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THE LIMITS OF LAW AND THE ROLE OF *APETH* (VIRTUE) IN THE CLIMATE CRISIS

Exigency—What Is a Crisis?

On September 7, 2008 the executive administration of American President George W. Bush announced that his government would take over the giant mortgage finance companies Fannie Mae and Freddie Mac, costing the citizens $200 billion. One week later, the 160 year-old American investment bank Lehman Brothers filed for the largest bankruptcy in U.S. history.[1] What would soon be known worldwide as "the financial crisis" had begun. In response to that crisis, less than a month later, on October 3, 2008, the United States Congress passed the Emergency Economic Stabilization Act of 2008, which established the Troubled Asset Relief Program and authorized the use of $700 billion in taxpayer funds to bail out the banking and finance industry. As a result, the U.S. Treasury reports that the total bailout gave Bank of America $45 billion, Citigroup Bank $45 billion, AIG Bank $40 billion, J. P Morgan $25 billion, Wells Fargo $25 billion, General Motors $10.4 billion, Goldman Sachs $10 billion, Morgan Stanley $10 billion, GMAC $5 billion, and Chrysler corporation, a mere $4 billion.[2]

This response to a perceived crisis was not limited to the United States. On October 12, 2008—in one day alone—the United Kingdom coughed up the equivalent of €679 billion in bank relief. And in Germany, Der Spiegel reported on December 23, 2008 "The German government whipped its €480 billion bank bailout package through parliament in record time."[3]

By comparison, eighteen years before the financial crisis had arrived, a group of nearly 600 natural scientists from over 130 countries of the world, acting

1. "Lehman folds with record $613 billion debt". *Marketwatch*. September 15, 2005. http://www.marketwatch.com/news/story/story.aspx?guid={2FE5AC05-597A-4E71-A2D5-9-B9FCC290520}&siteid=rss Retrieved 2008-09-15.
2. BBC Business, January 16, 2009, http://news.bbc.co.uk/2/hi/7832484.stm. The "bailout" was accomplished through the Emergency Economic Stabilization Act of 2008 (EESA), which established the Troubled Assets Relief Program (TARP). That program ended in October, 2010.
3. "The Bottomless Pit", *Spiegel* Staff, December 23, 2008, http://www.spiegel.de/international/business/0,1518,598207,00.html, accessed June 26, 2010. Germany has since then responded with a number of new and modified statutes, most notably the Financial Market Stabilisation Act and the Supplementary Financial Market Stabilisation Act. These Acts allow the state to gain unlimited control over banks of high systemic relevance. See, Klaus J. Hopt, Christoph Kumpan, and Felix Steffek, "A New Framework for Bank Rescue in Germany - Regulatory Challenges for Modern Company, Corporate Insolvency and Constitutional Law" (November 1, 2009). Available at SSRN: http://ssrn.com/abstract=1501187

together as the Intergovernmental Panel on Climate Change, warned that the continued burning of fossil fuels by humans would result in loading enough carbon into the atmosphere to raise global average temperatures.[4] As a result of increased global average temperatures, they warned that malaria spreads, the sea encroaches upon the coastline, agriculture is disrupted, islands would be submerged and draught and desertification would occur. Nevertheless, today—twenty years after the first warnings—the US government remains largely uncommitted to addressing the climate crisis. And although the U.S. and the rest of the world's governments came together to solve the climate crisis in Copenhagen in December 2009, ultimately they could only agree upon an "accord," leaving legal scholars to wonder what was meant by this non-binding political invention. In short, heeding political and economic forecasts, states worldwide took Herculean measures of speed and money to stop a perceived financial crisis. The necessity of these measures was questioned then and remains questionable now. In noting how quickly many of these banks began making sufficient profits to pay large bonuses again by the end of 2009, President Barack Obama insisted that they repay the bailouts to the last penny when he introduced the Financial Crisis Responsibility Fee. "If these companies are in good enough shape to afford massive bonuses, they are surely in good enough shape to afford paying back every penny to taxpayers."[5]

But by comparison, rational facts from the natural sciences have been insufficient to persuade these same states to arrest climate change.[6] It is absolutely astounding

4. The Intergovernmental Panel on Climate Change (IPCC) includes scientists from industry, government and NGOs. IPCC scientists from over 130 countries contributed to the IPCC Fourth Assessment Report over the previous six years. These people included more than 2500 scientific expert reviewers, more than 800 contributing authors, and more than 450 lead authors. Of these, the Working Group 1 report (including the summary for policy makers) included contributions by 600 authors from 40 countries, over 620 expert reviewers, a large number of government reviewers, and representatives from 113 governments.
5. U.S. Vice President Joe Biden, e-mail to citizens, January 15, 2010. On file with author.
6. The executive summary of the policy makers' summary of the Working Group I report states:(1) We are certain of the following: there is a natural greenhouse effect...; emissions resulting from human activities are substantially increasing the atmospheric concentrations of the greenhouse gases: CO_2, methane, CFCs and nitrous oxide. These increases will enhance the greenhouse effect, resulting on average in an additional warming of the Earth's surface. The main greenhouse gas, water vapour, will increase in response to global warming and further enhance it. (2) We calculate with confidence that: ...CO_2 has been responsible for over half the enhanced greenhouse effect; long-lived gases would require immediate reductions in emissions from human activities of over 60% to stabilise their concentrations at today's levels.. (3) Based on current models, we predict: [an] . . . increase of global mean temperature during the 21st century of about 0.3 ^{o}C per decade (with an uncertainty range of 0.2 to 0.5 ^{o}C per decade); this is greater than that seen over the past 10,000 years; under other ... scenarios which assume progressively increasing levels of controls, rates of increase in global mean temperature of about 0.2 ^{o}C [to] about 0.1 ^{o}C per decade. (4) There are many uncertainties in our

that within one month of threats of financial failure, states all over the world began pumping money into the pockets of the very banks who caused the financial crisis, and yet, by comparison, twenty years after states learned that climate change was real and that it is damaging and will continue to damage their own economies and human health, as well as the health and economy of others—not to mention the health and economy of others in the future—states have done little to nothing. Why in the world not?[7] To answer this question, we must ask ourselves the question: What motivates states to act? The simple and incomplete answer is economic gain or the threat of economic loss.

The motivations of a state are far more complicated than that however. At one moment in recent history when the world political landscape was changing to an uncommon degree, political scientist Martha Finnemore took pause to consider whether we know state motivations and how we know state motivations. Based upon observations that enable description, rather than using assumptions based upon a politically bi-polarized world, Finnemore made the following conclusions:

State interests are defined in the context of internationally held norms and understandings about what is good and appropriate. That normative context influences the behavior of decision makers and of mass publics who may choose and constrain those decision makers. The normative context also changes over time, and as internationally held norms and values change, they create coordinated shifts in state interests and behavior across the system. [8]

Two of the points made by Finnemore are of particular interest here. First she notes that the normative contexts by which a state perceives its own interests changes over time. Indeed, she makes very good points about the assumptions that political theorists used for a generation during the cold war with little resistance or

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predictions particularly with regard to the timing, magnitude and regional patterns of climate change, due to our incomplete understanding of: sources and sinks of GHGs; clouds; oceans; polar ice sheets. (5) Our judgement is that: global mean surface air temperature has increased by 0.3 to 0.6°C over the last 100 years...; the size of this warming is broadly consistent with predictions of climate models, but it is also of the same magnitude as natural climate variability. Thus the observed increase could be largely due to this natural variability; alternatively this variability and other human factors could have offset a still larger human-induced greenhouse warming. The unequivocal detection of the enhanced greenhouse effect is not likely for a decade or more. (6) under the IPCC business as usual emissions scenario, an average rate of global mean sea level rise of about 6 cm per decade over the next century (with an uncertainty range of 3 – 10cm per decade), mainly due to thermal expansion of the oceans and the melting of some land ice. The predicted rise is about 20 cm by 2030, and 65 cm by the end of the next century.

7. Despite substantial and broad-based natural science to the contrary, economic skeptics remain. Yet it was a sense of democracy, not capitalism, that drove 158 of 192 United Nations member states in the world to agree to the Copenhagen accord.
8. Martha Finnemore, *National Interests in International Society* (London: Cornell University Press, 1996) 2.

disagreement. But the cold war is over and those assumptions are demonstrated to be no longer supportable. She prefaces this by noting that even during that time, the "Cold War did not define interests in a whole range of issue areas. . .it did not narrow the set of possible goals very much, and it provided no guidance… in environmental policy."[9] So now, she notes, that although one might say that seeing one's state in the context of a bipolar world was seeing the state in context, with the end of the bipolar world, state interests are now at least in part determined by the perceived context of the state among several other states, not just from bipolarizing or worse, its own navel-gazing. And she provides evidence that the process of determining state motivation can be done as one of methodical description, not wishful prescription—the evidence shows that states and their citizens do respond to international social contexts, not simply shout out like children about what they want because it has tasted good to them in the last five minutes.

And this leads one to the second of Finnemore's points that is of particular interest here. Finnemore begins her book and thus her constructivist journey by asking "how do states know what they want?"[10] With Finnemore's provocative foundation in place, she then goes about demonstrating through evidence that state interests can be observed and thus described by the evidence of their social construction. Rather than socially construct state interests through politics, I am going to allow states to articulate their interests, as interests, through the laws that they enact, or fail to enact in the face of perceived crises. Even though I am using laws as the concrete moments to know interests, I am not suggesting that state action is based upon a sense of self that is limited to legal enactments. The observable acts that indicate a state's motivations come from many different international sources, not just the law. In short, the statements of law are a necessary, but insufficient indicator of a state's motivation.

Even former U.S. Vice President Dick Cheney, whose government introduced the Troubled Asset Relief Program through the Emergency Economic Stabilization Act of 2008, noted the fickleness of perceiving financial crises. In a public television interview back on July 18, 2001, Dick Cheney said:

Well, I suppose if you think you've got a crisis, if you turn on the wall switch and you don't get any power, you've got a crisis. If your gasoline goes from $1.25 a gallon to $2 a gallon, the American people think they have a crisis. I think we've been fairly consistent in terms of how we described it. What shifts is the public opinion out there based upon the problem at the moment. We do have a tendency I think as a nation sometimes to be very shortsighted in our time horizons. The press, on the one hand, sometimes are saying, "oh, it's a terrible practice what are you going to do about it?" The next day it's an overblown deal; there's no crisis

9. Finnemore, x.
10. Finnemore, 1.

here, because gasoline has dropped a nickel a gallon since last night. And it's a lot more complicated than that. These are long-term problems. It takes years to get to develop some of these projects, and it will going forward.[11]

So let us go immediately past the shallow and fickle oversimplification of simple economic gain or loss and look to describing other factors that might help to explain the motivation for state action, and in the context of other states' actions, explain state inaction.

Aristotle insisted that social theory be based upon the sort of empirical science in which he engaged.[12] In this light, let us consider the "freeze, fight or flight response," first described by Harvard physiologist Walter Cannon in 1929. Cannon's theory states that animals react to threats with a general discharge of the sympathetic nervous system, priming the animal for fighting or fleeing. Coupling this with evolutionary theory, we would see that those animals incapable of the nervous system discharge simply take no action—that is, they freeze—and are thus more likely killed, thereby eliminating or diminishing their ability to reproduce.

Usually, when a person is in the basic unstimulated state, the firing of neurons in the brain is said to be minimal. A novel stimulus, which could include a perception of danger or an environmental[13] stressor such as elevated sound levels or over-illumination, once perceived, is relayed from the sensory cortex of the brain through the hypothalamus to the brainstem. If a stimulus is perceived as a threat, a more intense and prolonged discharge activates the sympathetic division of the autonomic nervous system.[14] In turn, hormones facilitate immediate physical reactions associated with a preparation for violent muscular action.[15]

In current times fight and flight responses have assumed a wider range of behaviors. For example, the fight response may be manifested in angry, argumentative behavior, and the flight response may be manifested through social withdrawal, substance abuse, and even television viewing.[16] What we learn from all of this for our social theory is that we, as animals, do have a physiological response to perceived crisis. Thus in order to understand the motivation of states, the question shifts to a social one—how and why do we perceive crises?

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11. Richard Cheney, http://www.pbs.org/newshour/bb/white_house/july-dec01/cheney_7-18.html.
12. Annas, *Morality of εὐδαιμονία*, pp. 150-52, considers Aristotle's empirical support for the naturalness of the *πόλις*. Aristotle provides no empirical support, and Halper sees no reason to suppose that he relies on any. That through governance of a state one can exercise moral ἀρετής is according to Halper, for Aristotle, simply analytic.
13. "Environment" is Canon's own word choice, not that of this author for this paper.
14. M. E. Thase and R.H. Howland, "Biological processes in depression: An updated review and integration". In Beckham & Leber. *Handbook of Depression* (NY: Guilford Press, 1995).
15. (Gleitman, et al., 2008)
16. Friedman & Silver 2007

Greed

In professionally assessing the perceived finance crisis, the General Counsel of Deutsche Bank, Arne Wittig,[17] reported that the two clearly traceable causes for the beginning of the worldwide financial collapse at the end of 2008 were first, the bursting of the American housing market bubble and second "greed."[18] Entire forests of paper have been printed already to analyse the mechanics of the bursting of the American housing market bubble and the resulting worldwide effects on finance and economy.[19] In contrast, precious little has been systematically and methodically said—the way philosophers can—about greed. Greed is not simply making rational choices based upon economic benefit. A March 2010 report by the court-appointed examiner of the Lehman Brothers bankruptcy indicated that Lehman executives regularly used cosmetic accounting tricks at the end of each quarter of a year to make its finances appear less shaky than they really were. The court examiner concluded that Lehman executives intentionally created "a materially misleading picture of the firm's financial condition in late 2007 and 2008."[20] That is greed. And in Germany, the Düsseldorf Regional Court convicted the former Chief Executive of Germany's oldest bank—Deutsche Industrie Bank—of misleading investors that the bank's risk factor was minimal in company publications. That is also greed. He was sentenced to ten months imprisonment and fined €100,000.[21]

And it is greed that ties the financial crisis to the climate crisis. When asked in Copenhagen in December of 2009 how best to address the climate crisis, Yvo de Boer, the Executive Secretary of the United Nations Framework Convention on Climate Change started his answer by saying "this is an ethical problem." Just as misleading investors and regulators concerning financial goings-on is greed, so too is filling the atmosphere with carbon to enable a luxurious lifestyle, even when we know it hurts other persons to do so.

Thus one cannot help but to notice that the experts and others in a position to judge are telling us that there is something basic to both the financial crisis and the climate crisis that is driven by greed. In the perceived financial crisis, states acted immediately. In a more rationally-demonstrated climate crisis, states hesitate.

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17. Arne Wittig, General Counsel, Deutsche Bank AG, ***"Regulatorische Antworten auf die Finanzkrise"*** Lecture, University of Cologne, Institute of Banking Law, January 13, 2010.
18. Wittig, ibid.
19. (A position supported by Professor Richard Buxbaum, University of California at Berkeley, Faculty of Law, presented on June 15, 2010 during a lecture in Cologne, Germany. Buxbaum concluded, however that with finance, weak law permitted it and strong law could fix it.
20. Mark Trumbull, "Lehman Bros. used accounting trick amid financial crisis – and earlier," *The Christian Science Monitor*, March 12, 2010.
21. Bloomberg News, *International Herald Tribune*, July 15 2010, p. 18.

Why? To understand what motivates states to act, we may indeed need to look to the causes and nature of the perceived crises.

For the sake of the physical quality of daily human life, it is disturbing that states fail to address the climate crisis. But for Aristotelian philosophy, it is equally disturbing that the failure of states to act may demonstrate the real possibility that rationality plays a relatively small role in the actions and attitudes of states toward climate change. Aristotle considered the rationality of the individual to be the highest and most distinctive feature of human behavior. In fact, in the book known as *Nicomachean Ethics*, he considers it to be nothing less than our τέλος. We have sufficient scientific facts, economic facts and legal facts to enable us to make rational choices both to mitigate the change that will occur if we do not stop loading the atmosphere with carbon, and to adapt to the results of the carbon we have already loaded into the atmosphere—results such as the loss of biodiversity, food production, the spread of malaria, and the forced migration of populations from submerged islands and nascent deserts. And yet we are doing next to nothing about it. So if rationality is an insufficient impetus to solve agreed-upon crises, what might be ἀρετή?[22] Philosophers have most often written of individual ἀρετή. But is the ἀρετή of the individual sufficient or do we need to consider the ἀρετή of the state to solve the climate crisis? Near the end of the *Nicomachean Ethics*, in Book X Aristotle sets up connections between the personal ἀρετή he has discussed throughout the *Nicomachean Ethics* and the actions of the πόλις he will thereafter discuss in *Politics*.

Individual ἀρετή-state ἀρετή

We know that Aristotle says only good men can truly be friends in Book VIII of the *Nicomachean Ethics*, and that the good man is one who cultivates ἀρετή and that the cultivation of ἀρετή is the job of society through education. But can we apply this admonition, this formula, to the state today? If so, how and when does the state cultivate ἀρετή as the necessary basis of friendship? If friendship between individuals can be so powerful as to make justice unnecessary as asserted in *Nicomachean Ethics*, Book VIII, could the same be said as between states? Aristotle asserts that individuals can take pleasure in their associations with others, and not just profit.[23] Is that true for states as well?

The Aristotelian notion of the ἀρετή of the individual can be connected with the

22. A philologic point is worth noting here. "Virtue," as the usual English word used to translate ἀρετή, often carries with it meanings synonymous to moral ethics. It would not have been used quite in that way by Aristotle, it seems. It might be better to translate it as "excellence," although "excellence" has its own difficulties, especially given the fact it has now become a favorite word of marketing and advertising.

23. See *Nicomachean Ethics*, Book VIII

ἀρετή of the state as insofar as we consider the work of the statesman. Thus, as John Hallowell concluded, the task of the statesman is more like the task of the physician than it is like the task of the engineer. It is φρόνησις or practical wisdom rather than τέχνη or productive knowledge that the statesman needs.

The statesman is not concerned with making anything but rather with inspiring right action, and his ability to inspire right action is the measure of his statesmanship. It is not, then, a question of bringing about the "human nature we want" and of planning scientifically "for the development of human nature in the direction we would specify" but rather a question of discovering those principles of conduct which will promote the perfection of human nature and of providing a social environment congenial to the relation of these principles I practice. It is not so much a matter of imposing something upon men as it is of releasing the creative forces for good already in men and of restraining that which is bad. In short, politics is [thus] not a kind of technology but a form of moral endeavour.[24]

So my question moves to how one motivates ἀρετή in the behaviour of the state?

To answer that question, one should consider the fact that Aristotle thinks that the good life must be lived in a πόλις. It is usually supposed that the state serves to provide the security and stability that individuals need for acts of ἀρετή. Further one must admit that although participating in the governing of the state could play some important, or even necessary, role in a good life, the predominant view is that εὐδαιμονία is mostly pursued individually or with friends.[25] I would suggest however that there remains a role for states. As regards friendship—why not friendship between states as well?

According to Edward Halper, we should read Aristotle's account of best friendships with an emphasis on mutual interest and common activity, instead of emphasizing individual ἀρετή aided by a concerned friend. I extend the thesis of Halper's further by globalizing the nature of the πόλις. Halper concludes that εὐδαιμονία not only requires living with friends in a πόλις, but consists of governing a πόλις. He insists that for Aristotle the best states are knit together so tightly that the interests of one person are the same as the interests of all and that the ἀρετή he describes in his ethics is meant to be exercised in the governance of such a state. And because governing the state (or rather the πόλις) fulfills the individual's potential for acts of ἀρετή, then governing the state is said in the *Politics* to be "by nature."[26]

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24. John Hallowell, *The Moral Foundation of Democracy* (Chicago: University of Chicago Press, 1954) p. 107, as cited in David K. Hart, "The Virtuous Citizen, the Honorable Bureaucrat, and 'Public' Administration," 44, *Public Administration Review* (March, 1984) pp. 111-120.
25. Edward Halper, University of Georgia, http://www.bu.edu/wcp/Papers/Anci/AnciHal2.htm, accessed July 10, 2010.
26. Halper, ibid.

That said, we must keep in mind the size and nature of the πόλις when Aristotle was writing. It was not the nation-state of today, an institution that we often treat as the obvious and natural organizer of human affairs. The πόλις of the fourth century was the city, and although the city was considerably smaller than today[27] it could be said to have the character of the known largest, organized and functioning community at that time, much as the nation-state would be today. This brings me to my hypothesis: the achievement of εὐδαιμονία for the individual within the state, accomplished in the fourth century by ἀρετή, applies today to the role of the state in the world. To support extending Aristotle's treatment of the πόλις to the global community today, I would point out that in *Politics*, one of Aristotle's main disagreements with Plato's Republic was that by treating the state only as a household, Plato eliminated political ἀρετή from consideration.[28]

To support my thesis, I want to consider a brief catalogue of the Aristotelian ἀρετή and how each instance might apply to state action in a globalized world, rather than simply to individual action in a πόλις. In the *Nicomachean Ethics*, we learn in fact that ἀρετή is sometimes best exercised in political activity. Courage, for example, is a disposition toward a particular behavior in battle: "Properly (κύριος) the courageous man might be said to be fearless of noble death and all that suddenly brings death, most especially in war" (*Nicomachean Ethics*, III.6.1115a32-34). States, not individuals, go to war; so only people who live in or act with states could be properly courageous. Likewise, Aristotle declares that political justice or . . . simple justice is "found in a life lived in an association for the sake of self-sufficiency" (1134a26-27), that is, in a state (*Politics*, I.1.1252a1-7).[29]

So if in a globalized world we consider the political system to be the relations of nations, rather than the individual within the state, we can begin to get some traction by applying Aristotelian principles of ἀρετή to state action. "There are at least two more indications in the Nicomachean Ethics that the ἀρετή it describes are meant to be exercised in governing states. One occurs in Aristotle's statement near the end that "the actuality of the practical ἀρετή is in political and military activity."[30] Likewise, while discussing φρόνησις in *Nicomachean Ethics* VI, Aristotle "ascribes this ἀρετή to those like Pericles who manage households and are statesmen, for they understand what is good for themselves and for humankind."[31]

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27. By the year 431, Athens had a population of about 40,000 and Piraeus another 25,000. Ian Morris, "The Growth of Greek Cities in the First Millenium BC," http://www.princeton.edu/~pswpc/pdfs/morris/120509.pdf, accessed July 11, 2010.
28. Aristotle, *Politics,* II.1.1261a16-22; 5.1263b7-14.
29. Halper, ibid.
30. Aristotle, *Nicomachean Ethics*, X.7.1177b6-7
31. Aristotle, *Nicomachean Ethics*, VI.5.1140b7-11as cited in Halper, ibid.

Aristotle can make these claims about φρόνησις that extends to human kind because he bases his social theory on his empirical science of the human animal, rather than upon cultural variations. Consequently, he can neatly connect rationality to ἀρετή: since our τέλος is to be rational, the fulfillment of that τέλος is our ἀρετή.

At issue in Politics is not, for example, which constitution will best govern and provide for the needs of its citizens but rather which constitution will allow its citizens the opportunity to realize the greatest ἀρετή. The ability to rule is an honor that ought to be distributed to people who merit it and an opportunity for them to exercise ἀρετή. It is thus clear that Aristotle conceives of political activity as the exercise of ἀρετή. So if we connect this to the initial problem that is of concern here, what might that mean? Rational science alone, without an exercise of φρόνησις based upon that rational science, has led us to our freezing in the face of the climate crisis.To understand how that exercise of φρόνησις might look, we must take some liberties with the anachronistic facts of the rational basis of Aristotle's world. If we do, we might extend his πόλις to the globalized world, and therefore the ἀρετή of the individual to that of his or her role in the global πόλις.

Aristotle thinks that ideally a πόλις should provide all citizens opportunities to realize their ἀρετή to the extent they are capable. First, he defines the citizen as someone for whom „it is possible to share (κοινόν) in the deliberations and judgments of rule."[32] Sometimes this is interpreted to mean only those who themselves directly participate in legislation. That would be far too limiting, however, and as at least one commentator has noted, in the case of an absolute monarchy, it would mean he is writing about only one person. Deliberation and judgment are in fact exercised in the large number of administrative and judicial tasks necessary in any πόλις, such as managing the young or the old, taking care of public markets, providing for defense and I would say today, managing our human relationships to the earth, including the climate crisis. Aristotle in fact takes note of them,[33] and even refers to them specifically as types of rule.[34] Citizenship, the capacity to share in the deliberations and judgments of rule, must extend to all who are capable of any of these tasks. Aristotle takes one task of the rulers of a state to be the distribution of all these offices to those capable of them. It follows, then, that it is not only the monarch or the aristocrat who has the opportunity to exercise ἀρετή but, ideally, each citizen can realize his capacity for ἀρετή in executing any of the manifold tasks of government.

One might ask why rule is so important. The answer is that in the act of ruling, one exercises genuine ἀρετή because he or she, in ruling, has φρόνησις. If we apply this point to something so current as the climate crisis, it becomes plain that with the conclusions of rational climate science at their disposal, rulers have the ability

32. Aristotle, *Politics*, III.1.1275b19-20.
33. Aristotle, *Politics*, IV.15-16.
34. Aristotle, *Politics*, III.1.1229a3.

to enable everyone else to exercise genuine ἀρετή. In fact we do hear exactly this argument made when people say that science of climate problems are too difficult to understand and compared with simple political topics such as taxes and crime, leave the decisions to the rulers. Unfortunately what we experience now is a situation in which the rulers do not wish to take those decisions. In the virtuous friendship of which Aristotle writes, friends do not act for one another but with one another. However, Aristotle takes their common activity (κοινωνία) to be part of and governed by the common activity (κοινωνία) that defines a state.[35] He claims friendship is an expression of justice, and what counts as justice depends on the state.[36] Each person should give the other his due; the friend, because of his moral ἀρετή, deserves more than others; he deserves the close association of those of like ἀρετή. Thus, friends pursue ἀρετή together, but the character of the ἀρετή pursued must depend on the state. Hence their activity of friendship is not just part of the state, but positively beneficial to it.

State Action Case Studies

So where and when might one see the Aristotelian hypothesis in action as a way to describe the motivation of state action? While the motivation of a state or individual is difficult to ascertain in a scientific sense, one can amass sufficient evidence to make rational descriptions in the way that Finnemore suggested. For example, in *The Guilt of Nations*, Elazar Barkan explores the question of whether guilt motivates state action, particularly when states' actions cannot be explained by economic or legal expediency. Building upon the case studies of German reparations to Jews, U.S. reparation to Japanese-Americans, Native Americans and Hawaiians, Australian reparations to Aborigines, and the counterfactual example of the reluctance of Japan to come to terms with sexual slavery in Korea and elsewhere, Barkan inductively uses descriptive evidence to form the basis of the outline for his theory of "restitution."[37] Barkan distinguishes restitution, which he describes as non-vindictive punishment that is voluntarily accepted, from retribution, which is vindictive punishment, from reparations, which are an involuntary and imposed payment for identified losses.[38]

35. Aristotle, *Nicomachean Ethicss*, VIII.8.1160a8-9, a28-30. Halper, ibid. compares to VIII.9-12.
36. Aristotle, *Nicomachean Ethics*, VIII.1159b29-30. Halper, ibid. compares to XI.1161a10-11.
37. Elazar. Barkan, *The Guilt of Nations* (London: Norton, 2000). In support of Barkan's thesis since he wrote the book, one might consider that in 2008, Spain announced that it would grant nationality to foreigners whose Spanish parents or grandparents left the country to flee the civil war and Franco's subsequent dictatorship. Around 225,000 people in Cuba, Central America and South America have already applied for Spanish citizenship under the scheme, and 117,000 have already obtained it. The motivation? "Spanish officials explain their decision as part of a wider effort to fully examine, digest and - when possible - repair the wrongs of the Franco era." Bruce Crumley, "Four E.U. Nations Stoke Fears of an Immigrant Flood," *Time*, August 13, 2010, http://news.yahoo.com/s/time/20100814/wl_time/08599201043600.
38. Barkan, xxii et seq.: "To explicate restitution further as a cultural, political and legal concept, I use

While it would seem that an argument might be made by states in international law for losses due to climate change after the point at which the scientific causation had been established and developed states have agreed to pay, Barkan's focus is on the concept of restitution, which he feels is superior to both the traditional notions of retribution and reparations. "Restitution for historical injustices embodies the increasing importance of morality and the growing democratization of political life."[39] So how might one apply the lessons learned from Finnemore to describe state action in terms of restitution, according to Barkan? To employ restitution to climate change, we would need to take two steps away from where we are. First we would need to establish that attention to economic measures might best address climate change and second, we would need to characterize those measures in a way that interprets the agreed-upon "adaptation" as including restitution. [40]

While the original project of comparative law, according to Zweigert and Koetz, as well as in some ways that of international law, may have been to look for and establish common legal norms for the whole world,[41] Barkan would distinguish restitution because it "rejects the notion of a general global moral system and recognizes instead that only voluntary local resolutions can provide tentative solutions. . In amending gross historical immoralities, restitution replaces a comprehensive standard of justice with a negotiated justice among the opposing parties in specific cases."[42]

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it in contrast with enforced retribution –or "punishment"- and with the age-old custom of imposed war reparations. Traditionally the winner imposed various payments on the loser (…). Within this context of nonvindictiveness the modern concept of restitution was born, and it is from this point that I examine specific cases."

39. Barkan, 308.
40. "The Bali Action Plan, adopted at COP 13 in Bali, December 2007, identifies adaptation as one of the key building blocks required for a strengthened future response to climate change to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012. Most recently in Copenhagen, Parties decided to extend the mandate of the AWG-LCA and requested it to present the outcome of its work to COP 16 in Mexico. In addition, the COP took note of the Copenhagen Accord, in which Heads of State, Heads of Government, Ministers and other heads of delegations stress the need to establish a comprehensive adaptation programme. The signatories agree that enhanced action and international cooperation on adaptation is urgently required and that developed countries shall provide adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation action in developing countries. Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the LDCs, SIDS and Africa." http://unfccc.int/adaptation/items/4159.php, accessed January 31, 2010.
41. See, Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law*, 3rd ed. (Oxford: Oxford University Press, 1998), 24: "The final function of comparative law to be dealt with here is its significant role in the preparation of projects for the international unification of law. The political aim behind such unification is to reduce or eliminate, so far as desirable and possible, the discrepancies between the national legal systems by inducing them to adopt common principles of law."
42. Barkan, 309.

Barkan's subtle but powerful argument is that all societies ultimately have been operating within the framework of the Enlightenment's liberal notions of individual rights. Insofar as they do, the most global system of norms to which we can address wrongs is one of recognized global human rights. But that still means creating and maintaining systems designed for the good of the individual and not some sort of collective understanding. Even so, this system that is focused upon the individual nevertheless produces change when the rights are not asserted by the privileged, but by the poor, the weak and the disadvantaged. "These demands for political and economic justice, which go beyond traditional liberal principles, inform neo-Enlightenment that increasingly includes compensation for past deprivations and historical injustices"[43] Barkan asks "Could we learn, then, from the discussion of the various restitution cases ways in which contemporary liberalism and Enlightenment principles might be reformed in order to respond to this frustration of lack of substance?"[44] This sense of "contemporary liberalism" might well be the accurate character of the new age of international environmental law. The two great exploiting states of the atmosphere—the United States and People's Republic of China—are marked by an individualism that Barkan roots in liberalism.[45] The United States of course was founded upon such notions of individualism, and China seems to have adopted it along with its new- found economic place of power in the world.

Thus I would answer yes, but add an additional possibility for restitution for the unjust or immoral exploitation of fossil fuels and the earth's resources in such a way as to have caused climate change complications for the poor or underprivileged, such as drought, flood, agricultural failure and famine, mosquito-borne illness in new altitudes and places, desertification, loss of habitat, and loss of land due to sea encroachment.

Conclusion

In conclusion, one can say that the question of what motivates state action became disturbingly concrete when, in December of 2009, the states, citizens, religions, industries and non-governmental organizations of the world came together at COP 15 to agree upon a path to mitigate our own destruction of the atmosphere, and to adapt to the destruction of that atmosphere that we have already set in place. But from the COP 15, no concrete actions were taken. There are several possible reasons for states failing to act in the face of the climate crisis. First, the individuals who have voice in those states have failed to perceive a crisis. If that is true, we must ask why, and the answer may be that we are at our limits in the use of rationality.

The problem with relying upon the perception of crisis before the human takes

43. Barkan, 311-12.
44. Barkan, 312.
45. Barkan, 308 et seq.

action is this: insofar as "crisis" is a learned behavior that may be connected in some way to our genetic hardwiring, it has socially and genetically evolved to respond to crises (unwanted changes) of a type and speed that were reversible. That tool is no longer a survival advantage. But what if we use that evolutionary tool to wait for the moment when we need to act regarding climate change? The other evolutionary gain—known as rational science—has through the International Environmental Agency, the IPCC and others told us it will be ineffective to reverse the effects, at least to do so in the types of year numbers that humans use to measure things. So what other tool might we need to use? The other evolutionary tool of human ἀρετή—a tool that has evolved since our ability to recognize history and consequences, and to empathize with other humans, if not other species.

There are two possible solutions to the freeze of states in the face of the climate crisis. Individuals must see themselves as part of a larger πόλις—regional or global, in order to understand that their individual eudemonia is fulfilled in concert with that larger πόλις, or the contemporary nation state must see itself as the individual, the ἀρετή of which is to exercise φρόνησις based upon the empirical facts as it can rationally know them. In Aristotle's ideal state, for to act in the interest of one person, whether one's self or another, is already to act in the interest of all. Indeed, the more I benefit myself or another, the more I increase the exercise of my or the other's ἀρετή, and so the more I benefit all. The best friendship promotes ἀρετή in the friends, but their best exercise of ἀρετή promotes the common interest. To do so, Aristotelian ἀρετή of individual rationality would mean that when it comes to climate change, those without specialized knowledge in the natural sciences need to learn as much science as possible in order to exercise φρόνησις, and those with specialized knowledge in the natural sciences need to learn as much about the known social world as possible in order to exercise φρόνησις. All members of both groups must then in fact exercise φρόνησις and make judgments, rather than treat the decisions as though they are the province of some form of specialized knowledge only to be left to specialists. Failure to make judgments and take action is itself action—it says yes to laissez-faire economics and power structures already extant. Many of these prudent judgments will in fact be based upon the authority of other persons. That is not a failure of rationality. The act of rationality includes the prudent judgment that determines the authorities that one ought to accept, given that he or she does not have the time or ability to make those judgments on his or her own.

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