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Aristotle and Natural Law

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Abstract: This paper seeks to clarify the long-standing controversy over Aristotle's relationship to the natural law tradition. The paper argues that a precondition for any adequate assessment of Aristotle's natural law credentials is a close analysis of the *Nicomachean Ethics* V.7 discussion of the just by nature. Such an investigation, the primary concern of section 1, reveals that Aristotle's characterization of the politically just as partly natural and partly conventional does entail that nature serves as a normative ground for just law. With this conclusion in place, section 2 then turns more directly to Aristotle's relation to the natural law tradition. Despite important differences between Aristotle's account of the normative foundations of law and those found in the paradigmatic natural law teachings of the Stoics and Aquinas, I argue, there are nonetheless features of later natural law thought on the purpose and evaluation of law which are genuinely Aristotelian in orientation.

The question of Aristotle's natural law credentials has often divided interpreters.[1] In the current paper, I argue that much of this disagreement stems from insufficient attentiveness to both the details of Aristotle's account of the just

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[1]Fred D. Miller Jr., "Aristotle on Natural Law and Justice," in *A Companion to Aristotle's "Politics,"* ed. David Keyt and Fred D. Miller Jr. (Oxford: Blackwell, 1991), 280–304, and Tony Burns, "Aristotle and Natural Law," *History of Political Thought* 19 (1998): 142–66, both offer arguments in support of significant natural law tenets in Aristotle's practical works. See also Peter Trude, *Der Begriff der Gerechtigkeit in der Aristotelischen Staatsphilosophie* (Berlin: de Gruyter, 1955), 177; Walter Siegfried, *Der Rechtsgedanke bei Aristoteles* (Zurich: Schultess, 1942), 57–62; Ernest Barker, *The Political Thought of Plato and Aristotle* (New York: Dover, 1959), 366; and Walter Von Leyden, "Aristotle and the Concept of Law," *Philosophy* 42 (1967): 1–19. Representative criticisms of the claim that Aristotle is a natural law theorist are found in Harry V. Jaffa, *Thomism and Aristotelianism: A Study of the Commentary by Thomas Aquinas on the "Nicomachean Ethics"* (Chicago: University of Chicago Press, 1952); Richard Mulgan, *Aristotle's Political Theory* (Oxford: Oxford University Press, 1977), 141; Bernard Yack, *The Problems of a Political Animal* (Berkeley: University of California Press, 1993), 140–41; Francesco Lisi, "The Concept of Law in Aristotle's *Politics*," *Proceedings of the Boston Area Colloquium on Ancient Philosophy* 16 (2000): 47; Donald D. Schroder, "Aristotle on Law," in *Aristotle and Modern Law,* ed. Richard O. Brooks and James Bernard Murphy (Aldershot: Ashgate, 2003), 37–51; and

by nature in *Nicomachean Ethics* 5.7 and the ambiguity of the term "natural law." The paper thus proceeds from the assumption that a precondition for any adequate assessment of Aristotle's status as a natural law theorist is a close analysis of the 5.7 discussion of natural justice.[2] Such an investigation, the main concern of section 1, reveals that Aristotle's characterization of the politically just as partly natural and partly conventional does indeed entail that nature serves as a normative ground for law. With this conclusion in place, section 2 then turns more directly to Aristotle's relation to the natural law tradition. Despite important differences between Aristotle's account of the normative foundations of law and those found in the paradigmatic natural law teachings of the Stoics and Aquinas, I argue, there are nonetheless features of later natural law thought on the purpose and evaluation of law which are genuinely Aristotelian in orientation.

1. Natural Justice

At no point in the practical works does Aristotle use a compound term directly equivalent to "natural law." The closest approximation is found neither in the *Nicomachean Ethics* nor in the *Politics*, but rather in the *Rhetoric*, which distinguishes between particular and common law (*nomon ton men idion ton de koinon*) by stipulating that the latter consists of things agreed upon by all persons and hence in accord with nature (*kata phusin*, *phusei*) (*Rh.* 1.13 1373b9–13, 1.15 1375a31–b2). Even if one regards the *Rhetoric* as a reliable source of Aristotle's considered views, however, its account of law is internally inconsistent and provides insufficient textual grounds for a natural law doctrine.[3] Aristotle's better-known discussion of natural right in *Nicomachean Ethics* 5.7 has recommended to some interpreters an explicit or implicit natural law view. This is despite the fact that Aristotle's description of the politically just as partly natural and partly legal seems to contrapose, rather than conjoin, nature and convention (*tou de politikou*

Ross Corbett, "The Question of Natural Law in Aristotle," *History of Political Thought* 30 (2009): 229–50.

[2]I use "natural justice," "natural right," and "the just by nature" interchangeably as translations of *phusikon dikaion*. It needs to be remembered, however, that Aristotle's primary focus in *NE* 5.7 is with "the just" (external facts of "right": *to dikaion*), rather than an ethical quality of persons (*dikaiosunē*). See Eckart Schütrumpf, "Little to Do with Justice: Aristotle on Distributing Political Power," in *Aristotle's Politics: A Critical Guide*, ed. T. Lockwood and T. Samaras (Cambridge: Cambridge University Press, 2015), 163–83.

[3]In *Rh.* 1.10 (1368b7–8) Aristotle says that particular law is written, whereas in 1.13 (1373b56) he says that particular law is either written or unwritten. This inconsistency is discussed further below. The reliability of the *Rhetoric* as a source of Aristotle's considered views is also discussed in more detail in section 2.

dikaiou to men phusikon esti to de nomikon) (*NE* 5.7 1134b18–19; cf. *MM* 1.33 1194b30–1). Aristotle's partition, taken at face value, suggests that the just by nature and the just by convention are distinct parts of a political community's principles of justice, not that positive law derives its normative justification from a transcendent or moral origin that is external to politics.

It would nevertheless be overly hasty to conclude that the attribution to Aristotle of natural law commitments is simply anachronistic. While natural justice cannot be regarded straightforwardly as a transcendent or even antepolitical source of positive law's validity, it does provide a ground for the evaluation of positive law as just or unjust. In order to work through this complexity, it is best to begin with an examination of the discussion of the natural part of political justice in *Nicomachean Ethics* 5.7. The difficult question of Aristotle's natural law credentials, that is to say, is best approached through a prior consideration of his difficult statements on the topic of natural right or the just by nature.

Political justice refers to the rightful ordering of relations (inclusive of offices, honors, and material goods) among the citizens of a polis who are governed by law. In *Nicomachean Ethics* 5.7, Aristotle divides this political justice (*politikon dikaion*) into natural and conventional parts:

> Of the just in the political sense, one part is natural, the other, conventional [or legal] [*tou de politikou dikaiou to men phusikon esti to de nomikon*]. The natural [*phusikon*] is that which has the same capacity [*dunamin*] everywhere [*pantachou*] and is not dependent on being held to exist or not, whereas the conventional [*nomikon*] part is that which at the beginning makes no difference whether it is thus or otherwise, but once people have set it down [*hotan de thōntai*], it does make a difference. (1134b18–22)

The contrast, within political justice, between the natural (*phusikon*), as what has the same power everywhere, and the conventional or legal (*nomikon*), as what is posited by particular communities, seems at first to be a fairly standard application of the *phusis* and *nomos* distinction familiar from mid- to late fifth-century Greek thought and associated most readily with the sophistic movement.[4] This initial impression is corroborated by Aristotle's

[4]On the sophistic contrast between *phusis* and *nomos* see W. K. C. Guthrie, *The Sophists* (Cambridge: Cambridge University Press, 1971), 55–134, and G. B. Kerferd, *The Sophistic Movement* (Cambridge: Cambridge University Press, 1981), 111–30. As Guthrie notes at 53, Aristotle's standpoint is closer to the sophists than it is to Plato on some issues. Aristotle employs or discusses the opposition between *phusis* and *nomos* in a number of places including *NE* 1.3 1094b15–16, 5.5 1133a30, 5.7 1134b18; *Pol.* 1.3 1253b21, 1.4 1254a13–15, 1.5 1254b19–21, 1255a1, 1.6 1255b13–16, 3.6 1278b33; *MM* 1.33 1194b32; *SE* 12, 173a7–30. The passage from *Sophistical Refutations* is particularly revealing insofar as it considers the use of the *phusis-nomos* dichotomy in Plato's *Gorgias* and the sophistic view that convention represents the majority opinion whereas the wise speak according to the standard of truth and nature.

subsequent reference to the commonplace example of the burning of fire as a natural phenomenon because it occurs in the same way in Greece and Persia (1134b27). From the perspective of this dichotomy between the invariance of the natural (*phusikon*) and contingency of the conventional or legal (*nomikon*), the idea of a natural law which serves as a transcendent or antepolitical normative ground for the evaluation of positive law is paradoxical.[5]

Aristotle's partition of the natural and conventional parts of political justice does not, however, map neatly onto the *phusis* and *nomos* distinction. In the first instance, Aristotle's conception of nature is conceptually richer than that associated with the sophistic movement. In *Metaphysics* 5.4, Aristotle distinguishes several senses of nature. These include primary matter, the form or substance which is the *telos* of the process of becoming, substances as such, and the origin or principle of primary movement which inheres in each natural entity intrinsically and nonaccidentally. This latter sense of nature—the source or internal principle of change—is privileged for theoretical enquiry.[6] In the practical domain, however, Aristotle's emphasis is on the systematic relationship between the nature (*phusis*) of a thing, its function (*ergon*), and its end (*telos*).[7] From this viewpoint, the end or *telos* of a natural entity is to realize or actualize its nature in the performance of its function (*NE* 9.7 1168a6–9).

In the second instance, conventional justice (*nomikon dikaion*) appears to have a narrower scope than *nomos* (inclusive of positive law and custom). Aristotle's examples of the conventionally just exemplify "original indifference": the specific sum of money for a ransom, the choice to sacrifice a goat rather than two sheep, specific legislative (*nomothetousin*) provisions such as the details of the sacrifice to Brasidas and decrees. All of these examples describe particular determinations which are ethically indifferent prior to enactment (they could be otherwise and not involve injustice), but ethically (or at least practically) significant subsequent to enactment, because they function as guides to conduct which co-ordinate the activities of the citizens of a polis. The conventionally just, therefore, does not seem to include all legislative enactments and customs, but legal provisions and decrees in relation to particulars (*NE* 5.7 1134b23). This leaves open that legislation could include both natural and conventional elements, in the sense that, for example, it might be "in the nature of things" for all communities to legislate on religion, yet for the precise determination of such laws to remain a matter of positive

[5]As E. R. Dodds, *Plato: Gorgias* (Oxford: Clarendon, 1959), 268 notes, when Callicles employs the expression *kata nomon ge ton tēs phuseōs* at *Gorgias* (483e) he is "coining a new and paradoxical phrase," albeit one anticipated by Thucydides 5.105.2.

[6]Fred D. Miller Jr., "Aristotle: Naturalism," in *The Cambridge History of Greek and Roman Political Thought*, ed. Christopher J. Rowe and Malcolm Schofield (Cambridge: Cambridge University Press, 2000), 322.

[7]C. D. C. Reeve, "The Naturalness of the Polis in Aristotle," in *A Companion to Aristotle*, ed. George Anagnostopoulos (Oxford: Blackwell, 2009), 512.

stipulation allowing lawmakers to select from a delimited range of "originally indifferent" choices without injustice. This construal of conventional or legal justice points forward to the Thomistic natural law doctrine of *determinatio*, according to which legislators can choose from a range of eligible options for the common good of their political communities.[8]

Aristotle's assertion of the "changeability" of the just by nature also speaks against reading the partition of political justice in terms of a simplistic construal of the *phusis* and *nomos* distinction. If one assumes, as "some people" do, that what is by nature is unchangeable and has the same capacity everywhere (*akinēton kai pantachou tēn autēn dunamin*) (1134b24–25), then it is difficult to see how anything politically just could fail also to be conventional and hence changeable. As a consequence, the whole domain of justice would exclude the natural. Yet this is true, Aristotle insists, only in a sense. While it certainly might be unintelligible in the case of the gods, in the human realm it is possible for there to be something that is by nature and yet also changeable. By nature the right hand is stronger (*kreittōn*) and yet people can become ambidextrous, so that in one sense what is by nature is fixed and in another sense it is subject to variations and habituation. The just by convention is a function of agreement and the pursuit of advantage (*ta de kata sunthēkēn kai to sumpheron*) and hence is not the same everywhere (just as measures for amounts of corn and wine are not the same everywhere). What is just at the human level, but not by nature, is also not the same everywhere (*ta mē phusika all' anthrōpina dikaia ou pantachou*), as may be seen by reference to the different constitutions that are established. Nonetheless, Aristotle concludes, there is only one constitution that is everywhere by nature the best (*mia monon pantachou kata phusin hē aristē*) (1134b25–1135a5).

The obscurity and difficulty of 5.7 is undeniable. In what follows, I attempt to argue that Aristotle's examples of the stronger right hand and the best constitution justify an interpretation according to which nature serves as a normative foundation for the enactment and evaluation of positive law. Before I turn to these examples, it is helpful to consider some broader interpretative issues at stake.

Aristotle's inclusion of natural justice within political justice seems in tension, it was suggested above, with an appeal to a higher source of justification for law beyond a practically reasonable legislator's conception of the common advantage. Political justice obtains between citizens who are free and equal and governed by law (5.6 1134a25–32) and presupposes an association of "universal justice" with the "lawful" (5.1 1129b1–2), that is, a

[8]Aquinas recognizes that many norms which are part of the *ius civile* (civil law) can only be rational guides to action if they are *posited* and that such norms are selected (determined) by relevant authorities from a *range* of reasonable schemes for serving the common good (ST I-II q95 a2). See also John Finnis, *Natural Law and Natural Rights*, 2nd ed. (Oxford: Oxford University Press, 2011), 183 and 280–89.

legislative interpretation of complete virtue in relation to others. There is accordingly little suggestion in the practical works that nature serves as am "external" normative standard for legislation. It might be thought a short step from this to the conclusion that the just by nature plays a limited role in Aristotle's account of law. If the content of ethical virtue for each community is predominantly determined by positive law, then appeals to nature as a normative criterion appear to be of both limited relevance and limited application in the political domain.[9]

Such a conclusion underestimates the normative significance of Aristotle's derivation of law from the practical rationality of a legislative expert and the capacity for political science to track ethical truths. The above points do nevertheless rule out a "vertical" interpretation of the relationship between the just by nature and the just by law of the kind associated with the Stoics, Roman jurists, and Thomistic natural law tradition.[10] The categorization of the just by nature as a part of political justice is rather suggestive of a "horizontal" relationship, in which the naturally just and the conventionally just are either mutually exclusive parts of political justice or interwoven within the positive laws of a polis.[11]

On a "mutual exclusion" interpretation, natural justice and conventional justice concern different objects and something politically just could either be naturally just or conventionally just but never both.[12] If the "mutual exclusion" view is true and conventional justice is identifiable with positive law, then this would seem to rule out the possibility that nature could serve as a normative foundation for legislative enactments.[13] Yet the mutual exclusion view seems erroneously to assume an exact correspondence between conventional justice and positive law. As noted above, Aristotle limits the sphere of the conventionally just to "originally indifferent" detailed specifications within legislative enactments and decrees, rather than identifying it with positive law *simpliciter*. Aristotle's discussion also appears to allow for evaluation of positive laws by reference to natural justice.[14] One could imagine, for instance, a detailed specification of the religious norms of a political

[9]An interpretation along these lines is proposed by Hans Kelsen, "Aristotle's Doctrine of Justice," in *What is Justice? Justice, Law, and Politics in the Mirror of Science* (Berkeley: University of California Press, 1957).

[10]Burns, "Aristotle and Natural Law," 148; Yack, *Problems of a Political Animal*, 233. Cf. Thornton Lockwood, "Phusis and Nomos in Aristotle's Ethics" (unpublished manuscript), 22–27.

[11]Burns, "Aristotle and Natural Law," 148.

[12]Darren Weirnick, *Law in Aristotle's Ethical-Political Thought* (PhD dissertation, Rice University, 1998), 102. Weirnick translates *nomikon* exclusively as "legal." This risks a misleading strict identification of conventional justice with positive and customary law (*nomos*).

[13]Ibid.

[14]Ibid., 112.

community which was so violent or barbaric as to counteract, rather than promote, the goods which can be instantiated through the regulation of the human inclination towards religious respect and worship. In addition, Aristotle's wording in 5.7 does not necessarily entail that natural justice has no existence at all independent of political justice. The characterization of political justice as partly natural and partly conventional leaves open the possibility that the naturally just is in some sense "prior" to, or independent of, the politically just, but is subsequently embedded within positive legal enactments. On this reading, the establishment of political justice through legislative enactments will be informed by the just by nature, albeit different communities will determine the precise specification of their laws in diverse ways.[15] Nature could accordingly serve as a normative foundation for the evaluation of law, because (at least some) legal enactments would contain both natural and conventional elements.

The most plausible interpretation of the relationship between natural and conventional justice is hence either in terms of "double aspect" or "partial overlap."[16] According to "double aspect," a law that is politically just would contain elements of both the naturally and conventionally just. According to "partial overlap," some politically just laws would be both naturally and conventionally just, while others would be just in one sense only.[17] Once mutual exclusion is eliminated, however, then the difference between these readings is less significant than might first appear. If one assumes that conventional justice refers to the legal specification of particular matters that are "originally indifferent," and that natural justice refers to normative content embedded within the laws of all (just) political communities, then laws in the focal sense possess a double aspect. While the content of some legislative norms may seem originally indifferent, the mere fact that the flourishing of the political community—which is understood in terms of the development of natural capacities—requires the order introduced by law entails that the content of those norms will contain an element of the just by nature. From an alternative perspective, it is possible to imagine legal norms that are accepted as valid and binding by the members of a political community, but so completely antithetical to the human good that they contain no content that is just by nature. One could equally say, however, that in such circumstances the subject matter is no longer positive laws that fall under the scope of the politically just, given the restriction of that notion to correct constitutional forms and the relations which obtain

[15]Cf. Fred D. Miller Jr., *Nature, Justice and Rights in Aristotle* (Oxford: Clarendon, 1995), 122; Richard Kraut, "Are There Natural Rights in Aristotle?," *Review of Metaphysics* 49, no. 4 (1996): 758.
and Burns, "Aristotle and Natural Law."

[16]Weirnick, *Law in Aristotle's Ethical-Political Thought*, 102.

[17]Ibid.

between free and equal citizens ordering their communal life through just law (*NE* 5.6 1134a25–32).

In any case, on either reading, politically just positive legal norms may contain both natural and conventional elements. There is a range of human relationships and transactions within any political community which require the co-ordination of law. While it pertains to the very nature of political communities to legislate in areas such as the duration of offices, economic exchanges, and arrangements for religious worship, the precise content of legal norms is a matter of determination for those in positions of legislative authority within particular political communities at a certain time and place. That a community would need to enact laws for the regulation of private property, for instance, could be taken to reflect certain facts about human nature and the practically reasonable regulation of the sphere of property relations.[18] Yet the specific content of particular laws enacted to achieve that natural purpose (including, say, the penalties associated with theft) can, within a reasonable range, differ from one community to another. A law prohibiting murder may also be understood as containing both natural and conventional aspects. All political communities require legal norms which proscribe unprovoked acts of violence. The detailed content of such laws—including provisions for trial and punishment—nonetheless has a conventional aspect which admits of alternative determinations.

With this general picture of the relationship between natural and conventional justice in place, it is now possible to turn to Aristotle's two examples of things which are by nature, but which nonetheless undergo change. Both examples—ambidexterity and constitutional regimes—indeed point to nature as an underlying normative foundation for just legislative enactments. While nature serves as a normative criterion for the enactment and the evaluation of constitutions and laws, however, Aristotle does not lose sight of either the political contingencies of lawmaking or its positive (human) source.

Aristotle's analogy between natural justice and right-handedness assumes as a premise that the right hand is by nature stronger than or superior to (*kreittōn*) the left.[19] In *Progression of Animals* Aristotle argues that the right side is better (*beltion*) than the left by nature for all animals, but particularly

[18]Cf. Miller's argument (*Nature, Justice and Rights in Aristotle*, 91) that Aristotle, while not subscribing to a modern view of subjective rights possessed in a prepolitical state of nature, "denies that individuals possess rights merely by convention" and hence can be ascribed a theory of "natural" rights that is based on natural justice and determinative for political rights. For critique see Kraut, "Are There Natural Rights in Aristotle?," 755. As Kraut's analysis suggests, it is more convincing to argue that Aristotle has an incipient concept of rights than that "rights have a central place" in the practical works.

[19]This analogy reoccurs at 1.33 of *Magna Moralia*. On the difference between the two accounts, see Miller, "Aristotle on Natural Law and Justice," 286. The *Magna Moralia* expressly identifies the natural with what happens for the most part (*hōs epi to polu*).

in the case of humans, insofar as humans are also "more" according to nature (*kata phusin*) than the other animals (*PA* 4 706a18–20). It is the nature of the right hand to initiate movement (705b33–706a1) and it is better because of its function in achieving a beneficial and necessary end.[20] The justification is hence teleological: What is better (*beltion*) is also what is more according to nature (*kata phusin*) (*PA* 2 704b12–18).[21] While naturally better, however, the superiority of the right hand applies in most cases, not all. Even apart from those who favor the left side from their youth, it is possible for the naturally right-handed to become ambidextrous through habituation (*NE* 5.7 1134b33 and *MM* 1.33 1194b33).

In applying the analogy back to the just by nature, the obvious starting point is Aristotle's political naturalism. The three tenets of political naturalism—that the polis exists by nature, that humans are by nature political animals, and that the polis is by nature prior to the individual (*Pol.* 1.2 1253a2–26)—all lead to the conclusion that political life is necessary for the fulfillment of distinctive rational human nature. Given the threat that unchecked political authorities will rule in their own interest, or tyrannically, a corollary of this conclusion is that the governance of the polis through just law is conducive to virtue and human flourishing (*NE* 5.6). If one then assumes, consistent with the "double aspect" interpretation sketched above, that the content of legislative enactments interweaves elements of the just by nature and convention, then constitutions and laws will be just by nature insofar as they promote the natural human end of rational thought in conformity with virtue.

Reference to political naturalism and the natural human end does not in itself, however, explain why it is that the just by nature—particularly as embedded in legal norms—is associated with what is naturally stronger or superior. Aristotle's discussion in *Politics* 1.6 of the debate between those who regard slavery as always conventional and those who assert that it can also be natural provides perhaps the clearest example of a normative connection between what is superior and natural justice.

The initial defense of natural slavery in *Politics* 1.4–5 famously asserts that men who are as inferior with respect to rationality and deliberation as the body is to the soul, or as beasts are to humans, would be slaves by nature (1254b18–20).[22] In *Politics* 1.6, Aristotle considers the claims of those who argue, with reference to captives in war, that slavery is by convention rather than natural. Although Aristotle notes that slavery and the slave are spoken of in a double sense—and thus considers the possibility that some

[20]Miller, "Aristotle on Natural Law and Justice," 292.

[21]Ibid., 290.

[22]An insightful discussion of the issues at stake in Aristotle's defense of slavery is found in Richard Kraut, *Aristotle: Political Philosophy* (Oxford: Oxford University Press, 2002), 277–305.

captives could be slaves by convention rather than nature (1255a4–5)—he also acknowledges that this matter is disputed even among the wise. Aristotle then proceeds to attempt to bring greater clarity to the debate by stating its underlying cause (*aition*):

> Virtue], once it obtains the necessary resources, is in a certain manner particularly able to apply force [*biazesthai*], and what is dominant [*kratoun*] is always preeminent in some good, so it is held that there is no force without virtue, and that the dispute concerns only the plea of justice [*dikaiou*]; for on this account the ones hold that good will [*eunoian*] is the measure of what is just, while the others hold that this very thing, the rule of the superior, is just [*auto touto dikaion, to ton kreittona archein*]. At any rate, if these arguments are set on one side, the other arguments—which assume that what is better in virtue ought not to rule or be master—have neither strength [*ischuron*] nor persuasiveness. (1255a13–23)

Although Aristotle's presentation of this debate is dialectical, certain claims seem to be accepted or endorsed. In particular, Aristotle notes the distinction between just and unjust wars and states that no one would assert that a person (i.e., a Greek who was previously free) undeserving of enslavement ought to be slave (1255a25–27). This claim appears to assume that there are in fact slaves by nature (as suggested by *Politics* 1.4–5)—namely non-Greeks or barbarians—and that the primary criteria for natural mastery and slavery are virtue and vice respectively (1255a39). While those who seek to assert that slavery is purely conventional speak with some reason, they extrapolate from one type of circumstance in which nature has been subverted by convention to the incorrect conclusion that it is impossible to uphold the principle of the natural superiority of virtue. It is this natural superiority which supports the claim that slavery is advantageous for both the master and the slave when it is in accordance with nature, that is, when the slave lacks the capacity for rationality and human excellence.

For Aristotle it is naturally just for those with virtue to rule over those lacking in virtue. It would seem to follow from this that laws will be just by nature insofar as their content reflects the natural superiority of virtue. Yet even the laws of a genuine aristocracy, based on virtue as the correct interpretation of merit, would imperfectly reflect this superiority. Human development is informed not only by nature, but also by reason (*logos*) and habit (*ethos*) (*Pol.* 7.14 1332b4–5).[23] This necessarily complicates legislative attempts to enact laws in conformity with true virtue in a way that is helpfully explicated by returning to the analogy with right-handedness and ambidextrousness. While the right hand is naturally stronger, and ambidextrousness remains a possibility unrealized for the most part, the role of reason and habituation in human development entails that the naturally superior is

[23]Aristotle notes at *Pol.* 7.14 1332b4 that animals can also be habituated to some extent.

frequently unable to rule. In the first instance, true virtue is not strictly speaking a natural capacity (*NE* 2.1 1103a19, 2.5 1106a9). Unlike natural virtue (*phusikē aretē*), true virtue requires choice and an appreciation of the noble or fine (3.8 1116b23–333, 1117a4–9, 7.13 1153b28–30) and this only develops through habituation. The development of virtue through habituation is also subject to contingency, as evidenced by the fact that although nature "desires" that the children of those with virtue will be similarly excellent, it is not always able to achieve this end (*Pol.* 1.6 1255b2–3). In the second instance, the polis is not straightforwardly a naturally arising entity, but rather requires the supplementary rational direction of a practically reasonable lawmaker. While the legislative expert should intend to enact a constitution and laws in conformity with nature, this will often be impossible owing to limitations of the lawmaker, the citizens of the community, or even the climate and natural surroundings.[24] In addition, and partly as a consequence, most actual regimes are determined by a conception of the good life which differs from what is truly according to nature. The less excellent has become the dominant principle in actuality, just as if left-handedness were to become the norm.

Aristotle's second example of the just by nature—the best constitution—likewise reflects the priority of virtue. The best constitution is one in which participation in political office is granted on the basis of virtue or merit (*Pol.* 3.13 1283b23–40). Orientation by virtue, then, is what defines the best regime, regarded as a genus of which absolute kingship, aristocracy, and the aristocratic polity of *Politics* 7 and 8 are species.[25] The just things that are not natural, but human (*ta mē phusika all' anthrōpina dikaia*), are not everywhere the same (*ou tauta pantachou*), and this is reflected in the different regimes. On one hand, there is only one regime that is accord with nature, the best regime (*alla mia monon pantachou kata phusin hē aristē*) (*NE* 7.16 1135a3–5). On the other hand, Aristotle's acknowledgment of different species of the best regime suggests that the just by nature is not completely unchangeable in the political domain. In the case of absolute kingship, there is one individual who so surpasses other individuals in virtue that he should rule. In the case of a genuine aristocracy or an aristocratic polity, there are a few citizens or a group of citizens who exceed others in their excellence. The contingency of political affairs, such that it is difficult to predict how many individuals will in each situation acquire the requisite level of virtue, thus points to the variability of what pertains to political justice, albeit the ultimate natural standard remains the same in all cases.

[24]In *Politics* 7 Aristotle considers in this context the size of the best city (7.4), its territory (7.5), and its access to sea and naval power (7.6). For discussion see Pavlos Kontos, "Aristotle on the Breadth of Practical Reason" (unplublished manuscript), 5.

[25]David Keyt, "Three Basic Theorems in Aristotle's *Politics*," in Keyt and Miller, eds., *Companion to Aristotle's "Politics,"* 257; Miller, *Nature, Justice and Rights in Aristotle*, 191–93.

The predominant actual regimes, of course, tend to judge merit on the basis of the status of being a free citizen or wealth rather than virtue. This does not entail, however, that the just by nature is completely absent from the legislative enactments of defective democracies and oligarchies. Aristotle's constitutional methodology allows for recognition of better and worse forms of defective regimes (*Pol.* 4.4–5 1291b31–1292b10). The versions of defective regimes governed by law are superior to those in which rule is by arbitrary decree (4.4 1292a1–40). Insofar as democracies and oligarchies enact laws regarding, for example, property relations and procedures for the judgments of disputes, the content of such laws will retain, in however distant or diluted a manner, some orientation by human virtue and, as a consequence, also reflect the just by nature.

The just by nature is hence best interpreted by reference to human excellence and virtue (*aretē*). All political communities distribute offices, honors, and other goods on the basis of an interpretation of the correct human end. A regime which judges merit on the basis of true human excellence is most in accord with what is just by nature, but even the laws of such a regime will contain particular determinations that are "originally indifferent." Conversely, the laws of defective regimes ordered by a conception other than true flourishing will also contain at least some content which may be considered just by nature insofar as these legal norms seek to promote, however imperfectly, the human good.

There is accordingly a sense in which nature serves as a normative foundation for the evaluation of positive law on Aristotelian assumptions. The best regime is a natural standard for the practically wise legislator seeking to enact laws that promote the human good. A polis is in a natural and just condition if it has a correct constitution, and in an unnatural or unjust condition if it has a deviant constitution (*Pol.* 4.1 1289a14–17). If political justice is inseparable from the good ordering of a polis (1.2 1253a31–9), then the most just constitution is that which best serves the common advantage and promotes the fulfillment of distinctly human nature.[26] While this allows for variability in the way political communities legislate to promote the practical good, Aristotle assumes that just laws—by establishing the conditions for human excellence and promoting the common advantage—play an important role in allowing humans to fulfill their natures. Laws which contain content that is reflective of the just by nature—understood in terms of virtue—are those which will best promote the human end of flourishing. In this sense at least, nature does indeed serve as a standard for human lawmaking.

[26]Charles H. Kahn, "The Normative Structure of Aristotle's *Politics*," in *Aristoteles' Politik*, ed. Günther Patzig (Göttingen: Vandenhoeck and Ruprecht, 1990), 382–83.

2. Natural Law

Disputes over Aristotle's natural law credentials reflect not only the obscurity of his account of natural justice, but also the ambiguity of the compound term "natural law."[27] This second section assumes that it is futile to examine whether Aristotle is a natural law theorist without reference to some of the specific commitments associated with the distinct, yet related, strands of the natural law tradition. Consideration of these claims leads to the unsurprising result that Aristotle holds to some, if not all, central commitments associated with natural law positions. Although this cautious conclusion may seem of limited interest, close examination of Aristotle's relationship with central strands of the natural law tradition elucidates the normative foundations of positive law in his practical thought.

As noted in section 1, the closest approximation to a reference to "natural law" in the Aristotelian corpus is the distinction between common (*koinos*) and particular (*idios*) laws in the *Rhetoric*. Common law is unchanging because it is according to nature (*kata phusin*, *phusei*) (*Rh.* 1.13 1373b9–13, 1.15 1375a31–b2) and made up of things agreed upon by all persons (1.10 1368b7–9, 1.13 1373b6–9). Particular law is defined differently by political communities and is a covenant by which they govern themselves (1.10 1368b7–8, 1.13 1373b4–5). In drawing this distinction, Aristotle notes that an act may be consistent with particular law while contravening common law, citing the case of Sophocles's Antigone and her burial of Polyneices against the order of the tyrant of Thebes (1.13 1373b9–13, 1.15 1375a31–b2). The *Rhetoric* thus appears to offer an account—albeit in outline—of a form of nonpositive "common" law which could potentially serve as a normative foundation for the evaluation of legislative norms.

While suggestive, there is insufficient material in the discussion of common and particular *nomos* in *Rhetoric* 1.10, 1.13, and 1.15 to build a systematic natural law interpretation. In the first place, the focus of the *Rhetoric* is alternative rhetorical and argumentative forms and it must therefore be employed with caution as a source of Aristotle's considered views on law.[28] While the definitions of practical concepts in the *Rhetoric* often resemble the more precise accounts in the *Nicomachean Ethics* and *Politics*, they are also usually presented in a more provisional fashion (i.e., as indicated through the use of hypothetical imperatives such as *estō*) consistent with the primary emphasis of the work upon effectiveness in persuasion. This lack of precision is evident in the treatment of *nomos* within book 1. In 1.10 common law is

[27]Parts of section 2 draw on material from "Aristotle as Natural Law Theorist," in the *Research Handbook on Natural Law Theory*, ed. Jonathan Crowe and Constance Youngwon Lee (Cheltenham: Edward Elgar, 2019), 13–30.

[28]See Max Salomon Shellens, "Aristotle on Natural Law," *Natural Law Forum* 40 (1959): 79–81.

unwritten and particular law written, whereas in 1.13 particular law is either unwritten or written. While such inconsistency may reflect the contextual variability of unwritten law (*agraphos nomos*), it does compromise attempts to use the *Rhetoric* to illuminate the account of natural justice in the *Nicomachean Ethics* 5.7 or to offer a natural law interpretation more generally.[29]

Moreover, although natural law interpretations of Aristotle are relatively common, it is an overstatement to say that "when discussing law and justice philosophers and historians almost invariably claim that Aristotle is the father of natural law."[30] This is the case even if Aristotle's status as a natural law theorist is framed quite broadly in terms of the question whether he is an advocate of the view that there is an absolute standard of justice which transcends conventional opinion and positive law. Recent scholarship has correspondingly tended either to uphold Aristotle's status as a natural law theorist with reservations or point to the incompatibility of his political conception of justice and law with the central commitments distinctive of the mainstream natural law tradition.[31]

One obvious concern with the attribution to Aristotle of natural law commitments is a form of anachronism which reads into the *Nicomachean Ethics*, *Politics*, and *Rhetoric* natural law doctrines which, although nourished by Aristotelian influences, rest upon quite remote Christian presuppositions.[32] Another source of anachronism arises from assuming that Aristotle's views on law can be understood by reference to contemporary debates between natural lawyers and legal positivists. Such debates focus on a notion of validity within a legal system that has limited applicability to the concept of *nomos*. As discussed in the introduction, although *nomos* refers to an order that is (or ought to be) held valid by those who live under it, this sense of validity includes conventions and customs and is broader than the intrasystemic positive validity of contemporary legal systems.[33]

These kinds of anachronisms are not hard to find in defenses of Aristotle as a natural law theorist. Burns, for example, rightly acknowledges that it is difficult to extract from *Nicomachean Ethics* 5.7 a commitment to many of the doctrines generally associated with Thomistic natural law theory, but then appears to proceed on the assumption that the terms "natural justice" and

[29]See Martin Ostwald, *Nomos and the Beginnings of the Athenian Democracy* (Oxford: Clarendon, 1969) on the contextual variability of *agraphos nomos*.

[30]Shellens, "Aristotle on Natural Law," 72. Shellens does not offer citations for this claim.

[31]See note 1 above.

[32]See Jaffa, *Thomism and Aristotelianism*.

[33]Ostwald, *Nomos and the Beginnings of the Athenian Democracy*, 20; Felix Heinimann, *Nomos und Physis: Herkunft und Bedeutung einer Antithese im Griechischen Denken des 5. Jahrhunderts* (Basel: Friedrich Reinhardt, 1965), 59–89.

"natural law" can be used interchangeably.[34] Von Leyden frames his advocacy of Aristotelian natural law by reference to Hart's definition of legal positivism as the view that there is no necessary connection between law and morality.[35] Such a framing presupposition is dubious on several levels, including that it operates with an account of legal positivism developed in the context of modern legal systems, postulates a clear-cut distinction between moral and legal norms of doubtful applicability to classical Greek thought, and assumes a definition of legal positivism that is now considered incorrect by many contemporary proponents.[36] The examples von Leyden offers in support of the contention that Aristotle "on the whole" rejects Hart's positivism demonstrate the inadequacy of the approach.[37] These include the claim in *Politics* 3 that there can be no law contrary to a prudent ruler and the observation that "Aristotle's preference is for laws which are generally and absolutely the best."[38] Given that *Politics* 3.15–16 presents a debate on the merits of the rule of law and the rule of the best man, it hardly offers persuasive material for a natural law interpretation. And a preference for better rather than worse laws is a position so widely held as to be of limited use in determining natural law commitments.

My main intention here is not to undermine specific interpretations of Aristotle's natural law credentials. The relevance of these anachronisms and interpretative infelicities is that discussions are often led astray by lack of clarity on what constitutes the natural law position in the first place. This reflects that the concept of natural law has been understood in different ways by diverse thinkers. The best method is thus to respect the equivocality of the term "natural law" while employing a general definition which captures core features shared by theories of law brought together under its banner.

For current purposes, natural law theories—considered as theories of law—can be characterized in general terms as accounts of positive law's dependence upon extrapositive normative foundations. More precisely, it is distinctive of natural law positions to hold that the existence and content of positive law depends in some way on normative facts.[39] The most obvious, and

[34]Burns, "Aristotle and Natural Law," 142. According to Burns, Aristotle is a proponent of a "formal" conception of natural law according to which it is "a logical impossibility for positive law to conflict with the requirements of natural law."

[35]Von Leyden, "Aristotle and the Concept of Law," 12.

[36]See John Gardner, "Legal Positivism: 5 1/2 Myths," *American Journal of Jurisprudence* 46 (2001): 199–227.

[37]Von Leyden, "Aristotle and the Concept of Law," 12.

[38]Ibid., 13.

[39]M. C. Murphy, "Two Unhappy Dilemmas for Natural Law Jurisprudence," in *The Cambridge Companion to Natural Law Jurisprudence*, ed. George Duke and Robert P. George (Cambridge: Cambridge University Press, 2017), 354. The claim here, it should be noted, is not that the existence and content of positive law depend *exclusively* on normative facts: no one could sensibly deny that the existence and content

historically prevalent, normative foundations for positive law are the divine, nature, and reason. In what follows, I therefore consider Aristotle's practical thought in relation to each of these potential normative foundations.

In relation to divine foundations, it should be uncontentious that many of the core presuppositions of Aristotle's practical thought diverge significantly from those of medieval Christian natural law theory. One need not even subscribe to the claim that for Aristotle there is "no moral horizon beyond the political horizon" to accept that medieval natural law theory, as developed in particular by Aquinas in the *Summa Theologiae*, rests on some assumptions that are decidedly foreign to Aristotle's philosophy of human affairs.[40] This does not entirely settle, however, Aristotle's stance on the divine normative foundations of law. Insofar as Aquinas is the "paradigmatic" natural law theorist, it is helpful to examine this question by comparing the fourfold division of types of law in Question 91 of the *Prima Secundae* with both Aristotle's account of natural justice as developed in *Nicomachean Ethics* 5.7 and the concept of the common law according to nature (*kata phusin*) that is set out in book 1 of the *Rhetoric*.[41]

Eternal law (*lex aeterna*) is defined by Aquinas as the order of divine providence that is promulgated from eternity by God according to which all creatures—both the rational and the nonrational—are ordered toward the good of the universe (ST I-II q91 a1). *Natural law* (*lex naturalis*) is the participation in this eternal law by intelligent creatures employing their practical reason insofar as they are ranked under divine providence; the capacity of natural reason to discern what is good and evil, moreover, is due to the imprint of the divine light that is within us (ST I-II q91 a2). *Human law* (*lex humana*) arises from the human need to enact

of positive law depend on some nonnormative (i.e., so-called social) facts such as particular acts of legislating. Murphy's definition plausibly captures other commitments that are often associated with natural law positions. It is also distinctive of natural law positions, for example, to assert that there are certain actions which are wrong or unjust in and of themselves (*mala in se*) rather than *mala prohibita*. This commitment would seem to depend, however, on the existence of an extrapositive normative foundation, insofar as such a foundation is understood to function as a higher standard allowing for an assessment of the justice or otherwise of the positive law(s) of any particular community and also for the identification of some of its laws as "merely" conventional.

[40]Jaffa, *Thomism and Aristotelianism*, 30.

[41]For the claim that Aquinas is the paradigmatic natural law theorist see Mark C. Murphy, "Natural Law Jurisprudence," *Legal Theory* 9 (2003): 241. Strictly speaking Aquinas outlines five types of law: the "law of the *fomes*" refers to sensual inclinations natural to animals but also present in humans after the Fall (ST I-II q91 a5). A full comparison of Aristotle and Aquinas on the theme of natural and positive law would require attentiveness to Aquinas's account of natural and positive, and special and legal, forms of right and justice in ST II-II q 57–58 and the Commentary on Aristotle's *Nicomachean Ethics* 5.7. My intention here is merely to point to some pertinent differences with respect to divine normative foundations.

specific arrangements in accord with practical reason for the common good of the political community (ST I-II q91 a3). Finally, *divine law* (*lex divina*) is the revealed law which gives us certitude in relation to what is to be done and what is to be avoided, leading us towards our supernatural end by governing both our interior and exterior acts (ST I-II q91 a4).

On the Thomistic conception, then, the natural law is our rational participation in an eternal law which manifests the order of divine providence. With respect to the created world, divine wisdom is encapsulated in the notions of *creation* (according to which God is an artificer whose wisdom serves as an exemplar for the creation of the world as God's artifact) and *governance* (according to which God is the ruler and director of the movement of all things) (ST I-II q93 a1). Eternal law has primacy over other forms of law—natural, divine, and human—and is known to God absolutely and to created creatures to some extent through its effects (ST I-II q93 a2–3). The eternal law is accessible to human reason through a natural habitual cognition (*synderesis*), which is equivalent in the practical order to an understanding of first principles (*intellectus*) in the speculative order (ST I-II q94 a1). The first principle of the natural law founded in the eternal law is that good is to be done and evil is to be avoided (ST I-II q94 a2). Precepts of natural law derived on this basis all pertain to what is apprehended by practical reason as human goods, such as the preservation of individual life, the preservation of the species, and the good of reason (which includes knowledge of God and what promotes the *summum bonum* of the political community) (ST I-II q94 a3). Practical reason, Aquinas assumes, proceeds from more general principles to particular considerations. While natural law pertains to activities which humans have a natural inclination to engage in, and the general principles of natural law and right and truth are in this broad sense known by everyone, with respect to particular situations it is not the case that the same thing is practically right or true (ST I-II q94 a4). The Thomistic natural law, that is to say, is not an algorithm allowing for precise practical deductions from a set of precepts.

In comparison with the Thomistic account of natural law, Aristotle's 5.7 account of natural justice considered in the previous section contains no reference to either eternal or divine law and is in fact distinctly sublunary. Whereas Aquinas considers natural law to arise from the participation of practical reason with an eternal law and divine order, for Aristotle by contrast the naturally just is a part of political justice and conceptualized within the frame of the philosophy of human affairs.

While Aristotle's account of the just by nature does not postulate a divine normative foundation for positive human law, the *Rhetoric* discussion of common law according to nature might seem to provide more fertile ground.[42] As

[42]Fred D. Miller Jr., "Aristotle's Philosophy of Law," in *A History of the Philosophy of Law from the Ancient Greeks to the Scholastics*, ed. Fred D. Miller Jr. and Carrie-Ann Biondi (Dordrecht: Springer, 2007), 94.

noted above, in explicating the common law according to nature, made up of things agreed upon by all, Aristotle refers to Antigone's appeal to nonpositive law (1.13 1273b1–18, 1.15 1375a33–b2).[43] The discussion of Antigone nonetheless emphasizes the status of common law as unwritten, and hence invariable, rather than its divine origin.[44] In the *Politics*, moreover, Aristotle suggests that unwritten laws are based on customs (*Pol.* 3.16 1287b6) and are reflections of the way of life of particular communities, not universally valid norms.[45] Following the interpretative principle that the *Rhetoric* is to be employed cautiously as a source of Aristotle's views—and that where the *Rhetoric* conflicts with the *Nicomachean Ethics* and the *Politics* there is a presumption in favor of the latter—then *Rhetoric* 1.15 offers inadequate evidence to construct a divine natural law theory.

For the sake of completeness, it is also worth noting that Aristotle's surviving work demonstrates little commitment to the ambiguous variant of political theology found in Plato's *Laws*. In the preamble to the law against atheism in book 10 of the *Laws*, the Athenian Stranger admonishes those who set up a strict demarcation between nature (*phusis*) and convention (*nomos*) and seek to derive all ethical standards from the latter (888e–890b). In opposition to this view, the Athenian Stranger insists that the cosmos is directed by a divine soul that is concerned with human matters (893c–899b, 901d–903c).[46] Although Aristotle echoes Plato's (890d) association of law and reason, he at no point directly appeals to a divine creator that troubles itself with human affairs.[47] The divinities of Aristotle are the eternal substances thinking true thoughts on which all change in the cosmos depends (*Met.* 12.7 1072b13–1073a13; *NE* 10.8 1178b8–25). These divinities "do not guarantee that justice will be done."[48]

On the basis of the foregoing, it is clear that Aristotle's practical thought does not contain an appeal to divine sources of the kind found in the Thomistic account of natural law. The case with respect to the natural and rational normative foundations of law is, as I will now demonstrate, more complex.

[43]For the view that unwritten justice is part of the common law according to nature see William Grimaldi, *Rhetoric 1: A Commentary* (New York: Fordham University Press, 1988), 297–98. For a convincing critique of this view, see Weirnick, *Law in Aristotle's Ethical-Political Thought*, 157–58.

[44]Miller, "Aristotle's Philosophy of Law," 94.

[45]Weirnick, *Law in Aristotle's Ethical-Political Thought*, 157.

[46]On the implications of Plato's appeal to the divine in book 10 of the *Laws* see Richard F. Stalley, "Plato's Philosophy of Law," in Miller and Biondi, eds., *History of the Philosophy of Law*, 71.

[47]The closest approximation is perhaps *Physics* 2.4 196a25ff. On *theologikē* in Aristotle see Stephen Menn, "Aristotle's Theology," in *The Oxford Handbook of Aristotle*, ed. C. Shields (Oxford: Oxford University Press, 2012), 422–64.

[48]Kraut, *Aristotle: Political Philosophy*, 203.

The sense in which Aristotle's account of natural justice establishes nature as a normative foundation for the evaluation of positive law has been discussed in detail in the previous section. It is nonetheless helpful, in thinking about the relationship of these commitments to the more mainstream natural law tradition, briefly to compare Aristotle's practical thought with Stoic teachings on nature and law. In his discussion of the subject of nature in Stoic philosophy in *De finibus*, Cicero writes:

> The same honor is also bestowed with good reason upon Natural Philosophy, because he who is to live in accordance with nature must base his principles upon the system and government of the entire world. Nor again can anyone judge truly of things good and evil, save by a knowledge of the whole plan of nature [*nisi omni cognita ratione naturae*] and also of the life of the gods, and of the answer to the question whether the nature of man [*natura hominis*] is or is not in harmony with the nature of the universe. (*Fin.* 3.73).

In *De finibus*, Cicero distinguishes between several senses of *natura*, including the *prima naturae* or primary inclinations (e.g., life, knowledge) (3.16–18) and the features of *natura* that are discoverable by human reason in natural philosophical investigation (3.73, 4.12).[49]

What is salient here about Cicero's presentation is the Stoic construal of the idea that the human good is to live in accordance with reason and nature.[50] On the Stoic view, the good is sought through inference (*collatio rationis*) from what is in accordance with nature (*secundum naturae*), rather than directly accessible as the practical end of human intentionality (*Fin.* 3.33). This contrasts with the Aristotelian perspective, according to which ethical enquiry always remains practical in its orientation (*NE* 2.2 1103b25–30) in the sense that the good is the internal end at which all activity aims.

At this point it is instructive to recall that Aristotle's account of natural justice as outlined in section 1 is situated within a discussion of political justice and remains practical in orientation throughout. In *Nicomachean Ethics* 5.6, Aristotle states that the just in the political sense exists among those for whom there is law (1134a30). Justice is a judgment about what is just and unjust and the law is required in particular where there is the possibility of injustice (1134a31–32). Law serves a natural need by bringing order to political communities in light of the limits on the human capacity to act with complete virtue in relation to others. This explains the desirability of the rule of law as a restraint on the natural tendency to distribute honors and other goods to suit one's own interest in a tyrannical way (1134a35–b2). Political justice in the central sense exists where citizens share a life in common and

[49]I assume here that Cicero, while a nonstandard Stoic, remains close to Stoicism on moral questions. For a more detailed exposition of the different senses of *natura* in Cicero's *De finibus* see Finnis, *Natural Law and Natural Rights*, 375–76.

[50]Finnis, *Natural Law and Natural Rights*, 375–76, citing *De legibus* 1.55.

are free and equal, either in accord with geometrical proportion or arithmetically (1134a26–28). Judgments about the just and unjust are in one sense *naturally* expressed in law (*kata nomon ēn, kai en hois epephukei einai nomos*) (1134b13–14). Yet positive laws remain an articulation of practical judgments on the good by human—albeit in the ideal case prudent and insightful—legislators (1.9 1099b29–32, 1.13 1102a7–25, 10.9 1180a34, 1180b25–30). Law is therefore natural on Aristotelian assumptions principally in the sense that it arises from practically reasonable reflection on the human good, not in the sense that it can be derived from nature understood as a transcendent or even extrapolitical source of external ethical standards.

Another passage that elucidates the role of nature as a normative foundation for human lawmaking is Aristotle's discussion of *logos* as distinctively human. The sense in which humans are more truly political animals by nature than other gregarious animals like bees (*Pol.* 1.2 1253a1–25) reflects the active role of practical reason in the development of law. Humans are distinguished from other animals because they have a natural capacity for rational speech (*logos*), which allows them to express opinions on the expedient and inexpedient and the just and the unjust, in contrast to other animals, which are only capable of expressing pleasure or pain (1253a8–14). Once again, it is through this natural capacity for rational speech and practical choice and action that humans develop a sense of the just and the unjust, the good and the bad, which culminates in the distinctly political association and law.[51]

In sum, Aristotle's conception of the role of law within political communities is informed by the view that laws play an indispensable role in allowing humans to fulfill their natures. The fulfillment of human nature involves rational activity in accordance with virtue, but it also requires the formation of political communities governed by law. In this sense, and keeping in mind the discussion of section 1, it is true to say that nature serves as a normative foundation and evaluative standard for human lawmaking.

In the context of debates surrounding Aristotle's natural law credentials, it is worth noting that the claim that laws are best when they are enacted in conformity with a true conception of human flourishing need not culminate in an illicit derivation of normative claims from factual premises regarding nature. This is because the sense of nature most pertinent to understanding Aristotle's account of law is not that found in a descriptive investigation of "bare nature," but rather that articulated in practically reasonable reflection on the fulfillment of human capacities. In order to understand human nature, Aristotelian practical philosophy implicitly assumes, it is necessary to understand human capacities; in order to understand those capacities, it is necessary to understand their acts; and in order to understand those acts, it is

[51]K. Cheery and E. A. Goerner, "Does Aristotle's Polis Exist by Nature?," *History of Political Thought* 27 (2006): 563–85.

necessary to understand their objects.[52] Ultimately the objects of practical reflection are human goods accessible to practical reflection as directive propositions about what it would be best to do. It is thus not the fact that humans are political by nature which justifies certain sorts of constitutions and laws but rather the capacity of practically reasonable agents to apprehend participation in a complete and just political community as conducive to human flourishing. If this conception of human nature and practical rationality is characteristic of natural law theory, then in this respect Aristotle may indeed be classified as a natural law theorist.

It remains to consider the sense in which rationality serves as a normative foundation for law on an Aristotelian conception. The claim that law is "intellect [*nous*] without desire" (*Pol.* 3.16 1287a33), the seemingly intellectualist characterization of *nomos* in 10.9 of the *Nicomachean Ethics* as rational speech (*logos*) derived from practical wisdom (*phronēsis*) and intellect (*nous*) (1180a22–23), the identification of *nomos* with order (*taxis*) (*Pol.* 7.4 1326a30; cf. 1263a23, 1287a18), and the attribution of a significant role to the practical reason of the lawgiver in the establishment of constitutions and law, all undoubtedly reflect an appreciation of the rational content of law. Laws are also evaluated in the *Politics* as better or worse depending on both the capacities of the lawgiver and the particular end that they intend to promote (*Pol.* 4.9 1293b42–1294a7). In the best regime, legal norms have a transhistorical rational content because they are oriented by the natural human end. In less than ideal regimes, laws can nonetheless promote a limited form of virtue and mitigate sectional rivalries. The relativization of the defectiveness of democracy and oligarchy to whether they adhere to positive law reflects Aristotle's view that where laws do not rule, there is in a sense no regime at all (*Pol.* 4.4 1292a33–34). Aristotle thus also subscribes to "the rule of law" in the sense that adherence to the law differentiates the best and worst versions of the defective regimes. Positive law can accordingly serve as a rational standard that the good citizen should follow.[53]

From this perspective, there are obvious affinities with the Thomistic account of law developed under Aristotelian influence. Aquinas defines law (*lex*) in the *Summa* as "nothing other than an ordinance of reason for the common good, made by the person who has care of the community, and promulgated" (ST I-II q90 a4). This definition does not expressly appeal to divine sources in its insistence that law, properly speaking, is the outcome of human practical rationality in its directedness towards the common good. Aquinas's definition also incorporates reference to a lawgiver:

[52]John Finnis, *Aquinas: Moral, Political and Legal Theory* (Oxford: Oxford University Press, 1998), 29 and 90. Finnis cites *De anima* 415a16–22 and Aquinas *An.* 11. 6 nn. 6–10, 111. 14 n. 9; ST 1 q 87 a 3c; 1 *Sent.* d. 1 q. 1 a. 1 ad 3; d. 17 q. 1 a.4 ad 4; 111 *Sent*. d. 23 q. 1 a. 2 ad 3.

[53]Lisi, "Concept of Law," 42.

the law is understood as an achievement of practical reason and it is the political common good that serves as the normative criterion for assessing the justice of particular legal enactments. All these points suggest that it is indeed legitimate to talk of a common Aristotelian-Thomistic tradition of legal thought.

In light of this affinity, it is instructive to consider Aristotle's relationship to the natural law dictum that an unjust law is not a law (*lex iniusta non est lex*).[54] Contemporary natural law theorists such as Finnis and Murphy have sought to avoid the counterintuitive implications of interpreting this dictum to mean that unjust laws are necessarily legally invalid, while continuing to uphold a connection between central or nondefective cases of law and practical reasonableness.[55] For Finnis, an unjust law is not a law in the focal sense.[56] A person's history with another person might make him count as friend, even though disloyalty prevents him from being a friend in the focal sense. Likewise, a law might meet a particular legal system's requirements for validity, even though its injustice makes it a nonfocal instance of law. Murphy approaches *lex iniusta non est lex* in a more metaphysical key by reference to law's "non-defectiveness conditions." On Murphy's view, natural law theories characteristically assert theses of the form "law exhibits N, where N is some normative feature" (such as being a legitimate practical authority or being just).[57] On a strong reading, this core natural law thesis entails a necessary universal generalization: that "necessarily, if x is a law, then x is legitimately authoritative, or just." On Murphy's favored, weaker reading, it asserts that it is necessarily the case that nondefective law "is backed by decisive reasons for compliance."[58] Falling short of this rational standard makes a law defective as such. Both approaches thus reconcile the tradition's view that true laws are rational guides to action with an acknowledgment that defective laws may still be intrasystemically valid.

Aristotle can intelligibly be regarded as at least incipiently subscribing to both Finnis's theory of law in the focal sense and Murphy's weak natural law thesis. When Aristotle asserts that all the lawful (*nomima*) things are somehow (*pōs*) just (*NE* 5.1 1129b13), the indefinite correlative adverb *pōs* suggests that this passage should be interpreted by reference to law in the focal sense. Aristotle also states in this passage that the laws pronounce on all

[54]The dictum is not *directly* attributable to either Augustine or Aquinas. See Norman Kretzmann, "Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience," *American Journal of Jurisprudence* 33 (1988): 100–101.

[55]Finnis, *Natural Law and Natural Rights*, 23–55, and Mark C. Murphy, "The Explanatory Role of the Weak Natural Law Thesis," in *Philosophical Foundations of the Nature of Law*, ed. Wilfrid Waluchow and Stefan Sciaraffa (Oxford: Oxford University Press, 2013), 5.

[56]Finnis, *Natural Law and Natural Rights*, 364.

[57]Murphy, "The Explanatory Role of the Weak Natural Law Thesis," 5.

[58]Ibid.

things in their aiming at the common advantage (either of all persons, or the best, or those with authority, either in accord with virtue, or in some way) and that those things apt to produce or preserve well-being for a political community are just (1129b15–19). The reference to the common advantage and *eudaimonia* indicates that the lawful is just in the sense that it conforms to the normative point of law. Aristotle is accordingly not claiming that any legislative enactment or unwritten custom is necessarily just, but rather pointing to the assumed purpose of law to promote political justice and hence also the overall human good. The association of law with the common advantage of a political community and human flourishing thus situates Aristotle within a natural law tradition that has sought to differentiate between practically reasonable and just laws and laws that fall short of those rational standards. This is true even if, as is plausible, Aristotle would not seek to deny the status of defective laws as laws in a qualified sense, a view that is in any case advocated by most prominent adherents of contemporary natural law theory.

In conclusion, Aristotle does appeal, in a nontrivial way, to nature and reason as normative grounds for the enactment and evaluation of positive law. While it is necessary to avoid strict identifications of Aristotle's concerns with those of medieval Christian natural theory, or with contemporary critiques of legal positivism, his practical works are committed to law's nonpositive normative foundations.