CHAPTER III

ARISTOTLE

Aristotle spurns me, as colts kick
out at the mother who bore them.

Plate

Greek thought had formulated, by the time Aristotle began
to write, the frame of general legal conceptions which
from that day to the present has been the staple of Western
jurisprudence. Aristotle developed those conceptions in two
directions. He subjected them to the tests of a highly for­
malized methodology, and he incorporated them as thus refined
in a body of thought that was never closed, and that was
more complete than any previously known.

Methodology in Socrates’ hands was the cross-examining
elenchus of the lawyer. He assumed, in opposition to the
Sophists, that although a word might be used in many senses,
nevertheless it properly stood for some one general meaning
which it was the goal of inquiry to discover. Thus in the Minos
his first question was “What is law,” and he proceeded to elicit
by questions the various meanings of the term, arriving finally
at a general definition. In Aristotle’s opinion this was a form
of induction, in the sense that the arguments were arguments
from analogy; he believed that Socrates was the first to recog­
nize the importance of induction and the first systematically
to use the method to reach general definitions.¹ Plato’s dia­
lectic cannot be caught in a formula; in the wonderful efflor­
escence of methodological activity to be observed in the

¹ Meta. 1078b 28.
dialogues the elements of many of our modern procedures can be detected. Some of his principal methods had a strong influence upon lawyers. A characteristic legal expression of his method of the Idea as the hypothetical premise is the utilization by the courts of natural or "higher" law propositions as points of departure for the reasoning that leads to decision; his method of division has always been an approved technique in legal analysis, and appears for example in the separation of public and private law.

Aristotle took the methodology of his predecessors and cast it into a formal system of valid inference, which has never lost its dominance in logical thinking. Its importance for the law has been twofold. In the judicial process the Aristotelian logic has been the basis of effective legal analysis from Roman times to the present. For jurisprudence, Aristotle’s works represent the first example of the use of a precise scientific method in the exploration of legal propositions. Platonists have made out a strong case that most of the roots of Aristotle’s methodology, even the syllogism, are present in the writings of his great teacher. Nevertheless, putting aside the question of originality, the systematization of formal logic as a distinct domain of knowledge, if not as an independent science, is undeniably an achievement of Aristotle. In modern times the Aristotelian logic has been rectified and further generalized by later systems. Lukasiewicz and others have devised alternative systems of logic by basing their systems on new definitions and different primitive ideas. The major premise of the Aristotelian logic has been reduced by modern logic to the status of an hypothesis. Nevertheless, the basic principles of the Aristotelian logic operate in the domains of all the alternative systems. Notwithstanding many dogmatic statements to the contrary, no non-Aristotelian logic has yet been formulated in the sense in which we have non-Euclidean systems of geometry. That is to say, no logic has been devised which assumes the contrarieties of the laws of identity, contradiction and excluded middle to be true even when taken as
necessary formal conditions of inquiry, and not in their Aristotelian ontological interpretation, and which permits the making of valid inferences. To his logical methodology Aristotle added an empirical procedure that included a constant reference to the facts of observation and the views of other investigators. Whatever may have been its limitations in Aristotle’s hands when judged by its results or ontological bias, his methodology possessed all the requirements of modern scientific method. At bottom it was the method of hypothesis and verification. He had an extraordinary genius for the perception of problems, which he attempted to solve by methods that in their formal aspects are still the mainstay of valid inquiry. In all this he never lost sight of the necessity of system, the requirement that verified propositions should be systematically inter-connected.

Thus with Aristotle we are for the first time brought face to face with an effort to deal with legal materials systematically, by justified methods and as part of a larger whole. He took the legal ideas that Plato with a lavish hand had scattered throughout his dialogues, and arranged them in a scheme which as a whole attempted to explain human conduct in its most essential aspects. He assigned to jurisprudence what must always be its main task, the establishment of a rational legal order for a given society.

The Contingency of Legal Method

Aristotle held that the end of theoretical knowledge was truth, that of practical knowledge action. He divided the sciences into the theoretical, which had as their object knowledge for its own sake, the practical, which sought knowledge as a guide to conduct, and the productive, which employed knowledge for the creation of beautiful or useful objects. Politics, or what in view of the modern classificatory outlook we would term the social sciences, was the pre-eminent prac-

\[ ^2 \text{Meta. 993b 19.} \]

\[ ^3 \text{Meta. 1025b 25; Top. 145a 15; E. N. 1139a 27. The origin of the classification is Platonic. Phil. 55C-59A; Polit. 258E-260D. Diog. Laert. iii, 84.} \]
tical science. It should be emphasized that Aristotle attempted no separation of ethics and politics. Both were aspects of the "philosophy of human affairs," and he did not attempt, as is done today, to draw any distinction between them on the ground that the good of the state and the good of the individual were different, or that there was a class of "political duties" differing essentially from others. Inasmuch as Aristotle admitted only metaphysics, natural science and mathematics into the group of theoretical sciences that study knowledge for its own sake, it follows that the modern practice of studying the legal process for precisely that purpose runs counter to Aristotelian dogma. However, the unsoundness of the practice is not apparent, and Aristotle's own contributions to the analysis of jurisprudence could be taken as evidence that he ignored his own rules. Aristotle's views may have been influenced by what practical men, e.g., statesmen, actually do; for, as he observed, even if they investigate how things are, practical men do not study the eternal, but what is relative and in the present.

Scientific reasoning in the Aristotelian system is distinguished sharply from dialectical or popular reasoning. Metaphysics, natural science and mathematics are alone regarded as sciences. The ideal of science is knowledge, and it takes expression as an ordered system of demonstrative syllogisms. Scientific knowledge is knowledge that necessarily cannot be otherwise. The dialectical syllogism reaches conclusions that are true upon the whole; its premises are probable, that is, they are accepted by all, or by the majority, or by the wise. Since demonstration alone gives us knowledge, a syllogism which reaches that result must have certain characteristics: (a) the premises must be true; (b) they must be undemonstrable, otherwise they will require demonstration in order to be known, for knowledge of things which are demonstrable means pre-

4 E. N. 1094a 18 et seq., 1141b 23 et seq.  
5 E. N. 1181b 15.  
6 Meta. 1026a 18.  
7 Meta. 993b 23.  
9 Top. 100b 23.
cisely to have a demonstration of them; (c) they must be the causes of the conclusion, since we possess scientific knowledge of a thing only when we know its cause; (d) they must be better known and prior to the conclusion, prior in order to be causes, and prior and better known in the sense that the truth of particular causes is more readily perceived, being closer to sense than universal causes.\(^{10}\) Aristotle’s concept of nature had a pronounced influence on his view of the constituents of science. He held that every demonstrative science has three elements: the genus which is posited, the axioms which are the primary premises of the demonstration, and the essential properties of the genus revealed by the demonstration.\(^{11}\) Aristotle is here plainly influenced by the fact that biology and geometry were the most advanced sciences of his time. Nevertheless, it is important to note that he generalized those elements beyond the model sciences of biology and geometry, and expressly recognized that some sciences might pass beyond them. His ultimate conclusion was that in the case of a demonstration the essential elements of demonstration were a subject matter, the basic premises, and that which is proved.\(^{12}\)

As generalized, the three elements are present in the demonstrations of scientific methodology today. But the heart of the Aristotelian theory—that demonstrative knowledge is syllogistic—is no longer regarded as valid. To take Aristotle’s own case of mathematics, it is plain that nothing would be gained by casting a modern mathematical argument into syllogistic form. Further, the material truth or falsity of the axioms is of no interest to the mathematician; he accepts them as given, and is concerned only with whether his theorems are implied by them. If he has a set of postulates he wants to know also if they are self-consistent and will never lead to a contradiction; but such knowledge has apparently never been vouchsafed to anyone. However, if we turn from mathematics to the empirical sciences the theory is still unacceptable. The

\(^{10}\) *An. Post.* 71\(b\) 9 et seq.
\(^{11}\) *An. Post.* 75\(a\) 42; 76\(b\) 14.
\(^{12}\) *An. Post.* 76\(b\) 16 et seq.
axioms of contemporary scientific practice are hypotheses. That is to say, they are propositions asserted for the purposes of study, without any suggestion as to their truth or falsity. There is no necessary requirement that they should be known to be true, or be "better known" before we have knowledge of the warranted conclusions. Generally when the material truth of the conclusions has been established, it confirms the probability of the truth of the axioms.

Methodology was always a troublesome matter to Aristotle; he had difficulty in making people understand that its characteristics necessarily varied with the subject matter. It is the customary, he insisted, that is intelligible. We find the strength of the familiar in the ancient laws, in which the mythical element prevails by force of habit over our knowledge of its childishness. Thus, some people will not listen to a speaker unless he gives a mathematical proof; others demand examples; still others want a poet cited as authority. Some want exactness, while others are annoyed by it, either because they cannot follow the reasoning or because they think it is pettifoggery. There is something about exactness, in philosophy as well as in business, that repels people. We must be trained in the proper method before we begin the study of a subject, so that we will know when to expect mathematical accuracy and when it would be out of place. It is absurd to seek simultaneously for knowledge and for the method of obtaining it; as a matter of fact, it is not easy to get even one of the two.\textsuperscript{13}

In the view of Aristotle, precision should not be looked for in jurisprudence, which is a part of the philosophy of human affairs; its conclusions are outside the realm of demonstration. They lie in the field of the contingent, the idea of which Aristotle asserted he was the first to investigate.\textsuperscript{14} He begins by noting that some things always come to pass in the same way,

\textsuperscript{13} Meta. 995* 3.
\textsuperscript{14} Phys. 196* 17. In the \textit{Protrepticus} written at the beginning of his philosophical career, Aristotle maintained the opposite position, that "the knowledge of unjust and just actions and of immoral and moral actions is similar to that of geometry and such like sciences." Rose, \textit{Aristotelis Fragmenta} (1886) 58-59 (Frag. 52).
and others for the most part. There is a third class, consisting of the irregular and exceptional. He also looks at this class from another point of view. Things happen per accidens (κατὰ συμβεβηκός); that is to say, a carpenter may happen to be a cultivated person, so that this accidental quality becomes part and parcel of the direct cause of the building. Such qualities are not necessary in a carpenter, and thus the erection of buildings by cultivated carpenters will happen neither always nor for the most part.

So far, he has been talking about the incidental production of some significant result by a cause that took its place in the causal chain incidentally, and without the result in question being contemplated. In order to arrive at the idea of "chance," he adds "purpose-serving actions" that accomplish "ends" when the result is such that would have been recognized as a purpose and would have determined the action, had it been anticipated. Thus, a man goes to the market-place to buy bread; he discovers his debtor receiving money from a third person and collects the money from him. The collection of the money was an accident of his journey to the market to buy bread; but if he had anticipated the recovery of the money it might have determined his action in going. Altogether, we are in the presence of chance, which can be defined as an incidental cause in the sphere of action for the sake of something, and which involves purpose.¹⁵

In this treatment Aristotle does not allow for a true contingency. What happened may have been unforeseen but it was nevertheless determined; the actions of the bread-buyer and the debtor followed separate lines of strict causality that intersected. He once implies that determinism operates throughout the whole of existence, and that accidents are only unintelligible exceptions which are as much subject to laws as the intelligible.¹⁶ Elsewhere, in denying the applicability of the law of excluded middle to statements about particular future events, he asserts the reality of an objective contingency, one

not a function of ignorance. If you state, tomorrow there will either be a sea-fight, or there will not be a sea-fight, this assertion will be necessarily true; but it is not the case either that tomorrow there will be a sea-fight or tomorrow there will not be a sea-fight.\textsuperscript{17} Hobbes\textsuperscript{18} attempted to meet this argument by pointing out that it says "no more but that it is not yet known whether it be true or not." Other statements by Aristotle imply a belief in a true contingency,\textsuperscript{19} and nowhere in his writings is there evidence of a belief in a general law of causality of the kind conceived, for example, by Mill.

These views are important when considered in connection with Aristotle's reflections on the methodology applicable to the study of human conduct. He remarks, first, that his analysis of conduct will be adequate if it achieves that amount of precision\textsuperscript{20} which belongs to its subject matter. We must not expect the same precision in all departments of philosophy alike, any more than in all the products of the arts and crafts, \textit{e.g.}, we make more exact tools from metal than from wood. The subject-matter of the science of human conduct, such as justice and virtue, exhibits so great a diversity and uncertainty that it is sometimes thought to have only a conventional, and not a natural, existence. Hence, reasoning with such conceptions, we cannot expect demonstrative and exact conclusions; we must be content with rough and general theories. Again, he inquires whether in appraising conduct we should proceed \textit{from} first principles or \textit{to} first principles; and he concludes that we should begin inductively with what we know, \textit{e.g.}, relative and not absolute truths.\textsuperscript{21} Finally, after stating the meaning of the idea of good, he observes that having drawn the outlines he must now fill in the details; the idea of the good

\textsuperscript{17} \textit{De Int.} 19a 30.
\textsuperscript{18} \textit{1 Works} (1889) 131.
\textsuperscript{19} \textit{Meta.} 1027b 10; \textit{De Gen. et Corr.} 337b et seq.; \textit{De Int.} 18a 33 et seq.; \textit{E. N.} 1110b 14.
\textsuperscript{20} \textit{E. N.} 1095b 13. \textit{ἀξιόθετη} here appears to mean "that \textit{mathematical exactness} is not suited to ethics, that too much \textit{subtlety} is not to be expected, that too much \textit{detail} is to be avoided." \textquote{1 Grant, \textit{Ethics of Aristotle} (3d ed. 1874) 450 n. 18.}
\textsuperscript{21} \textit{E. N.} 1095b 5.
is also a leading principle and, having been found, it amounts to more than half the whole science. He repeats his warning against expecting too much exactness and points out that while a carpenter and a geometrician both want to find a right angle, they do not want to find it in the same sense. Above all, he insists upon the practical nature of the study of human conduct. In such an enterprise it is by the practical experience of life and conduct that the truth is really tested, since it is there the final decision lies. We must, therefore, examine all conclusions by bringing them to the test of the facts of life. If they are in harmony with the facts, we may accept them; if they are in disagreement, we must deem them mere theories. In a practical science the end is not to attain a theoretic knowledge of the subject, but rather to carry out theories in action.

All this amounts to the method Mill considered alone applicable to the social sciences. As a strict determinist, Mill believed that it was incorrect to say that any phenomenon is produced by chance. Nevertheless he observed that “if all the resources of science are not sufficient to enable us to calculate a priori, with complete precision, the mutual action of three bodies gravitating towards one another; it may be judged with what prospects of success we should endeavor, from the laws of human nature only, to calculate the result of the conflicting tendencies which are acting in a thousand different directions and promoting a thousand different changes at a given instant in a given society.” However, he did not despair of approximating some of the aims of science in that field. Aristotle and Mill both began with a “general conception,” or in modern terms an hypothesis, which is subjected to verificatory tests. This procedure is often inverted, as we have seen, so that instead of deducing conclusions from principles, and verifying them by observation, we begin by obtaining them conjecturally

\[ E. N. 1098a 17 et seq. \]
\[ E. N. 1179a 16, 1179b 2. \]
\[ Logic (1864) 561. I Stewart, Notes on the Nicomachean Ethics (1892) 104. \]
from specific experience and afterwards connect them with general principles by a method of reasoning which provides a verification.

Inasmuch as the study of human conduct analyzes in Aristotle's opinion "things which are for the most part so," "things which are capable of being otherwise," his theory at bottom was that human affairs were ultimately contingent. Apart from human conduct the contingency of occurrences might be an appearance that was the product of partial knowledge; and if the logical connections of existence in that sense could be wholly understood, chance might be altogether eliminated. However, in human affairs he apparently accepted a radical contingency; thus the propositions formulated for that field of study would be approximate merely.

That is the generally accepted conclusion in all empirical sciences today. Locke endeavored to maintain the opposite view, on the ground that "the precise real essence of the things moral words stand for may be perfectly known; and so the congruity or incongruity of the things themselves be certainly discovered, in which consists perfect knowledge." Thus he held that we could attain a demonstrative knowledge of justice. This argument overlooks the fact that in an empirical inquiry any general statement about justice is always an embodiment of contingent data. All data of that kind are obtained by observation, and observation is never otherwise than approximate. Thus the laws of all the empirical sciences cannot escape contingency. We are no better off if we establish a purely formal principle of justice, for it is impossible to apply it to particular instances. Pure universals, nineteenth century logic made clear, do not imply particular existential propositions. Non-Euclidean geometry and non-Newtonian mechanics showed that formal first principles are hypotheses, and unless an empirical element is added to the argument all deductions from them will remain hypotheses. As an example of a demonstrative moral proposition Locke suggested: "Man is subject to law" and defined

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“man” as “a corporeal, rational creature.” He intended to include children under the proposition, and even animals, if any were found that understood “general signs” and were able “to deduce consequences about general ideas.” As a normative proposition, it is clear that children ought not to be held criminally responsible unless they possess a certain measure of understanding; but Locke’s proposal does not tell us how much understanding we ought to demand. Modern experiments have shown that even pre-school children are capable of analyzing and reorganizing their impressions. Should we, in the interests of justice, revise downwards the common law standard of responsibility for felony and include them? Formally, on the basis of Locke’s argument, the rule should be revised; but would a present-day community accept as adequate a standard that might result in the hanging of three-year old children? Like all juristic propositions it breaks down in specific application. That is so because the initial hypothesis is radically defective in the material statement of those facts which it will be called upon to meet.

In this characteristic the propositions of a legal science are not different from those of other empirical sciences. They are approximate merely. If we attempt to determine the position of the sun over Paris at any moment, to paraphrase Duhem, we begin by discarding the real sun, which has an irregular surface, for a perfect geometric sphere; it is the position of the center of this ideal sphere that we shall try to determine: or rather, we shall endeavor to determine the position that will be occupied by this point if astronomical refraction does not deviate the rays of the sun and if the annual aberration does not modify the apparent position of the stars. We shall use extremely complicated instruments, but all of them are imperfect, and we shall perform long and complex calculations. From this example, it is apparent that it is possible to devise any number of formulae to direct the experiment, and no differences will be detected in the observations, since the actual differences are too imperceptible to be detected by our crude instruments.
A comparable situation exists in the judicial process. Inasmuch as numerous principles can be suggested as the basis of any particular decision, it is foolish to assert that any particular case decides a principle as its *ratio decidendi*. From the example, the conclusion can also be drawn that every law of physics is an approximate law, and as a matter of strict logic, cannot be either true or false; all other laws which represent the same phenomena with the same approximation are able to claim, as justly as the first, the title of a true law, or to speak more rigorously, an acceptable law. Because of their approximate quality all laws of physics are thus of merely provisory validity.  

**Teleology in Social Science**

In Aristotelian theory the grounds of contingency are not established as in modern thought on the basis of the approximate character of the elements of scientific procedure, the data, the propositions and the instruments, but rest on his view of nature. His ultimate explanation of nature, which is teleological in character, also involves a necessary way of viewing social phenomena and is an essential addition to his formal methodology.

Matter and form are the fundamental categories which for Aristotle explain the universe. We know a thing through its form and thus form is the basic reality; but Nature consists of forms which are materialized or embodied. Matter in the Aristotelian sense has a meaning beyond corporeality. A man's character is matter which has impressed upon it a certain form just as much as the copper in the copper vase. The principle of matter and form takes on a different meaning when the idea of change is added. Form then becomes the end or object of change, matter the potentiality that will receive the impress of

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form. When matter has received its form it has realized the aim of becoming. Hence, in the doctrines of matter and form, and of potentiality and actuality, we have a theory of a continuous development from the potential to the actual, from that which is capable of being to that which is. Now the realization of matter in actuality is the end or final cause. Development is always towards an end, and thus the end is itself the cause of becoming. For example, the form of the oak is potentially present in the acorn and determines its full development. In the sense therefore of its true being, the oak is really prior to the acorn. But in Nature conceived as the conquest of form over matter allowance must be made for the refractory character of matter. Too often the material with which form struggles displays itself as recalcitrant. Thus we have imperfect conduct and the abnormalities of nature. Matter is therefore the passive recipient of impressions, the wax conforming to the die, the source of necessity in Nature to the extent of its capacity to achieve form; it is also the resister of impressions, the wax which refuses to receive the die, the source of contingency in Nature to the extent that it rejects form.

From this metaphysical position Aristotle arrived at his teleological method of handling social phenomena. In the *Ethics* he sets the stage for that approach in the first sentence: “Every art and every inquiry, and similarly every action and pursuit, 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.” All that follows is a development and deduction from that principle. Similarly the opening sentence of the *Politics* is again teleological: “Every state is a community of some kind, and every community is established with a view to some good; for mankind always act in order to obtain that

27 *De Part. An.* 640a 18.

28 Aristotle’s doctrine of form and matter appears in his writings on logic, natural science, metaphysics, social science and aesthetics, in brief, in nearly all the works. For a general discussion see Joachim, *Aristotle on Coming-to-be and Passing-away* (1922).
which they think good." And the rest of the discussion is an effort to determine the end of the state, and the nature of the matter or means which is necessary to a realization of that end. This view led him to see the function of education and law as instruments for the achievement of the good life; it permitted him also to find a justification for slavery in the doctrine that the end was thereby promoted.

It is not difficult to reduce a thoroughgoing teleology such as Aristotle's to absurdity. The nose, Voltaire said, is made to carry glasses. However, in a limited sense the theory contains some elements of truth. One of the aims of science is to explain the events of experience. In the social sciences particularly, explanation in qualitative, as against quantitative, terms is a customary practice. The object of explanation of that kind is to determine the extent to which a given activity achieves a purpose or conforms to a value. Does the infliction of capital punishment affect the homicide rate? is clearly a legitimate question in social science. Teleological explanation assumes intelligent direction and evaluation; it looks to the effect to make the earlier activity intelligible, to the future as determining the present. In general, teleological explanation seeks to answer the question Why? Why did the Constitution provide for the Supreme Court? Why did the framers of the Constitution seek that objective? Why did they not attempt to realize it through the administrative power? There seems to be no good reason why this is not a sound and enlightening method of explanation. However, it possesses another aspect which involves greater difficulty. Bosanquet's argument that nothing is properly due to mind which was never a plan before a mind, meets the issue of the individual will as a factor in social causation, but it does not dispose of the theory of social purpose. The activities of the leader of a Greek colony to Ionia in the eighth or ninth century B.C. paved the way to Christianity, but it certainly was never part of his design any

29 "The Meaning of Teleology" (1906) in Proceedings of the British Academy 235, 244.
more than the coral reef is the design of the coral insect. Individual purpose is a factor in the immediate and apparent; it is an inadequate element in the explanation of the radical changes which are a feature of human history. "The human will is a juridical cause," writes Tourtoulon, \textsuperscript{30} "but it is nothing more than a cause. It urges the law to the right or left, it knows not whither. Must we compare it to Luther's tipsy peasant, who cannot stay on his donkey, but falls sometimes to one side, sometimes to the other? This would, perhaps, be giving it too much honor, for the peasant knows that he has a road and wishes to follow it, although he cannot. The juridical will has no road to follow. It goes, as a poet says, 'Où va toute chose, où va la feuille de rose et la feuille de laurier.'" It is true that we frequently fail in the immediate social purpose at which we aim. As Spinoza saw long ago, those who try to determine everything by law foment crime rather than lessen it. Nevertheless, social purpose, or the immediate ends at which human action aims, is a standard which a sound methodology cannot ignore. To eliminate it would be to deprive social behavior of much that makes it intelligible.

It is true of Aristotle's general theory as of history that any one who endeavors to tell a piece of it must feel, in Maitland's phrase, that his first sentence tears a seamless web. His theory of jurisprudence cannot be wholly understood apart from his political science and that in turn rests upon his ethics; ethics presupposes certain psychological doctrines which are developed in his metaphysics and his philosophy of nature. His great strength lies in the coherent and comprehensive character of his system which permits him to see things in their totality. It was a system also not without its practical effect on the course of the law. In 1829, when the question of ownership of a finished article made by one man out of material belonging to another was first fully considered in the United States we find the court settling the problem in terms of "identity of the material," "conversion into original species," "retention by

\textsuperscript{30} Philosophy in the Development of Law (1922) 41.
the material of its specific character, or kind, or qualities,” “change of mere form,” “change of species,” “specific but not essential change,” and “essence of material.” It is not improper to assert that the meaning of those words and phrases stems, through Bracton and Justinian, from the significance they acquired in the works of Aristotle. 31

THE NATURE OF LAW

In the Platonic Minos we fortunately possess an inquiry into the nature of law undertaken in the full panoply of the dialectic. No comparable writing of Aristotle has come down to us. We are without any analysis of his conducted for the express purpose of stating a general and ultimate theory of law. His definitions of law are partial and are thus an anticipation of the practices of modern science. They are always relative to the problem before him, and the aspect of law which they emphasize constantly shifts in order to permit different consequences to be drawn.

In the Rhetoric to Alexander it is pointed out that in a democracy the final appeal on all matters is to the law, but in a monarchy the appeal is to reason. A self-governing community is directed along the best path by its public law, and so a king, as the embodiment of reason, guides along the path of their advantage those who are subject to his rule. In a clumsy attempt to bring the two ideas together, law is then stated to be reason defined by the common consent of the community, regulating action of every kind. Later, in the same treatise, which is a handbook on how to persuade audiences, another aspect emerges. Advice is offered on how to speak in favor of a law (show that it affects all equally, that it is beneficial to the city, etc.) or against a law (show that it does

not apply equally to all the citizens, etc.). For this purpose law is defined as the common agreement of the state enjoining in writing how men are to act in various matters. Aristotle argued that the nurture and occupations of the young should be fixed by law so that they would become customary. He agreed with Plato that legislation should teach virtue. Goodness, in men, he thought, could be secured if their lives were regulated by a certain intelligence, and by a right system, invested with adequate sanctions. Paternal authority does not have the required force to accomplish this end. But law has this compulsive power and it is at the same time a rule emanating from a certain practical wisdom and reason. Thus, while people hate men who oppose their impulses, even if they are right in so doing, they do not regard the law as invidious if it enjoins virtuous conduct. Similarly, in an action involving a contract, if the contract’s existence is admitted and if that is a fact favoring the side of the speaker, that circumstance ought to be “magnified” or strengthened. That can be done by calling it a “law” because a contract may really be considered as a private or special and partial law; and it is not of course the contracts which make the law binding, but it is the laws which give force to legal contracts. Aristotle therefore suggests that, in a general sense, the law itself is a kind of contract, so that whoever disregards or repudiates a contract is repudiating the law itself. However, Aristotle believed that law was much more than a contract. He pointed out that if the state did not pay attention to virtue, the community became merely an alliance; “the law would be a contract, and, as Lycophron the Sophist says, a pledge of lawful dealing between man and man.” Again, in arguing that it is difficult and perhaps impossible for a state with too large a population to have good legal government, he observes that law is a form of order, and

1420a 25, 1422a 2, 1424a 9. For the authenticity of the dialogue, see Cope, An Introduction to Aristotle’s Rhetoric (1867) 401 et seq. The first definition may be by Anaximenes of Lampsacus, purportedly a tutor of Alexander.

E. N. 1180a 21. Plato, Laws 722 D.

good law must necessarily mean good order; but an excessively large number cannot be orderly.\textsuperscript{35} Again, in considering whether the best men or the law should be supreme he observes that he who bids the law rule may be deemed to bid God and reason alone to rule, but he who bids man rule adds an element of the beast; for desire is a wild beast, and passion perverts the minds of rulers, even when they are the best of men. Hence, law is reason without appetite.\textsuperscript{36} As he observed elsewhere, intellect is always right, but appetency may be right or wrong. Appetency aims at the practical good which may not be good under all circumstances.\textsuperscript{37} Finally, Plato\textsuperscript{38} had divided state organization into two parts, one the appointment of individuals to office, the other the assignment of laws to the offices. Both divisions came under the general topic of the “constitution” (\textit{πολιτεία}). Aristotle\textsuperscript{39} developed a distinction between “constitution” (\textit{πολιτεία}) and “laws” (\textit{νόμοι}). As a general principle he insisted that the laws should be laid down to suit the constitutions—the constitutions must not be made to suit the laws. A constitution is the organization of offices in a state, and determines what is to be the governing body, and what is the end of each community. But laws are not to be confounded with the principles of the constitution. They are the rules according to which the magistrates should administer the state, and proceed against offenders. Cicero\textsuperscript{40} observed the distinction and differentiated the “optimus rei publicae status” from “leges” and thereafter it became firmly fixed in Western political thought.

\textsuperscript{35} \textit{Polit.} 1396\textsuperscript{a} 30. Cf. 1287\textsuperscript{a} 19.
\textsuperscript{36} \textit{Polit.} 1287\textsuperscript{a} 32.
\textsuperscript{37} \textit{De An.} 435\textsuperscript{a} 26. In the \textit{E. N.} 1139\textsuperscript{a} 23 he points out that pursuit and avoidance in the sphere of desire correspond to affirmation and denial in the sphere of the intellect. Hence, inasmuch as moral virtue is a disposition of the mind in regard to choice, and choice is deliberate desire, it follows that, if the choice is to be good, both the principle must be true and the desire right, and that desire must pursue the same things as principle affirms. He is here speaking of practical thinking, and of the attainment of truth in regard to action.
\textsuperscript{38} \textit{Laws} 735\textsuperscript{a} A; cf. 678\textsuperscript{A}. Cf. 4 Newman, \textit{The Politics of Aristotle} (1902) 142.
\textsuperscript{39} \textit{Polit.} 1289\textsuperscript{a} 15; 1298\textsuperscript{a} 17; 1292\textsuperscript{b} 15; 1278\textsuperscript{b} 8; \textit{E. N.} 1181\textsuperscript{b} 12.
\textsuperscript{40} \textit{De Leg.} I. 5. 15.
Aristotle

To the extent his works have survived, it is clear that Aristotle did not reach any final definition of law comparable, say, to his idea of substance or of justice; he reveals no general and leading conception of it from the point of view of its nature. This failure to state explicitly the meaning of a vital idea is not an anomaly. At the heart of Aristotle's theory of the State is the idea of κοινωνία; but nowhere are we told plainly what the conception stands for, and it is only by analyzing his incidental remarks when the term is emphasized that we are able to ascertain the idea behind it. If what has come down to us represents his true view of the nature of law then he attained a position which was not reached in jurisprudence again until the twentieth century. That is to say, he saw the inherent complexity of legal phenomena, and he found that no single description of it could embrace its manifold aspects. The identification of any aspect may have significance for the task in hand; and he therefore, so far as we can judge, allowed room for them all and did not insist upon the exclusive validity of any single one. In this approach he was on much sounder ground than Plato who saw law as a simple unitary phenomenon. All the elements which Aristotle emphasized have been taken separately as the single bases of subsequent systems, and most of them are factors in current legal analysis. He thought of law as a rule of conduct for the individual, perhaps the most discussed conception in jurisprudence; he stressed the ideal of reason, the doctrine that legal precepts should have some basis in intelligibility and not be the mere expression of arbitrariness, force or custom; the idea of law as a contract was adopted by Epicurus and Lucretius,11 and appears in present day opinion in the theory that its naked function is to prevent attacks by individuals on each other; when he distinguished law from the constitution and defined it as the rules which regulate how the magistrates are to govern, he formulated a theory of law—that laws are the rules in accordance with which courts determine cases—which reappeared again in the

11 Diog. Laert. 10. 150; Lucr. 5, 1143.
later development of analytical jurisprudence; when he pointed out that law was a form of order he put his finger on an aspect that since Kant has been dominant in continental legal thought.

Law itself, like everything in the Aristotelian system, had its end and to Aristotle it was clear that its task was to make men good.\textsuperscript{42} This was deduced from his premise that the state does not exist for the sake of life only, but for the sake of the good life.\textsuperscript{43} But what is goodness? Everyone agrees, Aristotle says, that the highest good is happiness or well-being; but that is merely a label and the main inquiry is to find out what the word means. Aristotle’s \textsuperscript{44} general definition is that happiness (ἐυδαιμονία) is an exercise of the powers of life in accordance with virtue throughout a whole life-time. He endeavors to show that this definition sums up and improves upon all that has been said on the subject. If it is asserted that happiness is virtue he claims to make an advance on this by insisting that happiness is an exercise and not a mere possession of virtue; if happiness is pleasure he says that happiness is necessarily accompanied by an inherent pleasure; if it is good fortune or external prosperity he says that the functions of happiness cannot be performed without it. Thus happiness takes its origin in virtue, it issues in pleasure, and material good-fortune is its ordinary equipment.

That this position is largely Platonic scarcely needs to be stated. Plato had held that a task of law was to produce happiness in the state as a whole and that through its instrumentality men could be taught virtue.\textsuperscript{45} However, while Aristotle’s definition satisfies the Platonic conditions for a happy life—that the goal is important on its own account and not as a means to other things, that its satisfactions appeal to us, and that it would be the final choice of the wise—as a juristic formula it has several defects. In his attitude towards the nature of law, Aristotle admitted a plurality of viewpoints.

\textsuperscript{42} E. N. 1199b 33, 1102a 10, 1103b 3; Polit. 1280b 12.
\textsuperscript{43} Polit. 1280a 30.
\textsuperscript{44} E. N. 1098b 16.
\textsuperscript{45} Rep. 519E; Laws 693, 701D, 705E.
Here, only one position has significance; no doubt this view is a product of his teleological method which has as its object the discovery of the final end. Now it is plain that the tasks of law can no more be caught within the net of a single formula than its numerous and contradictory aspects can be confined within the limits of one definition. If we look at the police functions of the legal order, the task of law is to keep the peace; if we look at law as one of the instruments of control in a complex society its task is also the harmonization of disparate claims. The task is a function of the problem; and since the problems are numerous, the tasks are alike multitudinous and are equally valid. Law may also be a means in the inculcation of established ethical ideals and the promotion of new ones. The maxim of the Institutes that the precepts of law are to live honorably, not to hurt another, to give each man his due, gives expression to ideals which if insisted upon in applicable situations, such as those involving the issue of good faith in undertakings, may raise the entire moral tone of a people. Another defect in Aristotle's idea of the end of law is that it breaks down as soon as it is put into practice. However, as we have seen above, it shares this weakness with all other ideals that have been proposed. They do not contain enough elements to meet all concrete situations. Thus, Aristotle excludes the man of pre-eminent virtue from the operation of the law. His principle is that the law is necessarily concerned only with those who are equal in birth and power. He maintained that anyone is ridiculous who attempts to make laws for exceptional men, for probably they would say what the lions said when the hares made speeches in the assembly and demanded that all should have equality: “where are your claws and teeth?” This position when stated conversely will also provide a justification of slavery. Some idea of the concrete model Aristotle probably had before him in depicting the actual

46 Inst. I, 1, § 3. This is clearly the crystallization of a Greek conception. Cf. E. N. V, i, 14; Plato, Rep. 331E et seq., 433E.
47 Polit. 1284a 12, 1287a 17.
realization of the end of the law may be derived from the following summary: "Aristotle's political ideal is that of a small but leisured and highly cultivated aristocracy, without large fortunes or any remarkable differences in material wealth, free from the spirit of adventure and enterprise, pursuing the arts and sciences quietly while its material needs are supplied by the labor of a class excluded from citizenship, kindly treated but without prospects. Weimar, in the days when Thackeray knew it as a lad, would apparently reproduce the ideal better than any other modern State one can think of." Goethe found Weimar the most satisfactory place in the world in which to live; nevertheless it seems possible to devise other ideals which would have a wider appeal.

Aristotle held that the law has no power to command obedience except that of habit, which can only be given by time. This assertion, like many others, reveals the clear unity of his thought. If obedience to law is based on habit, then, as he says, a readiness to change from old to new laws enfeebles the power of the law. Inasmuch as law has a psychological basis, education also has a major role in Aristotle's theory. It assists in making obedience to law second nature to the citizens. He believed that the best means to secure the stability of constitutions is a system of education suited to the constitutions; for there is no merit in the most valuable laws, ratified by the unanimous judgment of the whole body of citizens, if the citizens are not trained and educated in the constitution. The state must begin the education early, for if a man is to lead the good life he must practice it a long time. Aristotle's aphorism "It is hard to be good" is often quoted. But he also said: "A life of virtue ceases to be painful when you get used to it."

There is an apparent paradox here which should be noted.

48 Taylor, Aristotle (1919) 117.
49 Polit. 1269a 20, 1310a 12; E. N. 1163b 37; Meta. 995a 2.
50 Polit. 1269a 23.
51 Polit. 1310a 12, 1337a 14.
52 E. N. 1180a 1.
in passing. If the citizen is to be educated in the spirit of the constitution, what happens if the constitution is a bad one? Will the citizen be able to live the good life? Aristotle's answer, and it is not clear whether it is given normatively or descriptively, is that the citizen should be educated in the aims of the constitution, whether good or bad. Thus the citizen may be taught to be an evil man. During the Reformation the question took on practical importance and became sharply focussed in the test issue: Is it lawful to kill tyrants? Melanchthon 53 thought that Caesar was unjustly killed; but Luther 54 apparently took a different stand. In view of the rise of authoritarian government it may once again cease to be an abstract matter.

In the doctrine of the categories, conduct comes under the heading of Quality. 55 Virtue is a Quality and Aristotle assumes that that category has four divisions: habits, or tendencies to do a thing; capacities for doing a thing; feelings, passions and emotions prompting us to do a thing; and external form or shape. 56 In which classification does conduct fall? Aristotle does not trouble to mention form or shape, which is used in describing a man's appearance, since character is here alone in question. Conduct is not to be classified under feeling—e.g., desire, anger, fear, confidence, envy, joy, love, hate, longing, emulation, pity—because no one is praised or blamed for having feelings, but only for having them in a certain way; similarly, good and bad conduct is not a capacity, for we are not said to be good or bad because we are capable of experiencing certain feelings, but for the manner in which we actually do so. If their conduct is neither a feeling nor a capacity, it must be a habit or settled tendency to act in a certain way. Good conduct is not acquired from nature; if it were it could not be changed and moral training would be impossible; however, we owe nature something, for she gives us the capacity

53 16 Opera (1850) 105.
54 2 Bossuet, Histoire des Variations (1770) 91.
55 Categ. VIII. E. N. 1096a 24.
56 E. N. II, v.
for good conduct. Nor does it come from teaching. Character depends on what you do and not on what you are told to do. Most people, instead of acting, take refuge in theorizing; they imagine that they are philosophers and that philosophy will make them virtuous; in fact, they behave like people who listen attentively to their doctors but never do anything their doctors tell them. People who doctor themselves that way will never get well.\(^57\) Habituation therefore is the only method of acquiring that settled tendency to do acts of a certain kind. It is by doing acts of a given kind and as a consequence of these acts that we become good or bad, as the case may be, just as in the arts; by playing well you come to be a good player, and by playing badly, a bad one. This truth is attested by the experience of states: lawgivers make the citizens good by training them in habits of right action—this is the aim of all legislation, and if it fails to do this, it is a failure; that is what distinguishes a good form of constitution from a bad one.\(^58\)

Although his theory of legal sanction is essentially a psychological one, Aristotle is careful to point out that the lawgiver need not be a specialist in psychology any more than it is necessary for the medical practitioner to be a specialist in physiology. Nevertheless, since the aim of law is to make men good, and goodness is happiness which in turn is an activity, it behooves the lawyer to have some acquaintance with psychology just as physicians of the better class devote attention to the study of the human body.\(^59\) Aristotle also recognized the element of compulsory force in the law; there must be some force to maintain it.\(^60\) In the \textit{Republic} \(^61\) Glaucon had argued that the laws are obeyed, not from a sentiment of natural law-abidingness, but through a fear of the penalties which will be imposed if we break them. Those penalties are imposed by force, and thus the police and prisons are necessary elements

\(^{57}\) \textit{E. N.} 1103\textit{b} 16. \\
\(^{58}\) \textit{E. N.} 1103\textit{b} 5. \\
\(^{59}\) \textit{E. N.} 1109\textit{a} 18. \\
\(^{60}\) \textit{Polit.} 1286\textit{b} 32, 1255\textit{b} 15; \textit{E. N.} 1180\textit{a} 22. \\
\(^{61}\) 360C.
of a society. In analytical jurisprudence this doctrine has reappeared in the distinction taken between social orders which rest on voluntary obedience and the legal order which is based on coercion. It is true that in some communities conformity to a social order is a matter of choice, e.g. in large cities in the United States church attendance is voluntary; it is also equally true that sanctions for the violation of other orders may be more severe than the penalty for the violation of a law. In some Southern communities of the United States, the non-churchgoing member may find the sanction for the violation of a rule of the society so effective that he will be unable to obtain work of any kind and thus be compelled to move elsewhere. To argue otherwise than in a formal juristic sense that the sanctions of custom are imperfect because no man is under an absolute compulsion to visit the barber, or to wear garments of usual design is to shut the eyes to the true effectiveness of the sanctions behind custom. Which sanction would a railroad conductor choose for imposition on himself in the event he lost his temper and struck a passenger: ten dollars and costs in the police court for disorderly conduct or loss of his job and blacklisting throughout the business? Coercion is undoubtedly an element in the legal order, but it is also an element in many other orders. Aristotle's insistence upon habit as one of the bases of legal obedience is also sound and is a valuable corrective to the formal excesses of analytical jurisprudence.

**Theory of Legislation**

Aristotle's normative view of law is clearly apparent in his theory of legislation. The law prescribes certain conduct; the conduct of a brave man *(e.g. not to desert or run away or to throw away his weapons)*, that of a temperate man *(e.g. not to commit adultery or outrage)*, that of a gentle man *(e.g. not to assault or abuse)*, and so with all the other virtues and vices, prescribing some actions and prohibiting others—rightly if the law has been rightly enacted, not so well if it has been
made at random. The science of legislation must be learned like any other science. No doubt it is possible for a particular individual to be successfully treated by some one who is not a trained physician, but who has an empirical knowledge based on careful observation of the effects of various forms of treatment upon the person in question; just as some people appear to be their own best doctors, though they could not do any good to someone else. Nevertheless, it would doubtless be agreed that anyone who wishes to make himself a professional and a man of science must advance to general principles, and acquaint himself with them by the proper method: for science deals with the universal. So presumably a man who wishes to make other people better by discipline, must endeavor to acquire the science of legislation—assuming that it is possible to make us good by laws. For to mold aright the character of any and every person that presents himself is not a task that can be done by anybody, but only (if at all) by the man with scientific knowledge, just as is the case in medicine and the other professions involving a system of treatment and the exercise of prudence. This is an enlargement of the Socratic theory that virtue is knowledge; since our passions and emotions are not good or bad but are ethically neutral, they must be trained to make us desire what is right; mere knowledge is not sufficient to make us do right.

Plato had held that legislation should be so framed that it could be incorporated in a manual of instruction for the young. Aristotle does not take exception to this view but he indulges in a severe criticism of the Sophists for attempting to teach legislation from existing codes of law.

From whom then or how, Aristotle asks, can the science of legislation be learned? He answers: Perhaps like other subjects,
from the experts, namely, the politicians; for legislation is apparently a branch of political science. But there is this difference between political science and all other sciences. In these, the persons who teach the science are the same as those who practice it, for instance, physicians and painters; but in politics the Sophists, who profess to teach the science, never practice it. It is practiced by the politicians, who apparently rely more upon a kind of empirical skill than on the exercise of abstract intelligence; for we do not see them writing or lecturing about political principles (though this might be a more honorable employment than composing forensic and parliamentary speeches), nor have they ever made their sons or friends into statesmen. Yet we should expect them to have done so if it were in their power; they could not have bequeathed any better legacy to their country. Still it must be admitted that experience does much good; for we see that those who live in a political environment become politicians.

It follows that those who aspire to a scientific knowledge of politics require practical experience as well as theory.

However, those Sophists who profess to teach politics are found to be very far from doing so successfully. In fact, they do not know what it is, or what it is concerned with; otherwise, they would not class it as identical with, or even inferior to, the art of rhetoric. They would not have thought it easy to legislate by merely collecting such laws as are held in high repute, and selecting the best of them—as if the selection did not demand intelligence—as if all did not depend on deciding rightly! Who, we would ask, is the intelligent judge of the product of any art—of the musical composition or painting? The experienced musician or painter. Now laws are the product, so to speak, of the art of politics. How then can a mere collection of laws teach a man the science of legislation, or make him able to judge which of them is the best. We do not see men becoming expert physicians from a study of medical handbooks. Yet medical writers attempt to describe not only general courses of treatment, but also methods of cure and modes of
treatment for particular sorts of patients classified according to their various habits of body; and their treatises appear to be of value for men who have had practical experience though they are useless to the novice. Very possibly, therefore, collections of laws and constitutions may be serviceable to students capable of studying them critically and judging what measures are valuable or the reverse, and what kind of institutions are suited to what national characteristics. But those who examine such compilations without possessing a trained faculty cannot be capable of judging them correctly, unless, indeed, by accident, though they may very likely sharpen their political intelligence.

Aristotle concludes that as his predecessors had left the subject of legislation unexamined he will proceed to state its general postulates, a statement exceedingly unfair to Plato who had worked out an elaborate legislative theory.

Accordingly, Aristotle laid down a series of principles to control and guide the legislative process. The best legislators, he believed, were from the middle class, giving as instances Solon and Lycurgus and remarking that in fact almost the greatest number of the other lawgivers had that status. In the *Laws* Plato had said that the legislator ought to have his eyes directed to two points—the people and the country. As an example Plato cited the Cretan lawgiver who chose for the Cretans bows and arrows which were the most suitable arms for swift runners in a hilly country like Crete. Aristotle accepts this principle but adds to it the corollary that neighboring states must not be forgotten by the legislator if the state for which he legislates is to have a true political life, that is to say, a life of intercourse with other states. A nation's arms should be such as to enable it to meet its foes in its own territory and in theirs, something bows and arrows would not enable it to do. For this reason there must be a fleet, the government must be organized with a view to military strength, and the legislator

66 *Polit.* 1296a 16.
must pay attention to the foreign relations of the state. Still, the legislator should not make conquest the aim of his state; it is the province of the legislative art, if the state has neighbors to consider what the practices should be in relation to each sort of neighbor. It was a mistake for the Lacedaemonian legislators to lay down one indiscriminating rule; the rule ought to vary in accordance with the character of the neighboring state. Isocrates had maintained that laws affect only the internal organization of states, and not their mutual relations. The legislator must know all possible forms of the state, and he should be able to find remedies for the defects of existing constitutions. He must know what sort of democratic institutions save and what destroy a democracy, and what sort of oligarchical institutions save and destroy an oligarchy; he must not think that a law is democratic or oligarchic which will cause the state to be democratically or oligarchically governed in the greatest degree, but which will cause it to be so governed for the longest time. In amending the constitutions of democracies and oligarchies it is necessary to distinguish between the different kinds and to handle each kind in a different way, so that those who recognize only one kind of democracy and one of oligarchy cannot properly amend their constitutions.

The same political insight will enable a legislator to know which laws are the best, and which are suited to different constitutions; for the laws are, and ought to be, relative to the constitution, and not the constitution to the laws. The legislator must know under what conditions each form of constitution will prosper and by what internal developments or external attacks each of them tends to be destroyed. By destruction through internal developments Aristotle means that all constitutions, except the best one of all, are destroyed both by not being pushed far enough and by being pushed too far. Thus, democracy loses its vigor, and finally passes into oligarchy, not only when it is not pushed

\[66 \text{ Polit. 1265a 18, 1267a 20, 1327a 23, 1325a 11. Isocrates, De Antid. § 79.} \]

\[69 \text{ Polit. 1289a 7; 1309b 53; 1320a 2.} \]
far enough, but also when it is pushed a great deal too far; just as the aquiline and the snub nose not only turn into normal noses by not being aquiline or snub enough, but also, by being too violently aquiline or snub, arrive at a condition in which they no longer look like noses at all, e.g., it is altogether effaced or becomes a beak. This is an application of the doctrine that it is in the “mean” state alone that the constitution can be said to keep its true character. For example, if the principle of democracy is equality, and if this principle is exaggerated so that everybody actually becomes equal, then the government degenerates into mob-rule or anarchy and thus loses its true democratic character; if it is relaxed and the equality diminished, the democratic institutions become so enfeebled that the inequalities increase until at last we are in the presence of an oligarchy. Constitutions differ because the deliberative, magisterial, and judicial elements are organized in different ways, and the legislator must have regard to what is expedient in each state. The legislator must not trust to fortune to make certain of the virtue of the state; to secure this is not the function of fortune but of science and policy. In his aims the legislator must always be modest and never attempt the impossible.

Shall legislation have in view the good of all or that of a privileged class when several classes coexist in a state? Aristotle’s reply is that the laws must be equal, and this means that legislation must aim at the good of the whole state. Moreover, all should share alike in ruling and being ruled in turn, for when the sharers are alike, equality demands that each shall have an identity of political privilege. The legislator

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70 Rhet. 1360a 22. 
71 Polit. 1297b 37. The legislative, executive and judicial elements of modern theory do not correspond to Aristotle’s three “elements of all constitutions.” Aristotle’s deliberative element had legislative functions but it also had executive and judicial ones as well. 2 Zeller, *Aristotle and the Earlier Peripatetics* (1897) 283. 
72 Polit. 1273b 22, 1332a 32. 
73 Polit. 1265a 17, 1325b 38. This was a Platonic principle. *Laws* 709D, 742E, Rep. 456C. 
74 Polit. 1283b 40. 
75 Polit. 1332b 25.
must always favor the middle class in order to give stability to the government; the laws must prevent oppression of the rich and tend permanently to increase the material prosperity of the poor. Nevertheless, in anticipation of the Marxists, he recognizes that the law in fact may be the expression of the will of a particular class. In a well-ordered state the citizens should have leisure and not have to provide for their daily wants.

In all this Aristotle was viewing law, and particularly legislation, as a concrete expression of a moral ideal. He saw legislation as an instrument through which the standard of human conduct could be lifted above the practices which prevailed in the societies he had studied. He is not so much intent upon telling legislators what laws to enact as upon instructing them in the general theory of legislation itself.

EQUITY

Equity (ἐπιεικεία) in Aristotle's hands can be viewed narrowly in modern terms, as a rule of construction. It is also the Cerberus of the legal system; it is the attempt to work out philosophically the meaning of the idea of fairness in its application to concrete legal systems. Plato had recognized that the appearance of a philosopher king, an expert who could be trusted to rule in disregard of the written law, was unlikely; we must therefore accept the second best, the

76 Polit. 1296b 35; 1320a 4-1320b 16; 1281a 37, 1282b 10.
77 Polit. 1269a 34, 1273a 32, 1331b 12.
78 Rhet. 1373b 25-1374b 23; E. N. V, 10. It is not unusual to find Aristotle's treatment of this topic criticized as mere metaphysical web-spinning, and as evidence of the academic character of his thought, which is held to be 'remote from legal practice and real problems.' See, e.g., Schulz, History of Roman Legal Science (1946) 75. For the opposite view see Allen, Law in the Making (1927) 201 et seq.; 2 Vinogradoff, Outlines of Historical Jurisprudence (1922) 64 et seq. As Vinogradoff observes, the idea has had such an influence on modern developments of the theory of law that the framers of the Code Napoléon in 1804 thought it necessary to restate Aristotle's doctrine in their introductory chapter. Contemporary opinion now accords Aristotle a wide knowledge of law and legal science. See Calhoun, Introduction to Greek Legal Science (1944) 72.
79 Polit. 295AB.
government of fixed, inflexible law which cannot always do justice to the individual case. Aristotle analyzed the idea with care and gave it a wider scope.

To bring out his meaning he puts a concrete case. The law provides a penalty for an offender who inflicts a wound by an iron weapon, or by iron in general. If a man wearing an iron ring strikes another, by the letter of the law he is liable to the penalty and has committed a crime; but in truth and in fact he is not guilty of the crime and in this fair interpretation lies equity. Equity therefore is a kind of justice, e.g., fairness, but beyond the written law. It is a rectification of the written law, to supply deficiencies consequent upon its universality. The failure of the legislature to provide for the particular case is partly intentional, partly unintentional; involuntary, when it may have escaped their notice, voluntary when it is necessary to lay down a general rule, and this rule has exceptions which cannot be foreseen and determined; and also by reason of the infinite variety of possible cases that may arise, no two of which are exactly alike. Legal rules, which are general, require constant modification and adaptation to circumstances, and this is equity, the mitigation of the austerity or the relaxation of the exact rigor of the written law, and a leaning to the side of mercy, indulgence, liberality.

Since law is general, equity must always be on the watch to see that justice is done in the individual case. It is equity

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80 Quintilian gives the same case. Inst. Orat. VII. 6. 8. The present-day movement for individualization of justice favors greater discretion. See Found, Law in Books and Law in Action (1910), 44 Am. L. Rev. 12; Wigmore, A Program for the Trial of a Jury Trial (1929), 12 J. Am. Jud. Soc'y 166; Frank, Law and the Modern Mind (1930). Wigmore has shown that a satisfactory legal system has functioned in which courts were expressly authorized to treat all cases as unique. See Wigmore, The Legal System of Old Japan (1892), 4 Green Bag 403. These writers have also shown that when the rules lead to results that offend the "sense of justice," discretion enters by the back door through general verdicts by juries, decisions by trial courts unaccompanied by findings of fact, or the twisting of such findings so that they misreport the facts. All this has led Judge Frank to suggest that we ought carefully to study the Japanese system "and to consider substantial modifications of our own, instead of adhering to our present misleading and somewhat hypocritical practice of sanctioning furtive, unavowed, exercises of discretion." See Frank, Say It With Music (1948), 61 Harv. L. Rev. 921, 953.
therefore to pardon human failings, and to look to the lawgiver and not to the law; to the spirit and not to the letter; to the intention and not to the action; to the whole and not to the part; to the character of the actor in the long run and not in the present moment; to remember good rather than evil, and good that one has received, rather than good that one has done; to bear being injured; to wish to settle a matter by words rather than by deeds; lastly, to prefer arbitration to judgment, for the arbitrator sees what is equitable, but the judge sees only the law, and for this an arbitrator was first appointed, in order that equity might flourish. Indefinite circumstances require a flexible rule like the leaden one used by Lesbian builders, adapted to the shape of the stone used.

This view has theoretical merits, but it runs at once into a practical difficulty. Equitable principles in their application are governed by rules or they are not; if not, justice ceases to be uniform, one of its most valuable characteristics; if it is, equity itself soon becomes as rigid as the written law; in the first case, the leaden rule becomes so soft that it can hardly be used, in the second, so rigid that it is indistinguishable from an iron one.

Equity is a part of the unwritten law. Aristotle divided law into two classes, particular and general; the former is either written or unwritten, the latter is unwritten, is based upon nature and embraces the great fundamental conceptions of morality and is superior to all the conventional enactments of human society. Equity is that kind of unwritten law which belongs to particular law and is what is omitted by (i.e., intended to supply the deficiencies of) the written law. It is, therefore, a law of mercy or clemency, the particular decision adapted to the special occasion where the written general law fails to meet the case.

Aristotle's treatment of unwritten law when coupled with his teleological doctrine suggests his answer to the question raised by the Sophists, whether law was right by nature or by convention. He regarded it as a commonplace argument for
leading men into paradoxical statements. The man whose statement agrees with the standard of nature is met by the standard of the law, but the man who agrees with the law is met by the facts of nature. Aristotle refuses to accept the antithesis. In so far as the end of law is realized it is natural, for the realization of the nature of anything is its end. In discussing civil justice, Aristotle admits a natural element and a conventional element; that is natural which has the same force everywhere, and does not depend on being adopted or not being adopted; while that is conventional which at the outset does not matter whether it be so or differently, but when men have instituted it, then matters. This assertion is difficult to reconcile with other statements of Aristotle; but it has been taken to be similar to the distinction drawn in modern treatises between moral and positive laws; natural justice is law because it is right, conventional justice is right because it is law. His meaning is further brought out by his criticism of the phrase “law is said to be the ‘measure’ or ‘image’ of the things which are by nature just.” This, he says, is a bad definition; such phrases are worse than metaphors; for the latter do make their meaning to some extent clear because of the likeness involved. Whereas this kind of phrase makes nothing clear; an image arises through imitation, and this is not the case with law.

Administration

Another commonplace antithesis of Greek thought which Aristotle attempted to reconcile was whether the rule of man or law is best, whether, in the historic phrase, it shall be a government of laws, and not of men. Pittacus had early decided in favor of law, but Solon apparently thought otherwise, as did his people. In fourth century Athens only two

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81 Soph. El. 173a 7, E. N. 1134b 18.
82 Top. 140a 6.
83 Diod. 9. 27. 4, Diog. Laert. I, 77.
principal forms of constitution were recognized: democracy and oligarchy. Democracy was the constitution under which law ruled, or should rule, and in oligarchy men ruled without regard to law. Theseus thus urges the case of democracy in the *Suppliants*:

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\begin{align*}
&\text{No worse foe than the despot hath a state,} \\
&\text{Under whom, first, can be no common laws,} \\
&\text{But one rules, keeping in his private hands} \\
&\text{The law: so is equality no more.} \\
&\text{But when the laws are written, then the weak} \\
&\text{And wealthy have alike but equal right.} \\
&\text{Yea, even the weaker may fling back the scoff} \\
&\text{Against the prosperous, if he be reviled.}\end{align*}
\]

Socrates, by asserting that he who knows should rule, gave fresh vitality to the problem. Plato urged the supremacy of the wise man to the rule of law on the principle that simplicity can never encompass complexity. If law determined what is noblest and most just for all, nevertheless it could not determine what is best for them; for the differences of men and actions are so numerous, and since change is always occurring, it is impossible for any science to promulgate a simple rule for everything and for all time. In attempting this very thing law is like an ignorant and stubborn man who permits no one to question his commands even though a sounder alternative has been proposed. Why make laws at all, if this analysis is sound? Plato answers the question on the analogy of the physical training instructor who issues general orders for his class as a whole and who cannot go into details in individual cases and order what is best for each man's physique; he makes a rough general rule which will be good for the physique of the majority, such as the assignment of equal exercise to whole classes. Similarly, the legislator who watches over the human herds will never be

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85 429 et seq. (Way's trans.)
86 *Polit.* 294A et seq., *Laws* 874E et seq.
able by making laws for all collectively, to provide exactly that which is proper for each individual; he will legislate for the majority and in a general way only roughly for individuals. In the nature of things this must be the case, for no one can sit beside each person all his life and tell him exactly what is proper for him to do. Thus, if laws are promulgated the king should be at liberty to change or depart from them as circumstances indicate.

In his old age when he wrote the *Laws* Plato still held to the view that law was only a second-best; but he was more aware of its indispensability. It is really necessary, he says, for men to make themselves laws and to live according to laws, or else they will not differ from savage beasts, a metaphor which Aristotle also employed. He urged this for several reasons: Human nature is such that it is impossible for man both to perceive what is of benefit to the civic life of men and, perceiving it, to be alike able and willing to practice what is best. Even if a man should fully grasp the principle that the public interest ought to prevail over private interest, should he afterwards get control of the State and become an irresponsible autocrat his mortal nature will always urge him on to grasping and self-interested action. It is not right for reason to be subject to anything, for no law is mightier than knowledge; but genuine reason does not exist anywhere and hence it is that we have to call on law to rule.

At this point Aristotle took up the discussion and subjected the problem to an analysis from several points of view. It is important to notice when his analysis is aporetic and when he is speaking for himself. It is worthwhile to examine his position in full inasmuch as it bears directly upon the vital present-day question of the degree of power to be accorded administrative agencies.

In examining the subject of kingship as a type of normal constitution, Aristotle observes that those who are for a king will say that laws enunciate only general principles but do not

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67 *Polit.* 1286a 9 et seq.
give directions for dealing with the circumstances of the particular case. In an art of any kind it is foolish to govern procedure by written rules: even in Egypt, where the physicians are expected to treat their patients by stereotyped written rules, they are allowed to change the treatment after four days, if desirable. However, if the objection to law is that it embodies a general principle, we must not overlook the fact that the king also must possess the general principle, so that he is open to the same objection; moreover, in the case of the ruler it will be coupled with the unsettling influence of emotion and passion which every human soul necessarily has; it will consequently be inferior. It may be answered, however, as an offset that the ruler will be better able than the law to handle the particular case.

This analysis suggests that the ruler should make laws which will be binding in all cases except where they fail to give justice in some particular case. But this raises the question, ought the one best man govern or all the citizens in matters which it is impossible for the law either to decide at all or to decide well? Aristotle’s answer seems to favor the citizens, on the ground that the many judge better than one, are less corruptible, and are as inherently virtuous as a single ruler.

So far Aristotle has been discussing the case of the king who rules subject to law except where justice requires that he set the law aside. What of the absolute monarch who rules according to his own will? Some people think that it is entirely contrary to nature for one person to rule over all the citizens when the state consists of men who are alike; everybody must govern and be governed alike in turn; but this constitutes law, for regulation is law. But it may be objected that any case which the law appears to be unable to determine, a human being also would be unable to decide. The law, however, does all that can be done to meet this difficulty, for it purposely trains the rulers to deal fairly and justly with these matters. The law has this merit, that it not only regulates but educates men to supply its own inevitable defects.
Furthermore, it permits the introduction of any amendment that experience has shown is better than the established code. The rule of law is the rule of God and reason: the rule of a man involves a part rule of the brute which is present in every man in the form of desire and anger. There is really no analogy with the art of medicine. A physician is seldom drawn by spite or favoritism in a direction contrary to that which reason dictates, whereas the ruler may have a personal interest in the matter which he has to decide. Moreover, physicians themselves call in other physicians to treat them when they are ill, believing that they are unable to judge truly because they are judging about their own cases and may be influenced by feeling. Hence it is clear that when men seek for what is just they seek for what is impartial; for the law is that which is impartial. The argument against curing men by written rule and governing by written rule also applies only to one sort of law—written law; unwritten, or customary law, which is the more authoritative sort, is not affected by it. Then, again, it is certainly not easy for the single ruler to oversee a multitude of things; he will have to delegate much of his authority; and if he does so why should not supreme authority be given to the whole number at once. He repeats that “two heads are better than one,” especially after they have legal training, and he states again the argument from equality.

To this point Aristotle’s discussion has been kept rigorously on an aporetic basis. He has stated fully the arguments for the rule of the best man under law, and he has taken account of Plato’s position in the *Politicus* notwithstanding Plato’s apparent abandonment of it in the *Laws*. In their precise problematic setting the arguments for Absolute Monarchy are in the realm of the abstract in relation to the modern state which could not be administered without the aid of law even by the wisest of men. At this stage of the argument Aristotle abandons the aporetic analysis and ends the discussion by giving his own position. He remarks that what has been said is a true account of the matter in some cases, but it does not apply in others;
specifically, the arguments against the rule of the superior man unrestrained by law do not apply in the case of the individual whose virtue exceeds that of all the others. It is clear, he says, that among people who are alike and equal it is neither expedient nor just for one to be sovereign over all—neither when there are no laws, but he himself is in the place of law, nor when there are laws, neither when both sovereign and subjects are good nor when both are bad, nor yet when the sovereign is superior in virtue, except in one particular instance, i.e., when he surpasses all the others in virtue.

Aristotle began with the assumption that wherever supreme authority in the State was lodged, some hardships will result, and that supreme authority should be given to laws which conform to normal constitutions. His analysis drove him to make an exception to this rule: it holds only when the State is composed of individuals who are equal, and does not hold where it would work injustice. If the philosopher king of Plato should ever appear on this earth his will should be paramount in the State, even over law. He was driven to make this exception in order to make his study theoretically complete; he could not logically maintain the supremacy of law in the face of the hypothetical supposition that a Heracles might appear on earth. Moreover, to the fourth-century B.C. mind, the idea of the possibility of a philosopher-king was a familiar one. Xenophon and Isocrates had drawn convincing pictures of the ideal ruler. But the conception had a deeper root. It was supported by the conviction that the rule of the superior man or superior race was a natural one. "We do not," said Plato, "set oxen to rule over oxen, or goats over goats"; and so in the golden age of the reign of Cronus, demigods were set by him to rule over man "and they with great ease and pleasure to themselves, and no less to us, taking care of us and giving us peace and reverence and order and justice

88 Polit. 1281a 14.
89 Polit. 1282b 1.
90 Laws 713D. For a full discussion see 1 Newman, op. cit. 279.
never failing,” secured a life of concord and happiness to the tribes of men. “This tradition,” he adds, “tells us, and tells us truly, that for cities of which some mortal and not God is the ruler, there is no escape from evils and toils.” “There is in nature a principle of slave mastery,” said Aristotle.\(^{91}\) He believed that the appearance of a philosopher-king was most improbable but he would not hold that it was impossible; if such a ruler appeared the “truest and most divine” form of the State would be realized.\(^{92}\)

Aristotle\(^ {93}\) elsewhere again considered the problem of the necessary insufficiency of general rules of law when applied to particular cases. The question arose in a consideration of the kind of appeal to address to a judge or jury. Aristotle held that rhetoric was an art which could be treated systematically if not scientifically; previous discussions of the subject had contributed very little to an understanding of proof, the legitimate and most effective method of persuasion, which is the reputed end of the art. If trials were everywhere conducted, as they are in some well-governed cities, the rhetorician would have nothing to say. For in those trials all appeals to a judge’s passions and feelings, all attempts to excite him to anger, jealousy, compassion are rightly excluded. It is clear that the parties to an action strictly speaking have nothing to do but prove their point; whether the fact is so or not, whether the thing alleged has or has not been done. Whether it is important or unimportant, just or unjust, in all cases in which the legislature has not laid down a rule, is a matter for the judge himself to decide; it is not the business of the litigants to instruct him.

Aristotle here indulges in a digression to discuss how much should be left to the discretion of the judge. Laws properly enacted should as far as may be determine everything themselves and leave as little as possible to the discretion of the

\(^{91}\) Polit. 1288\(^ b\) 37.
\(^{92}\) Cf. Polit. 1289\(^ a\) 40, 1261\(^ a\) 29 et seq.
\(^{93}\) Rhet. 1354\(^ a\) 15 et seq.
Aristotle

judge: first, because it is easier to find one or a few men of good sense, capable of framing laws and pronouncing judgments, than a large number; and second, because legislation is the result of long consideration, whereas the decisions of a judge are given on the spur of the moment, without much time for reflection, so that it is difficult for the judges properly to decide questions of justice or expediency. But the most important consideration of all in favor of this view is that the judgment of the legislator does not apply to a particular case, but is universal and applies to the future: he lays down general rules with reference to future acts and events, in which he himself has no immediate interest; but when we come to the judge, he has to decide present and definite issues in which he is, or may be, directly concerned, and in which his interests and affections may be engaged; and so from this conjunction of his personal feelings and private interests with the case before him, his judgment or power of decision is clouded and he is unable to discern the truth. Questions of fact, however, past, present and future, are a necessary exception to the application of this principle: these cannot be foreseen by the legislator, and it is impossible for him to provide for them by any general regulations; they must necessarily be left to be decided as occasion arises by the ordinary judges.

Some of Aristotle’s analysis must be read against the background of Greek legal procedure, for example, that the judge is not allowed sufficient time in which to deliberate. His general conclusion that the law is better than the individual but should be coupled with a power to relieve in hard cases has been the usual historical practice since his time. It represents the over-all picture today. The wide latitude accorded jury and judge in criminal cases, executive clemency, bills for special relief, the power to grant new trials in civil cases, above all, the rise of administrative agencies, are instances of attempts, haphazard though they may be, to meet Aristotle’s principle. There are many gaps to be closed, as in the so-called doctrine of the law of the case; but in the absence of a systematic
approach to the problem the defects will always be numerous. Aristotle's great achievement, in spite of the unique character of Greek law, lay in reaching a position which has accorded with the ideal and practices of all subsequent legal systems.

JUSTICE

With the theory of justice worked out by Aristotle we pass to a theory rich in legal content. That is to say, we are concerned in large part with justice as an application of law as opposed to justice as the whole of virtue. In the latter sense it had been the subject of Plato's greatest dialogue; its legal significance was, of course, known to him, but he had scant interest in that aspect. Aristotle's approach is different. He is interested in justice as a particular virtue; specifically, as a virtue which must be analyzed in order to make his philosophical theory of the virtues complete. Moreover, in the Ethics and Politics he was setting forth a practical philosophy, guides which would make men good, and which would instruct legislators in the management of the State. Plato's theory of justice gave no help in legal practice inasmuch as he declared the "conduct within" to be justice in the only true sense of the word,\textsuperscript{94} while the judge's primary concern is with external action. Justice is accorded a fuller treatment than any other virtue since it is the virtue most directly connected with the welfare of the State.

Justice is divided into Universal Justice and Particular Justice, and the latter is further subdivided into Distributive Justice and Corrective Justice; the latter is again subdivided into that concerned with voluntary transactions, and that concerned with involuntary transactions, which again are either furtive (theft, adultery, etc.) or violent (assault, murder, etc.).\textsuperscript{95} The conceptions underlying this classification have been notably influential in subsequent thought; but their precise meaning in Aristotle's mind is not clear and the mathematical analogies to which he resorts while helpful are not conclusive.

\textsuperscript{94} Rep. 443CD
\textsuperscript{95} E. N. V.
It has been thought that if his ideas are read in a legal context all difficulties will be resolved. This method has been more fruitful than any other but it is in danger of being carried to an excess.

Universal Justice means, Aristotle says, complete virtue. He arrives at this definition by an appeal to popular usage. A man is unjust if he breaks the law of the land or if he takes more than his share of anything. By “just” we mean therefore what is lawful, what is fair and equal. Universal Justice is the former and Particular Justice the latter. It is clear that in one sense all that is lawful is just; for the law aims either at the common interest of all, or at the interest of a ruling class determined either by excellence or in some other similar way; so that in one of its senses the term “just” is applied to anything that produces and preserves the happiness of the political community. The law speaks on all subjects and more or less rightly commands the practice of all the virtues. Justice, then, in this sense, may be said to be the practice of entire virtue towards one’s neighbors. In an abstract sense therefore the just can be identified with all law and therefore with all morality. Hence Justice is often regarded as the best of the virtues—neither the evening star nor the morning star is so admirable. This kind of Justice is not a part of virtue but the whole of virtue. However, Aristotle remarks that he is not interested in Justice in this sense: “what we are investigating is the Justice which is a part of virtue.”

Juristically, Universal Justice has been interpreted to mean that in Aristotle’s intention it is the source of the conception of public law, the law of things and a large part of the law of persons. Particularly it is the source of the criminal law that the state enforces as distinguished from the appeal to the courts for the redress of private wrong to individuals.96 This interpretation has been criticized on the ground that the jurist

96 Vinogradoff, *Aristotle on Legal Redress* (1908) 8 Col. L. Rev. 548; idem., *2 Outlines of Historical Jurisprudence* (1922) 57; Barker, *Greek Political Theory, Plato and His Predecessors* (1918) 47.
is attributing his own point of view to Aristotle and making him reason as a lawyer when he is really thinking more of Platonic and traditional Greek ethics than of the systematic philosophy of law.\(^7\) Aristotle's Universal Justice appears to be an ethical, rather than a legal, conception and the legal references are brought in only in subordination to, and in illustration of, the ethical idea. Aristotle wishes to get rid of, to dismiss as he says, the broader Platonic conception of justice as the whole of virtue before entering upon the discussion specifically of justice as a distinctive virtue. Did Aristotle have in mind the legal classification the jurists have ascribed to him? The division of justice into the two classes "obedience to laws and equitable treatment of neighbors" is not taken over from Athenian law, but is reached by Aristotle's topical method of examining the current use of terms (πολλαχώς λεγόμενα). These appear to be, Aristotle says, the two chief current conceptions of the word. There is no conscious discrimination between public and private law when it is stated that the law enjoins all virtue. It is an illustration and confirmation of the Platonic notion Aristotle wishes to discuss. It is only the exigencies of the theory and not any explicit statement of Aristotle that classifies criminal justice under General Justice instead of under Corrective Justice. Lastly, there appears to be no shred of evidence for the further deduction of the technical process of διάδικασία from this same conception of General Justice. The jurists' legal mind may connect the two ideas, but Aristotle did not.

This is a strong case and has not apparently been satisfactorily answered. It has been argued in reply that such an interpretation would leave certain parts of the juridical process unexplained. If we restrict the notion of juridical justice to Distributive and Corrective Justice we would fail to account for important parts of the law. The juristic view of Aristotle's

scheme is based on the assumption that the great encyclopedist could not have disregarded such juridical categories as crime and punishment, property and possession, relations between the city and the citizen; men have to estimate them in all systems under some standard of justice and so did the Greeks. Neither Distributive nor Corrective Justice supplies such standards, but Justice in general does supply them from the point of view of compulsory morality. This interpretation is primarily juridical but it can hardly be maintained that the confronting of a passage on justice with fundamental categories in the administration of justice must be considered as a methodological defect.

However, is it not precisely such a defect unless there is some evidence that Aristotle intended in his theory of justice to account for all the primary legal categories? The object of the whole discussion is plainly not that. It is to show that the principle of the mean is applicable to Justice as well as to other forms of goodness. More exactly, he wants to show that Justice is the establishment of a sort of proportion (ἀναλογία) and that the three kinds of justice involve three different kinds of proportion. In accomplishing this end he displaces Plato's theory, which maintained that justice was always proportion, and also that of the Pythagoreans who had asserted that it was reciprocity. That he did not, contrary to his usual practice, directly allude to Plato's theory has been best accounted for by Mme. de Staël's remark that it is more than commonly true that the names we forget are those which we remember only too well. It must not be forgotten also that when Aristotle says that "the various pronouncements of the law (νόμος) aim at the common interests of all" νόμος means law and custom as sanctioned by public opinion. If Aristotle was thinking of the fundamental categories of law he must also have been thinking of the fundamental categories of custom. But where is the evidence? Even if Aristotle desired, as he apparently did, the extension of law in its strict sense to the

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*E.N.* 1131* 30.  
*E.N.* 1129* 14.
whole of life, he could not have affirmed truthfully that “the laws, in fact, have something to say about all that we do,” although it would be true to make that remark about custom whether sanctioned by law or by public opinion. If custom is neutral it does not forbid, and fashion decides.

Distributive Justice “is exercised in the distribution of honor, wealth, and the other divisible assets of the community, which may be allotted among its members in equal or unequal shares.” The principle of this distribution is one of geometrical proportion and is the one which should guide the legislator. If A and B be persons, C and D lots to be divided, then as A is to B, so must C be to D. A just distribution will produce the result that A + C will be to B + D in the same ratio as A was to B originally. Distributive justice, therefore, consists of the distribution of property, honors, offices, etc., in the State according to the merits of each citizen. Concretely, if you are twice as good a citizen as I am you should be twice as honored and twice as wealthy.

Aristotle seemed to think that the rule could be applied in concrete cases and that ideally it was capable of a wider application as a regulative principle for the distribution of property and all the distinctions of society. That it was impossible to measure the immeasurable apparently did not occur to him. Historically, it represents the Platonic ideas of a harmony and proportion ruling the world, and in addition the idea of two kinds of equality, one a mere equality of number and measure, the other, the “award of Zeus,” which was the equality of proportion.

Corrective Justice is the rule of arithmetical proportion and is a matter for the judiciary. It operates in the realm of private transactions between citizens, and therefore in the field of private and not public law. The principle takes no account of persons, but treats the cases as cases of unjust loss and gain, which have to be reduced to the middle point of equality between the parties. Justice is a mean, and the judge

100 E. N. 1130b 32. 101 Gorg. 507E, Laws 757B. 102 E. N. 1131a 1.
a sort of impersonation of justice, a mediator or equal divider. The division of Corrective Justice into voluntary and involuntary corresponds to the modern classification of contract and tort and in Roman law to *obligationes ex contractu* and *ex delicto*. It seems clear that Aristotle had before him the distinctions of Greek law and that he was speaking in terms of Greek legal practice and probably using Greek legal terminology in so far as there was one.\(^{103}\)

To the conception of justice as a mean or proportion Aristotle adds the requirement of a state of mind. There must be a deliberate purpose. An action done in ignorance and which could not be reasonably expected is called an accident; an action done in ignorance and without malice but which might reasonably be expected is a mistake (it would be negligence for us); an action done with knowledge but without deliberation (*e.g.*, in anger) is unjust but it does not imply that the doer is unjust; an action done deliberately means that both the act and the doer are unjust.\(^{104}\)

In all this Aristotle no doubt had an eye on Greek legal practice, and was perhaps rationalizing aspects of it. However, he was groping for an ethical and not a legal principle. That is to say, he was searching for general principles to the effect that inequality in the treatment of individuals must be justified by the requirements of the good life seen in all its aspects. If such a principle were found, legal justice, as Plato held, could be accounted for as a special case. Aristotle's movement towards a separation of the various kinds of justice is a step away from Plato, who wished to unite all activities under one supreme rule of goodness, towards the present-day practice of perceiving a multitude of problems. Because Aristotle's theory was more specific than Plato's its influence upon legal thinking has been more marked.

\(^{103}\) For a full discussion see Lee, *The Legal Background of Two Passages in the Nichomachean Ethics* (1937) 31 Classical Quarterly 129.

\(^{104}\) *E. N.* 1135a 15.
CONCLUSION

At Paris in 1536 Ramus defended the radical thesis that all the doctrines of Aristotle were false. His opponents were plainly hard-pressed since Ramus was silenced only by an edict of Francis I which forbade him, under pain of corporal punishment, from "uttering any more slanderous invectives against Aristotle." Ramus' revolt was really against scholasticism and the equating of truth with authoritative dogma. The extent to which he himself was entangled in the coils of Aristotelianism is clear from his own logic which, in spite of his claims to the contrary, amounted to no more than a formal improvement upon that of his predecessor. However, his lesson for us is that we need not assume that a philosophical position necessarily states doctrines of truth or falsity. Our first question may be: Is the doctrine a serviceable one? Does it help us in the verification of hypotheses and in the prosecution of our inquiry?

By this test there is no room for debate with respect to Aristotle's contribution to legal thought. In the first systematic legal treatise ever put forward, the work of Q. Mucius Scaevola, the definition and classification of legal concepts proceeded on the basis of the Aristotelian logic. He was the first, Pomponius remarked, to "arrange the ius civile in genera" and a clue to the meaning of this statement may be found in Gaius' observation that he distinguished five kinds of guardianship.105 Aristotle's doctrine of law as passionless reason, as a form of order, as a kind of a contract, his theory that its end was to make men good, that it must be grounded on habit, his instrumental view of legislation, his insistence upon the necessity of the rule of fairness or equity in any legal system, his establishment of the fundamental principle of the administrative process, his conception of justice, all have had so obvious an influence that it is impossible to examine the work of any subsequent legal thinker of importance without finding some of his ideas present in an explicit form. Whether true or

105 Gai. I. 188. Jolowicz, Historical Introduction to Roman Law (1932) 90.
untrue their usefulness is apparent from the fact that they have never ceased to be employed. Between Aristotle and modern legal thought there are profound differences; but those differences are due in part to a working out of his own ideas by means of the consideration of the possible alternatives.

“The Athenians have invented two things,” Aristotle once remarked, “wheat culture and excellent laws. The only difference is that they eat the wheat, but make no use of the laws.” No one knew better than Aristotle how false this witticism was. It is true that Greek law never had the benefit of the technical analysis of professional jurists. Moreover, it never achieved the complexity which marked the Roman system; but complexity in a legal system is a direct function of the complexity of the activities it regulates. A system controlling the behavior of a city-state will need fewer elements than one which seeks to maintain the order of an area which includes most of the known world. But it was the characteristic of the Athenians that they made use of their laws. Solon was once asked which was the best policed city. “The city,” he replied, “where all citizens, whether they have suffered injury or not, equally pursue and punish injustice.” This idea, which was carried out in practice through the institution of large jury courts, instilled in the Athenians a passion for litigation. The law became one of the chief agencies through which public opinion expressed itself. At the same time the solutions which were reached for the large problems of substantive law have, because of their soundness, never lost their appeal to subsequent generations.

To the historian of Greek law Aristotle has a special importance. His painstaking accounts of Greek law and procedure are the chief source of our knowledge of the system. That aspect of the Aristotelian encyclopedia is beyond the limits of the present study, but it must be mentioned for completeness. An example is the detailed account of the procedure of the dikastic courts which appears in the final chapters of the

Athenian Constitution. Until the year 1937 it was believed that Aristotle’s description of the allotment process with respect to jurors was so ambiguous and contained so many omissions that the process could not be understood. However, in that year a Greek allotment machine (κληροτήριον) was discovered, and when Aristotle’s meticulous text was restudied the result was a complete vindication.\(^\text{107}\) For the legislative process, the law of property, contract, inheritance, possession, crime and punishment, tort and the other divisions of the law his writings are equally important. He was an incomparable encyclopedist, and his interest in the law was a powerful one; for the legal historian as well as the legal theorist his works, in which he systematized much of the knowledge of his time, are a matchless source of information and stimulation.