

Locke and Aristotle on the Limits of Law

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ABSTRACT: Both Locke and Aristotle suggest that deviations from the rule of law may be necessary, but their primary reasons differ: the former attributes these failures to the constant flux of things, while the latter emphasizes the irreducibility of virtue to law. Yet a careful reading of each shows that they recognize the other's point. Aristotle acts as a guide to why this difference in emphasis concerning extralegal action reveals their deep disagreement regarding the relationship of philosophy and politics.

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There is something about law that is suggestive of righteousness. The unreflective equation of what is lawful with what is just is not simply characteristic of popular governments, where we might expect the laws to serve the public good. Even a tyrant, where able, will destroy his rivals by lawful means: even a tyrant seeks the appearance of legality. It is as though we expect the law, by virtue of its being law, to somehow be fair. Yet everyone knows that laws can be unjust or prohibit what is necessary. Violations of the law may therefore be justified.

To leave the sphere of the legal, however, is to enter into a realm where the habits and intuitions fostered by law-abidingness are no longer adequate. To obey the law, one need know only one's place in the regime; to fulfill the ends of the law, one must see and judge the regime and its self-understanding as a whole. Consequently, any account of why deviations from the legal order are justified must be informed by one's sometimes implicit opinions concerning the regime. To act where the laws are insufficient for the ends of the regime, even to know where these limits of the law are, requires the perspective of a legislator or a founder, of a *nomothētēs*. The extralegal is important, not because it is the foundation of the legal *à la* Machiavelli, but because it compels a comprehensive reflection on the obscured premises of one's regime's claim to justice.

One of the most revealing chapters of John Locke's *Two Treatises of Government* addresses extralegal action, "Of Prerogative." Similarly, Aristotle's discussion of absolute kingship (*pambasileia*) in Book III of the *Politics* provides a window into why the best practical regime can never be the best regime, simply.

Aristotle's analysis also highlights the importance of what Locke encourages us to accept as given or incontestably self-evident. Locke and Aristotle agree on all the key facts — except, that is, on which facts are most important to emphasize. They disagree, not on man's situation in the world, but on the right way to act within that situation. Their distinctive treatments of extralegal action serve to deepen our understanding of their competing approaches to political theory, and thereby of politics itself.

The Lockean commonwealth exists for the sake of its subjects' prosperous enjoyment of their lives. Locke therefore focuses more on threats to that comfort and security, and so fosters a sense of discomfort and insecurity. (This is the great irony of the *Two Treatises*) It is the “mutual *Preservation* of their Lives, Liberties and Estates” that causes men to accept the legitimacy of government (*2nd Tr.*, §123),¹ even though there is a natural “love, and want of Society” that also brings them together (cf. *2nd Tr.*, §101). Prerogative is justified on *these* grounds, less so on those which Aristotle singles out for thematic analysis.

Aristotle begins with the observation that the daily needs of a human being must be secured for there to be political life. But he also says that every regime aims for some conception of the good, and so exists for the sake of living *well*. Yet this cannot be articulated coherently except as the life of virtue, and true virtue cannot be formalized into laws and can indeed require their violation. The rule of

¹ Parenthetical references to Locke come from Peter Laslett's edition of the *Two Treatises of Government*. For Aristotle, I have used Carnes Lord's translation of the *Politics* and Joe Sachs' of the *Nicomachean Ethics*.

the virtuous is not lawful. Still, since every actual regime must make use of the citizens it has, and since the irreducibility of virtue to law-abidingness means that their virtue can never be guaranteed, Aristotle, too, recommends a regime that at least avoids manifest injustices. The best practical regime safeguards much the same things as the Lockean commonwealth, and is similarly ruled by law. Extralegal action is in practice necessitated by considerations of expediency. Aristotle is at much greater pains, however, to emphasize that the rule of law can never be the rule of justice or virtue.

The difference may be stated as follows. Locke shows a greater concern for the exceptional situation, Aristotle for the exceptional individual. The inability to predict every contingency means that not everything can be covered by law. The inability to codify virtue behaviorally means that the excessively virtuous will always be superior to any regime's laws.

It is difficult to discern a difference in the practical implications of Locke's and Aristotle's extralegal teachings. The latter's exploration of the heights seems to be negative, culminating in the reduced expectations from politics that characterize Modernity. Or, we might say, what actually characterizes Modernity is the assertion that one need not address the question of the best regime in order to maintain and appreciate the best practical regime. In order to view the regime as a whole, one must step outside it: the knowledge required when extralegal action is necessary must seem superfluous and even dangerous from within the regime's moral horizon. The issue between Locke and Aristotle is whether this knowledge is

self-evident and can be inculcated in ordinary times through the laws. Otherwise, the self-assurance and statesmanlike decisiveness which extraordinary times elicit may be guided by prejudices hostile, or at least alien, to the regime. For Locke, politics and therefore ideology can be self-sufficient. For Aristotle, no city can do without something of the philosophers' rejection of society's opinions as sacred.

LOCKE AND THE NECESSITY OF PREROGATIVE

When Locke advises that rulers cannot always and in every situation govern in accordance with a standing law, his point is not the prudence of having an emergency powers act on the books or to debate the merits of the Roman *dictatura*. It is rather to justify to men — specifically, those who would have supported Parliament's cause against the Stuart kings in the name of law — a power which in its nature is hostile to every attempt at legal regulation. Prerogative is extra-constitutionalism in defense of the public good. Its being extraconstitutional means that no institution possesses the legal authority to compel a prince to cease exercising prerogative or to judge its use in a manner that all must accept. Abuses of prerogative are redressed in revolutions, not law courts or legislative chambers (*2nd Tr.*, §168). Prerogative is beyond the reach of every law.²

That is, Locke pitches prerogative to an audience disinclined to accept it. His purpose is to overcome that resistance. He justifies the sweeping scope of

² For more on the view of prerogative suggested here, see Ross J. Corbett, "The Extraconstitutionality of Lockean Prerogative," *Review of Politics* 68, no. 3 (Summer 2006): 428–48.

prerogative by reference to the inability of legislators to provide for the community's well-being. It is thus an exception to the rule that the society must be governed by settled, standing laws: prerogative is not the norm.³ It is a sometimes-superior means of achieving the same end as pursued by law, viz. the public good. Yet this is only one of the law's ends. The other is to be a check on government abuses, to prevent the community's power from being turned against it. Government by stated rules of right not only clarifies the duties of the subject but also hinders the rulers from pursuing their own interests under the shadow of the public good (i.e., from abusing the trust of prerogative, cf. *2nd Tr.*, §§87–8, 124–6, 134–7, 210). Prerogative certainly doesn't advance *this* goal by other means. Locke must therefore persuade his sympathetic readers that the ideal of lawful government must be abandoned from time to time.

The anti-tyrannical aspirations of the rule of law call to mind an ideal of automatic execution: the ruler should look to the case at hand, consult the legal code, and then do whatever it commands. The executive would in essence simply follow an algorithm. Law would take the form of a series of situation-action pairs.⁴

³ Though, as Locke's discussion of early kings reveals, it is not essential that prerogative be exceptional: "the governors, beings as the fathers of them, watching over them for their good, the government was almost all *prerogative*" (*2nd Tr.*, §162).

⁴ A perfect analogy would be the `switch` command in a number of programming languages.

If the situation at hand were not covered by the code, or the code demanded an absurd response, then the prince should instead exercise prerogative.⁵

And here we come to Locke's argument for why prerogative is necessary, why it is not simply endemic to an immature legislative code. Such an exhaustive string of prescriptions, covering every possibility and never harming the community or committing an injustice, would require an unimaginable degree of foresight. General guidelines will not cut it, given the ends of law: on the contrary, permitting the police to employ the sort of balancing tests so popular in jurisprudence would be to grant them precisely that discretion which the laws must restrict. Every law is consequently limited by the imaginativeness of its legislator. Justice is easy; predicting how it is to be applied in every case is hard. The exceptional situation is what dooms the exorcism of extralegal action.

“Things of this World are in so constant a Flux, that nothing remains long in the same State” (*2nd Tr.*, §157). Legislators are not “able to foresee, and provide, by Laws, for all, that may be useful to the Community” (*2nd Tr.*, §159). It is “impossible” to “foresee, and so by laws to provide for, all Accidents and Necessities, that may concern the publick” (*2nd Tr.*, §160). The ability to be “so much Masters of future Events” as to legislate well for every occasion is beyond human capacity (*2nd Tr.*, §156).

⁵ A slightly different problem is raised when the law is ambiguous (i.e., when the analogy to computer programming breaks down, as it in reality almost always does). Prerogative would also seem necessary here, but this would render every judicial resolution of a question of law prerogative.

The emphasis on prescience in these statements might suggest that the problem is largely epistemological. And indeed a reading of the *Essay Concerning Human Understanding* supports this impression. We cannot have certain knowledge concerning causes and effects in the natural world, and so it is always possible that something surprising will arise. Of course, the probability that our understanding of the basic laws of physics is wrong in an catastrophic way is relatively low, and an extralegal power that finds its justification in our inability to predict earthquakes or asteroid impacts is of only a marginal interest to politics.

What is more undetermined, and thus most in need of an extemporaneous response, is the result of human interactions. We might say that it is not so much the dearth of physics as of economics and political science that is problematic. This dearth takes on what might seem to be comically absurd proportions. Locke's weighty judgment, stated in such a way as to signal that a profound thinker is revealing an important truth, viz. that the fundamental character of worldly things is a constant flux, that Heraclitus was right and Parmenides wrong, that there is no *cosmos*, only *chaos*, no being save what our minds fix in ideas and that these minds, too, are becoming — this abyss before which men seek succor in the LORD, is made manifest in the fact that Old Sarum sends two members to Parliament, even though nobody lives there anymore (cf. *2nd Tr.*, §157).⁶ An analogous situation surrounds

⁶ Locke does not adduce this particular example in order to recommend redrawing legislative districts. Rather, he assumes that his persuadable readers already agree that this is necessary, and so may accept a broader doctrine of extralegal action as following from that necessity. We might comfortably counter this argument with

the prince's exercise of the federative power: it cannot be regulated by antecedent laws because, being "done in reference to Foreigners," it depends "much upon their actions, and the variation of designs and interests" (2nd Tr., §147). Just as Machiavelli's *Fortuna* is seen more in the sacking of Rome by the Gauls than in evils which come from heaven, so too is Locke's flux more a matter of human freedom than of natural disasters.⁷

For John Dunn, prerogative revealed the depth of Locke's piety; Filmer's stable world, by contrast, rested on his "naïvely providentialist assumptions."⁸ Instead, Locke argued that men make their social world, and so are responsible for it — they cannot blame God or expect Him to resolve their difficulties. "God made Human Nature, the potentialities inherent in the species, the framework within which human life takes place. But men make human history."⁹ This means accepting that there are real difficulties to which there may be no complete resolution. Prerogative, the inability to legislate difficulties away, is the acceptance

the observation that redistricting need not be extralegal. Yet Locke does not take for a law just any standard, but rather only one whose violation ought to be clear to just about everyone, i.e., one that can be applied mechanistically. The battles fought over redistricting in the United States suggest that we have not solved this problem, as do the solutions proposed for those battles: entrusting it to the discretion of an impartial judge relies more on that judge's honesty and prudence than on having found a rule by which to limit that discretion.

⁷ The success of social science in roughly predicting movements at the macro level, while of indispensable utility to modern governments, does not preclude a continued need for discretion in particular cases.

⁸ John Dunn, *The Political Thought of John Locke: An Historical Account of the Argument of the Two Treatises of Government* (Cambridge: Cambridge University Press, 1969), 153.

⁹ *ibid.*

of this truth. Pasquale Pasquino gives the same account, except with History instead of God.¹⁰ And Harvey Mansfield sees in this flux the resonances of Machiavelli's *fortuna, necessita, and accidenti*.¹¹ The same story can be told with or without God, as the moral is that God will not resolve our political problems and that the fundamental fact about politics is disorder.¹² That is, what appears to be a cosmological statement about the flux of all things in fact reveals an anthropological or political truth.

All of this might appear to flow from Locke's uncompromisingly narrow conception of law. It must be conceded that his 'jurisprudential theory' would not pass muster in contemporary philosophy of law discourse. Indeed, we must even question whether he had a fully developed theory on the subject, as it isn't treated at length in the *Two Treatises* (or anywhere else, so far as I am aware). It is certainly incompatible with the common law tradition, and perhaps even with significant portions of a civil law approach. Yet contemporary philosophy of law

¹⁰ Pasquale Pasquino, "Locke on King's Prerogative," *Political Theory* 26, no. 2 (April 1998): 198–208.

¹¹ Harvey C. Mansfield, *Taming the Prince: the Ambivalence of Modern Executive Power* (Baltimore: The Johns Hopkins University Press, 1993 [reprint]).

¹² As a consequence, Dunn's interpretation recasts the debate between Locke and Filmer. One might have thought that the latter opposed to the natural equality of mankind a hierarchy set by God himself, and that Locke confronted this supposed hierarchy in order to reestablish the plausibility of equality. Instead, Dunn informs us that Locke struck at Filmer's fair-weather piety with one which could command the submission of a real believer. Unfortunately for this interpretation, however, the *Two Treatises* give every indication of their author's having believed that the issue revolved around the existence of a divine mandate to rule, not the unmanly cravenness a desire for such a mandate would reveal. Dunn's point that prerogative results from man's being alone in his struggle to live together with other men, however, is well taken.

tends as a whole to begin with the practice of law: not everyone may take law to be whatever a court of law will enforce, but it seems that every theory must bear at least some relation to actual legal practice if it is to be taken seriously. This is not at all Locke's procedure. He instead asks what is required from the government for society to adequately safeguard its members' lives, liberties, and estates, and has the answers to this give law its definition. Locke is less constrained by the accidents which shaped his society's legal order than a legal theorist.

To recapitulate, the constant flux of worldly things which justifies the rulers' departures from the law might have a purely epistemic source. Regardless of the underlying reality, the limitations on what can be known entail that the world must always *appear* as flux to the human (and consequently, the political) understanding. Yet a little bit of examination reveals this to be formally true but largely irrelevant. It is, rather, human beings whose unpredictability is at issue. The "Things of this World" that are "in so constant a Flux" are human things. The world in which man lives is not an orderly one because his main concern is social, not natural or divine: it is man as he relates to other men, not as he relates to gods and acorns. The implications of this are treated as if indubitable.

ARISTOTLE AND THE KINGSHIP OF VIRTUE

Never for a moment does Aristotle doubt that what Locke says about unforeseen accidents and their effect on lawful governance is true. He might appear to denigrate the importance of chance when he says that "no one is just or sound by fortune or through fortune" (*Pol.* 1323b28–9), but he is clear that all goods

external to the soul do result from chance and fortune. As these are the only goods to which the Lockean commonwealth is dedicated, comprehended in his byword of “property” (cf. *2nd Tr.*, §123), it is clear that Aristotle would consider the good of Locke’s commonwealth to be just as dependent upon the ruler’s prudent response to chance as Locke himself did.

Aristotle’s concerns regarding the rule of law extend beyond the variableness of human things, however. Most acutely, the rule of law would not resolve the sorts of conflicts that actually occur within politics. In the midst of a debate between an oligarch and a democrat, Aristotle allows that “one might perhaps assert that it is bad for the authoritative element generally to be man instead of law.” He immediately answers, however, that this contribution contributes little: “But if law may be oligarchic or democratic, what difference will it make with regard to the questions that have been raised? For what was said before will result all the same” (*Pol.* 1281a34–8; cf. 1282b1–15, 1289a13–4, 1289a21–5).

That the rule of law does not address the question of the regime is not, however, a criticism of law as such: the best regime may still be utterly law-bound. It is this possibility that attracts Aristotle’s attention. Locke says that the unpredictability of human affairs stands in the way of this. For Aristotle, it is not only the exceptional situation that is problematic for the rule of law, but also the exceptional individual. The generality of law does present certain problems for governance by law: written rules must be altered because it is impossible to write down everything precisely (*Pol.* 1269a8–13), or to make clear general declarations

about everything (*Pol.* 1282b5–6). The result is not, however, just that circumstances change such that what was once a good law becomes a bad one. Rather, the problem of the exceptional individual is that even the best laws are never simply good, even in the most favorable circumstances.

Virtue and the Regimes

Aristotle notes that certain individuals can be so outstanding that they are a danger to the regime itself. Frequently, the problem they pose is simply one of political clout, e.g., Julius Caesar or Lorenzo de' Medici. "It would be ridiculous," Aristotle says, "if one attempted to legislate for them. They would perhaps say what Antisthenes says that lions say when the hares are making their harangue and claiming that everyone merits equality" (*Pol.* 1284a14–7).¹³ To remedy this, democracies practice ostracism and tyrants kill off the preeminent men in their city.

Aristotle reminds us, however, that it is not only the deviant regimes that are threatened by exceptional individuals. This is clear and largely unobjectionable regarding those who gather friends more loyal to themselves than to the regime, whether by political favors or by charisma or by wealth. Even good regimes must guard against ambitious plots. And tyrants are notoriously jealous and suspicious of virtuous men — both those with patriotic ambitions and those seeking only a quiet and private life — so the latter's difficulties from deviant regimes is also

¹³ The reference to Antisthenes is lost, but in Aesop's version the lions say, "Where are your claws and teeth?" Cf. *Fables* 241; *Politics* [trans. Lord], 255 n. 37.

inoffensive. What might be surprising, however, is that excessive *virtue* is perceived as threatening in *correct* regimes, as well.

In the case of the best regime, however, there is considerable question as to what ought to be done if there happens to be someone who is outstanding not on the basis of preeminence in the other goods such as strength, wealth, or abundance of friends, but on the basis of virtue. For surely no one would assert that such a person should be expelled or banished. But neither would they assert that there should be rule over such a person: this is almost as if they should claim to merit ruling over Zeus by splitting the offices. What remains — and it seems the natural course — is for everyone to obey such a person gladly, so that persons of this sort will be permanent kings in their cities. *Pol.* 1284b25–34

The exceptional individual, if it is his virtue that sets him apart, challenges every regime with his bare existence to either submit to his rule or put an end to his presence in the city. Aristotle concludes his discussion of ostracism by remarking that the claim the virtuous have on political power is implicit in the claims of every aristocracy, oligarchy, and democracy (*Pol.* 1288a19–24).

Nor can such virtuous people be trusted to simply keep quiet if the city refuses to grant them authority. It is bad to be ruled by someone more vicious than oneself; as a consequence, the virtuous at the very least have a strong motive for violating the city's laws, especially as they pertain to ethics or other areas where virtue is especially beneficial to the virtuous.

If there is one person so outstanding by his excess of virtue — or a number of persons, though not enough to provide a full complement for the city — that the virtue of all the others and their political capacity is not commensurable with their own (if there are a number) or his own (if there is one), such persons can no longer be regarded as a part of the city. For they will be done injustice if it is claimed they merit equal things in spite of being so unequal in virtue and political capacity; for such a person would likely be like a god among human beings. From this it is clear that legislation must necessarily have to

do with those who are equal both in stock and capacity, and that for the other sort of person there is no law — they themselves are law.
Pol. 1284a3–14

We should not neglect how curious a claim this is. We tend to consider assertions that one is above every law to be characteristic of criminals, not of the paragons of excellence. Many people absent themselves from obligation to the law, but this person could do so with perfect and clear-sighted justice. Aristotle doesn't say that there is anything in particular wrong with the law, or that such a person could not claim superiority over a different, better law.

This discussion of excessive virtue gives rise to the question of absolute kingship. In the course of analyzing this new topic, two key questions are implicitly answered. a) Must the rule of virtue be absolute, i.e., above every law, and hence destructive of the previous regime? And b) is the virtuous man's criminality evoked even by the best laws? The answer to each question is yes, and the reasons are linked. The rule of law can never be simply just. Justice does not take the form of law. The first question is the obverse of the second, the explicit subject of Aristotle's discussion.

The Absolute King

Consideration of the king who rules over everything arises from the question of ceding kingship to the man of excessive virtue. What would this cession mean? This is resolved by asking whether it is more advantageous to be ruled by the best man or the best laws (*Pol.* 1286a8–9). If the latter, the rule of the most virtuous need entail nothing more than a permanent general on the Spartan model (cf. *Pol.*

1285a2–16): Aristotle’s claim about ostracism and kingship seems far less objectionable if it means only that the paradigm would be the reelection of a Roosevelt. Answering in favor of rule by the best man, on the other side of things, need not mean that the exceedingly virtuous would necessarily rule as an absolute king: his virtue may shine so brightly for no other reason than the paucity of virtue in the city, i.e., he might not be a good man without qualification. If the laws were reasonably good, it might be preferable that he rule in accordance with them. It *would* mean, however, that this would always be an approximation of justice, and so that a better man would with greater right be less constrained by these laws.

This ambiguity regarding the most virtuous man in the city versus the best man without qualification persists throughout the rest of the discussion. Arguments against absolute kingship make him the best in the city, while the serious point about regimes and Aristotle’s concern focus on the second option.

Aristotle has raised the question of whether it is best for the best man to rule or the best laws. He almost immediately refines this question, however. It turns out that this distinction misses the point, as is shown by the ensuing debate. One arguing for rule by the best man, the debate begins, might say that law speaks only of the universal and does not command with a view to circumstances; “to rule in accordance with written [rules] is foolish in any art,” and so “the best regime is not one based on written [rules] and laws” (*Pol.* 1286a11–2, 1286a15). But, on the other hand, whatever is unaccompanied by the passionate element is in general superior to that in which it is innate, and this is true of the laws but not of human beings.

Perhaps, Aristotle goes on to suggest, the promoter of kingship will respond that the king's possession of the passionate element will be offset by his finer deliberation regarding particulars. But this cannot dispose of the problem, for now we have two sets of corresponding strengths and defects on each side of the argument. The laws, in their favor, are dispassionate, but their universality means that they do not look to circumstances or particulars. The best king, on the other hand, will judge particular cases more finely than the laws would, but is subject to human passions.

So the question of whether the best laws should rule or rather the best man would seem to obscure the real question by establishing a false dichotomy. Instead, the laws should be authoritative where their particular defect does not render their particular strength useless. (Dispassionate folly is folly nonetheless) A human being simply must rule at times. These times are not, however, when man's particular defect does not render his strength useless, but rather when this defect cannot be circumvented. The debate between the rule of law and the rule of man misses the issue: what *can* be contested is whether one alone should decide things where the laws cannot, or rather everyone. But this is nothing else than to revisit the matter of whether one can be so exceedingly virtuous that the just city has no choice but to submit to his authority as a king! This possibility, combined with questions of succession and the king's bodyguard, calls forth a series of arguments against kingship ungoverned by law and the rule of man in general. This argument has led us in circles.

A Counterargument to Absolute Kingship

The king who rules by law, where law is able, was deemed preferable to the one who rules only by his own will. Yet the reason for this was that the latter form of government does not guard against human passion where such protection is possible (*Pol.* 1286a22–4). This was also the same reason why an aristocracy would be preferable to a kingship, since a numerous body is more incorruptible than is a single human being (*Pol.* 1286a25–1286b7). None of this settles the question of the best regime: *that* question requires that we maintain the moral virtue of the best man. Everything since Aristotle introduced the problem of ostracism has been merely a prelude to this point. The question of rule by man versus by law may rely on an unhelpful dichotomy, but that of the *best* man versus the *best* laws is foundational.

The analysis of the absolute king takes the form of a series of arguments against it (*Pol.* Bk. III, Ch. 16). The place of this chapter in the larger discussion will likely be misinterpreted if we fail to notice that these arguments are not offered in Aristotle's name. Instead, he says only that "the arguments of those who dispute against kingship" are roughly these (*Pol.* 1287b35–6). We can further distance Aristotle from these arguments by attentively noting certain deficiencies in them. The counterarguments to this chapter are, it turns out, contained in the manner in which the arguments are themselves presented. Three stand out for special attention.

(1) The chapter urges that, “as regards those things which law is held not to be capable of determining, a human being could not decide them either” (*Pol.* 1287a24–5). I take this to mean, based upon what follows this statement, that where the law cannot answer, neither could a human being without having been educated by the laws. After all, the argument continues, the laws educate men for this (“this” presumably being those cases where the law does not adequately guide the magistrates). They guide rulers in those cases where the laws do not speak.¹⁴ Indeed, the laws themselves make room for their alteration on the basis of the rulers’ experience.

What Aristotle adds, however, undermines the initial plausibility of this argument by disclosing its questionable premises. He summarizes the point by saying,

One who asks law to rule, therefore, is held to be asking that god and intellect alone rule, while the one who adds man adds the beast. Desire is a thing of this sort; and spiritedness perverts rulers and the best men. Hence law is intellect without appetite. *Pol.* 1287a28–32

This appears to be Aristotle’s judgment on the argument, or his addition to it. The rule of laws not of men, he implies, expresses the ideal that the god and intellect should rule, and consequently maintains a bestial conception of human beings. Desire is a bestial thing, while the intellect is divine. Spiritedness is similarly unambiguous, serving only to pervert rulers and even the best of men. In response to the question “what is law?” those who defend the rule of law and think that

¹⁴ That they are to be guided “by the most just decision,” the oath sworn by jurors (*Politics* [trans. Lord], 256 n. 55), might suggest the sorts of things that the law cannot cover, as conceived by the ones making this argument; cf. *Rhet.* 1354b13–5.

human rulers should be nothing but law-guardians and servants of the laws (cf. *Pol.* 1287a19–22) seem to answer “intellect without appetite.”

The power of this argument therefore lies in its view of what law is. We can begin by noting that Aristotle has already said that the rule of law doesn’t answer any interesting questions, for the laws may be democratic, oligarchic, etc. This diversity is absent here. Yet this absence can be satisfactorily accounted for. That is, this “law” seems to be what later thinkers, some seeing themselves as Aristotle’s heirs, others as purgators of his influence, would call the natural law.

It might seem intuitive that if no actual law can be identical with the law of nature so defined, then this argument against the rule of a human being would ring hollow. But this suggestion mistakes the terms of the debate: if we are to consider an unimaginably good human being as king, we must also allow the law to express its virtues without extrinsic opposition. The serious challenge to this argument, therefore, and the point around which this entire discussion of the rule of law and absolute kingship revolves, is the status of this law. The argument that the best king rules all things in accordance with his will and without law would be destroyed, not by asserting that such virtue is beyond human capacity,¹⁵ but by showing that even a god could not possess all the requisite virtues or, if it did, would rule by law. The first might be the case were those virtues essentially

¹⁵ Cf. *Pol.* 1286a23–8. Consider also that, whereas the Spartan and barbarian models of kingship actually exist, and various sources suggest that the Greeks formerly had dictators and heroic kings, Aristotle provides no example of there ever having been an absolute king (as opposed to a tyrant).

incompatible such that the good ruler passed from the merely unlikely and into the realm of the incoherent or absurd. The second would be true if the law were simply good, so that such a god would in point of fact rule in accordance with it.¹⁶ The argument under consideration relies on just such a law. Consequently, it *would* ring hollow were no such law to exist, or were it not obligatory. Similarly, if the relationship between desire and the intellect is not so unambiguous, nor spiritedness simply bad, then this argument loses most of its force.

(2) The rule of law had been criticized by analogy to the arts, where only the foolish think rules adequate to the task (cf. *Pol.* 1286a10–5, cited above). The chapter goes on to respond, therefore, that those engaged in the arts, like doctors, do not pervert their judgments on account of partiality; if they did, we would insist that they healed according to written rules. Doctors, moreover, do not heal themselves, and trainers seek others when they are training. This shows that the experts know themselves to be poor judges both in their own cases and when they are suffering. What these analogies make clear is that what men seek when they seek justice is impartiality (*meson*).

The point of this counter-analogy isn't immediately obvious, and so it must be reconstructed. It claims that what men seek in the law is impartiality. But how is this relevant to the discussion at hand? In suggesting that the pro-kingship argument's analogy to the arts is inapposite, the chapter implies that the

¹⁶ I shall ignore Aquinas' distinction between the eternal and natural laws. That distinction is irrelevant for the argument at hand.

impartiality for which men seek in the law is to be contrasted with an expertise which they do *not* seek. This suggestion, however, implies a positive statement about the nature of justice. This statement, it turns out, also underlies the previous argument. It suggests that justice is easy. That is, the problem of politics is *not* that the intellect does not know, but that it does not rule. One need only bracket off spiritedness and desire, the sources of partiality, for the intellect to shine through.¹⁷

(3) The chapter next introduces a distinction between sources or kinds of law. That which is based on custom (*ethos*) is more authoritative and deals with more authoritative things than that which is in written form. This distinction is important because it allows one to distinguish an argument applicable against the rule of *written* laws from one touching customary laws. Thus, one can grant that it might be safer to have a human being rule than written laws, but that this is not so for customary laws. It seems that one can grant everything that Locke says and yet maintain the authority of Law.

The crux of this argument is that the customary laws are more authoritative than written ones. What this means isn't immediately clear. We need not, however, read it as making the somewhat unbelievable assertion that the customary laws by contrast are infallible, as if "more authoritative" somehow meant "more competent." The more plausible assertion, and the one I will take this

¹⁷ There is another implication of this which is not taken up in Aristotle's summary of the chapter. It is that knowledge of justice *is* like an art in that it does not determine ends, or can be misused (cf. the discussion in the *Republic* 331d–334b). Since this is certainly not Aristotle's view, this is another indication that this chapter is not offered in his name.

argument to be making, is that human beings are less trustworthy in more authoritative matters, i.e., in the sphere treated by customary laws, than they are in matters covered by written laws. The things relating to custom are literally ethics (*ēthika*).

The saliency of this argument would suggest that the absolute king claims a superiority to the moral laws, as well. Note, he is *not* necessarily eschewing ethical conduct, but rather the obligatory nature of laws which claim to give definitive expression to this conduct. Similarly, this argument need not assert, as (1) did, that these laws express justice perfectly. Nor does it desire to assume, with (2), that the principles of right and wrong are unproblematic. Rather, it says that human beings are poor judges of these things. If this is so, this argument would be a more sophisticated version of (1): men, educated by the customary laws, can judge written laws well enough, but they cannot safely move beyond that law-bred moral horizon.

This argument is penetrating, but its insight is into a question different from the one under immediate consideration. It denies, by way of assertion, that a human being could ever be wise in the way that the ancestral laws are wise. This, in turn, could be true if these laws were the product of inimitably superior gods or those whom they inspire, e.g., Minos or Numa. The question, however, is, How would these gods or demigods rule? That is, the truth of this argument does not imply that the best would not rule absolutely or have a just motive for violating these laws.

Aristotle's mythic account of the growth of cities from villages and households is not providential, and the gods appear as only human creations from an age wherein men lived like Cyclopes (*Pol.* 1252a24–1253a1). The one who ended this barbarism by imposing a view of the good through law and sanction (cf. *Pol.* 1253a30–9) must have himself been human. The wisdom of the ancestral customs is only human wisdom, and so cannot claim the superiority over the wisest that this argument grasps for. Yet, at the same time, this superiority would be logically possible if what ought to be done could always be commanded in law, what avoided, forbidden. Were that the case, then the benefits that accrue from lawful regularity would mean that even the best man would rule in accordance with law. He could be a perfect legislator, the founder of a flawless community, making the city into the mirror of his own excellence. This would provide precisely what the argument under consideration is looking for: questioning *these* laws would not only be impious but also a sign of deep moral confusion. Anyone with the wisdom to transcend them would have no cause to. If law can only be an approximation of and a poor substitute for the best man, however, then it is impossible that any laws were intended to be simply authoritative, at least if their authors were both benevolent and wise. In the end, this is the most penetrating argument in the chapter, but it is not an argument against the absolutism of the most excellent king.

Aristotle ends Chapter 16 by boiling down the entire argument against absolute kingship to two points. Roughly speaking, it is: “every ruler judges finely if he has been educated by the laws” (*Pol.* 1287b25–6), and many people see, judge,

and act better than one, just as one sees better with two eyes than with one, judges better with two ears, and acts better with two hands.

This second point has a nakedly rhetorical element to it, yet Aristotle's phrasing of it reveals how it is dependent upon the first. One certainly sees better with two eyes than with one, but one *judges* better with two ears only if judging correctly is a matter of correctly hearing. This is plausible only if the principles of judgment are clear and readily available, poor judgment proceeding only from a poor appreciation of the facts (moral perversion is silently dropped). In the event that we miss this, the third part of the analogy is pointedly bizarre: it mistakes the capacity to act for the good choice of *how* to act.

To buttress this claim, Aristotle tells us, they argue that kings make for themselves subordinate ministers, and that these are in effect "co-rulers." Yet because a king would rule over them and not have them be insubordinate, the argument continues, they must be his friends. But — and here one can almost hear Aristotle laughing as he attributes this to a grave democrat — if they are friends, and a friend is someone similar and equal, then the king has revealed his adherence to the principle that those who are similar and equal should rule similarly, and thus demolishes his own title to rule.

It is not until this brazen sophistry that Aristotle tells us that the arguments against kingship are "roughly" or "essentially" (*schodon*) these. What does he mean by this "roughly"? One thing to note is that not every argument that was present in the chapter is represented in this summation. Some things are left out when the

case against kingship is reduced to its essentials. We are left with two arguments: justice is easy and a sophistry. Might Aristotle mean to signal with this “roughly” that every assertion that absolute kingship is flatly unjust (rather than merely impractical) is reducible either to nonsense or the claim that justice is easy? What is certain, in any event, is that Chapter 16 contains six arguments, and that every aspect of each of these can be characterized in one of three ways: a) already dismissed, b) begs the question or otherwise misses the point, or c) asserts that justice is adequately known by every well-educated schoolchild — the view of the city.

Law and Philosophy

I have been treating the dialectic character of Aristotle’s arguments as indicating something of a plot: I feel compelled to approach the *Politics* as a full-fledged dialogue, and thus as possessing an action in addition to its argument. Attentiveness to this action reveals an interesting criticism of law. That is, the interjections in favor of the law play a consistent role in the development of Aristotle’s argument — one of obstruction. I take this to have been intentional. Conclusions drawn from this observation may lack the systematic rigor that could be had from piecing together Aristotle’s statements into syllogisms. To eschew this procedure because it does not allow for irrefutable proofs of my conclusions, however, would be to exchange blurred vision for blindness.

The laws, in point of fact, express the view of justice held by the regime in power (*Pol.* 1289a13–5). In every actual regime, moreover, authority is determined

by the sort of military force that predominates, not by questions of justice or some cosmologically significant design (*Pol.* 1289b33–40, 1297b16–28, 1321a4–14).¹⁸ But we should not, like Thrasymachus, get caught up on this fact. When Aristotle considers what the best practical regime looks like, law plays an essential role. Actual human beings cannot be trusted with power, and whenever the specter of their rule interposes itself in the discussion of rule by the exceptionally virtuous, Aristotle repeats again and again that law should rule. At the same time, he acknowledges that avoiding recourse to human discretion is ultimately impossible, for much the same reasons that Locke does, and the only “solution” for this is necessarily just as problematic as Locke’s.

If we begin with this fact about actual human behavior and the practical considerations it induces, we are well on the road to legalism. There are a number of beliefs that fall within the penumbra of that view. Deviations from the law are just that: deviant. Rule by law is best, or what is best takes the form of law. The unlawful requires an excuse: the necessity of Lockean prerogative does not inform the ideal, but rather indicates the gulf between the ideal and the possible. It seems almost intuitive that the resolution of the debate between rich and poor, democrat and oligarch, is to allow neither to rule: the law should rule. This view becomes even more plausible when the narrowness of Locke’s conception of law is noticed, and something like the Anglo-American tradition of law is considered.

¹⁸ See also Robert C. Bartlett, “The ‘Realism’ of Classical Political Science,” *American Journal of Political Science* 38, no. 2 (May 1994): 381–402.

And here we come to Aristotle's criticism of law. (We cannot call it a criticism of the rule of law, for it does not touch upon the practical matter of the untrustworthiness of human beings to know and pursue justice) Legalism does not replace disputes over justice with ones over natural property rights or legitimacy: it instead discourages the fundamental examination of justice, right, and legitimacy by implying that, even if the proofs or applications are complex, answers regarding 'what is justice?', 'right?', 'legitimate?', etc., will turn out to have been intuitive all along. Philosophy would thus stand disrobed as an idiosyncratic or even fetishistic waste of time and wood-pulp. The role that interjections on behalf of the rule of law play in the action is to sidetrack the examination of justice. Unless justice really is a simple matter, these interjections stand in the way of the argument's proceeding. Aristotle writes them into the story in order to highlight this question, and he does so in a manner that draws attention to how legalism can obscure that question.

Arguments against the superiority of rule by the best men to that of the best law, Aristotle intimates, rely on the unproblematic nature of the question of justice. Indeed, every democracy which does not undertake the wholesale initiation of its children into the mysteries of political philosophy implicitly makes the same claim about justice. The articulation of justice may be complex, but we do not need it to be articulated to know it. Right and wrong are known to every well-educated schoolchild because the necessary education is available to all: one need only to live in society to have learned these things. But that is to say that the laws were our educators — perhaps not every law, but the important ones, the customary laws or

the laws that describe our *ethos*. If they're not written down then perhaps they are the common law, or the spirit of the laws, or better yet the law beyond law with which Ronald Dworkin concludes *Law's Empire*. Anyone who claims to be better than *this* law would be unjust.

Aristotle begins his thematic treatment of justice in the *Nicomachean Ethics* by accepting the unreflective yet respectable equation of the just and the lawful. Yet the cost of making justice simple in this way comes due when we turn to consider the causes of injustice. One eminently plausible source of wrongdoing is that justice is bad for those who are expected to do right, and so of course criminals evade the law whenever they wager that they can evade detection, as well. This explanation is not available to the city, however, or to anyone attached to justice; it is even more subversive to consider the virtuous man in this light. If everyone is familiar with the law, a different argument might go, and justice is choiceworthy, must not injustice result from some unjust force within the soul? It is not necessary that this be passion and spiritedness, but given their role in crime it would not be surprising if they were enlisted for this role. And, as we saw above, they frequently are. Aristotle implies that there is a kinship among what the city teaches about law-abidingness,¹⁹ the simplicity of justice, and the singular badness of the passions.

¹⁹ One can disown the laws of one's city and still believe justice to be a simple matter. The city, in narrowing the gulf between justice and its laws, suggests the form that justice takes. It is easier to reject the content it gives to justice than this form.

Aristotle's correction of this naïve view is telling. He distinguishes between willing and unwilling acts, the difference hinging on whether it was up to the actor to choose how he would behave (*Nic. Eth.* Bk. V, Ch. 8). Ignorance is sufficient to mark an act as unwilling, as is physical compulsion. The example he gives for the latter is taking someone's hand and having them strike another (*Nic. Eth.* 1135a26–8). What is telling is that if a *passion* ever does something analogous to this, it must be “a passion that is unnatural and inhuman” (*Nic. Eth.* 1136a9). Normal — we might say “healthy” — people can never blame their passions. But note what question this intensifies: everything hinges on how one could *willingly* commit an injustice, neither ignorant nor overcome by some devil within. Employing language identical to his definition of willing acts, Aristotle subtly suggests that this is impossible, and for what I hope to have made an anticipated reason.

People believe that it is up to them to do injustice, and hence they believe that it is easy to be just, but it is not; for to have intercourse with one's neighbor's wife, or to hit one's neighbor, or to put money in one's hand is easy and up to them, but to do these things while being in a certain condition is neither easy nor up to them. And similarly, people think there is nothing wise about recognizing what is just and unjust, because the things about which the laws speak are not difficult to understand (but these are not the things that are just, except incidentally). But to know how just things are done and distributed is a bigger job than to know what is healthy, although even there it is easy to know about honey and wine and hellebore, or about burning and cutting, but how one ought to dispense them for health, and to whom and when, is such a big job that it is the same as being a doctor.
Nic. Eth. 1137a6–17

A good judge must be wise, not simply impartial. Right and wrong admit of expertise. Justice is not easy.

Some can know what justice is better than others. Some can be better rulers than others. And as soon as inequality is possible, we must wonder what justice demands when it is extreme. For the most part, this inquiry isn't important for its practical implications. Chances are that any people suited to be ruled by an absolute king would be incapable of perceiving his superiority anyway, and Aristotle has not answered the challenge of the *Republic* that the just man would not want to rule. Rather, the problem of the exceptional individual demands examination because it reveals something of the nature of justice. The arguments in favor of the rule of law that abound in Book III of the *Politics* are opposed to this inquiry even taking place, however. In making justice simple, they foreclose as superfluous any attempt to learn more about justice: the desire to be more just becomes a matter of will and self-control rather than of philosophy. This will not make men more just, only more repressed. Nor, as the discouraged inquiry would reveal, will the rule of law ever be the rule of justice. It will always be a particular, contingent, and partial view of right.

Aristotle's treatment of the rule of law focuses on or points us to two core problems. The first is the simplicity of justice. The second is the existence of what was later called the natural law. Yet the problem to which Locke points is not absent. On the contrary, it is explicitly stated and indeed forms the starting point of Aristotle's presentation. He could not have questioned the pretensions of custom without scandal were it not for the thoroughly respectable pretence provided by showing the inadequacy of written rules for the city's security and wellbeing. And,

as a practical matter, Aristotle is in total agreement with Locke on the desirability of rule by law.

CONCLUSION

Aristotle's exploration of extralegal action has a very different flavor from Locke's. What they agree upon is that a community whose force is applied only pursuant to law cannot secure itself in every circumstance. They both acknowledge the power of flux or chance or fortune — that aspect of the world which is recalcitrant to rational prediction and control. A commonwealth that does not make some accommodation for this will find the prerequisite resources of its existence imperiled. Here, at least, Locke and Aristotle are in agreement.

What, then, accounts for the very different flavor of their presentations? We must reject a narrative in which Locke sees the problems due to changing circumstances while Aristotle does not, and in which Aristotle sees those due to intractable problems in the articulation of justice in law whereas Locke does not. Since both are aware of and concerned with the first, we might be tempted to conclude that Aristotle just provides the more comprehensive account. Both would acknowledge the role of *Fortuna*, but only Aristotle would understand that the paradigm of moral goodness cannot be Forrest Gump. Yet this story also falls flat. After all, doesn't Locke acknowledge the problem of the exceptional individual when justifying the prerogative power of pardon (cf. *2nd Tr.*, §159)? And doesn't he go on to say, just a few sections later, that excessive virtue *would* provide (in theory) a title to absolute rule (cf. *2nd Tr.*, §166)?

Locke does everything he can to foster a sense that questions of right and wrong aren't all that complicated. Property can exist in the absence of government, and so there can be clear rules of natural justice. The law of nature is "plain and intelligible to all rational Creatures" (*2nd Tr.*, §124). Even the "strange Doctrine" of natural executive power was "writ in the Hearts of all Mankind" (*2nd Tr.*, §11). In this, he would certainly differ from Aristotle. But this would be the case only if we could take Locke at his word.

The problems with Locke's pronouncements on the law of nature have been indicated countless times.²⁰ Whatever its actual status in his thought, however, the cornerstone of Locke's entire account of political legitimacy is that the majority of mankind is ignorant of it (*2nd Tr.*, §§123–7, 136–7)! If justice is simple, its discovery at least requires more effort than most people are prepared to exert. Or perhaps the law of nature is simple, while justice itself is not: God, tellingly, governs the universe as a species of prerogative, not law (cf. *2nd Tr.*, §166). One need not acknowledge that Locke intentionally concealed a perfectly Hobbesian law of nature behind the façade of Hooker's Thomism to see that he exaggerates the obviousness of justice. That is, he is also aware of the limitations of the law that Aristotle brings to the fore.

²⁰ See, e.g., Patrick Coby, "The Law of Nature in Locke's *Second Treatise*: Is Locke a Hobbesian?" *Review of Politics* 49, no. 1 (Winter 1987): 3–28; Richard Cox, *Locke on War and Peace* (Oxford: Carendon Press, 1960); Robert A. Goldwin, "John Locke," in *History of Political Philosophy*, ed. Leo Strauss and Joseph Cropsey, 3d ed. (Chicago: University of Chicago Press, 1987); Thomas L. Pangle, *The Spirit of Modern Republicanism* (Chicago: University of Chicago Press, 1988); and Leo Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953).

We appear to be left with a difference of emphasis, Locke focusing more on the flux of worldly things, Aristotle on the irreducibility of justice to law. Aristotle's argument also demonstrates, however, why the problem of the exceptional individual cannot be of immediate importance to the practice of actual politics. We might therefore be tempted to say that Aristotle explores extralegal action for intellectual reasons, Locke for pragmatic ones. The *Two Treatises of Government* are certainly written in support of a readily identifiable political decision in a way that the *Politics* are not. Yet Locke's doctrine of prerogative is not bare pragmatism: it is the justification of a practice, and so requires the same sort of enterprise as Aristotle undertakes.

So what can it mean that Locke's presentation *seems* more practically oriented than Aristotle's? Either it confronts certain harsh facts which theorists like to abstract from in order to make the world more amenable to verbal manipulation, or it cuts through all the clutter which the philosophers' split hairs needlessly give rise to. There is no unpleasantness present in Locke which is absent from Aristotle, so the first cannot be the case. It must, therefore, be the second. Locke seems more concerned with what Aristotle calls the best practical regime because we suspect that an understanding of the best regime, simply, is superfluous to it. Which is to say that Aristotle seems more theoretical, Locke more practical, because of a prejudice on our part. In order for Aristotle's explorations to be superfluous, we would have to know at least enough about the standards of justice to construct rough guidelines for our practices. Our situation could not be one of

aporia or resourcelessness. The basics of justice, if not the finer points, must be readily available to us. As every society requires that its members accept its particular account of justice as relatively obvious, as no society will flourish for long which does not to a very large extent succeed in engendering this subjective feeling of certainty, we at the very least have cause to suspect that Aristotle's investigations are not so practically vain as they might at first appear.

Aristotle's investigations would not be practically vain if the city somehow required philosophy. Here we find the difference between Locke and Aristotle. The city would not need philosophy if knowledge of the best regime were superfluous to governing the best practical regime, or the end for which Lockean property is to be employed were irrelevant to a commonwealth solicitous of that property. The limit case of this proposition, from the perspective of the regime, is extralegal action: that situation is one that demands a comprehensive, foundational appreciation of the regime. So the question is, How much reflection on one's law-bred intuitions must precede this appreciation? Can the laws and the education they provide prepare one for this, or must one instead possess a sort of virtue which can be attained only by entertaining the transgression of society's constitutive opinions?

Locke, by his choice of emphasis, suggests that a more robust articulation of societal norms is sufficient.²¹ Politics need not require anything trans- or super-

²¹ One might surmise that Locke omitted more theoretically centered discussions for rhetorical reasons rather than because he thought them inessential: the *Two Treatises* would just have been too long. They were not composed, however, to be

political. The member of a well-constituted commonwealth can indulge in parochialism without falling short as a member. Perhaps some great founder or founders are necessary to set up this happy situation (Locke is strangely silent about this), but after that, *civic* virtue suffices. Ideology and the opinions fostered by obeying society's laws suffice.

Aristotle's *Politics*, on the other hand, provide an introduction to philosophic speculation before entering into the best practical regime; the discussion culminates in a consideration of liberal education. Philosophy may not necessarily make one a good citizen, and it is not presented as choiceworthy because it leads to the benefit of others, but there are times when the good citizen, in order to act well, must have true knowledge of those things which philosophers study. The perspective of the founder, the perspective which establishes rather than respects the *nomoi*, cannot simply be set aside or discouraged in the city.

the short tract we have, but rather to be a massive tome of more than twice their present length. This surmise is consequently unlikely.