undergraduate participants in ‘Law, Justice, and Ethics’, Department of Law, Queen Mary University of London, Spring Semester 2009, for providing my first opportunity to present the ideas in this article. Thanks also to Luke Doherty for his helpful technical assistance.

2 Unless otherwise indicated, citations to Aristotle in this article refer to Aristotle (1984). Although the traditional corpus includes other works on ethics, including the *Eudemian Ethics* and *Magna Moralia*, short-hand references to the ‘Ethics’ (or ‘NE’) in this article refer only to the *Nicomachean Ethics*. Abbreviations of Aristotle’s works in citations follow Kraut (2006, p. x). Citations of Plato refer to Plato (1997). Abbreviations of Plato’s works follow Plato (1997, p. 1746).

3 For recent, thorough discussions of the whole of NE, including specific attention to the function of Book One as preliminary to Aristotle’s positive ethics, see, e.g., Bostock, 2000, pp. 7–32; Pakaluk, 2005, pp. 47–86. Dedicated studies on Book One commonly focus on Aristotle’s general concepts of the good, or of happiness, precisely insofar as they introduce or underpin the whole of NE. See, e.g., Nagel, 1980; Ackrill, 1980, pp. 15–33; Lawrence, 2006, pp. 37–75.
puzzles, including: Is morality more a matter of taste than truth? Are moral standards culturally relative? (Sayre-McCord, 2007)

As with systems of positive ethics, there is no one school of meta-ethics. Thinkers inevitably invoke or presuppose meta-ethical principles ad hoc, in the course of elaborating their positive ethics. But Aristotle is the first in the Western canon to expound them in a way that invites systematic analysis. Within classical Western philosophy, perhaps only Immanuel Kant compares to Aristotle in formulating a distinct meta-ethics antecedent to his positive ethics. Kant first develops the categorical imperative as a precept that any ethics would have to fulfil (Kant, 1968a; 1968b), and only then proceeds to apply it to generate his positive ethics (Kant, 1968c).

In proposing both a meta-ethics and a positive ethics, Aristotle, like Kant, invites us to stake out one of four possible responses. First, we might accept both Aristotle's meta-ethics and his positive ethics. Second, we might reject both. Third, we can accept some or all of Aristotle's meta-ethics, but reject his positive ethics, on the view that the former does not perforce entail the latter. Fourth, we can reject some or all of Aristotle's meta-ethical principles, yet accept his positive ethics, because we believe that the latter satisfies some other meta-ethics; or perhaps because we wish to accept his positive ethics while suspending judgement on meta-ethical questions.

In all candour, it is hard to escape the impression that thinkers such as Aristotle and Kant are simply ‘reverse engineering’ – first formulating their preferred positive ethics, then working backwards to a meta-ethics tailored to it. By analogy, judges, in hard cases, have long been suspected of first choosing their preferred outcome, then selecting the legal norms to justify it. But Aristotle and Kant are not judges. Their express aim is to reason to and from the foundations of ethics, which judges have no warrant to do. In general ethical theory, such reverse logic lacks no more integrity than to reason in physics from a falling apple to a general concept of gravity. Whatever might have been Aristotle’s thought processes, there is no conceptual reason (a) why his meta-ethics would necessarily entail his positive ethics, nor (b) why his positive ethics can rest upon no meta-ethics other than the one he proposes.

It is worthwhile, then, to examine Aristotle’s meta-ethics as a separate matter, and equally interesting to do so with an eye towards his theory of law and justice. Aristotle famously discusses justice in Book Five of the Ethics. According to his concept of ‘general justice’, law is embedded within the whole of ethics and politics (e.g. NE V.i.1129b27–1130a13), as the Politics frequently confirms (e.g. Pol. Lith.1253a13–18). On Aristotle’s own terms, then, we can identify his meta-ethical principles with a view towards the meta-ethics of law.

Those principles allow us to see in Aristotle something like a Fullerian programme. In the Politics, Aristotle rejects the suggestion that any and every deployment of political power counts as law. He argues that extreme forms of tyranny, as well as unmitigated majoritarian or ‘mob rule’ democracy, are not merely ‘bad’ constitutions, which would still recognise them as forms of law. Rather, they are not constitutional forms, systems of law, at all. They are the negation of any legal system.

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6 Also called ‘universal’ or ‘broad’ justice; e.g. Young, 2006, p. 181.


8 The limitation to ‘extreme forms’ is crucial, insofar as power is exerted wholly ad hoc (Pol. IV.iv.1292a32–33). Aristotle does admit both moderate popular democracies and moderate tyrannies as genuine constitutional forms (Pol. IV.iv.1291b30–92a3; Pol. IV.x.1295a1–17).
(Pol. IV.xiv.1292a4–38; cf. Pol. IV.x.1295a18–21). ‘[T]here is no constitution where the laws do not rule’9 (Pol. IV.iv.1292a32, emphasis added).

Aristotle does not go so far as to adopt, in any unqualified sense, the ancient maxim that an unjust law is no law at all (lex iniusta non est lex); that an unjust law, being merely an exercise of brute force, is the opposite of law. That more absolute view can later find some acceptance in a Christian world in which injustice is sin. Aristotle, lacking that concept of sin, does not so categorically pronounce upon the legitimacy of any one law divorced from the entirety of the regime. It is the character of the whole that Aristotle treats as decisive.

Like Fuller (Fuller, 1969), Aristotle suggests that an evaluation along ethical lines is germane to a threshold determination as to whether a regime of political power counts as a legal system at all. In this article, I shall argue that Book One sets forth, as ingredients of any such threshold determination, the following principles of legal meta-ethics:

1. Law presupposes some concept or concepts of the ‘good’;
2. Law presupposes purpose;
3. Law presupposes dialectics;
4. Law presupposes objectivist ethics;
5. Law presupposes a best constitution;
6. Law presupposes a positive ethics;
7. Law presupposes a concept of the ‘human’.

Those principles might, should any of them lapse, and again recalling Fuller, entail a roster of ‘seven ways to fail to make law’ (Fuller, 1969, pp. 33–38). In examining them, my aim is not to draw detailed comparisons with Fuller, nor even to shed fundamentally new light on Aristotle. My aims are simply: (a) to distil, from already familiar insights into Aristotle, those which distinctly concern his meta-ethics; and (b) to emphasise the relevance of Book One to legal theory, in contrast to some legal theorists’ tendencies to jump to Book Five.

Aristotle’s major works have long been thought to have reached us in a form unintended for wide circulation. If he published major writings on justice for a broad readership, they have been lost (cf. Aristotle 1984, vol. 2, pp. 2384–465). The corpus aristotelicum is thought to consist largely of lecture notes, from which Aristotle spoke at greater length before an initiated audience (Höffle, 1999, pp. 22–28). In identifying meta-ethical themes within Book One, then, I do not mean to suggest that those themes can simply be read off the page. As always in the study of Aristotle, crucial gaps must be filled, with reference to ideas developed elsewhere in the corpus. Throughout his writing on ethics and politics, Aristotle frequently recalls that the views he takes on one issue relate to those stated elsewhere10 (e.g. NE I.vi.1096b8; II.vii.1108b7).

Some editions of the Ethics, such as Terence Irwin’s (Aristotle, 1999), show how attention to key terms, and to themes developed more broadly in the corpus, overcome obstacles that would otherwise arise from surface readings. Recent versions by Richard Bodéüs (Aristote, 2004), or by Sarah Broadie and Christopher Rowe (Aristote, 2002), also serve that aim. In the present article, I follow the earlier translation of W. D. Ross, as revised by J. O. Urmson, in Jonathan Barnes’s edition (Aristote, 1984). I adopt Ross’s text mostly because of its long-standing influence and wide availability. The copyright on his original version having expired (Ross, 1908), it is now widely available in both printed (e.g. Aristotle, 1941) and electronic (e.g. Aristotle, ICA online) versions, and retains some value even in unrevised form. I nevertheless refer to other translations for clarification.

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10 On the relationship between Aristotle’s ethical and political texts, see Kraut, 2002, p. 17.
1 Law presupposes some concept or concepts of the ‘good’

Aristotle’s most important remarks about law appear in his writings on ethics and politics. Yet there can be no suggestion that he unthinkingly collapses law into either topic – let alone that he is just an ‘early’ theorist who has ‘not yet’ pondered possible differences among the concepts of ‘law’, ‘ethics’ and ‘politics’. In the *Constitution of Athens*, long deemed to be only one of a compendium of studies undertaken for over 150 Greek city-states (Miller, 1995, p. 4; Höffe, 1999, p. 23). Aristotle pursues a fact-based account of the minutiae of Athenian legal rules and processes. That discussion conspicuously avoids normative evaluations (*Con Ath*, paras. 42–69). The embedding of law within ethics and politics in Aristotle’s more prominent works is undertaken by a thinker aware of the benefits of a strictly descriptive, institutionally focused account, but who is resolved that such an account cannot supplant an equally important inquiry, namely, a normative examination of the aims and goods of a legal system. The location of Aristotle’s discussions of law within expressly prescriptive works on ethics and politics represents not the lapse of an ‘early’ thinker, but a deliberate methodological choice.

The *Ethics* starts with what, for admirers, is one of the most astute, and, for detractors, one of the most vacuous principles in ethical philosophy. From a meta-ethical perspective, the latter impression comes as no surprise. A meta-ethical proposition may sound like a hollow formalism, making some assertion about ‘the good’, situating the concept of ‘the good’ within ethics, while suspending any substantive account of it. Aristotle famously begins:

> ‘Every art and every inquiry, and similarly every action and choice, is thought to aim at some good; and for this reason the good has rightly been declared to be that at which all things aim.’
> (*NE I*.1.1094a1–3)

Ross’s word ‘art’ must not be read to denote only such forms of fine or popular ‘art’ as painting, poetry or music. Ross uses it here to translate *techne*, which broadly signifies any area of special expertise, from the ‘art’ of baking to the ‘art’ of apple farming, navigation or medicine (recalling the Latin *ars*). Some scholars, such as Irwin, translate *techne* here as ‘skill’ (Aristotle, 1999, p. 1). Rowe proposes ‘expert knowledge’ (Aristotle, 2002, p. 95).

The meta-ethical principles introduced in Book One are not all innovations. Several appear in Plato, often with no hint that they would have been deemed controversial. Some propositions, such as Aristotle’s opening one here, appear to have been widely accepted. That status underscores their meta-ethical character: they are not deemed controversial in themselves, but rather assume the position of propositions which allow the very possibility of meaningful disagreement about propositions of positive ethics. It is deemed uncontroversial, hence meta-ethical, that each skill, inquiry, action and choice aims at some good, as opposed to some aiming primarily and deliberately at a bad result, or at results devoid of moral character. The next step, the task of positive ethics, where controversy may then arise, concerns the nature of the good, and how it is best achieved.

In *Gorgias*, one of the most viciously argued of Plato’s dialogues, in which Socrates and his interlocutors present wholly antagonistic theories of positive ethics, Socrates twice advances,
without opposition, that same meta-ethical principle with which Aristotle's *Ethics* begins. Plato leaves no doubt that people can fiercely dispute the most fundamental points of positive ethics, while still agreeing, as the very source of such disagreement, that we 'do all things for the sake of what's good' (*Grg.* 499e; cf. *Grg.* 468b). It is only insofar as they agree upon that meta-ethical point that their disagreement on positive ethics takes on any determinate meaning, as a disagreement about what, in substance, is or is not good. If much of Aristotle's meta-ethics, then, merely re-states existing views, the merit of Book One is nevertheless to present them in an orderly, autonomous sequence. In so doing, Aristotle invites attention to meta-ethics as a field of systematic enquiry in its own right.

The making, application and enforcement of law certainly entail expertise. Law's norms, practices and institutions are no random examples of activities that, on Aristotle's view, 'aim at some good'. They will frequently stand as peremptory examples. In the *Politics*, Aristotle's discussions of the Spartan, Cretan or Carthaginian (e.g., *Pol.* II.9–12) systems routinely evaluate their various benefits and drawbacks, in view of their disposition to promote some ideal of the good: justice over injustice, prosperity over misery. That explicitly normative approach to law is entailed by Book One's opening sentence. Aristotle effectively announces an examination of law from the perspective of the goods for which legal norms and practices are adopted, without ever needing to deny that the more structural, value-neutral kinds of accounts employed in the *Constitution of Athens* might suit other analytic purposes.

The orthodox positivism of Austin (e.g. Austin, 1998, pp. 12, 124, 126) or Kelsen (e.g. Kelsen, 1960, pp. 60–71) had acknowledged normative evaluation as important to, yet fundamentally distinct from, the analysis of law; Aristotle recognises expressly normative as well as strictly descriptive approaches, not rating one above the other as 'more appropriately' a study of law, but as serving, each, a distinct but vital analytic function. The question ‘What is the best legal system’ has long been seen, within positivist and analytic orthodoxy, as worthy, yet distinct from the question ‘What is a legal system’ (e.g. Hart, 1994, pp. 155–84). For Aristotle's expressly normative method, as we shall see, the latter question can be fully answered only with reference to the former. Law presupposes some concept or concepts of the 'good'.

The first sentence of Book One has introduced only a formal concept of the good. Familiar schools of positive ethics disagree on what counts as good, or on how it is achieved. They include, for example, theological, deontological, liberal, consequentialist, communitarian, Marxist, pragmatist, feminist, libertarian, anarchist, post-structuralist or post-colonial theories. On Aristotle’s meta-ethical view, however, all of them, as ethical theories, must by definition recognise (a) that some state of affairs X is better than some competing state of affairs Y, and (b) that X is ‘good’, at least in that comparative sense. Reading, for example, Marx and Engels from that still-very-basic meta-ethical perspective, society is better, and is at least in that sense ‘good’, with an emancipated proletariat, as compared to one subject to the control of the bourgeoisie. Similarly, for feminists, society is better, and in that sense ‘good’, when women are not dominated by men. For liberals, society is better, and in that sense ‘good’, with legal regimes of individual rights and freedoms. For libertarians, society is better with the smallest possible government. For anarchists, society is better with no government at all. And so on.

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15 Although ancient Greek societies, including democratic Athens, did not have an independent judiciary in the modern sense, Plato comments on the complexities of law, particularly in market-oriented democracies (*R.* III.1048–05d, IV.425c–e; cf. Heinze, 2007a, pp. 100–105).

16 For Aristotle, justice in the 'fullest' sense encompasses all virtues of character (*NE*.V.i.1129b30–31).

17 Plato’s approach is similar in the *Laws*. One might speculate that Aristotle’s more descriptive studies, like that of Athens, were intended to acknowledge more clearly the distinct utility of both descriptive and normative approaches.
2 Law presupposes purpose

One of Plato’s major attacks on sophists and orators arose from their subjectivist, relativist views of law and justice, spawning a controversy not unlike those that would later pit natural law against positivism. Like Hobbes (Hobbes, 1998, chapter 6), figures such as Callicles (e.g. Grg. 483b–84b, 488b–90c) and Thrasyamachus (e.g. R. 1.338c, 338e–39c) deny that justice exists as anything more than a subjective, human notion. Plato characterises the universe (kosmos) and the human soul (psuchē) in terms suggesting objective justice as a component of the natural, ordered world (e.g. Phd. 66b–d).

Within that cosmology, the laws of ethics are as much laws of nature as are the laws of chemistry or biology (e.g. Phd. 100b–e).

Through a rather different metaphysics, Aristotle carries forward Plato’s rejection of subjectivism and relativism (e.g. Kraut, 2006, pp. 20–49). Aristotle equally embraces justice as something concerned with the nature of humans as a species. He eliminates any absolute line between laws of nature operating through chemistry or biology, and laws of nature operating through ethics and justice. This is not to say that Aristotle draws no distinction at all between such laws. He recognises that laws governing human conduct are subject to more variability than laws governing, for example, the movements of planets or the building of bridges. He sees human variability, however, as betokening merely a different kind of law (e.g. NE I.iii.1094a20–27), not the absence of any natural character within human law. When Aristotle defines the human being as the ‘political’ animal (e.g. NE I.vii.1097a11–12, IX.ix.1169b18–19; cf. Höffe, 1999, pp. 248–56; Bostock, 2000, p. 26) or the ‘rational’ animal (e.g. NE I.vii.1098b3–5; cf. Höffe, 1999, p. 40; Bostock, 2000, p. 27), he is not using sheer figures of speech. He is assimilating humans into a broader, natural world. He is suggesting that law, ethics and politics can be examined in ways similar to those proper to the natural sciences.

It is useful to bear in mind how Aristotle’s approach to nature informs his approach to law. Before turning back to a vast and complex system like law, consider a simpler one. We could make observations about how to build a ship without reference to any aims the ship will serve, much less to the good or evil of such aims. It would be implausible, however, to suggest that questions about the ship’s aims are, by definition, irrelevant to questions about what the ship is. There is no reason why defining the ship in material terms – sails, mast, deck, starboard, etc. – more accurately explains what the ship is than explaining, in functional terms, how the ship serves as an instrument for economic, military or leisurely activity. So much less, from Aristotle’s perspective, could a legal system, whose components are human norms and acts, be understood only as some assemblage of discrete components (procedures for legislation, adjudication, policing, and, in turn, their more elemental components).

While a material explanation might define the ship in terms of sails, mast, deck or starboard, a functional definition might define it in terms of defending the nation from attack, or fishing, or purchasing food, or sunbathing at sea. These various accounts of the ship, the material and the functional, provide, for Aristotle, not correct, as opposed to incorrect, explanations. They provide qualitatively different kinds of explanations. Each complements the other, as famously described under his doctrine of the ‘four causes’: ‘material’, ‘formal’, ‘efficient’ and ‘final’ (e.g. Meta. V.ii.1013b24–35). Like the opening sentence of the Ethics, the doctrine of the four causes stands, depending on one’s sympathies, among the subtlest insights, or the greatest pedantry, in classical philosophy. Consider more fully the example of a ship:

- It is the ship’s constituent parts which provide the material cause for the ship being a ship (e.g. Meta. V.ii.1013b24–26). The material cause is the presence of sails, mast, deck, starboard, etc.

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18 For a concise overview, including variations in English terminology, see, e.g., Politis, 2004, pp. 50–61.
They, in turn, have as their material cause such things as wood, metal, etc. And those latter, ultimately, trace to more primary matter, such as atoms or the like.

- The ship’s design provides the formal cause of its being a ship (e.g. *Meta*. V.ii.1013²6–29). The said components are formally caused by the fact of those woods and metals being arranged into such-and-such a shape and character, as opposed, say, to the shape and character of a house, amphitheatre, chariot or temple.

- The means of the ship’s assembly, such as a labour force, provide an efficient cause for its being a ship (e.g. *Meta*. V.ii.1013²9–32). The ship is efficiently caused by people following certain building instructions and applying certain tools to the said materials in order to build it.

- The ship’s military, economic or leisurely aims provide the final, or teleological cause for the ship being a ship (e.g. *Meta*. V.ii.1013³2–35). In that sense, the ship comes into being to serve the aim of defending the nation, or for fishing, transporting foodstuffs, or fun.

As explanations of the natural world, Aristotle’s four causes run into difficulty. Today, post-Cartesian science dispenses with inquiry into inherent purpose or form in nature, as lying beyond empirical demonstration. Modern science may theorise a universe that seems well, or poorly, ordered to us, but knows no vocabulary for a kosmos that is inherently well ordered. Within deliberated human activity, by contrast, we more readily accept concepts of final and formal cause. We hesitate to attribute purpose to planetary orbits, but freely attribute it to a ship, arguing that it is built for such-and-such ends, and that its form well or poorly suits those ends. Although Aristotle’s detailed discussions of the four causes arise in his works on natural science, they fit more easily today into discussions of human, deliberative activity (cf. Aristotle, 1999, pp. 39–40). We can remain agnostic about their metaphysical truth, whilst reserving for them a meta-ethical function. Insofar as law’s norms, institutions and processes are deliberated, they presuppose purpose.

Even with respect to human activity, Aristotle’s application of causation within his positive ethics raises difficulties. The suggestion that the end, or final cause, of the marital relationship entails a woman’s subordination to her husband (e.g. *Pol*. Lxii.1259³7–1259³3), or that the end of domestic servitude involves a slave’s obedience to a master (e.g. *Pol*. Liii–vii), raise troubling questions. The degree to which such conclusions strictly follow from Aristotle’s own ethical premises has been debated (Kraut, 2006, pp. 277–305; Homiak, 1993, pp. 80–102; Hirschman, 1992; Nussbaum, 1991–1992). Those controversial elements of Aristotle’s positive ethics, however, are not meta-ethical. Aristotle’s four causes indicate modes of explanation, regardless of how Aristotle applies them to his own positive ethics.

The fact that any of the four causes may be invoked in a given case does not mean all of them must be invoked in all cases. Aristotle often chooses them as appropriate for the points he wants to make. Ross does rightly note that, ‘for Aristotle, all four are necessary for the production of any effect’ (Ross, 1995, p. 75). That does not, however, mean that, as a matter of sheer exposition, they all necessarily require explicit discussion in all cases. The *Constitution of Athens* paras. 42–69 refrain from teleology, generally employing material and efficient explanations, for the very limited purpose of explaining the institutional components of Athenian law and their operations. They set forth the elements and operation of norms, institutions and processes, without evaluating the goodness of their aims. In the *Politics*, particularly as interpreted in conjunction with the *Ethics*, Aristotle takes the opposite tack. Announcing that work’s goal not merely of describing regimes, but of ascertaining the best possible regime (e.g. *Pol*. II.i.1260⁵27–28), Aristotle recognises that both approaches can deepen our understanding of politics.

### 3 Law presupposes dialectics

After a twentieth century that unleashed brutalities from trench warfare, to extermination camps, to racist degradation, to atomic devastation, something may seem naive about the assertion that all
human acts aim at ‘some good’. But such horrors by no means lie beyond Book One’s reach. Little is gained by summarily branding evil as ‘evil’, or by assuming evil to be manifest in such a way as to obviate explanation. Individuals, organisations or governments acting even in flagrant bad faith generally proclaim not ‘evil’ aims, but good ones. Iranian law authorises stoning of adulterers or homosexuals not in the name of evil, but in the name of the good (e.g. Heinze, 1995, p. 3). Some American states, until forced to do otherwise, imposed the death penalty on mentally handicapped or juvenile offenders, not in the name of evil, but in the name of the good. The same holds for history’s most heinous crimes. Genocide and torture have been waged not in the name of evil, but in the name of the good (propagation of a supposed ‘master race’, preservation of national security, etc.).

From Aristotle’s rationalist perspective, we do few favours for the genocide or torture victim, and none for the cause of justice, by insisting that such acts are so evidently evil as to render explanation of their evil superfluous. Insofar as they are evil, it must, on Aristotle’s account, be because any good attributed to them, however sincerely or disingenuously, is demonstrably inferior to the greater good of refraining from them. Of course, any sensitive being might well cringe at the idea that genocide or torture can be condemned only after first being shown to be ‘inferior to the alternatives’. To be sure, in an era after war has devastated Greek civilisation, it is by no means clear that Aristotle places naive faith in rationality. He does, however, place some hope in communal beings who proceed through processes of shared, public deliberation. Aristotle’s concepts of public deliberation (Rhet. Liv–viii) provide a model of ‘communicative action’, with, as I shall note momentarily, all of the limitations that rationalism entails.

We might also note a utilitarian ring about the comparison of relative goods that follows from Book One’s opening words. That impression would be misleading, however, unless we were to dilute utilitarianism to the empty extent of having it merely represent ‘the most good’. Again, many ethical and political theories claim to represent ‘the most good’, from Christianity to Marxism to libertarianism. If utilitarianism represents whichever system produces ‘the most good’, then it collapses into whichever such theory prevails. And any stronger theory of utilitarianism, proposing a specific content of ‘the good’, surpasses the still formal, strictly meta-ethical character of the Ethics’ first sentence.

Book One’s starting words do anticipate some calculus or comparisons of goods – a basis for asserting that some things, such as kindness or helpfulness, are better than other things, such as aggression or brutality. Although they do not propose that calculation in any sense that necessarily entails utilitarian ethics, they do announce a dialectical foundation for justice, and for evaluating the merits and demerits of a norm, practice, process, institution or regime (e.g. Galston, 1994, p. 336). If genocide and torture are evil, it is not because no arguments can be adduced in their defence. Whether we like it or not, such arguments are made, as Callicles (e.g. Grg. 483b–84b, 488b–90c) and Thrasymachus (e.g. R. I.338c, 338e–39c) chillingly remind us. Dialectics can recognise no good as obvious or beyond question. Insofar as law is rationally deliberated – that ‘insofar’ being admittedly problematical – it presupposes dialectics.

Dialectical ethics are a mixed blessing. On the one hand, they suggest an anti-authoritarian element to the norms and operation of law, ethics and politics. Socrates and Plato had expended enormous effort in challenging conventionalism, i.e. the view that widespread or long-standing observance suffice to lend legitimacy to prevailing norms or practices. In Plato’s Republic, the quasi-sacred Homeric texts, for example, are pillaged to a comic degree, as Socrates keeps what’s suitable

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21 Cf. Galston, 1994 (challenging Michael Perry’s argument that there is ‘nothing to say’ to persons lacking, from the outset, a commitment to collective human ‘flourishing’).
and discards the rest. (R. II.379c–III.393b) Works like *Euthyphro*, *Ion* and *Protagoras* similarly undermine notions of uncontested political, ethical, religious or intellectual authority (e.g. *Euthphr*. 6b–c *et passim*; *Ion* 534c.*et passim*; *Prt*. 347c–48a *et passim*). Miriam Galston provides a thorough account of how modern theories of civic republicanism and deliberative democracy can be linked to Aristotle's dialectical ethics (e.g. Galston, 1994, pp. 355–71).

On the other hand, the rationalism of dialectal ethics entails the supremacy of the most rigorous argument, which is by no means as self-evident as a classical philosophical tradition wished to believe. In practice, it has often been those in power: (a) who decide which interlocutors or arguments count as 'rational'; and (b) whose superior educations endow them with competitive advantage, serving more to entrench than to challenge existing conventions of power and truth. In our own societies, doubts about the equal rational capacities of ethnic minorities or women avoided serious challenges until rather recently (Kraut, 2006, pp. 277–79; Galston, 1994, p. 359). Plato's *Meno* does suggest that the lowliest slave might participate in the loftiest exchange (M. 82a–85e), and his *Republic* admits women among the philosopher rulers (R. IV.540c), yet his writing remains pessimistic about the disposition of *hoi polloi*, 'the many', to pursue rational thought (e.g. *Lch*. 184d–85a; R. IV.428d–e).

Aristotle's theories of the inferiority of 'natural' slaves and women stems from his view of their diminished rationality (e.g. *Pol*. Lxiii.1260a12). On its own terms, that positive ethics would have to cede to the meta-ethical requirement of any dialectics which might challenge it. A Habermasian kind of discourse ethics (Habermas, 1987), if it can succeed at all, may be said to continue and to enhance the project of Aristotelian dialectics, as it seeks to eliminate the exclusion of participants otherwise silenced through prevailing power relations. Whether something like Habermas's ideal speech situations can be realised to some acceptable degree, or, in practice, would inevitably turn out to remain entrenched within those very power disparities which they would purport to overcome (Derrida, 1967, pp. 117–228), are controversies confronting Aristotle's meta-ethics as strongly as Habermas's discourse ethics. Any ethical conclusion ensuing from a process that regulates ethical dialectics through the unreflective enforcement of existing power relations is anti-dialectical. Aristotle's positive ethics violates his meta-ethics if it results from anything less than the best possible dialectical process.22

One might suspect here a vicious circle: justice arises only out of a just dialectics, which, in turn, cannot be ascertained without determining what justice is. That circle is only vicious, however, if we assume some stopping point at which the process of ethical reason would altogether end. Yet both sides of the equation, justice and dialectics, remain subject to revision in light of each other. To preclude any concept of justice or any dialectical process solely on the grounds that neither can guarantee a final, universally acceptable outcome would be to turn all ethical reasoning into a straw man.

Irwin persuasively argues that Aristotle's views on ethics, politics and justice accord with the writings on metaphysics and psychology (Aristotle, 1999, pp. 35–53). Meanwhile, Otfried Höffe reads in the opposite direction, arguing that the *Ethics* proceeds without metaphysical assumptions (Höffe, 1999, p. 196). Elsewhere, I have recalled that Plato, while subsuming his views on ethics, politics and justice within his metaphysics, often develops specific arguments more with reference to familiar, everyday insights than to metaphysical premises or references (Heinze, 2007b, pp. 332–33). For Höffe, Aristotle's dialectical method grows more out of common-sense reasoning, a hermeneutics of the Lebenswelt, i.e. of lived experience (Höffe, 1999, p. 198). Moreover, one might resist genocide or torture without having given a moment's thought to ethics, which does not, however, mean that such resistance eludes ethical explanation within the terms indicated by Book One's first sentence.

Someone might rescue a baby from drowning without convincingly knowing, stating or caring why it is good. Kant’s focus on intent (Kant, 1968a, p. 5 et passim) would indeed call the act’s goodness into question. From the perspective of Aristotle’s rationalist meta-ethics, however, such an act means neither that there is no reason why it is good, nor that we should be unable to identify such a reason.

The anti-authoritarianism of dialectical ethics does not render conventionalist foundations for legal or political norms or practices illegitimate solely because they are conventions. Long-standing conventions, such as prohibitions on murder, may be highly credible. But, as Plato insisted, their credibility does not lie solely in their conventional character (e.g. *Prt.* 337d; *Tht.* 172a, 167c, 177c–d). Plato and Aristotle recognise that widespread or long-standing beliefs or practices carry real weight; that their wholesale destruction may leave something worse in their stead. Note also that it is common for Aristotle to begin discussions precisely by departing from views that are widely shared (endoxa), on the assumption that such status may suggest at least prima facie plausibility (cf. *Top.* I.1.100a18–21). Their popular character, like the purely conventional character of many norms and practices, provides reason to think that they may be sound on other grounds, but are never deemed correct solely because they are popular or long-standing.

4 Law presupposes objectivist ethics

On first glance, Book One’s opening words might also risk falling sway to relativism. If any act can be ‘thought to aim at some good’, it is not perforce obvious why one good would be better than another. To call an evaluation of the good formally dialectical scarcely guarantees that the dialectics will be conclusive or universally embraced. Through figures like Callicles and Thrasymachus, Plato had waged such mind-numbing battle against ethical relativism that relativist positions cannot be far from any post-Socratic Greek reflection. It would be no exaggeration to suppose that, with Socrates, Plato and Aristotle, the whole enterprise of critical, systematic thinking about justice arises at an historical moment in which ethical and political thought have fallen subject to such a high degree of academic abstraction (e.g. *Phd.* 100d; *R*.III.405d) as to have lost altogether any sense of an obvious, unquestionable foundation.

The dialectics entailed by Book One’s opening words suggest foundations for law along ethical lines. By suggesting in the first instance that some good, however implausibly, can be ascribed to any act, Aristotle anticipates, as a foundation for law, an objectivist ethics, a standard for assessing whether one stated good at which an act ‘aims’ might be mistaken, i.e. believed to be good, and in that sense to be aiming at some good, when it can be shown to be less good than some alternative (Kraut, 2006, chapter 2). ‘Subjective’ and ‘objective’ are by no means the only ways of describing positive ethical theories. Susan Houser, for example, reviews a topology that has emerged, notably within Anglo–American theory, including realist and anti-realist schools, along with related or alternative concepts of foundationalism, intuitionism, coherenceism, scepticism and constructivism (Houser, 1993, pp. 1142–57). She suggests that several of those approaches can be eliminated from the study of law and government, as they would fail to take into account the deliberative processes by which law and policy-making must proceed (Houser, 1993, pp. 1158–81). Although Houser mentions Aristotle only in passing, his brand of anti-subjectivism would, within the familiar Anglo–American classifications, classify him as an ethical realist. Whether legal norms and processes are good or bad, just or unjust, is, for Aristotle, neither irrelevant nor incidental. It is central to what law is and does. If all deliberate acts ‘aim at some good’, the next step for any theory is to examine the concept of ‘good’ in order to determine the degree to which this or that specific claim about the good can be confirmed or

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refuted. If law does or should serve to achieve certain goods, then the better our insight into those goods, the better we can make law.

Again, the recognition of (a) some good at least nominally attributable to all deliberated acts is precisely how a moral relativist might surmise that (b) all acts being good insofar as some good can be attributed to all, none is irrefutably better than another. On Plato’s account, that ethical–relativist conclusion had induced Callicles and Thrasymachus to argue, in proto-Nietzschean terms, that it is not objective good at all, but merely the power to impose with impunity one’s own good, one’s own self-interest, that is ever ultimately desired or desirable. Not simply to generate his own positive ethics, but as a matter of meta-ethics, Aristotle will have to show that the plausible premise (a) does not entail the spurious conclusion (b), but the opposite, namely, that it is precisely the possibility of nominal attribution of ‘good’ to any deliberated act which allows us to compare goods, and to identify some as superior to others.

Were subjectivism and relativism valid, then an endless number of rival aims would contend as equally worthy. (Even for the nihilist, ‘equally worthy’ would mean ‘of no inherent worth whatsoever’. All ends would, in that sense, be ‘equally worthy’.) How, then, can we recognise better and worse attributions of goodness? Aristotle takes his next step by introducing further, elementary components of a classical metaethical lexicon (cf. *Lch*. 185d; *Grg*. 468a), namely, the distinction between means and ends. Acts undertaken not for their own sake, but for the sake of some other good, represent means to other ends, and not ends in themselves:

‘A certain difference is found among ends; some are activities, others are products apart from the activities that produce them.’

(*NE* I.i.1094a3–4)

Aristotle assumes an ordinary, or typical, case (although his theory would not be negated by occasional atypical cases) whereby I brush my teeth, or travel to work, not for the inherent satisfaction or enrichment of those acts, but for the greater goods of health or employment – which, as we shall see, stand in turn as means to still greater ends. Assuming that tooth brushing is a worthy end, then it is superior to the end of purchasing a toothbrush. Assuming that oral health is a worthy end, then it is a superior end to the end of tooth brushing. And so on. In the typical case, then, tooth brushing is good not in its own right, but because health, one part of which is oral health, is good. By extension, even health, as we shall see – albeit superior to tooth brushing, again, merely insofar as tooth brushing, on its own terms, subordinates itself to health – subordinates itself to health, in turn, to the even higher end of happiness (*eudaimonia*). From that perspective, even health is good not in its own right, but insofar as its end is *eudaimonia* generally (e.g. Ackrill, 1980, pp. 21–22).

In envisaging those typical cases of tooth brushing or travelling to work, Aristotle’s view can handily concede that some people might brush their teeth or travel to work without seeking any further end, perhaps relishing the erotic pleasure of the bristles, or the voyeurism of the journey, such that they might engage in such activities even if their teeth were already clean, or they had a day off from work. In Derrida’s terms, our normative positing of the typical case of tooth brushing, as conducive to health, does ‘violence’ to the atypical, marginal, even strategically pathologised case of tooth brushing as an erotic experience. Even for those people (much as we might wonder at Kafka’s Samsa or Freud’s Rat Man as symbols of primordial revolt) it would be difficult for *all* of their day-to-day activities – tying their shoelaces, locking the door, walking down the stairs – to be performed solely as ends in themselves. The problem would not be insanity, so much as sheer exhaustion.

On the other hand, as we have already seen, the atypical, the quirky, the marginal, the unconventional or the unfamiliar must not so readily be equated with the irrational; or, if they be called irrational, the irrational must not too hastily be excluded from dialectical or objectivist accounts of

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the good. Otherwise, like ethical dialectics, ethical objectivism risks collapsing into the sheer equation of reason with dominant preferences, entailing the very authoritarianism and conventionalism which Aristotle's dialectics and objectivism intrinsically challenge. Notwithstanding those caveats, law never proceeds, and never could proceed, on the assumption that all or most mundane activities are undertaken as ends in themselves. In terms of assuming the more instrumental ends to be subordinate, as goods, to the ends which they serve, law pervasively follows Aristotle's description of higher and lower aims. Hart's 'secondary' rules, aimed not as ends in themselves, but to facilitate 'primary' rules (Hart, 1994, pp. 79–99), provide one application, if not perforce one that would have wholly satisfied Aristotle (Heinze, 2007a, pp. 116–20, 130).

All of those acts, brushing one's teeth or travelling to work, which are undertaken not for their own good, but for some other good, are, for Aristotle, by definition, less good than that latter good. Aristotle has not yet refuted ethical relativism, but, in distinguishing between means and ends, has taken a step, through the meta-ethical premise that the constant pursuit of many kinds of goods does not imply that all are of indifferently equal worth. A hallmark of an objectivist, rationalist meta-ethics is the demonstration of that hierarchy of superior and subordinate goods, as opposed to morally indifferent, indeterminate or incommensurable ones. Once again, Aristotle is not merely developing his own positive ethics, but is asserting a meta-ethical condition of any rationalist ethics:

'Now, as there are many actions, arts, and sciences, their ends also are many; the end of the medical art is health, that of shipbuilding a vessel, that of strategy victory, that of economics wealth. But where such arts fall under a single capacity – as bridle-making and the other arts concerned with the equipment of horses fall under the art of riding, and this and every military action under strategy, in the same way other arts fall under yet others – in all of these the ends of the master arts are to be preferred to all the subordinate ends; for it is for the sake of the former that the latter are pursued.' (NE I.i.1094a6–16, emphasis added)

That distinction between ends and means allows many goods to be ruled out as foundational norms for law. Parking violations or statutes of limitations, like tooth brushing or travelling to work, are arguably goods, but are not plausibly foundational. They typically serve greater goods. The distinction, by nevertheless admitting at least some end of action as necessarily good in itself, equally limits the problem of infinite regress, whereby every act would only ever achieve the good of some anterior good ad infinitum. Any theory of law would entail a hierarchy of goods. Consider the example of orthodox Marxism, which might conventionally be thought the very antithesis of Aristotelian ethics (though Marx and Engels, never specifically discussing meta-ethics, cannot be read as categorically rejecting a meta-ethical interpretation of their positions). Bourgeois revolution is good not for its own sake, but for the sake of overcoming feudal aristocracy; proletarian revolution is good not for its own sake, but for the sake of overcoming bourgeois hegemony; socialism is good not for its own sake, but for the sake of promoting a politically, economically and psychologically liberated population; the demise of the state is good not for its own sake, but for the sake of ultimate communal and individual self-realisation in communism (Marx and Engels, 1990). For Aristotle, we can progress towards an objective foundation for law by reasoning about those ends which can most plausibly be said to be worthy in their own right:

'If, then, there is some end of the things we do, which we desire for its own sake (everything else being desired for the sake of this), and if we do not choose everything for the sake of something else (for at that rate the process would go on to infinity, so that our desire would be empty and vain), clearly this must be the good and the chief good.' (NE I.ii.1094a18–22, emphasis added)

Ethical dialectics and objectivism do not imply all-or-nothing results. To assume the superiority of a highest good is not to assume that all alternatives are equally bad, nor that some alternatives might not contain considerable good. The apple tree planted in fertile soil will flower most fully. The tree
planted in sand will die. For the apple tree, fertile soil is superior to sand. Yet there are intermediates between fertile soil and sand. The tree in partly sandy, partly fertile soil will flower to some degree, and there are many such greater and lesser degrees. There may be little or no perfect soil. The tree may blossom, and may even blossom well, without blossoming as fully as possible. Aristotle’s ideal polity may provide the best constitution (e.g. *Pol. III.1260b* 27–28), while tyranny may provide the worst (e.g. *Pol. IV.ii.1289b* 1–2), but kingship, aristocracy, oligarchy and democracy can provide relatively greater or lesser degrees of good law. If our aim, be it only for the sake of argument, is the best possible soil, then it is not, on a relativist view, any soil at all; nor necessarily, on an idealist view, the one soil that is so perfect that it is unattainable. The desideratum of some ascertainably best possible regime is meta-ethically presupposed by any normative theory of law. In that sense, law presupposes objectivist ethics.

For Plato, the greatest possible justice is not the greatest possible happiness for any one class of individuals – not even for the philosopher rulers, who might have to provide service to society when they might prefer to retire to study, as Plato suspects they would. Rather, it is the greatest possible happiness of the community as a whole (R. 4.420b, 7.519e). Similarly, a child may proceed to some kind of life with poor education. Yet parents commonly prefer for their children a good education – indeed, not just a *good enough* education, but the best possible education, the most fertile soil. Deconstructionists send their children to good schools, over and above poor or poorly educated parents who lack such means. They do so because of their belief that some schools are better than other schools. Even the best school will not guarantee a fulfilling life, but, they appear to believe, will augment its likelihood – which, they appear to believe, is good. Whatever may be their mental deliberations, their practical calculation is stunningly basic.

Plato’s and Aristotle’s detailed discussions of competing constitutional regimes reflect their view of greater or lesser degrees of good law. Plato’s backhanded compliment to democracy is to dub it the least worst (e.g. *Stm. 303b*; cf. *Pol. IV.ii.1289b* 1–2), which, for such a constantly ironic writer, may be very good indeed. Whole societies may get by with *good enough* laws. Plato and Aristotle think that many societies do. But they think the best possible laws will most likely produce the most prosperous societies. Aristotle makes that ideal explicitly and systematically meta-ethical, and not merely one arguable feature of just another positive ethics.

### 5 Law presupposes a best constitution

Aristotle immediately identifies the activity that leads to the greatest good, claiming that ‘politics appears to be of this nature’ (*NE I.ii.1094* 27). ‘Politics’ translates *politeia*. Unlike the English term *politics*, *politeia* etymologically recalls the specifically Greek sociopolitical form of the *polis*, variously rendered into English as *city*, *state*, *city-state*, *society* and sometimes other terms (Kraut, 2002, pp. 13–14). In much of ancient Greece, as Thomas Martin observes:

‘[T]he polis included . . . an urban center [and] countryside for some miles around, dotted with various small settlements. Members of a polis, then, could live both in the town at its center and also in villages or isolated farmhouses scattered throughout its rural territory. Together, these people made up a community of citizens embodying a political state, and it was this partnership among citizens that represented the distinctive political characteristic of the polis.’


In this article I retain the Greek singular *polis* and the plural *poleis* untranslated, and I reinsert them as such into the translations (as English grammar obviates declension). Richard Kraut counts over 1000 ancient Greek *poleis* (Kraut, 2002, p. 12), though many would have been very small. Athens figured among the largest, wealthiest and most powerful. It was simultaneously far less, and far more, democratic than any democracy today. It was far less democratic, since an estimated ninety percent of the population, including women, slaves and non-indigenous merchants (‘metics’), were excluded from participation in
political and legal institutions (Roberts, 1998, chapters 2–3). It was far more democratic, since the ten percent that held those privileges participated directly, unlike today's representative legislatures, which leave overwhelming numbers of citizens scarcely more involved than chucking the occasional voting form into a ballot box once every few years, if they even do that (Taylor, 1992, pp. 29–50).

Crucial to Aristotle's ideal polis is government of and by citizens who know each other. Community structure and political organisation are the same thing (Kraut, 2002, pp. 14–19).

Today, it is impossible for us to identify in our own societies any greatest good like Aristotle's politike. For us to cite 'national' politics would be to name levels of faceless, managerial organisation, vastly abstracted from individual lives and communities (e.g. Taylor, 1992, p. 32 et passim). To cite 'local' politics or 'community involvement' would be to name spheres that are too politically subordinated to compare to Aristotle's politike. To cite 'humanity' would be to cite the most abstracted, arguably most hollow entity of all (Heinze, 1999, p. 35).

Whether Aristotle's positive ethics are right or wrong in identifying the citizen-based polis as the best form of constitution, his meta-ethics suggests that justice is thinkable only within the context of a specific social and constitutional entity, which must be described if any theory of justice is to be plausible. Also derivative from 'polis' is politeia, which Aristotle uses in two senses. He uses the word generically, to mean any form of 'constitution', but also coins it to stand for his own model of the best possible constitution (Kraut, 2002, p. 15). By analogy, we might use the word 'circle' in an ideal, technical sense to denote a mathematically 'perfect circle', but also in a broader sense to denote shapes that are effectively circular, like motorway roundabouts or lollipops, albeit not in a mathematically perfect way. Circles in that generic sense are more or less circles insofar as they approach or deviate from the perfect circle.

For Aristotle, a constitution in the generic sense, like an apple tree, is more or less a constitution insofar as it approaches or deviates from the best possible constitution. (Note that the work which we, following Cicero, translate as Plato's 'Republic' bears the Greek title 'Politeia'; Bloom, 1991, p. 439).

In our own day, theorists have wondered whether a system might be so bereft of clarity, regularity or due process as to lack altogether any serious title to be called 'law', being altogether the opposite of law, a sheer system of brute coercion (Fuller, 1969). At some point, a roundness may become so irregular that it can no longer plausibly be called 'circular'. Similarly, as noted earlier, Aristotle questioned whether either extreme democracy – the unconstrained majoritarianism of sheer mob rule – or extreme tyranny could be called constitutional forms at all.

We must not too casually translate politeia as 'constitution'. Its etymology links it to a form of polis, and not to any conceivable form of social organisation. For Aristotle, any larger entity too far beyond the proportions of the polis inevitably disconnects citizens, or rather subjects, from government and law, rendering it actually or functionally tyrannical in its inability to allow humans to realise that which is most human, namely, interactive, communally participatory political being. Rousseau will famously re-state that point (Rousseau, 1964, pp. 386–87). Irrespective of our agreement or disagreement with Aristotle's own favoured regime, his meta-ethical point is that normative reason about law entails normative reason about the best constitution.

6 Law presupposes a positive ethics

Identifying the highest good with active, committed participation in the polis, Aristotle's positive ethics envisages the opposite to the fundamentally rule-bound concepts of law that emerge from legal scholars' occasionally isolated readings of corrective and distributive justice in Book Five of the Ethics.25 Central to Aristotle's positive ethics is a legal system not fundamentally deriving from, nor

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fundamentally subjecting us to, regimes of rules, let alone rules whose decisively legal character is coercive. His ideal regime arises out of shared values and undertakings. Those who rule and are ruled, those who bind through law and are bound by it, are the same people. They continually interact, as critically and collectively self-determining citizens.

A non-participatorily imposed, uncritically reflected ‘habit of obedience’ (Austin, 1998, p. 193), or sheer aggregation of ‘primary and secondary rules’ (Hart, 1994, pp. 79–99), may indeed suffice to sustain some sufficiently identifiable regime of law; but ‘no one would call a man just who did not enjoy acting justly’ (NE I.viii.1099*17). That requirement of ‘enjoyment’ rings totalitarian in a society bereft of critically minded citizen participation, which, far from incidental to the Aristotelian polis, is its defining element. From Aristotle’s perspective, our own legal systems, managed by comparatively small, distant coteries, who are largely unknown to us, smack far more strongly of totalitarianism, or what he calls ‘tyranny’, the hallmark of which is pervasive alienation of the ruled from the rulers. As Richard Kraut observes, ‘Aristotle is not proposing a theory about what the government should do, but about what the whole body of citizens should do […] the question “how should we organise our offices?” cannot be answered in isolation from a discussion of the more basic question, “how is it best to live?”’ (Kraut, 2002, p. 15). Aristotle is not interested in just any structural question we might ask about law, but in the most socially important question which we must ask about law; he inherits from Plato (R. I.331b) the view that the most important question is not ‘What is law?’, but ‘What is justice?’. The meaning and function of the former question always remains subordinate to those of the latter; hence his couching of normative discussions of law within discussions of ethics and politics. Kraut further notes that ‘the just person, as Aristotle conceives him, is not a merely passive follower of rules. It is not sufficient to know what the norms of one’s community are, and to abide by them’ (Kraut, 2002, p.107).

Having identified the greatest good as politics – politike in the sense of active, ongoing participation within a polis – Aristotle explains how the goods available through all other forms of ‘expert knowledge’ subordinate themselves to it:

‘[F]or it is [politics] that ordains which of the sciences should be studied in a state … and we see even the most highly esteemed of capacities to fall under [politics], e.g. strategy, economics, rhetoric; now, since politics uses the rest of the sciences, and since, again, it legislates as to what we are to do and what we are to abstain from, the end of this science must include those of the others, so that this end must be the good for man.’ (NE I.ii.1094*28–94b7)

To identify the greatest good as collective is not obvious. Aristotle always praises social cohesion, but never speaks of the ideal polis as a mystical entity possessing life or soul beyond those of its members. It could be argued, then, that the good of the polis is pursued not for its own sake, but, precisely to the contrary, for the good of its members. On that view: (a) the greatest good is the good of individual humans; and (b) the good of the polis is subservient to that greatest good: the better the polis, the more and better is the good of its individual members.

Aristotle draws no such distinction, however, between the ends of the polis and those of any or all individual members. The individual and the polis share the same ends. In Broadie’s view:

‘[Aristotle] thinks that the good is the same for a single person and for a [polis] not in the sense that the city, like the person, is an individual that can have a good, but in the sense that the question “What is the chief human good?” concerns anyone organising human life, whether at the private or communal level.’ (Aristotle, 2002, p. 264)

Aristotle continues:

‘For even if the end is the same for a single man and for a polis, that of the polis seems at all events something greater and more complete both to attain and to preserve; for though it is worth while
to attain the end merely for one man, it is finer and more godlike to attain it for a nation or for poleis.'

(NE I.ii.1094b7–11)

If there is no complete understanding of law without normative reason, then, whether or not we agree with Aristotle’s positive ethics, there can be no such thing as law without some positive ethics. The best possible legal system and the best possible ethical system become conjoined enterprises.

Intellectual revolutions in the West frequently trace back to some revolt against Aristotle. Copernican heliocentricity vanquishes Aristotle’s geocentric kosmos. Genetic science casts an ominous cloud over teleological biology. In the realms of law, politics and ethics, perhaps no onslaught has been as incisive as the various post-Nietzschean attacks on rationalism. Martin Heidegger’s Sein und Zeit cuts to the core, rejecting a metaphysics that collapses all of Being into that which is ‘present’ (vorhanden) or formally demonstrable, i.e. logos ‘vorwiegend als Aussage’ (Heidegger, 1979, p. 165) or ‘im Sinne des aufweisenden Sehenlassens’ (Heidegger, 1979, p. 32), and which reaches far enough to challenge Book One’s suggestions about the fundamental commensurability of goods, and, accordingly, about dialectical and objectivist ethics. At the very least, Aristotle recognises that styles of thought are by no means identical for all areas of human activity. Aristotle’s rationalism in no way entails a Kantian a priorism, by which the categorical imperative stands independently of everyday, sensory experience, such that we might resolve ethical questions, and indeed construct an entire legal system, merely through adequate reflection on the meanings of concepts. Critical engagement with law’s positive ethics cannot proceed in abstraction:

‘Our discussion will be adequate if it has as much clearness as the subject-matter admits of; for precision is not to be sought for alike in all discussions.’

(NE I.iii.1094b12–13)

Consider another analogy. As between chocolate cake, spice cake and lemon cake, which one provides ‘the greatest good’? One might apply a nutritional standard, assessing relative quantities of sugar, fat and the like. Indeed, as between chocolate cake and broccoli, the nutritional standard might be highly probative. As between these three types of cake, however, there is some chance that nutritional analysis might scarcely distinguish between them. It is by no means clear, however, that only the nutritional standard is relevant, particularly when, as in this case, it may produce an inconclusive result. From other viewpoints, like a culinary one, there are great differences among the three types, and they are not interchangeable. Still, even though the culinary standard might go further in distinguishing between the three types, there remains doubt about whether that standard could tell how much ‘good’ each cake provides. We would presumably have to resolve the matter by calling it a question of sheer taste. None can be called distinctly ‘good’, except according to that subjective, normatively relativist measure.

It is surely correct, then, that some differences of opinion are purely subjective. From that proposition, some sophists inferred that differences of opinion as such are subjective, or are mere matters of habit or convention (e.g. Tht. 152a, 167c):

‘Now fine and just actions, which political science investigates, admit of much variety and fluctuation, so that they may be thought to exist only by convention, and not by nature.’

(NE I.iii.1094b14–16)

For Aristotle, plausible subjectivity, relativism or conventionalism on some differences of opinion does not entail them for all questions on which differences of opinion might arise. Some things are indeed better than others ‘only by convention’, but justice is better than injustice ‘by nature’. On what grounds can such a distinction be drawn? Broccoli’s superiority over chocolate cake cannot be deduced from sheer tasting, which might well yield precisely the opposite conclusion. It follows only from examination of a broader pattern, extended over time or over individuals. It is law-bound, generally true (i.e. more than just randomly or incidentally true) over a meaningful number
of instances, distinguishing nutritional from culinary superiority. It is unlike any individual, purely culinary preference for chocolate cake at a particular instance, which prevails regardless of any law dictating broccoli’s nutritional superiority. That law-bound quality is not rule-bound in any mechanical sense. Someone eating nothing but broccoli over a long time might benefit from something different, even from cake. Similarly, for Aristotle, law as *nomos* is too contextual, too steeped in complex relationships of acts and values for ‘law-bound’ to mean ‘strictly rule-bound’.

Nor does the fact that some things are better than others ‘by nature’, i.e. in a law-bound way, mean that their superiority is immediately manifest. When Aristotle contrasts truth or goodness by nature with truth or goodness by convention, he suggests that things discoverable as true or good by nature, through dialectical inquiry, are not perforce those appearing true or good in immediate experience. The former become true through a sufficiently law-bound character which fails to inform the latter to the same degree:

‘When the objects of an inquiry, in any department, have principles, causes, or elements, it is through acquaintance with these that knowledge and understanding is attained. For we do not think that we know a thing until we are acquainted with its primary causes or first principles, and have carried our analysis as far as its simplest elements [...] The natural way of doing this is to start from the things which are more knowable and clear to us and proceed towards those which are clearer and more knowable by nature; for the same things are not knowable relatively to us and knowable without qualification. So we must follow this method and advance from what is more obscure by nature, but clearer to us, towards what is more clear and more knowable by nature.’

(Phys. I.184a10–21, italics added)

For Aristotle, good cake is a question of taste, precisely unlike justice, because cake, unlike justice, is not at all of the type of thing that is pleasant ‘by nature’, i.e. through any law-bound quality. No dialectical enquiry can proceed beyond our immediate sensations of chocolate, spice and lemon towards superiority of one or the other by nature. Value judgements about it remain subject to personal preference. From that observation, it does not follow that all normative evaluations are equally random. Some are more like the apple tree than the cake:

‘[F]or most men their pleasures are in conflict with one another because these are not by nature pleasant, but the lovers of what is noble find pleasant the things that are by nature pleasant; and virtuous actions are such, so that these are pleasant for such men as well as in their own nature. Their life, therefore, has no further need of pleasure as a sort of adventitious charm, but has its pleasure in itself.’

(NE I.viii.1099a12–16, italics added)

From the premise that the justice or injustice of our deliberated acts are just or unjust by nature, Aristotle does not infer a fixed human nature that is just or unjust. He does not think, like Rousseau, that we are just by nature, but corrupted by society, nor, like Hobbes, that we are unjust by nature, through necessary selfishness, until we are corrected by society. Aristotle postulates neither an inherently thriving nor inherently withering tree regardless of the soil. The soil is all. The tree’s nature is to respond to it:

‘[M]oral virtue comes about as a result of habit [...] [N]one of the moral virtues arises in us by nature; for nothing that exists by nature can form a habit contrary to its nature. For instance the stone which by nature moves downwards cannot be habituated to move upwards, not even if one tries to train it by throwing it up ten thousand times [...] Neither by nature, then, nor contrary to nature do virtues arise in us; rather we are adapted by nature to receive them, and are made perfect by habit.’

(NE I.i.1103a16–25, retaining Ross’s term ‘virtue’)

For Aristotle, the best or highest purpose of human law – justice – is neither something hovering divinely over us (contrary to vulgar accounts of natural law), nor something merely imagined within
us. It is a potentiality, and must be cultivated; that is the most important human mission. Unsurprisingly, as for Plato, law’s primary task, and its primary support, is education aimed at cultivating character (e.g., *Pol. VIII*). Again, regardless of whether we agree with Aristotle’s positive ethics, his meta-ethics presuppose that any ethics underlying law, albeit objectivist (i.e. anti-subjectivist, anti-relativist) and law-bound, need be neither strictly rule-bound nor immediately apparent in its law-bound quality. Matters of law, justice or ethics plunge reason into a complex world of lived experience:

‘We must be content, then, in speaking of such subjects and with such premises to indicate the truth roughly and in outline, and in speaking about things which are only for the most part true and with premises of the same kind to reach conclusions that are no better. In the same spirit, therefore, should each type of statement be received; for it is the mark of an educated man to look for precision in each class of things just so far as the nature of the subject admits; it is evidently equally foolish to accept probable reasoning from a mathematician and to demand from a rhetorician demonstrative proofs.’

(NE I.iii.1094b19–27, Ross’s italics, retained in Ross-Urmson-Barnes)

Again, one thinking along Kantian a priorist lines would only need to reason hypothetically in order to reach correct ethical conclusions. Aristotle never presents his ethical dialects or his ethical objectivism in that way. Some adequate, everyday experience, and even emotional maturity, is ethical reason’s resource. Aristotle famously observes:

‘[A] young man is not a proper hearer of lectures on political science; for he is inexperienced in the actions that occur in life, but its discussions start from these and are about these; and, further, since he tends to follow his passions, his study will be vain and unprofitable, because the end aimed at is not knowledge but action. And it makes no difference whether he is young in years or youthful in character; the defect does not depend on time, but on his living, and pursuing each successive object as passion directs. For to such persons, as to the incontinent, knowledge brings no profit; but to those who desire and act in accordance with a rational principle knowledge about such matters will be of great benefit.’

(NE I.iii.1095a2–11)

7 Law presupposes a concept of the ‘human’

Within Aristotle’s positive ethics, even politics as politiké cannot lay unqualified claim to being or to achieving the highest good. Committed political activity can produce disastrous results. What, then, must politics aim to achieve? Once again, the reply, expressly invoking a popular and ordinary notion, seems trivially obvious:

‘Let us . . . state, in view of the fact that all knowledge and choice aims at some good, what it is that we say political science aims at and what is the highest of all goods achievable by action. Verbally there is very general agreement; for both the general run of men and people of superior refinement say that it is happiness.’

(NE Liv.1095a14–18, italics added)

‘Happiness’ translates eu­daimonia. That word’s etymology means ‘good spirit’ (Kraut, 2006, p. 53), though Aristotle’s interpretation of it entails nothing supernatural. In observing the common, ‘verbal’ agreement among people that the highest good is happiness, Aristotle recognises that we can find easy enough consensus on that value, only to end up disagreeing on what, exactly, it is, or requires or produces. For Aristotle, then, eu­daimonia plays a meta-ethical role. Any positive ethics as such must assume and aspire to some eu­daimonia, even if opinion varies on what eu­daimonia is or how it is best pursued. Aristotle goes on to make that point: ‘with regard to what happiness is [people] differ’ (NE Liv.1095a20). Ethical objectivism is of little value if it can produce only an empty
formalism, a hollow ideal of ‘happiness’, embracing no shared concept about what it is, thus immediately degenerating into relativism as soon as we seek specific content for it:

‘[T]he many do not give the same account [of happiness] as the wise. For the former think it is some plain and obvious thing, like pleasure, wealth, or honour; they differ, however, from one another – and often even the same man identifies it with different things, with health when he is ill, with wealth when he is poor; but, conscious of their ignorance, they admire those who proclaim some great ideal that is above their comprehension.’ (NE I.iv.1095a20–26)

Kant admittedly poses a challenge, not simply to positive eudaimonism, but, more importantly, to Aristotle’s meta-ethical eudaimonism. For Kant, justice requires only obedience to moral law, irrespective of any consequential pleasure or benefit. To be sure, for Aristotle, eudaimonia is not merely consequential enjoyment or benefit. It constantly involves duty-bound conduct. Moreover, Kant concedes happiness – certainly a communal and duty-bound concept of happiness – as deeply relevant to moral law, albeit not its decisive principle. For Kant, even a eudaimonist positive ethics would be justified only derivatively, on grounds of strict adherence to moral law. In view of that Kantian challenge, and any other such challenges, can Aristotle’s eudaimonism stand as meta-ethical?

Aristotle depicts eudaimonia as both ‘living well and doing well’ (Liv.1095α18, retaining Ross’s original). Irwin observes that, in identifying eudaimonia with both ‘living well and doing well’, Aristotle ‘suggests that eudaimonia (a) involves one’s life as a whole, and (b) consists in action’ (Aristotle, 1999, p. 175). Aristotle rejects an individualised, isolated or private understanding of happiness. There is no purely personal, purely private happiness. In response to Athens’ highly commercial economy and values of individual freedom, Plato had asked, ‘Doesn’t [the] privatisation of pleasures and pains dissolve the city?’ (R. 462b–c). Individual happiness arises through participation in society – not a rote, coerced, brainwashed, Orwellian participation, but participation that effectively helps to maintain or to improve overall welfare. Aristotle’s eudaimonia is political, i.e. of the polis.

Aristotle rejects a purely ‘managerial’ regime of law, by which rule over humans would scarcely differ from rule over livestock. Managerial law devises norms and practices to promote, perhaps, an inertly, materially satisfied, yet a wholly subjected, politically passive populace. Aristotle’s eudaimonia is realised only insofar as the citizen who is bound by law also regularly takes part in the deliberations and processes of making and applying law. That view resonates with the aforementioned one that, lacking experience, ‘a young man is not a proper hearer of lectures on political science’ (NE I.iii.1095a2). Aristotle’s eudaimonist, citizen-based concept envisages the making and application of law as the product of citizens constantly involving their own immediate experience of community life and circumstances. For Aristotle, then, law presupposes a concept of the human, of the best possible human life as contrasted with sheer survival. Kant, too, theorises the human, the highest expression of which he finds in reason’s amenability to universal law. Once again, further theories could be added. Christian natural law theorises the human in terms of fall and salvation; libertarianism, in terms of maximum individual freedom, and so forth. For all their differences, then, Aristotle suggests the meta-ethical principle that each positive ethics attributes to law some concept of the human.

Aristotle is a naturalist, who will bequeath extensive observations of animal species (e.g. Gen. An.; Hist. An.; Part. An). The individual and group traits of animals interest him; indeed even the less empirical work of Plato often examines animal conduct for insight into humans. Some animals, upon maturity, leave their mothers and lead solitary lives, associating only sporadically to mate. Their good arises through solitary survival. Others, like bees, are collective to the point of living like a single organism, the survival of one readily sacrificed for the good of all. Such references are common in ancient writings, as, even today, naturalists examining animal behaviour (care, aggression, etc.) may be raising questions of interest to human relationships.
It is in earnest, then, that Aristotle asks what kind of animal the human is. It is a way of contemplating conspicuously human traits, which may serve to identify what is distinct about humans’ best conditions for life. Aristotle distinguishes us, calling the human being a ‘political animal’ (NE I. vii.1097b11). That English translation has acquired such different meanings, however, that translations often avoid it, preferring, for example, ‘man is born for citizenship’ (Aristotle, 1941, p. 942), ‘man is sociable by nature’ (Aristotle, 1984, p. 1734) or ‘man is by nature a civic being’ (Aristotle, 2002, p. 101). The colloquial English phrase ‘political animal’ has come to suggest slick or manipulative conduct, geared toward self-promotion, in government or other institutional settings. Aristotle’s point is ontological, intending, at least ideally, the opposite of opportunist self-interest. Our fundamental ‘nature’ is part and parcel of society. Its laws will manifest in our constitutive individual and social being. In Broadie’s words, ‘human nature comes to full development’ in the polis (Aristotle, 2002, p. 275):

‘[T]he complete good is thought to be self-sufficient. Now by self-sufficient we do not mean that which is sufficient for a man by himself, for one who lives a solitary life, but also for parents, children, wife, and in general for his friends and fellow citizens, since man is sociable by nature.’

(NE I.vii.1097b8–11)

What causes something to be a human being? The material cause is arms, legs, brain, heart, lungs and other organs or attributes. The formal cause is the specific arrangement of those things in contrast to the arrangement which would produce an ape or a cat. The efficient cause is conception, germination and birth. But the final cause? The function of the human, like the economic, military or leisurely function of a ship? Such a question creates some embarrassment for Western modernity. Starting with Machiavelli and Hobbes, political and legal philosophy certainly ask what is good for us, but rarely asks how such good serves some broader purpose of the human being as such. Starting with Bacon and Descartes, scientific enquiry can tell us more and more about the material and efficient elements of both organic and inorganic phenomena (the formal elements rendered superfluous), but defines purposive, teleological inquiry as, by definition, beyond the scope of empirical analysis, consigning it to the supernatural.

For Aristotle, both the human and the good, hence the legal regime which betokens us as ‘naturally political animals’, can be understood only in terms of that broader purpose. Again, a tulip may flower in partly sandy soil, but will flower more fully, and in that sense, for Aristotle, most fully realise its ‘end’ (telos) in fertile soil. Children may survive with little education, but, we widely feel, can more fully realise their ends as human beings with good education. Material, efficient and formal cause provide complimentary, and not surrogate, explanations to the purposive.

For Aristotle, the function of plants, unlike that of humans, does not extend beyond ‘nutrition and growth’ (NE I.vii.1098a2), which cannot therefore be specifically human. Aristotle then proceeds to distinguish us from other animal species:

‘Next there would be a life of [sense] perception, but it also seems to be common even to the horse, the ox, and every animal.’

(NE I.vii.1098a2–3, italics in Ross-Urmson-Barnes)

The function of the human is to be found, then, in what distinguishes the human animal, namely, reason, as already anticipated by our characterisation as ‘naturally political animals’:

‘There remains, then, an active life of the element that has a rational principle [. . .] [L]ife in the sense of activity is what we mean; for this seems to be the more proper sense of the term. Now if the function of man is an activity of soul in accordance with, or not without, rational principle, and if we say a so-and-so-and a good so-and-so have a function which is the same in kind, e.g. a lyre-player and a good lyre-player, and so without qualification in all cases, eminence in respect of excellence being added to the function (for the function of a lyre-player is to play the lyre, and that of a good lyre-player is to do so well): if this is the case . . . human good turns out to be
activity of soul in conformity with excellence, and if there are more than one excellence, in conformity with the best and most complete.’ (NE I.vii.1098a3–18)

The distinctively human is defined as both political and rational, as, alone, neither attribute would suffice. To define us only as ‘rational’ would not logically contradict a non-political nature; and to define us only as ‘naturally political’, without adding the ‘rational principle’, would leave indeterminate the specific traits of the human polis as compared to other animal collectives, which, however sensitive, intuitive or astute, show no evidence of organizing their communal life according to deliberative, dialectical reason. Aristotle identifies the distinct function of the human life, then, with reference to ‘the element that has a rational principle’, which, in turn, enables ‘activity of soul in conformity with excellence’.

That view would have considerable consequence for natural law theory. In the Western tradition, faith-based natural law posited God and His revealed law as authoritative, beyond rational demonstration. The revival of Aristotle in Europe in the Middle Ages struck a blow to faith-based natural law, spurring a rationalist theology which would argue that revealed law can be substantiated through dialectical reason, nowhere more rigorously than in the theology of St Thomas Aquinas. Aquinas alters Aristotle, insofar as salvation becomes the overriding purpose of deliberate human activity, displacing Aristotle’s concept of constructive participation within the polis as the highest good, and therefore the highest aim for law.

References


