

Aristotelian Justice and Hate Crime

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Introduction

Aristotle's *Nicomachean Ethics* serves as a foundational text in the study of jurisprudence. Aristotle develops a comprehensive philosophy of justice based on the bifurcation of this virtue into *general justice* and *particular justice*. The *general* is described as a meta-excellence¹. The *particular* involves the distribution of goods and the rectification of injury.

These Aristotelian philosophies, and derivations thereof, are embedded in the Judeo-Christian and Western legal traditions. Therefore, analysis of modern law in relation to the Aristotelian concept of justice serves multiple purposes. First, a strong understanding of this jurisprudential history provides perspective when considering and evaluating past, present, and future laws or legal trends. Second, principles of Aristotle's *particular* justice, specifically the elements associated with rectification or retribution, serve as useful benchmarks and standards in evaluation of modern law.

In this paper, the Aristotelian concept of justice is introduced and summarized. Justice in the general sense is detailed with analysis of related matters of disposition, unequal-mindedness, and law. Particular justice is then analyzed with special attention to the distributive and rectificatory aspects. The relationship of particular justice to proportionality, reciprocity, equalization, the unjust person, and reasonableness are explicated. Finally, Aristotelian rectificatory justice is contrasted with a modern American jurisprudence, specifically the United State Supreme Court holding allowing enhanced criminal sentencing in "hate crimes".

¹ Broadie, S., and Rowe, C., *Aristotle Nicomachean Ethics* (New York: Oxford University Press, 2002) at 35

General Justice

Disposition (Hexis)

Justice is the sort of disposition that makes people do just things, namely act justly (*dikaioma*) and wish for what is just.² The just person then seeks to execute the just act and wishes for the just. Injustice is similar in that it is a disposition that makes people act unjustly (*adikema*) and wish for what is unjust.³ This disposition is a character excellence with special emphasis in the *Nicomachean Ethics*.

Justice, as a disposition, is differentiated from capacity (*dunamis*) or expertise (*techné*). Capacity and expertise relate to both members of a pair of contraries. Justice is a disposition, one of a pair of contraries, and does not relate in the same way.⁴ Justice does not lead to our doing both just and unjust acts. Justice leads to only the just act.

A person acts justly when he acts as a just man acts. As a just act is identifiable, so can an unjust act be identified. The just action serves to clarify the unjust action and vice-versa. Further, as justice may be said in more than one way, so may injustice be said in more than one way.⁵ People regard as unjust both the person who breaks the law and the grasping, unequal-minded one.⁶ Conversely, the law abiding person and the equal-minded one are considered just.⁷ Just is then considered the lawful and equal, and the unjust unlawful and unequal.⁸

² *Nicomachean Ethics* V.1 (1129a8-11)

³ *NE* V.1 (1129a10-11)

⁴ *NE* V.1 (1129a13-16)

⁵ *NE* V.1 (1129a26-27)

⁶ *NE* V.1 (1129a32-33)

⁷ *NE* V.1 (1129a34)

⁸ *NE* V.1 (1129b1-2); V.2 (1130b7-10)

The lawful is more easily determined due to legal pronouncements, decrees, and codes. The equal is more difficult to establish and value.

Unequal-Mindedness

The unjust act involves grasping (*pleonexia*) which places this action in the sphere of the operation of goods, specifically those to which good and bad fortune relate.⁹ Aristotle states that human beings "*pray for these, and go after them; but they should rather pray that what are goods generally speaking be good for them too, while choosing the things that are good for them.*"¹⁰ Seeking the greater share is not requisite to unjust act as the unjust person seeks less in the case of the generally bad.¹¹ By seeking the lesser of the bad, the unjust person is actually grasping for more of the good in keeping with unequal-mindedness.¹²

Law

Everything in accordance with the law is in a way just.¹³ Legal pronouncements aim toward what is either "*common advantage to all, or at what is of advantage to the best people, or of those in power, or on some other basis of this sort; so that in one way we call just the things that create and preserve happiness and its parts for the citizen community.*"¹⁴ The law also enjoins citizens to act in accordance with excellences,

⁹ *NE* V.1 (1129b2-4)

¹⁰ *NE* V.1 (1129b4-6)

¹¹ *NE* V.1 (1129b6-8)

¹² *NE* V.1 (1129b9-10)

¹³ *NE* V.1 (1129b12-13)

¹⁴ *NE* V.1 (1129b15-20)

ordering some actions and forbidding others.¹⁵ Thus, justice is complete excellence in relation to another person and often considered the "mightiest of the excellences".¹⁶

Furthermore, justice is *"the activation of complete excellence"* because the person who possesses justice *"has capacity to put his excellence in use in relation to another person"*.¹⁷ The just man acts for the advantage of another which is a more difficult task.¹⁸ The nature of this action being for another provides a unique motivation and action not expressed in an area *"special or exclusive"* to itself.¹⁹ The virtue is more expansive. Justice is excellence as a whole and injustice badness as a whole.²⁰ Nonetheless, justice and excellence remain distinguishable as justice in one sense involves the relationship of the state to another person; alternatively, justice as a disposition is excellence.²¹

It can then be determined that the person who is just in the general sense *"will be on who acts out of respect for all concerned and with respect for the law."*²² Therefore, it is possible to exercise specific virtue without having general justice. As general justice is directed toward another, exercising virtue purely by habit without consideration of the other is insufficient.

This *general* justice differs from *particular* justice involving distribution of goods and retribution for injury.

¹⁵ NE V.1 (1129b20-25)

¹⁶ NE V.1 (1129b26-30)

¹⁷ NE V.1 (1129b31-1130a1)

¹⁸ NE V.1 (1130a5-9)

¹⁹ Broadie, S., and Rowe, C., *Aristotle Nicomachean Ethics* (New York: Oxford University Press, 2002) at 35

²⁰ NE V.1 (1130a9-13)

²¹ NE V.1 (1130a11-16)

²² Broadie, S., and Rowe, C., *Aristotle Nicomachean Ethics* (New York: Oxford University Press, 2002) at 34

Particular Justice

There is justice which is part of excellence just as there is injustice as part of badness.²³ There exists a certain sort of justice as a whole, and a part of it, sharing the same name because its definition is the same genus. The difference being one form of justice involves money, honour, security, or pleasure from profit.²⁴ This form is the *particular*. The *general* form involves the things that concern the person of excellence.²⁵

*"Of the justice that is a part, and of what is just in this sense, one sort is the one found in distributions of honour, or money, or the other things to be divided up among those who are members of the political association; while another is rectificatory, operating in interactions between one person and another."*²⁶ The rectificatory type is either voluntary at the beginning or countervoluntary, meaning clandestine (i.e. theft, adultery) or violent (i.e. assault, murder).²⁷

Distribution of Goods

In considering distributive justice, Aristotle identified the equal as the intermediate; thereby given the just is equal, it will also be an intermediate.²⁸ So what is just is both intermediate and equal, and relative as it relates to certain individuals.²⁹ As

²³ *NE* V.2 (1130a14-16)

²⁴ *NE* V.2 (1130a32-1130b4)

²⁵ *NE* V.2 (1130a32-1130b4)

²⁶ *NE* V.2 (1130b30-1131a2)

²⁷ *NE* V.2 (1131a2-8)

²⁸ *NE* V.3 (1131a10-15)

²⁹ *NE* V.3 (1131a15-17)

an intermediate, justice will be between certain things.³⁰ As it is equal, justice will involve two things. As it is just, it will relate to certain individuals.³¹ There will also be equality between the things and the individuals so if the individuals are equal, they will have equal shares. Conversely, if the individuals are not equal, then they will not have equal shares.³² The shares will instead have proportion.

It is the introduction of *proportionality* that is both unavoidable and problematic. Proportionality according to merit depends on political system and will differ between democracies, oligarchies, and aristocracies.³³ Regardless of constitution, the just, then, represents a kind of geometric proportion.³⁴ What is just is the proportionate and what is unjust is what contravenes the proportion.³⁵

Rectification of Injury

The rectificatory, or retributive, form of particular justice involves voluntary and countervoluntary interactions between people.³⁶ Retributive justice, unlike distributive, involves an arithmetic proportion.³⁷ The law concentrates on the difference created by the damage done, not the relative equality or inequality of the interested individuals.³⁸ Interested individuals are treated equally by the law. It is the effect of the action and the commission which constitute unequal parts of the division.

³⁰ *NE* V.3 (1131a17-18)

³¹ *NE* V.3 (1131a19)

³² *NE* V.3 (1131a21-23)

³³ *NE* V.3 (1131a24-30)

³⁴ *NE* V.3 (1131a30, 1131b14)

³⁵ *NE* V.3 (1131a17-19)

³⁶ *NE* V.4 (1131b25-26)

³⁷ *NE* V.4 (1132a1-3)

³⁸ *NE* V.4 (1132a3-7)

The imposition of loss on the agent, or doer, equalizes their gain received. Justice in terms of rectification will be the intermediate between the loss, incurred by the victim, and the gain, incurred by the doer.³⁹ The intermediate is sought assuming the lawgiver, or the judge, serves as the intermediate or mediator providing equality to each side. The just, or *dikaion*, results from the matter of cutting *dicha*, or into two allowing for arithmetical proportion.⁴⁰ So, the just is the intermediate between the kind of gain and loss that are countervoluntary; resulting in an equal amount for the victim before and after the action.⁴¹

Reciprocity and Equalization

In distributive and rectificatory justice, pure reciprocity (*lex talionis*) fails to substitute or satisfy proportion.⁴² Particularly in the commercial or city setting, reciprocal action governed by proportion is required.⁴³ It is the necessity of coupling opposites in exchange that begs for proportional reciprocity as evidenced by the example of the homebuilder and the shoemaker.⁴⁴ The equalization allows for exchange. It is the proportional equality which must first be recognized in order for them to exact commerce.

Otherwise, the inherent inequality in product- a house versus a shoe- would disallow a transaction hindering both commerce and the city to develop. It is from these

³⁹ *NE* V.4 (1132a18-20)

⁴⁰ *NE* V.4 (1132a28-30)

⁴¹ *NE* V.4 (1132b18-20)

⁴² *NE* V.4 (1132b24-25)

⁴³ *NE* V.5 (1132b34-38)

⁴⁴ *NE* V.5 (1133a7-9)

needs and understanding of equalization from which currency derives.⁴⁵ "*Currency, then, acts like a measure, making things commensurate and so equalizing them; for there would be no association without exchange, no exchange without equality, and no equality without commensurability*".⁴⁶

Unjust Person and the Unjust Act

Just action is "*an intermediate between doing what is unjust and being subjected to what is unjust; for the one is having too much, the other having too little*". Thereby, justice is an intermediate disposition, differing from other excellences, because it serves to achieve the intermediate or *mesos*.⁴⁷ A just person is disposed to the just act; deciding to distribute with proportional equality between himself and others, or simply between others.⁴⁸ Injustice, conversely, is the unjust act and contrary to right proportion. One may behave unjustly without being unjust; alternatively, one may be justly while being unjust⁴⁹ For example, a just man may commit an unjust or criminal act, such as stealing, without being unjust. Also, a thief who is unjust may commit a just act.

The distinction in this scenario rests in context- the just without qualification versus just within the political community.⁵⁰ The "*politically just*" divides into the *natural* and the *legal*.⁵¹ The *natural* has the same force universally regardless of political form and does not involve decision. The *legal* has force when enacted and

⁴⁵ NE V.5 (1133a30)

⁴⁶ NE V.5 (1133b16-20)

⁴⁷ NE V.5 (1133b31-33)

⁴⁸ NE V.5 (1134a1-6)

⁴⁹ NE V.6 (1134a21-23)

⁵⁰ NE V.6 (1134a25-27)

⁵¹ NE V.7 (1134b19)

involves the laying down of certain laws or decrees.⁵² The legal are "*just arrangements established not by nature but by human beings and are not the same everywhere*" as political constitutions may vary.⁵³

An unjust act and the unjust differ; so, too, a just act and the just differ. The unjust is by nature or prescription. When the unjust is committed, it is an unjust act.⁵⁴ Prior to being committed, the unjust act is simply unjust. The unjust and just acts require voluntariness. If counter-voluntary, then the act is merely incidentally unjust or just.⁵⁵ "*An unjust act, or a just one, is marked off by the distinction between voluntary and counter-voluntary; for when something unjust is done voluntarily, it is an object of censure, and at the same time it is, then, an unjust act.*"⁵⁶ Aristotle defines voluntariness as a person acting "*knowingly*" and "*not in ignorance of relevant factors*" or "*under force*".⁵⁷

Aristotle proceeds to identify three (3) harms stemming from personal interactions. The first harm is *mistake* which involves ignorance.⁵⁸ The doer supposes the wrong affect, action, instrument, or person. Or, the agent anticipates the outcome but the harm is inflicted without "*bad intent*".⁵⁹ When the agent proceeds in ignorance because of ignorance, he warrants sympathy.⁶⁰ The second harm is *misfortune* which

⁵² NE V.7 (1134b20-25)

⁵³ NE V.7 (1134a3-5)

⁵⁴ NE V.7 (1135a10-12)

⁵⁵ NE V.8 (1135a16-18)

⁵⁶ NE V.8 (1135a20-23)

⁵⁷ NE V.8 (1135a23-29)

⁵⁸ NE V.8 (1135b11-12)

⁵⁹ NE V.8 (1135b17-18)

⁶⁰ NE V.8 (1136a7-8)

involves an outcome "*contrary to reasonable expectation*".⁶¹ The third harm is the *unjust act* which involves the agent inflicting harm "*knowingly but without prior deliberation*" such as acts done through temper or affection.⁶² These acts lack prior decision or premeditation and may provide simply the appearance of injustice. The unjust act does not qualify the agent as unjust or of bad character as the harm does not derive from badness.⁶³ Alternatively, when the harm inflicted results from decision and is contrary to proportion or equality of distribution, the doer is both unjust and a bad character.⁶⁴ In keeping, a person is just when he acts justly from decision; someone acts justly if he merely does the just act voluntarily.⁶⁵

In viewing the unjust act, it is not necessarily the beneficiary who is unjust. Instead, it is the agent who assigns the benefit that may be unjust. "*[F]or it is not the person to whom what is unjust belongs that acts unjustly, but the person to whom it belongs to do what is unjust voluntarily, and this is located in the source from which the action has its origin, which is in the person distributing not receiving.*"⁶⁶ The unjust act also requires the agent to be in a certain state and is limited to only human beings.⁶⁷ Further, for something to be just or unjust there must also be more than one person involved.⁶⁸ It is only in limited forms of disparate relationships, such as between master and slave, where a person may arguably treat oneself unjustly.⁶⁹

⁶¹ *NE* V.8 (1135b16-18)

⁶² *NE* V.8 (1135b20-21)

⁶³ *NE* V.8 (1135b24-25)

⁶⁴ *NE* V.8 (1135b25-26, 1136a1-4)

⁶⁵ *NE* V.8 (1136a4-5)

⁶⁶ *NE* V.9 (1136b26-31)

⁶⁷ *NE* V.9 (1137a23-24, 30-31)

⁶⁸ *NE* V.11 (1138a20-21)

⁶⁹ *NE* V.10 (1138b6-10)

Reasonableness

Reasonableness, *epieikeia*, shares many traits of justice but relates more specifically to equity. While the reasonable is just, it is not the just according to the law but a "*rectification of the legally just*".⁷⁰ While law is universal there are instances where the application is incorrect. In case of universal pronouncement of law where the application is incorrect, the law chooses the reasonable while fully recognizing the error.⁷¹

Reasonableness is commonly considered or called "equity" and resides outside of the universal pronouncement of law. Yet, application of the reasonable, or equitable, is no less correct as the "*error is not in the law, or in the lawgiver, but in the nature of the case.*"⁷² Therefore, the reasonable is just and better in specific instances. However, the reasonable is never better than what is just without qualification.⁷³

The reasonable person is then someone who is not rigid or a "stickler for justice in the bad sense"⁷⁴. This person is liberal in approach, recognizing application and need for equity. Reasonableness serves as a disposition to act in this manner; a kind of justice not distinct altogether from the original virtue.⁷⁵

⁷⁰ *NE* V.10 (1137b10-12)

⁷¹ *NE* V.10 (1137b15-18)

⁷² *NE* V.10 (1137b18-20)

⁷³ *NE* V.10 (1137b25-26)

⁷⁴ *NE* V.10 (1138a1-3)

⁷⁵ *NE* V.10 (1138a13-5)

Application to Modern American Law

The justice theories advanced by Aristotle in the *Nicomachean Ethics* serve as useful tools in analysis of current law. To evidence this assertion, contemporary American "hate crime" law will be contrasted with Aristotelian retributive justice. More specifically, the United States Supreme Court case of *Wisconsin v. Mitchell*, which allowed for enhanced criminal sentencing in "hate crimes", will be contrasted with Aristotelian concepts..

Currently, both federal statute and United States Supreme Court precedent allows for increased sentencing in "hate crime".⁷⁶ Hate crime occurs when a perpetrator targets a victim because of his or her membership in a certain social group, usually defined by race, religion, sexual orientation, nationality, or gender. Hate crimes are considered different than conventional crime based on the rationale that said crimes are not directed simply at an individual, but an entire group people. Despite existing within the American law for nearly fourteen years, this area remains a hotly debated and controversial topic.

For the purpose of analysis, we will consider the undisputed facts associated with *Wisconsin vs. Mitchell*. In this case, Todd Mitchell and several black males assaulted and battered a young white man after watching the movie *Mississippi Burning*. Mitchell incited the violence and targeting of the young white victim based on race. The attack was without provocation by the victim. The motivation for the beating was later attributed to anger generated by Mitchell and friends from a disturbing scene of racially motivated violence in the aforementioned movie. The Supreme Court ruled

⁷⁶ 28 U.S.C. 994 (1994); *Wisconsin v. Mitchell*, 508 U.S. 476 (1993)

that Mitchell and his fellow co-defendants may suffer enhanced, increased criminal sentences based on the targeting of the victim based on race.

To analyze this case from an Aristotelian perspective is difficult but illuminating. This specific case relates to the particular form of justice. The general form is less relevant as the court ruling regarding punishment is essentially retributive. This rectificatory form of particular justice involves voluntary and countervoluntary interactions between people. The actions of Mitchell and his co-defendants were voluntary whereas the impact on the victim was countervoluntary. Regardless of whether the application is civil or criminal, just resolution in this case requires the lawgiver to employ arithmetic proportion. To determine arithmetic proportion, a valuation of the damage sustained by the victim is necessary. This damage is the loss which is then related back to the agent, namely Mitchell. Once the determination of damages, or loss, is established, an attempt to determine right proportion to be imposed on the defendant is possible. In this instance, the Supreme Court was faced with the challenge of determining proportion based on aggravating circumstances surrounding the case. Acts of violence are common but to allow enhance sentencing, the loss incurred must be greater to maintain arithmetic proportion.

The victim in the instant case suffered serious injuries, including permanent brain damage. These damages are also compounded by the trauma incurred at the time of the event and future pain associated with his disability. Therefore, justice will be the intermediate between these losses, incurred by the victim, and the gain, incurred by the defendants. The role of the court is to provide equality to each party involved with the

victim having an equal amount before and after the unjust act. Complicating the determination of the Court is the motivation for hate crimes which are to intimidate and threaten specific protected groups. These factors need also be calculated when considering damages incurred and proportion.

Pure reciprocity fails to substitute or satisfy proportion in retributive justice. Reciprocity would require the defendants to endure the same violence and future disability of the victim. This approach is prohibited by the prevailing law. Limiting the analysis to the criminal remedies, redress may include incarceration and restitution.

Working within established legal parameters, proportion and equalization are developed between proper criminal punishment and the loss sustained by the victim. The inherent inequality in exchange is obvious as the loss of the victim will outweigh any single aspect of sentence. Nonetheless, the lawgiver is tasked with attempting to identify arithmetic proportion based on the facts and the available means of rectification. Failure to strike this right proportion may then be in a sense, injustice. However, the lawgiver in this situation is working in the context of the *legally* just which involves the laying down of certain laws or decrees. Assuming the impartiality of the lawgiver, the ruling is then considered intermediate and just. To assist in the determination of proportional sentence, the circumstance of the actions of the agent must be considered to determine the type of harm and the character of the agent.

When something unjust is done voluntarily, it is an object of censure and an unjust act. Voluntariness requires a person is acting knowingly and not in ignorance or

duress. Mitchell and the other defendants' actions were voluntary in that the assault was committed knowingly and without ignorance, duress, or the justification.

As Mitchell incited the defendants to physically attack the victim, the resulting injuries cannot be considered unexpected or contrary to reasonable expectation as in the case of a misfortune. Also, the defendants committed the act knowingly with prior deliberation as evidenced by their discussion regarding the desire to target a white victim. The act is not simply unjust as prior deliberation and premeditation is established by accounts of those participating in the beating. Therefore, the harm is not simply an unjust act which is a common result of anger. In this instance, the harm inflicted resulted from decision and was contrary to proportion or equality of distribution, Mitchell is both unjust and a bad character. By establishing the type of harm and character of the agent, the lawgiver is better equipped to calculate proportionality and justice.

In the foregoing case, Aristotelian justice theories appear evident in the determination to allow for enhanced sentencing in this specific crime. This is based on a determination of proportionality. A determine, which not exact, does appear to roughly follow an attempt at arithmetic proportion.

Conclusion

Book V of the *Nicomachean Ethics* is a foundation in the development of jurisprudence. The Aristotelian concept of justice creates standards in evaluating modern legal decisions and trends. The theories of distributive and retributive justice,

in particular, provide a complex yet fluid mechanism for assessment of legal decisions. As demonstrated by the application to recent "hate crime" precedent, Aristotelian justice theories provide valuable insight when evaluating judicial interpretation.

Bibliography

- Aristotle, *Nicomachean Ethics* (trs. S. Broadie & C. Rowe), Oxford 2002
Broadie, S., and Rowe, C., *Aristotle Nicomachean Ethics* (New York: Oxford University Press, 2002)
B. Williams, "Justice as a Virtue", in Rorty (ed.) 1980:189-99
D. Keyt, "Aristotle's Theory of Distributive Justice", in *A Companion to Aristotle's Politics*
28 U.S.C. 994 (1994), Hate Crime Sentencing Enhancement Act of 1994
Wisconsin v. Mitchell, 508 U.S. 476 (1993)
U.S. Constitution, Fifth Amendment
U.S. Constitution, Fourteenth Amendment