

Four Theses:

Preliminary to an Appeal to Equity

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“Equity is justice in that it goes beyond the written law. And it is equitable to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.”¹

Introduction

Clarity on the meaning of equity is a precondition for an appeal to equity – or at least it ought to be. There have been many recent appeals for more equity (or at least no less) in arbitration,² in federal procedure,³ in environmental law,⁴ in international law,⁵ and, most naturally, in sentencing.⁶ There is even an argument that maintaining the health of equity is a constitutional obligation.⁷ It is not uncommon for these appeals to make

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¹ SECURITIES INDUSTRY CONFERENCE ON ARBITRATION, *THE ARBITRATOR'S MANUAL 2* (2004) (attributing quote to “Domke on Aristotle,” but actually a translation of two passages from Aristotle as cited by Domke), http://www.nasdaq.com/pdf-text/arb_manual.pdf (last visited Oct. 2, 2004).

² See, e.g., Robert A. Creo, *Mediation 2004: The Art And The Artist*, 108 PENN ST. L. REV. 1017, 1037 (2004).

³ See, e.g., Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429 (2003).

⁴ See, e.g., David E. Cole, Note, *Judicial Discretion and the “Sunk Cost” Strategy of Government Agencies*, 30 B.C. ENVTL. AFF. L. REV. 689 (2003).

⁵ See, e.g., Steven W. DeVine, *Epieikeia in International Law*, 24 TEXAS INT'L L. JNL 149 (1989). [hereinafter, DeVine, *Epieikeia in International Law*].

⁶ See, e.g., Martha C. Nussbaum, *Equity and Mercy*, PHILOSOPHY AND PUBLIC AFFAIRS, Spring 1993, at 83.

⁷ Following Meyler, the argument is that insofar as the founders opted for a double dose of equity through instituting a Supreme Court that resembled the Chancery and mandating jury trials in many cases, which were also justified by appeal to their equitable discretion, equity ought not be allowed to wither. Bernadette Meyler, *Substitute Chancellors* 38-39 (unpublished manuscript, on file with the author). An

some attempt to define what is meant by equity, usually through an argument based on history or authority, particularly that of Aristotle. Given the place of precedent in our system, history is clearly not only of antiquarian interest. Sometimes contemporary appeals to equity also assume a kind of analysis of equity, namely that there is an essential concept of the equitable, which, again, is generally assumed to have been first discovered by Aristotle.

This Note aims to enable future better appeals to equity through advancing four theses about the history and the concept of equity. The four theses are as follows:

- 1) Aristotle's account of equity has been received into the legal tradition many times and this reception is ongoing today.
- 2) Aristotelian equity is not primarily legal.
- 3) There is no unified concept of equity.
- 4) The primary aspects of equity have metaphysical grounds.

Because there is neither a unified concept nor a direct evolutionary history nor a simple account, i.e. Aristotle's, which would allow one to bypass the confused reality of the tradition, appealing to equity is more fraught than is commonly recognized. Equity should be appealed to, but only after it is clear what aspect of equity is being discussed and in what broader context.

The confusion as to what we are discussing when we say "equity" could be covering up some important issues or at least questions. The association of arbitration with equity, for example, goes back to Aristotle, a tradition even now referred to by one

even simpler constitutional hook is, of course, the Article III, Section 2 reference to cases in law *and* equity. True to this command, Main notes that various legal reforms, including the advent of the Federal Rules of Civil Procedure, were claimed to be merely procedural and not to have affected underlying substantive equitable rights at all. *See* Main, *supra* note __, at 474.

of the leading institutions and industries involved in arbitration, namely the securities industry (see the quotation preceding this Note). However, if we assume, following Roscoe Pound, that the 20th century began with equity in decline, then what does it mean that it later saw a great flourishing of arbitration?⁸ Was Pound wrong then or has equity been revived along with arbitration or is modern arbitration somehow inequitable? Or were Pound's concerns simply of no relation to what Aristotle meant when he associated equity with arbitration?

More concretely, the Supreme Court seems to be under the impression that arbitration is merely a change in forum that affects no substantive rights.⁹ How can this be when a leading arbitration organization celebrates the role of equity in contrast to law? Is not one of the primary justifications for arbitration, also recognized by the Court,¹⁰ that arbitrators can bring localized knowledge and expertise to bear on a problem? These questions are hardly insoluble. It is possible that the Court understands the reality of contemporary securities arbitration is other than what the opening quotation to its rules would suggest, or perhaps it is the case that arbitration has *become* (or should become) more legal and less equitable, or perhaps different rationales apply to different contexts, but none of these or other solutions can be adopted without first getting clear on what equity means.

This Note has a spiral structure, with Aristotle's account of equity the central point to which we will return again and again, each time deepening our reading. Before

⁸ Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 35 (1905).

⁹ See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). This passage is cited with approval in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), another leading case on arbitration and one having to do explicitly with the arbitration of employment claims in the securities industry.

¹⁰ See, e.g., *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-82 (1960).

we can sketch out the historical moments in which Aristotle's account of equity has been received, I will present a brief discussion of what it is Aristotle says about equity. After the sketch of the various receptions (Thesis I), I will return to Aristotle to make the argument that despite its centrality to our legal tradition, Aristotle's notion of equity was not primarily a legal notion in our sense (Thesis II). At this point, equipped with a deeper reading of Aristotle and some sense of the richness of the equity tradition, I will collect the various aspects of equity that have been important to the tradition (Thesis III).

Finally, this catalog will make clear what was already been implicit, namely that until recently equity was not appealed to as a merely logical or procedural idea or even as another body of substantive rights. Rather, the equity tradition is a tradition of appealing to a particular metaphysics, though not always the same metaphysics (Thesis IV). By metaphysics here I mean primarily an appeal to an argument as to what there is (i.e. an ontology), but also to what is the proper role for humans given what there is – i.e. a conception of the good life (i.e. an ethics). We will also see, relatedly, that such appeals out of the law have political implications, and these should also be attended to.

Aristotle on *Epieikeia*

There is general agreement that the equity tradition begins with Aristotle. Yet like any true beginning, thinking about equity actually starts earlier; there is no creation *ex nihilo*, and, as Aristotle demonstrates in the characteristic manner in which he begins his works, one needs to start from one's predecessors. The tradition of *epieikeia*, the word now translated as equity, begins in Homer, where *epieikeia* and its cognates means what is appropriate, as when Achilles, hosting the funeral games in Book Twenty-Three of the *Iliad*, argues that it would be *epieikeia* to give a prize to the warrior who came in

last (23.537). These games, and particularly Achilles' conduct in leading them, represent Achilles' re-absorption into his community after his brooding, treasonous and then murderous rage. Another especially striking instance of *epieikeia* is in Book One of the *Iliad*, where Zeus insists that he tells Hera all that is *epieikeia* for her to hear (1.547); Hera is not pacified by this and is certain that Zeus has been scheming against the Greeks. She persists in questioning him and Zeus then threatens her with violence, reminding her that all the gods on Olympus could not save her should he attack her – she drops the subject.¹¹ Zeus' threat is a reminder that the alternative to an agreement on *epieikeia* may well be a resort to force.

By the 5th Century B.C., the rhetorician Gorgias contrasted “mild *epieikeia*” with “stubborn justice [*dike*]” (Diels-Kranz 82b6). The historian Thucydides also contrasts *epieikeia* and justice, and Hobbes translates *epieikeia* sometimes as “equity” (1.76.4, 71) and sometimes as “lenity” (3.40.2, 198).¹² Fourth Century orators also appeal to *epieikeia*, though they do not give it a consistent technical sense – contrary to what one might have assumed based on Aristotle.¹³ For instance, Demosthenes asks whether and

¹¹ I presume this is the passage that strikes Max Radin as well, though his somewhat eccentric history/discussion of *epieikeia* contains no citations. This is not to say that Radin's whirlwind tour through legal history does not largely comport with what I have found elsewhere. Max Radin, *A Juster Justice, A More Lawful Law* in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MURRAY 540 (Max Radin and A.M. Kidd eds., 1935).

¹² THOMAS HOBBS, HOBBS'S THUCYDIDES (Richard Schlatter, ed., 1975).

¹³ Just because the word *epieikeia* is not found in Aristotle's technical sense in the orators does not mean that some aspects of it are not found. As we will see again and again, it all depends what one is looking for. For instance, Lawless finds equity argumentation in *Isaeus* 1 because he finds an argument based on the intention of the testator (there is also an appeal to an earlier favorable settlement of arbitrators). JOHN LAWLESS, LAW AND ARGUMENT IN THE SPEECHES OF ISAEUS 115 (1991) (Unpublished Ph.D. dissertation, Brown University). But see HARALD MEYER-LAURIN, GESETZ UND BILLIGKEIT IM ATTISCHEN PROZESS (1965) and S.C. Todd: “It should indeed be noted that Aristotle's statement of theory receives little acknowledgment in Athenian practice: when a litigant in an extant speech pleads for the application of natural justice in his favour, he characteristically describes this as *dike* and not as *epieikeia*.” *Glossary of Athenian Legal Terms*, http://www.stoa.org/projects/demos/article_law_glossary?page=31&greekEncoding=UnicodeC (last visited Oct. 2, 2004). The same analysis is applicable to Plato as well. Plato does not develop a theory of *epieikeia*

how an opponent can claim to be a man of *epieikeia*, that is, a man who does what is proper (22.40). In *Against Meidias* (21.90), Demosthenes uses *epieikeia* to mean leniency, urging none to be shown to his opponent, though not long later (21.207), he explicitly offers a “sign” of his own *epieikeia*. Thus in one speech Demosthenes uses *epieikeia* in the sense of propriety, which he claims for himself, and also as somehow less strict than law, which he wishes to deny to his enemy. The two senses can be seen as continuous insofar as one does not deserve *epieikeia* if one is not oneself a man of *epieikeia*.

There are two main discussions of *epieikeia* in the works of Aristotle, with his discussion in Book Five, Chapter 10 of the *Nicomachean Ethics* the more famous and influential. Nevertheless, the treatment of *epieikeia* in Book One, Chapters 13 and 15 of the *Rhetoric* is in many ways fuller. I will begin by sketching out the main points Aristotle makes about *epieikeia* in the *Ethics*.

First, Aristotle states that *epieikeia* is a “correction of legal justice,” though it is not itself legal. Second, he explains the need for this corrective as a product of the necessarily general nature of legal rules. Third, in deciding just how to correct the general law, Aristotle instructs us to look to how the lawmaker would have decided this case had he been aware of it. Fourth, Aristotle recognizes that not all can be determined by law, and it is in this regard that he offers the image of the leaden measuring device used by Lesbian builders – just like this flexible leaden rule can bend to the shape of the stone, so too specific decrees (versus general laws) can be issued to meet the specifics of a case. Finally, the person who is characterized by *epieikeia* is he who does equitable

as such, but he is clearly aware of the challenge posed by the necessary generality of legal rules, see *Statesman* 294a et seq, which analogizes between the general prescriptions of the legislator to the commands of a trainer and of a doctor who travels abroad (see also *Laws* 876d).

things both by choice and habit and is not a “stickler for his legal share” and is indeed willing to accept less even when he has law on his side.

It is easy to see what is so appealing about this account. Aristotle provides a method (look to intentions) to solve a necessary problem (the connection of the general to the specific), and, as he does so, he makes it clear that in this sense *epieikeia* is superior to merely following the law strictly. Aristotle even addresses, implicitly, what we would call the separation of powers issue inherent to equity. After all, Aristotle is only implicit in recommending *epieikeia* to a judge/jury in the context of a legal dispute, but is explicit in recommending *epieikeia* to a legislative body, i.e. the Assembly should issue specific decrees to correct defects in its general laws – it is these precise instruments that approximate the leaden measuring device of the Lesbian builders, not any kind of judicial discretion or expertise. We can also see the continuity between Aristotle’s usage and what comes before. To be a man of *epieikeia* is to do what is proper and to appeal to *epieikeia* is to appeal to a norm less rigid than law but that is one’s due in another sense.

In the *Rhetoric*, Aristotle makes some additional points. First, Aristotle connects *epieikeia* with the unwritten law, which makes sense because it is a correction of law that has been written down, which one can see as necessarily general (1.13). Interestingly, Aristotle also treats written laws as a brute given to be manipulated by the skillful rhetorician, just like hostile witnesses or contracts (1.15). Second, Aristotle argues that it is a technical rhetorical skill to appeal to *epieikeia* in a forensic context (1.13). Finally, and obviously, it is in the *Rhetoric* that Aristotle makes it explicit that *epieikeia* can be appealed to (indeed ought to be) in the context of a trial and not a debate in the Assembly.

Indeed Aristotle goes on at length as to what it is to show *epieikeia* and, since this discussion is not as well known and adds a great deal, it is worth quoting at length:

And it is *epieikeia* to excuse things characteristically human. And to look not to the law but toward the lawgiver; and not to the letter of the law, but to the intention of the lawgiver; and not to the action but to the purpose; and not to the part but to the whole; not to how someone is now, but to how he was, either always or most of the time; and to remember being treated well rather than badly, and the good received rather than done. And to be patient though being wronged. And to prefer to be judged by reason [logos] over deeds. And to prefer to go to arbitration rather than court. For the arbitrator sees the equitable, but the citizen-juror only the law. And it was because of this that the arbitrator was invented, so that *epieikeia* might prevail. (1.13)

This beautiful passage develops what it is to show *epieikeia*; we have seen the end of this passage, which connects arbitration and *epieikeia* already, as the frontspiece to the securities industry's arbitration manual.

As far as nomenclature goes, from now on I will refer to equity and not to *epieikeia*. As will be clear from the next section, the identification of *epieikeia* and *aequitas* is itself a matter of scholarly contention, at least for Roman law. From our perspective today, i.e. post-Aquinas, it seems clear that *epieikeia* is generally taken up into mainstream legal thought as equity and I do not see what is to be gained through proliferating ambiguous terms, and so I will use equity unless *epieikeia* is necessary in context.

Thesis 1: Aristotelian equity has been received into western law numerous times and this reception is ongoing.

The brief discussion of equity above may seem simple and relatively unified; it is particularized justice. Perhaps so it seemed to Aristotle as well, but the history of western law has peeled part and actualized different aspects of Aristotle's equity, which

makes it very difficult to say just when, if at all, Aristotle’s teaching has been received into the mainstream of western law. We will begin with the first possible moment for the reception of Aristotle, namely into classical Roman law.

Taking equity as a particularized exception from the general law, Alan Watson finds very little equity in classical Roman law, while Pothier, taking equity as perfect justice saw nothing but equity as that which Roman law was striving to achieve.¹⁴ Coing argues that by late antiquity, Aristotelian *epieikeia* as *aequitas* has definitely been received, but Coing focuses on Aristotle as contributing the equitable idea that there can be grades of punishment based on whether the wrongdoing was voluntary.¹⁵ Focusing on equity as discretion, there was clearly equity in Roman law from the start in the office of the praetor.¹⁶

Assimilating, plausibly, equity with the obligation to negotiate and interpret treaties in good faith, Ziegler finds equitable interpretation in Roman law, particularly as regards international relations.¹⁷ The key passage from Cicero is rightly famous and connects many different aspects of equity and so, like Ziegler, I will quote it at length:

Injustice often arises also through chicanery, that is, through an oversubtle and even fraudulent construction of the law. This it is that gave rise to the now familiar saw, “More law, less justice” [*summum ius summa iniuria*]. Through such interpretation also a great deal of wrong is committed in transactions between state and state; thus, when a truce had been made with the enemy for thirty days, a famous general went to ravaging their fields by night, because, he said, the truce stipulated “days” and not nights.

¹⁴ Alan Watson, *Equity in the Time of Cicero*, in *AEQUITAS AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS* 24 (Alfredo Rabello ed., 1997); Michel Humbert, *Equity in the Corpus Iuris Civilis* *AEQUITAS AND EQUITY: EQUITY IN CIVIL LAW AND MIXED JURISDICTIONS* 31 (Alfredo Rabello ed., 1997).

¹⁵ Helmut Coing, *Zum Einfluss der Philosophie der Aristoteles auf die Entwicklung des römischen Rechts*, 69 *ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE* 24, 47 (1952). And so Coing concludes: “Es ist kein Zweifel, dass in der Spätzeit und Im Corpus Iuris eine volle Rezeption der Aequitas-Lehre stattgefunden hat.” *Id.* at 44.

¹⁶ Peter Stein, *Equitable Principles in Roman Law* in *EQUITY IN THE WORLD’S LEGAL SYSTEMS: A COMPARATIVE STUDY* 76, 87 (Ralph A. Newman ed., 1973).

¹⁷ Karl-Heinz Ziegler, *Aequitas in Roman International Law*, in Rabello, *supra* note ___, at 54.

Not even our own countrymen's action is to be commended, if what is told of Quintus Fabius Labeo is true – or whoever it was (for I have no authority but hearsay): appointed by the Senate to arbitrate a boundary dispute between Nola and Naples, he took up the case and interviewed both parties separately, asking them not to proceed in a covetous or grasping spirit, but to make some concession rather than claim some accession. When each party had agreed to this, there was a considerable strip of territory left between them. And so he set the boundary of each city as each had severally agreed; and the tract in between he awarded to the Roman people. Now that is swindling, not arbitration.¹⁸

In the example of the general we have an instance of deliberately inequitable interpretation, which Cicero rightfully connects to the phrase *summum ius, summa iniuria*, though the truth of this saying does not seem to require an inequitable interpretation of the law to begin with. Returning to Aristotle, the equitable man has the law on his side without need of dubious interpretation and yet does not push his advantage. The treacherous arbitrator demonstrates why some sort of external standard seems necessary even for unique extra-legal adjudications, and the context of the two examples demonstrates why the appeal of equity would be very strong as regards international relations.

Buckland and Stein summarize the situation as regards *aequitas* in Roman law as follows:

The word *aequitas* figures in juristic texts, in so many senses that it is of no great use [The footnote here reads: Cicero gives it many senses, as the basis of all law, or of the civil law or as contrasted with this]. Its basic meaning for classical law is “fairness” but in post-classical texts it is used to mean *benignitas*, *indulgentia* and the like and is used to justify modifications of law in favour of the weaker party in a way which has little relation to the old conception of “fairness” and often ushers in a rule the implications of which must have made the applications of the law very uncertain. That the strict law at times worked unfairly (*summum ius, summa iniuria*) was recognized in the Edictal reforms and the juristic “*interpretatio*.” It has recently been shewn with a wealth of illustration [footnote to Stroux] that the modification of law in the direction of

¹⁸ CICERO, DE OFFICIIS. 1.10.33; Ziegler, *supra* note __, at 56.

aequitas, inspired by Greek philosophy, through the rhetoricians, was strongly operative among the lawyers of Cicero's time. It tends to interpretation according to intent, rather than literal (*voluntas* as against *verba*) and to such interpretation as gives a fair result, which is not quite the same thing. The changes are only gradually realized, but their prominence in republican times is a serious difficulty in the way of those writers who are inclined to see in allusions to "*voluntas*" and the like signs of Byzantine interpolation.¹⁹

Though clearly no simple conclusion is possible, it seems fair to conclude that Roman law had absorbed some aspects of *epieikeia*, e.g. looking to intent, particularly through Cicero, while others were homegrown, particularly the praetor's discretion and the connection between equity and international law. It is interesting to note that in using his discretion, the praetor seems to have worked to effect what we would now consider specifically equitable doctrines, i.e. doctrines developed in the Court of Chancery. Here are two examples offered by Peter Stein:

The praetor was concerned to apply the principle that parties who had seriously entered into transactions should have their intentions fulfilled, even though they had failed to comply with the particular forms laid down by the law. This principle is exemplified by the development of so-called "bonitary ownership"....

The Roman lawyers recognized expressly a general principle that no one ought to be enriched to the detriment of another...²⁰

¹⁹ W.W. BUCKLAND AND PETER STEIN, A TEXT-BOOK OF ROMAN LAW 55 (3d ed. 1963). This is in fact really the tip of the iceberg since there are phrases besides *aequitas* that have plausibly been associated with *epieikeia*/equity, e.g. *bonum et aequum* by Budeaus, see J.L. Barton, *Equity in the Medieval Canon Law* IN EQUITY IN THE WORLD'S LEGAL SYSTEMS: A COMPARATIVE STUDY 139, 153 (Ralph A. Newman ed., 1973). But see Fritz Pringsheim, *Bonum at aequum*, 52 ZEITSCHRIFT DER SAVIGNY-STIFTUNG FÜR RECHTSGESCHICHTE 87, 97 (1932), who assumes that the relevant sense of equity is mildness in opposition to strict law: Darin [a passage attributed to Celsus] liegt keine Verweisung auf die Billigkeit, sondern eine Einschärfung der Interpretationskunst . . . *Id.* at 84. This passage demonstrates an acknowledgement of one kind aspect of equity (as relates to interpretation), while rejecting another. See generally GUIDO KISCH, ERASMUS UND DIE JURISPRUDENZ SEINER ZEIT 26-35 (1960) [hereinafter, Kisch, *Erasmus*].

²⁰ Stein, *supra* note __, at 87. Note that Stein distinguishes between the application of these equitable principles in the classical period, and equity in the post-classical period which consisted in relaxation of the results arrived at through application of these equitable principles. *Id.* at 92.

The next major reception of Aristotle occurs in the 13th century with the rediscovery of Aristotle, particularly in the work of St. Thomas Aquinas, who translates *epieikeia* as *aequitas*.²¹ *Aequitas* as analyzed by Baldus (1327-1400) appears to have virtually all of the aspects that are first found in Aristotle and are then developed in different parts of the tradition.²² The crucial innovation of St. Thomas and those that follow in his tradition is that now equity is connected with a fixed natural law that comes from God.²³ This is a simplification given the complex nomenclature of law that St. Thomas develops from Aristotle, but the upshot is that there is another law that effectively limits the laws that a legislator may pass and thus limits what an individual or a judge can be asked to do in the name of the law.²⁴ Faced with such injustice, the “proper technique of equitable construction” is to look to the dictates of the natural law.²⁵

This is not to say that there was no equity in the law before the explicit reception of Aristotle in the 13th century. Insofar as equity is a relaxation of the rigor of customary or legislative law, DeVine finds equity in Gratian’s *Decretum*, and thus at the core of the canon law. Especially interesting is that DeVine argues that customary or legislative law is to be relaxed in favor of the “natural-divine law.”²⁶ This is interesting because this is

²¹ NORBERT HORN, *AEQUITAS IN DEN LEHREN DES BALDUS* 47 (1968).

²² See Horn, *supra* note __, and later discussion

²³ Following Goerner, St. Thomas distinguishes between natural right (*jus naturale*) and natural law (*lex naturalis*). E.A. Goerner, *Thomistic Natural Right: The Good Man’s View of Thomistic Natural Law*, POLITICAL THEORY, Aug. 1983, at 393. This key distinction, which will we encounter again later, is between lawfulness as an internal virtue, ultimately associated with *epieikeia* by Aquinas according to Goerner, *Id.* at 410, in contrast to merely following the natural law, which is imposed on humans from without on account of human weakness. *Id.* at 395.

²⁴ See generally, JOHN FINNIS, *AQUINAS*, 266-74 (1998).

²⁵ Raymond B. Marcin, *Epieikeia: Equitable Lawmaking in the Construction of Statutes*, 10 CONN. L. REV. 377, 391 (1977-78).

²⁶ Steven W. DeVine, *The Concept of Epieikeia in the Chancellor of England’s Enforcement of the Feoffment of Uses Before 1535*, 21 U. BRIT. COLUM. L. REV. 323, 331-2 (1987) [hereinafter, DeVine, *The Concept of Epieikeia*]. DeVine does not claim that the actual word *aequitas* plays a role in Gratian or that this notion of relaxation is central to the *Decretum* (compiled around 1140), and, following Peter Landau, this is because it was not. However, almost immediately thereafter *aequitas* emerges as the characteristic

another explicit instance of an appeal to equity functioning as an appeal from one law to a higher law, and a law that will soon be explicitly justified as more equitable because more merciful, i.e. consonant with Christian values. Irnerius, founder of the University of Bologna and one of the first great scholars of the Corpus, also appeals to the principle of equity in the context of legal interpretation: “It is only when the written laws are adjusted to the principle of equity that the true legal rules can be gleaned from them by the judge.”²⁷

The next and arguably most important reception of Aristotle occurred in the 16th and 17th centuries. This is most well-known in the work of the humanists, like Erasmus, who further naturalize equity.²⁸ As Kisch argues, the natural law developed by the humanists did not contradict Christian theology, but supposedly emerging from reason itself, was independent of it, and hence its future independent history.²⁹ Both divine law and the law of reason provide a spirit of the law that should be preserved against overly literal, “Jewish,” interpretation, which “impl[ie]d a literalism untouched by grace or reason.”³⁰ For Grotius, who is central to the application of equity to international law, equity was of no use within natural law itself because “nature speaks no more universally than a matter requires,” but equity retains its importance in human law to the extent that

that distinguishes canon law from civil law. Peter Landau, “*Aequitas*” in the “*Corpus Iuris Canonici*” in Rabello, *supra* note __, at 132-39.

²⁷ As quoted in Marcin, *supra* note __, at 389 n.58.

²⁸ Although they do not necessarily give it a technical sense, at least at first. Here is Kisch: Erasmus hat sicherlich nicht an “Billigkeit” als Interpretationsmethode im Sinne von Stroux gedacht . . . Unter “aequitas” nun scheint er Gerechtigkeit in ganz allgemeiner Bedeutung (“sachliche Gerechtigkeit”), der die Unrechtigkeit, “iniquitas” (“sachliche Ungerechtigkeit”) gegenuebergestellt wird.” Kisch, *Erasmus*, *supra* note __, at 62-63; see also *id.* at 159.

²⁹ Guido Kisch, *Humanistic Jurisprudence*, 8 STUDIES IN THE RENAISSANCE 84-85 (1961).

³⁰ Donald R. Kelley, *Civil Science in the Renaissance: Jurisprudence Italian Style*, THE HISTORICAL JOURNAL, Dec. 1979, at 788.

human law must remain general.³¹ The law of nature thus provides Grotius with an additional interpretive tool, particularly useful as regards treaties, because now the legislator or treaty makers can be presumed to have wished “to govern all things according to the principles of nature.”³² Cicero’s clever general had clung to words strictly and ignored the treaty’s sense as revealed by natural equity

Natural law thinkers like Domat turn Roman law into a law of reason, though tempered by equity, which seems to emerge from nature itself as that which, primarily, defends the spirit of the law against its harsh application.³³ Domat’s discussion of equity is notable for combining a demand for equity (I.II.vii), a concern with too much equity undermining the rigor of law when rigor is appropriate (I.II.vi), and an acknowledgement that there can be no rule for knowing which is which (I.II.vi), but little concern that this situation could lead to an abuse of discretion (though see I.II.xxix).

At about the same time, there is the “direct” reception of Aristotle in England. Writers like St. German (*Doctor and Student* came out in 1532) and Edward Hake move right from their reading of Aristotle to their application of his teaching to the contemporary legal situation.³⁴ Kelley sees this as an example of English legal nationalism at a curious time of legal hardening in England.³⁵ More charitably, Barton sees the appeal of Aristotle as rationalizing an already existing institutional arrangement, namely the relation between the common law courts and the Chancery.³⁶ Barton sees the

³¹ DeVine, *Epieikeia in International Law*, *supra* note ___, at 233. This is a passage from Grotius translated by DeVine.

³² *Id.*, at 235.

³³ JEAN DOMAT, A TREATISE OF LAWS, Tit. I Sec. II, v-viii. Also, see generally JAMES Q. WHITMAN, THE LEGACY OF ROMAN LAW IN THE GERMAN ROMANTIC ERA, 46-50 (1990).

³⁴ Donald R. Kelley, *History, English Law, and the Renaissance*, 65 PAST AND PRESENT 24, 28 (1947) [hereinafter, Kelley, *English Law*].

³⁵ *Id.* at 24-5, 30.

³⁶ Barton, *supra* note ___, at 154.

influence of St. German as explaining why the Chancery Court became a court of “equity” (versus say, of “conscience”).³⁷ Though common lawyers had complained about Chancery’s use of civil and canon law as early as 1415,³⁸ it seems plausible to argue that accepting equity ostensibly directly from Aristotle allowed the English to deny the influence of these other laws.³⁹

Marcin sees Hake’s appeal to the intent of the legislator to advance the *common good* as an innovation that also served to make the advent of equity more palatable because it did not rely on any external law.⁴⁰ This seems to be an over-statement given the numerous direct appeals that Hake makes to the laws of God, nature, and reason.⁴¹ Nevertheless, there is merit to Marcin’s claim that the appeal of Hake’s solution to the problem of equitable discretion is only as strong as one’s belief that a law of nature or a goal to promote the common good are real constraints. To the extent that we no longer believe in a law of nature or a unitary common good, then Hake’s solution amounts to merely looking for the intent of the legislator, and the question of what constrains this equitable discretion is again before us.

³⁷ On the powerful influence of St. German, see Franklin Le Van Baumer, *Christopher St. German*, THE AMERICAN HISTORICAL REVIEW, July 1937, at 631 (“[St German’s] Doctor and Student served as the basic handbook for law students up to the time of Blackstone . . .”). Interestingly, St. German was trained in civil law as well as common law, *id.* at 632, and his metaphysics was essentially Thomistic, *id.* at 639, including his association of equity with god’s law (642). *Id.* at 642.

³⁸ Barton, *supra* note __, at 146.

³⁹ Kelley, *English Law*, *supra* note __, at 35.

⁴⁰ Marcin, *supra* note __, at 396-97.

⁴¹ Consider the following passage: To conclude, I [Hake] take the saying of Justice Yelverton in 8 E. 4 to belong to our present purpose. The saying is this. *In matters doubtfull* (sayeth he), *wee must does even as the sophonists and the civilians doe, who, when a newe case cometh before them wherein they had no law before* (meaning, no doubt, as in the verball sense of law) *they resorte thereupon to the lawe of Nature which is reason and grownde of all lawes, and therein owte of that that is most for the Commonwealthe they make a law; quod non negatur.* EDWARD HAKE, *EPIEIKEIA: A DIALOGUE ON EQUITY IN THREE PARTS* 108 (D.E.C. Yale, ed., 1953); *see also id.* at 13, 16, 117. This passage is especially remarkable because it combines the appeal to the law of nature with the common good and even seems to have kind words to say for the civilians – and all from an actual opinion.

Starting with the 16th century, Aristotle’s teaching on equity was readily available to legal scholars and it seems no longer appropriate to speak of a “reception” of Aristotle. That said, at the moment we are experiencing another period of heightened interest in Aristotle, as evidenced by a flowering of scholarship, including much that encourages a return to his true teaching. In reading this scholarship, it seems pretty clear that what has been lost is not so much Aristotle’s true teaching so much as knowledge of the rich tradition that exists between us and Aristotle.

For instance, several scholars have noted that Aristotle does *not* say that the judge using equitable principles “fills in gaps” in the law.⁴² This is not what the Greek says and besides it would have been somewhat absurd given the legal culture, i.e. this is not a society with a comprehensive set of laws that could even conceivably be thought of as leaving gaps. There were not many laws and just what they were was a matter of dispute; Aristotle treats laws as a form of non-technical proof because, like a contract or a witness, they are collected by the litigants and presented to a mass jury composed of laymen, and the rhetorician must do with them what he can.

What Aristotle does say is not that there are gaps, but that there is a “falling short” between the general law and the specific case, and it is equitable to apply the general law as the legislator would have intended in this case. This deference to the lawgiver seems, initially, to solve many problems involving judicial discretion – most notably, the democratic deficit.⁴³ Yet this solution is illusory because it presumes that there is a stable thing called an intention to be discovered and a method to discover it, and that judges

⁴² Eric Zahnd, *The Application of Universal Law to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 LAW & CONTEMP. PROBS. 263 (1996); Roger A. Shiner, *Aristotle’s Theory of Equity*, 27 LOY. L.A. L. REV. 1245 (1994) [hereinafter, Shiner, *Aristotle*].

⁴³ Zahnd, *supra* note __, at 292-93. It should be remembered that in the *Ethics* Aristotle seems to primarily envision the Assembly passing specific decrees to correct for the generality of the laws.

should be the ones to do so. Hake, as just discussed, recognizes this problem also, i.e. that of equitable judicial discretion, and gives just this answer, which he correctly attributes to Aristotle (though he is apparently only working with a Latin translation) namely that the judge guided by the legislator's intentions is not creating new law.⁴⁴ Yet, as just noted, Hake's faith in intentions is grounded on more than the assumption that a legislator had an intention; he believed in a natural law discoverable by reason, as well as a common good discoverable by reason.⁴⁵

This last point I think moves us toward an explanation for the current celebrity of Aristotle, namely the appeal of a solution to the question of equitable discretion without metaphysical baggage. As noted above, first St. Thomas and then the humanists, constructed two parallel justifications for the use of equity, namely divine law and natural law. However, Aristotle himself does not have such a justification; there is seemingly just equity as solving a general logical problem. In an age allergic to metaphysical speculation, yet eager for theories of justice, Aristotle's approach to equity is very appealing.⁴⁶ Yet before we can assess the viability of this appeal to Aristotle, we must reconsider what it is that we would be returning to. The answer is somewhat surprising.

Thesis 2: Aristotelian equity is not primarily legal.

When Aristotle discusses *epieikeia* in the *Ethics* it is in order to resolve a puzzle involving the common usage of equitable and just as applied to people – are they the

⁴⁴ Hake, *supra* note __, at 27-28.

⁴⁵ This critique does not really apply to Shriner, who is clear that Aristotle's teaching on equity requires that it be applied by a man of practical wisdom (*phronesis*), a technical term in Aristotle, and one that implies a way of life very different from "liberal individualist visions of social life." Shriner, *Aristotle*, *supra* note __, at 1264. Though Zahnd mentions *phronesis*, this does not prevent him from looking to Aristotle for a solution to the problem of equitable discretion in a liberal democracy.

⁴⁶ See generally Marianne Constable, *Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law*, 19 LAW & SOC. INQUIRY 551 (1994). On Dworkin's thin metaphysics, see Roger A. Shriner, *The Metaphysics of Taking Rights Seriously*, PHILOSOPHIA, Mar. 1983, 223-56.

same thing or different? The answer is that equity is a certain kind of disposition to do justice, namely particular justice. Equity is thus a personal virtue, not a legal norm.⁴⁷ Of course in the *Ethics* Aristotle does refer to the lawgiver and to the need for specific decrees versus general laws, but it is not clear how, if at all, this relates to any specific institutional arrangement. The discussion in the *Ethics* seems to describe an equitable Athenian citizen, and it must be remembered that Athenian citizens often litigate, sit on mass juries and vote in the Assembly.

In the *Rhetoric*, equity seems closer to a legal norm, especially as regards relaxing the law in favor of equity, and this is correct. However, it is not clear that Aristotle's account of arbitration is accurate nor that the Athenians would have likely been responsive to a litigant requesting that they relax their beloved laws – to the contrary, and hence we do not see actual litigants making such arguments.⁴⁸ Indeed, as one would have expected from the *Ethics*, and as we saw with Demosthenes above, litigants tend to appeal to *epieikeia* as a personal characteristic, including trying to claim that they do not know the law that well – because if one did know the law well, then that would make one appear as a “stickler for the law.”⁴⁹

The best way to understand how Aristotelian equity looks like a legal notion and is one to some extent even while it is primarily ethical is to consider why Aristotle in the *Rhetoric* gives such importance to appeals to ethos, namely to one's character. This was not only for the reasons that would be familiar to us, namely the import of credibility,

⁴⁷ For similar conclusions on equity as a personal virtue, see Shriner, *Aristotle*, *supra* note __ and Meyer-Laurin, *supra* note __, at 49-52, but see Lawless, *supra* note __, at 82-109, who correctly collects most of the reasons that Aristotle's discussion would have been relevant to contemporary legal practice – for instance, because of how few laws there were at Athens, though he does not connect the legal import of *epieikeia* to the agonistic nature of Athenian society. For this, see DAVID COHEN, *LAW, VIOLENCE AND COMMUNITY IN CLASSICAL ATHENS* (1995).

⁴⁸ C. Carey, *Nomos in Attic Rhetoric and Oratory*, 116 *JOURNAL OF HELLENIC STUDIES* 36-37 (1996).

⁴⁹ *Id.* at 41-42.

empathy etc. Athenian trials were often elite agonistic contests, contests that were specifically channeled into the courts where they could be adjudicated democratically by the mass citizen jury. The relevant personal and material contributions to the city made by litigants were relevant to their case, as was their ability to demonstrate their behavior as consistent with the values of the democracy, as well as elite aristocratic values. This complex political arrangement is mirrored by the dramatic and political setup of a classical tragedy, the elite protagonists on stage, the “common” chorus below, performed before the people (sitting in their political subdivisions) and sponsored by a member of the elite.

For instance, following David Cohen, there was the rhetorical challenge faced by Demosthenes in his oration/prosecution *Against Meidias*.⁵⁰ The clash between Demosthenes and Meidias is part of a multi-generational elite feud that has already involved numerous lawsuits. The particular incident in question was a slap Meidias delivered to Demosthenes as he marched publicly with the chorus he had sponsored for the annual festival at which tragedies were performed. Demosthenes wishes to sue Meidias for the slap. The problem is thorny, as the same aristocratic norms that the slap violated would also have dictated an immediate physical response (which this suit is now replacing, and this restraint is, in a sense, equitable, as we have seen). Furthermore, Demosthenes has come to a mass democratic jury and so he is limited in the extent to which he can appeal to aristocratic values at all. Apparently, the speech we have in which Demosthenes attempted to navigate these challenges was never given, which indicates perhaps the difficulty of his situation.

⁵⁰ Cohen, *supra* note __, at 90-101.

Establishing one's equitableness could be tantamount to victory, and Aristotle unambiguously urges such an appeal and gives his students the tools to do so, e.g. "look at how long it took before I came to court, and only after arbitration failed..." The upshot of the primarily ethical character of Aristotelian equity is that no direct return to it as a legal norm appropriate for our culture as possible – at least not without further argumentation.

Thesis 3: There is no unified concept of equity.

As the discussion of equity to this point should make clear, there is no unified concept of equity, nor a single true concept of equity. At this point, I would like to catalog the different aspects of equity that we have come across. In so doing, I will try to explain why these different aspects are distinct and will elaborate upon those aspects that have not yet been developed. Most of these aspects will be familiar from Aristotle or from the brief history above. Horn's discussion of *aequitas* in Baldus is very sensitive to the different aspects of equity, and so I will generally include references to the relevant sections of his work. This list is not exhaustive and most aspects are not mutually exclusive.

The list contains numerous different types of things usually not bunched together, from a somewhat obvious point of logic, to norms for procedure, to a type of description, to a body of concrete legal doctrine. Organizing this list poses a challenge since the creation of this list is meant to make the argument that there is no unified concept of equity, which also means that the nineteen aspects discussed below cannot be derived from one another or from a relatively short series of assumptions and rules.⁵¹ An analogy

⁵¹ Noah Feldman offers a fourfold division for thinking about equity that clearly relates to the argument of this section: Rectification v. Interpretation, Authorization v. Non-Authorization. In his scheme, thinkers

to what I have in mind would be the kind of lists that one finds in the later of Ludwig Wittgenstein, lists that emphasize the irreducible variety of uses to which a word may be put, e.g. what it means “to see.”⁵² That said, not only is Wittgenstein’s method maddening, but his analysis is generally atemporal and only meant as an illustration as part of a larger argument about language. In our case, the concept of equity has a rich history and I would like to say something about this concept, and so, at the risk of undermining the argument about the variety of equity, I will class the aspects of equity below under six general categories, discussed below, from conceptually thinnest to richest. Within each category, should there be more than one aspect, the aspects will loosely be organized from most paradigmatically a fit for the category to most clearly overlapping with others.

As for the general categories, first, there is equity as a matter of *logic*. Second, there is equity as *procedural*. This is to say that some aspects of equity do not go to the grounds of an adjudication, but only to its method. Third, there are those aspects of equity that go only to the *substance* of the adjudication and are facially indifferent to method. I am exceedingly wary of using the all too convenient procedure-substance distinction. Not only is this distinction dubious in the abstract, but the distinction itself emerges from our legal tradition in the context of an assault on certain aspects of equity.

who see equity as outside of the law see it as rectifying the law. Since equity was itself extra-legal, these thinkers also tended to believe that the outside body had independent authorization to apply equity, say from God. On the other side, there is a tradition of equity as the necessary interpretation of a general law and thus requiring no outside authorization. Noah Feldman, *Equity in History*, (unpublished manuscript, on file with the author), www.law.nyu.edu/clppt/program2002/readings/feldman/feldman.rtf (last visited Oct. 2, 2004). Clearly I am in broad agreement with Feldman, but I think that his division is not fine-grained enough. For instance, equity has many more meanings than rectification and interpretation, and the question of authorization is both a matter of politics and metaphysics. Further, Feldman’s matrix, with its elegance and considerable explanatory power, does exactly what I argue cannot be done and is best not even intimated, namely reify the rich tradition into a formula.

⁵² See, e.g., LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* page 200 (1953); LUDWIG WITTGENSTEIN, *ZETTEL* § 197 (1967).

Specifically, I am referring to Blackstone’s innovative use of the procedure-substance distinction as a means of arguing that there was no substantive difference between law and equity, only a matter of procedure.⁵³ The triumph of this perspective is intimately connected with the eventual abolition of separate courts of equity – i.e. if the substance is the same, why the profusion of procedure? Despite these reservations, there is clearly a distinction between procedure and substance, even if only as points on a continuum. Furthermore, I am not claiming that the procedural aspects of equity have no substantive implications, nor vice versa, though I am claiming that there is no necessary connection between any of the procedural and substantive elements, e.g. natural equity does not require an abbreviated procedure.

Fourth, there is equity as it relates largely to who will be adjudicating; this is the *political* element of equity. Fifth, there are aspects of equity that do not fit into any of the other categories because they are *historically contingent*, “path dependent” to use the contemporary jargon. Sixth, at least many of the other aspects of equity discussed take a stand, at least implicitly, on *metaphysical* questions, such as what there is; this is the most obscure and least addressed aspect of equity.

Equity and Logic

1. Equity can be conceived as a *corrective to law insofar as it is general* and cannot reach the particular case. There is no necessity that this stretch to the particular occur through an appeal to intent or be applied to mitigate harshness. There also need not be any discretion involved since what equity can require is that the matter be referred to the sovereign with the authority to make new law. This

⁵³ See the discussion in Main, *supra* note __, at 459-64.

seems to be Aquinas' strong preference,⁵⁴ and it has roots in Aristotle's discussion of those matters that are suited to specific decrees rather than a general law.

Equity and Process

2. Equity is associated with a *simpler or more flexible process*. Arbitration is not the only way one could see equity as influencing process. The Court of Chancery, for instance, saw itself as doing equity in contrast to the rigidity of the common law.
3. Equity is also related to *compromise*. This is another feature associated with arbitration, or at least arbitration as mediation, but one that is ultimately contingent. The equitable litigant can simply settle for less and the contemporary judge, deciding equitably, can come up with a creative solution that completely vindicates neither party, e.g. a purchased injunction.
4. Equity can also mandate a *more fact-intensive inquiry*, particularly in connection with more technical facts. This aspect clearly goes back to Aristotle as well; for instance in his insistence in the *Rhetoric* on the equitable man's taking a broader view. It may be thought that this aspect is subsumed under other aspects, like discretion, but there is no reason that a judge might not be required to undertake an extensive factual inquiry, and one governed by rules that are to be applied strictly. One might think here of the role of the Delaware courts, particularly the chancery court, in connection with American corporate law, namely, as a court of equity this is a court that makes extensive factual findings in a specialized area,⁵⁵

⁵⁴ DeVine, *The Concept of Epieikeia*, *supra* note __, at 333.

⁵⁵ On the role of legal expertise in Delaware's domination of the market for corporate law, see generally Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 841-47 (1995).

which is not unlike why the Supreme Court found arbitration appealing because of the arbitrator’s knowledge of the “law of the shop.”⁵⁶

5. A call for equity can simply be a call for *discretion*. On some level, this idea too is in Aristotle insofar as it is possible for the law to be relaxed if so decided by the Athenian mass citizen jury, though we should note that Athenian juries did not deliberate or publish judicial opinions. Following Meyler, there was recognition in the 17th century that the discretion of juries allowed them to decide equitably.⁵⁷ It is more common to see equitable discretion as exercised by an official like the praetor or the chancellor. One key difference between the two types of discretion is on what basis it is being exercised – hence this aspect is being discussed under process and not substance. Juries are presumably drawing on the norms of the community, while the chancellor at least (in contrast to the praetor) is appealing to a conception of justice that may or may not comport with that of the community.
6. There is equity as a *method of interpretation*, particularly one that goes to the *intentions* of the legislator.⁵⁸ Clearly this goes back to Aristotle and is connected to the logical problem of the general and the particular, but note that Aristotle does not distinguish between a particular adjudication according to intent and a general principle of interpreting statutes. By the time of Baldus, but also in the work of Hake, statutory interpretation and mercy have been merged insofar as an especially *strict* interpretation of a statute is appropriate if the result is going to be

⁵⁶ United Steelworkers of Am. V. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960).

⁵⁷ For instance, quoting Coke, who said “twelve honest jurors are good chancellors.” Meyler, *supra* note , at 3.

⁵⁸ See Jerome Frank’s fascinating summary of the history, included in footnotes to his decision in *Usatorre v. The Victoria*, 172 F.2d 434, 439-41 (2d Cir. 1949); see also Judge Posner’s acceptance of the tradition in *Friedrich v. Chicago*, 888 F.2d 511, 514 (7th Cir. 1989).

harsh (i.e. the statute's scope is being narrowed);⁵⁹ this is in contrast to how purposive construction is generally seen in contemporary jurisprudence, i.e. as broadening the scope of a statute. This is why this famous aspect of equity is grouped under process and not substance; the look to intent is indeterminate as regards the substantive law to be applied or the outcome.

Relatedly, there is a distinction between interpreting according to the supposed intent of the legislator and according to the *common good*. First of all, if the common good offers a principled means of decision making, then this presupposes that the common good is unitary and readily identifiable, which, for instance, one need not assume if one is simply looking to legislative intention. Interpreting statutes so as to advance such a common good clearly is a substantive notion of equity. Further, as we'll return to shortly, assuming that the legislator's intent is to advance the common good can itself be a powerful political move.

There are also separate questions as to how equitable interpretation relates to common law precedents in contrast to statutes or to a code. This is especially interesting since the authors of the codes often place the requirement to act equitably within the code, e.g. the obligation to negotiate in good faith.⁶⁰ There is also the question of how to interpret a constitution. John Marshall clearly thought that a form of equitable interpretation was appropriate.⁶¹

⁵⁹ On Baldus, see Horn, *supra* note __, at 27 et seq.; Hake, *supra* note __, at 88, 90.

⁶⁰ Ziegler, *supra* note __, at 54. See also, e.g., Code Civil § 1134-35. Importantly the Code Civil was heavily influenced by the work of Domat and Pothier, both of whom, as we have seen, gave a prominent role to natural equity. James Gordley, *Myths of the French Civil Code*, 42 AM. J. COMP. L. 459, 460.

⁶¹ See *M'Culloch v. Maryland*, 17 U.S. 316, 407 (1819) for his famous insistence that interpreting a Constitution is different from interpreting a Code.

7. Equity has also been seen as the *appropriate standard for arbitration* in contrast to law. To the extent that the appeal to an arbitrator ruling “*ex aequo et bono*” was ruling according to equity, then a certain arbitration tradition of the *ius commune* (with Roman precedents) is a development of this Aristotelian insight.⁶² Note that this type of arbitrator lives on in German law where the parties may agree that a “*Schiedrichter*” is to decide between them not on the basis of law, but on the basis of fairness and equity.⁶³ This aspect too is bordering on the substantive, but note that equity here is still undetermined – is this a matter of natural equity, local custom, or, perhaps the arbitrator is to try to replicate the results that would have been achieved at law, only more expeditiously.⁶⁴
8. Equity has been associated especially with *international law*. This connection can only be made tenuously through Aristotle if one gives priority to the mention of a general law in *Rhetoric* 1.15 (see discussion below). Still, the reference is there and certainly by Cicero equity is applied to all nations and is particularly relevant to the interpretation of treaties. This is an aspect of equity developed by Grotius and the natural lawyers that followed, such as Wolff,⁶⁵ and is thus intimately related to certain substantive notions of law, particularly natural law.

⁶² REINHARD ZIMMERMAN, THE LAW OF OBLIGATION: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 628-30. For international courts as operating *ex aequo et bono*, per 38(2) of the ICJ Statute, see DeVine, *Epieikeia in International Law*. Also, for Baldus, see Horn, *supra* note __, at 156.

⁶³ Zimmerman, *supra* note __, at 628-30.

⁶⁴ For a thorough, though obviously dated, discussion of the connection between arbitration and law, see E.J. Cohn, *Commercial Arbitration and the Rules of Law: A Comparative Study*, 4 U. TORONTO L.J. 1 (1941). Cohn makes the argument that up until recently (from his perspective), the relation of arbitration and law had the following structure – to the extent an arbitrator’s decisions were as binding as that of a regular judge, the arbitrator was obligated to decide based on the law. *Id.* 8-9.

⁶⁵ Wolff: “Nations ought to observe equity in making treaties. For by nature nations are bound to perform the duties of humanity for each other, and every nation ought to have a fixed and lasting desire to promote the happiness of other nations...” JUS GENTIUM METHOD SCIENTIFICA PERTRACTATUM, § 409 (Joseph H. Drake, trans., 1964) (1764). See also § 375, where Wolff claims that the laws of nature provide rules for interpretation of treaties. For Baldus and *aequitas* and the *ius gentium*, see Horn, *supra* note __, at 72.

Nevertheless, especially in our world, there is a lot of positive international law and so one need not appeal to natural equity as governing the law of nations in particular. Equity is thus arguably appropriate for international law just as it is for all law on procedural grounds, say as a means of short-circuiting costly process or as a means of interpreting international statutory law,⁶⁶ just as equitable interpretation was what was lacking in the case of Cicero's general.

9. There is the notion of equity as *particularized justice*. There is no necessary connection between equity as a corrective to a general law and attending to the specific circumstances since there need not be a general law at all. Indeed, to the extent that we believe that particularized justice can be delivered and is superior, then general laws are to be eschewed. Prioritizing the specific makes heavy, indeed impossible requirements on procedure and on the whole structure of a legal system, and to the extent this decision is made it must be because of a substantive commitment. The commitment to particularized justice is classed under procedure because of the indeterminacy of this commitment; however the peculiarity of grouping particular justice under procedure, when in a sense all procedure must be generalizable, should be noted.

Equity and Substance

10. Equity is that which is in accord with the dictates of a fixed higher law. For Aquinas, for instance, this is the law of God as discoverable by human reason.⁶⁷ There is precedent for this in Aristotle because in the *Rhetoric* he does

⁶⁶ This is roughly what DeVine argues in connection with urging a return to what he calls "descriptive *epieikeia*," which is a methodological and procedural norm loosely based on *epieikeia* historically. See DeVine, *Epieikeia in International Law*, *supra* note __, at 252-59.

⁶⁷ See, e.g., Marcin, *supra* note __, at 391; Horn, *supra* note __, at 14.

recommend an appeal to an equity that is constant like the general law and is according to nature (*phusis* - 1.15). This passage is in tension both with his position in the *Ethics* as well as his earlier characterization of equity in the *Rhetoric* (at 1.13), where equity is simply what goes beyond the local written law. One way to resolve the tension is Winthrop's, who notes that in *Rhetoric* 1.15 Aristotle is giving advice for what to do when it is manifest that the written law is against you.⁶⁸ Curiously though, we have already seen that this is not a path followed by contemporary orators and so it is odd that Aristotle throws in this bad advice that also conflicts with his more careful consideration of the relation of equity to law. I would suggest that a way to understanding this is to note that in 1.13 Aristotle is discussing technical means of persuasion, whereas at 1.15, where we get the appeal to unchanging equity, we are dealing with non-technical means. The technical arguments must be invented by the rhetor, while the non-technical must simply be used as is (1.2), and hence Aristotle's more passive listing of arguments to use in contrast to the arguments to be invented based on how things actually are (as in 1.13).⁶⁹

⁶⁸ Delba Winthrop, *Aristotle and Theories of Justice*, THE AMERICAN POLITICAL SCIENCE REV., Dec. 1978, at 1207.

⁶⁹ Alas, it should be noted that discounting 1.15 in favor of 1.13 hardly solves the problem, since at *Rhetoric* 1.10 we have yet another division, see Carey, *supra* note __, at 34. Gadamer's approach to natural law in Aristotle, though it does not address this categorization problem, suggests another approach. Gadamer claims (with sparse references) that Aristotle does believe in an unchangeable natural law, but as a critical ideal. No particular law ought to be reified as natural and hence inviolable; rather the belief in a natural law serves as a spur to the conversation whether a law is equitable, and hence, perhaps, Aristotle's relative lack of concern with a stable classification system, but considerable concern about finding ways of asking whether a law measures up. HANS-GEORG GADAMER, TRUTH AND METHOD 318-20 (Joel Weinsheimer & Donald G. Marshall trans., 2d ed., 1994). One major additional complication here is that Aristotle did not mean our (complicated) notion of "nature" when he uses the term *phusis*, a fact Heidegger returns to again and again. See especially, Martin Heidegger, *On the Essence and Concept of Phusis*, in PATHMARKS 183 (Thomas Sheehan trans., William McNeill, ed., 1998). Speaking roughly, *phusis* for Aristotle delineates the realm of beings that grow and are self-moving from those that are made (like a table

11. There is equity as drawing upon the unwritten, but local and mutable law of the community.⁷⁰ In connection with Aristotle, see later discussion.
12. Equity has been and is equated with mercy. There is no question, as discussed above, that equity becomes associated with mercy in a Christian sense.⁷¹ Equity is not mercy in Aristotle. The word translated in the passage on page __ as “excuse,” following Nussbaum, means literally to “judge with,” and in the context the judging with the litigant is trying to achieve is clearly meant to excuse.⁷² Nussbaum notes that this “judging with” stops short of mercy because Aristotle thinks it is slavish to show mercy.⁷³ I will develop just how and why “judging with” stops short of mercy shortly, but the key clue here is I think to ask just with whom one is supposed to be judging.
13. There is equity as a corrective to the law when it operates so harshly as to undermine itself – *summum ius, summa iniuria est*. Note that this does not exactly emerge from Aristotle since it is a matter of personal virtue not to be stickler for law. The principle of *summum ius* operates as a principle within law itself when it would operate harshly according to some external standard, like natural equity for Domat. This aspect then is in one sense procedural since it brings in no new content, but it presupposes an external standard and hence I am categorizing it under “substance.”

or like the whole universe if one believes in a creator god). *Id.* at 228. What such a law of *phusis* amounts to, if it is even comprehensible at all to us post-moderns, is clearly beyond the scope of this Note.

⁷⁰ See Horn, *supra* note __, at 13.

⁷¹ See discussion above, also Horn, *supra* note __, at 97.

⁷² Nussbaum, *supra* note __, at 94.

⁷³ *Id.* at 97, following NE 1126a4-8.

14. There is also equity as equality or fair division. Insofar as equality is a part of justice for Aristotle, and equity is a type of justice, one can trace this aspect of equity back to Aristotle as well.⁷⁴ Clearly a commitment to a fair share is a substantive norm, though not one with a lot of traction of its own.

15. Equity can be simply a personal virtue. See discussion above.

Equity and Politics

16. There is or could be a political valence to every aspect of equity discussed so far. For instance, if equity is discretion then it is a political question who gets to exercise equity. Further, since the intentions of the legislator are not self-actualizing, it is a political question as to who gets to do the interpreting and on what basis. Connected with discretion, the appeal to equity was a justification for imperial changes to the law already in the time of the roman emperors and thus the claim that the canon law is more equitable was a direct papal challenge to the holy roman emperor.⁷⁵ Ockham, appropriately, turns this argument back around and uses appeals to equity and the common good as a means of advancing imperial power - at the heart of his claim is that it is the canon law that is reified and must be given life through equitable interpretation.⁷⁶

As for the import of a higher law, Goerner claims that Aquinas buried his teaching on a natural right that trumps even natural law, much less a base ruler,

⁷⁴ For the development of this argument, see Anton-Hermann Chroust, *Aristotle's Conception of "Equity"*, 18 NOTRE DAME L. REV. 119 (1942-3). For Baldus, see Horn, *supra* note __, at 95. For examples from contemporary international disputes, see DeVine, *Epieikeia in International Law*.

⁷⁵ On the roman emperors, see Landau, *supra* note __, at 129 (citing Dig. 4.1.7), and for the papal challenge see *id.* at 135.

⁷⁶ Charles C. Bayley, *Pivotal Concepts in the Political Philosophy of William of Ockham*, JOURNAL OF THE HISTORY OF IDEAS, Apr. 1949, at 199-218.

because of its radical political implications.⁷⁷ Grotius' discovery that natural law protected freedom of the seas had immediate implications for Holland.⁷⁸

In the case of 16th and 17th century England, equitable interpretation of statutes according to the common good had the political implication of restricting the king:

Coke's emphasis [following Plowden] on the freedom of the judiciary to construe the words of statutes "according to the true intent of the makers of the Act, pro bono publico" had the effect, as Alan Cromartie has written, of conceptually reducing the king to the position of an instrument of the public good, and of binding him to the priorities of the common law."⁷⁹

However, equity could also be associated with the discretion of the Chancellor, either as representing the king's discretion or as applying a higher law. But, as we have seen, there is also the equitable discretion of the jury that reflects the sense of the community. The upshot here is that, depending on the sense of equity and the political and metaphysical context, the political implications of equity can be dramatically different.

Equity in History

17. There is equity as a contingent historical system of doctrine and procedure that embodies some or all of the aspects of equity discussed above and complements law.⁸⁰ "Without the mysterious hardening of common-law procedures," there may

⁷⁷ Goerner, *supra* note __, at 411-15.

⁷⁸ R.C. VAN CAENEGEM, *AN HISTORICAL INTRODUCTION TO PRIVATE LAW* 126 (1992).

⁷⁹ Lorna Hutson, *Not the King's Two Bodies in RHETORIC AND LAW IN EARLY MODERN EUROPE* 178 (Victoria Kahn and Lorna Hutson eds.) (following Cromartie). Hake also provides ample support for this argument, see, e.g., Hake, *supra* note __, at 78-85.

⁸⁰ Paul Jackson identifies twelve maxims of equity as emerging from his study of textbooks on Equity, which he does not present as necessarily exclusive or necessarily inherent to Equity in contrast with Law. I list them here because it is interesting to note how these supposed maxims of Equity line up with the various independent aspects of equity discussed above:

not have been systematic problems for which an institutional solution, namely the Chancery, was required.⁸¹ Insofar as a thinker like Pound associates equity with discretion, the very size of the systematic lacunae created by the rigidity of the common law impelled the so-called Court of Equity on its path to self-destruction, i.e. once the Equity Court developed its own doctrine and precedent it was ready to be re-assimilated into the law.⁸²

18. There is also the appeal to equity as making a descriptive claim about how most disputes are actually resolved. This goes back to *epieikeia* as what is seemly and proper. On this reading, Aristotle is reminding his students (in the *Rhetoric*) that most disputes are not resolved in court and to the extent that they are, are generally not decided on “legal principles.” This aspect of equity is picked up by the Realists. For instance, here is Radin:

The valuations which the *iudex-arbiter* makes depends on some system of norms. They may be standards of decision as to benefits conferred or standards of choice among legal propositions or standards by which it is determined whether a proposition shall become a legal one. But the norms themselves are not peculiarly legal at all. They may be logical norms. Or they may be distinctly ethical. I make bold to assert that they are frequently aesthetic.

1. Equity will not suffer a wrong to be without a remedy. 2. Equity follows the law. 3. where there is equal equity, the law shall prevail. 4. Where the equities are equal, the first in time shall prevail. 5. He who seeks equity must do equity. 6. He who comes into equity must come with clean hands. 7. Delay defeats equity. 8. Equality is equity 9. Equity looks to the intent rather than to the form. 10. Equity looks on that as done which ought to be done. 11. Equity imputes an intention to fulfill and obligation. 12. Equity acts *in personam*.

Paul Jackson, *The Maxims of Equity Revisited in EQUITY AND CONTEMPORARY LEGAL DEVELOPMENTS* 74 (Stephen Goldstein ed., 1990).

⁸¹ ARTHUR R. HOGUE, *THE ORIGINS OF THE COMMON LAW* 188 (1966); also Radin, *Juster Justice*, *supra* note __, at 560 and DeVine, *The Concept of Epieikeia*, *supra* note __, which provides an account of the rise of the Chancellor’s jurisdiction in response to the common law’s inability to enforce the intentions of feoffors. In this curious situation, the feoffors have granted their land, by law, to feoffees to be held for the benefit of himself or some others in order to evade feudal incidents. Trouble arose when feoffees, who owned the land in fee simple, refused to follow the feoffors instructions, and for this there was no remedy at law.

⁸² See Pound *supra* note __.

And they are not changed in this respect when it is a judge or *judicaster* who applies them.⁸³

Equity as Metaphysical

19. Finally, there is equity as preserver of difference. Once equity is distinct from law, as it is in many of the senses listed above, then two consequences follow. First, in some sense all is not law. That which is distinct from law may not be a full-blown alternative, like natural law, but there is an acknowledgement of some limit to law. This leads to the second key question, which is what makes law equitable. This is the central question to which Hake addresses himself,⁸⁴ and his answer is that the law is equitable through incorporating many of the features of equity discussed above, and most especially through pursuit of the legislator's intentions as consonant with a discoverable common good.

The difference between equity and law tends to track other differences, such as the difference between humans and god(s) and the difference between humans and things. The difference between humans and the divine is clearest in the context of a thinker like Aquinas who believes that there is actually a natural law provided by God against which human law is to be measured and by which human law is to be limited. Yet it is the basic fact of human finitude, especially as regards knowledge of the future, which drives many of the aspects of equity discussed above. It is because humans can only generate finite rules that the rules can turn out to be indefinite, harsh, or unfair in a given case. Additionally, even if

⁸³ Max Radin, *The Chancellor's Foot*, 49 HARV. L. REV. 44, 65.

⁸⁴ Hake, *supra* note __, at 5. This concern goes both ways, e.g. Maitland: “[Blackstone] is concerned to show that the so-called equity of the Court of Chancery is in reality law . . .” F.W. MAITLAND, EQUITY AND THE FORMS OF ACTION 12.

rules could be perfectly ordered, human reality is not.⁸⁵ As Gadamer notes, Aristotle's account of *epieikeia* argues that it is a peculiarity of the skillful judge, that unlike the skillful craftsman, a judge can demonstrate her superior skill by *not* exercising it, i.e. not applying what she knows to be the rigor of the legal system in which she is an expert.⁸⁶

As regards the distinction between humans and things, human law cannot operate as automatically as a law of nature precisely because humans in their finitude could not apply such laws and, more importantly, as purposive beings, such laws would be untrue to what humans are. This point is most easily seen in the relation of equity and arbitration. Humans have goals and in the context of many disputes the goal is not to be found as a deciding between which party is correct. For instance, if the dispute is about a contract, and the disputants have a prior relationship and wish to have one in the future, then it may be the highest interest of both parties to find a solution that allows both to pursue their common purposes in the future. It is in this context, as Aristotle intimates, that it is especially helpful to have an arbitrator who cannot only mediate, but can dispense solutions that are compromises and not absolute vindications of one side or the other according to law. Yet, as Cicero's general reminds us, there is the question of what binds the arbitrator, and here too equity is implicated as the standard that binds the arbitrator as well as the parties.⁸⁷

Thesis 4: The primary aspects of equity have metaphysical grounds.

⁸⁵ Gadamer, *supra* note __, at 318.

⁸⁶ *Id.*

⁸⁷ See later discussion of Aristotle on friendship. To prioritize friendship over justice is to prioritize a uniquely human capacity.

I said above that a difference between law and equity tracks deeper metaphysical distinctions between humans and other types of things, but the concept of “tracking” is too thin. This connection is not a coincidence, but that which gives the concept of equity substance and in turn gives equitable procedural reforms their urgency. Again, this is clearest with thinkers like Aquinas, Baldus, or Grotius for whom equity is a measure of the extent to which a given positive law/legal outcome is consistent with a higher law that they derive from their metaphysical commitments. This is less easy to see for Aristotle, who is seemingly not appealing to a higher law and is just describing the concept of equity. We have already seen that there is no unified concept being described in Aristotle, and we will soon see that there is actually a substantive metaphysics. Before returning to Aristotle though, it will be helpful to consider two thinkers closer to our own time, Kant and Hegel. There are several reasons for this. First, as far as the task of preparing for better discussions of equity in the future is concerned, it seems like a good idea to reintegrate the thoughts of the two philosophers who still largely set our current philosophical agenda, especially since their two perspectives on equity are complex and profound. Second, unlike Aristotle, Kant and Hegel both discuss equity in a legal context similar to our own. Third, though I suppose one is unlikely to find an unqualified Kantian or Hegelian,⁸⁸ their metaphysical commitments are less foreign than those of Aquinas or Grotius. Finally, the details of Kant and Hegel’s position will actually help elucidate possible ways of understanding Aristotle.

Kant and Hegel on Equity

⁸⁸ But John Rawls explicitly see himself as pursuing a Kantian project, just as Charles Taylor sees himself as pursuing a Hegelian one.

Kant recognizes obligations beyond the legal, such as moral obligations, but not all are enforceable. Indeed, a moral obligation fulfilled for any reason other than duty is not properly a moral action at all. For Kant equitable rights are non-enforceable even though he recognizes them as juridical.⁸⁹ Both Wood and Rosen see Kant's refusal to allow courts to exercise equity as motivated by a concern with separation of powers, i.e. it is not the role of the court's to relax the law decided by the legislature.⁹⁰ However, there would seem to be a big difference between a moral obligation that the state cannot enforce, say to treat one's parents with respect, and an equitable ruling enforcing a covenant that did not follow all of the formalities or, to take Kant's example, to pay a worker with whom one has contracted the agreed upon price in "current dollars" (i.e. to index the wage to inflation even if not so stipulated). An unenforceable juridical right is very unappealing, but this is what Kant accepts.⁹¹ One reason perhaps that this is easier for Kant than for us post-moderns is precisely because of the great weight and substance that Kant gives to our moral obligations. There is an argument to be made that it is an affront to human dignity to legislate all that is right and to enforce all rights with law. Of course, one would have to have an account of human dignity, and particularly of human freedom, in order to make this argument, and Kant does.

Kant allows for equitable rights to be enforced when it is a matter of the state enforcing them against itself. At first it is hard to understand why Kant should allow for this exception; it is not as if there is any legislative legitimacy for the state to accept less than its due. Take a case involving a labor contract with the state, why should the judge

⁸⁹ IMMANUEL KANT, METAPHYSICAL ELEMENTS OF JUSTICE 34-35 (John Ladd trans, 1999).

⁹⁰ ALLEN D. ROSEN, KANT'S THEORY OF JUSTICE; Allen Wood in his notes to HEGEL'S PHILOSOPHY OF RIGHT 448 (H.B. Nisbet trans. 2003).

⁹¹ Rosen, *supra* note __, at 109-11.

be allowed to index the wages for inflation, thereby spending more of the people's money? This sounds like equity as discretion or as mercy and it is I think precisely what Kant does not want to accept. Following Allen Wood,⁹² it is very important that the worker in this example have a right – paying him the amount he earned in current dollars is not a mercy, is not a relaxation of the law, but giving him his due.

However there is a sense in which a state can legitimately delegate the power to relax the enforcement of its debts in a way *not* analogous to the state relaxing enforcement in a private suit. If the private employer had been willing to act equitably, then presumably the worker would not have brought suit at all. Thus Kant is allowing for the state to act rightly, just like a private actor, and to pay the worker his due. On this reading, the judge in such a case is neither exercising discretion nor showing mercy, but is doing what is right.

Hegel, contra Kant, seems to allow room for equity without qualification (PR 223). Hegel's gloss on equity is practically a transliteration of *summum ius, summa iniuria*. His argument is fairly simple: Since the administration of justice requires a process (PR 222) and this process is itself a right, there must also be cure for this process insofar as its abuse can prevent another right from being vindicated. The first thing to note is that it is not clear to what extent Hegel is really disagreeing with Kant because they are to some extent talking about different senses of equity. Based on Kant's discussion it is not obvious what he would think about making an alternative dispute resolution process available.⁹³ To the extent that equitable rights are rights, there would

⁹² In conversation.

⁹³ Strikingly, Hegel's language in this passage suggests that preliminary arbitration should be *required*, which is in tension with the whole justification for arbitration, namely that the litigants are entitled to just process, every step of it. Thinking through this tension is beyond the scope of this Note; one possible

seem to be reason to believe that Kant could see the benefit of a system that educated private actors as to what they should do so long as it did not enforce its judgment. On the other side, it is not obvious to what extent Hegel is allowing for the discretion of judges to show mercy. To the contrary, Hegel seems to believe that what is being dispensed is justice, but of an individualized kind that cannot become generalized precedent.

Though getting clear on the aspects of equity dissolves the starkness of the disagreement, there is still disagreement. Ultimately, the equitable process Hegel describes is a “departure from formal right in the light of moral or other considerations” and in particular he mentions formalities as regards evidence. Most importantly, for Hegel the results of such an equitable process are enforceable. How then to explain the disagreement? For Hegel there is no internal realm of moral and unenforceable obligations; Hegel argues that such a realm is incoherent and that anyway the supposed obligations that emerge from it are vacuous.⁹⁴ Instead, for Hegel, and this is crudely put, the state is the externalization of our communal values, of spirit, which is why, I presume, he believed that the ancient truth that the law itself could become an obstacle to justice must find an appropriate institutional solution. There is presumably no separation of powers problem for Hegel because the decision of the arbitrator is no less an expression of spirit than that of a traditional judge. For Kant, where there is such a thing as an internal realm and a corresponding distrust of institutions, there is a different solution to the democratic dilemma posed by equity.

solution is that Hegel is advocating a procedure where arbitration can always be compelled once a finding has been reached that the ordinary procedure will produce injustice. I hope to explore this further, especially in light of contemporary legal practice and reforms, in a future paper.

⁹⁴ See ALLEN WOOD, *HEGEL'S ETHICAL THOUGHT* 144-173 for a general discussion of Hegel's critique of Kant.

To sum up this section, investigating the different perspectives of Kant and Hegel on equity allowed us to put our categories to immediate use and to demonstrate the extent to which substantively different metaphysical positions informed what turned out to be subtly different arguments about equity in a (loosely) modern context.

Metaphysical Grounds of Aristotelian Equity

At this point, at least one broader ground for Aristotle’s notion of equity should be apparent, and that is the communal sense of what is proper. This sense not only goes back to Homer and to the word’s etymology, but relates to the puzzle as to public norms that Aristotle is seeking to solve in the *Ethics*, namely who is the equitable man in contrast to the just man. We also have seen why this communal sense of what is proper has bite – witness poor Demosthenes in *Against Medias*. What the case of Demosthenes also demonstrates is that this sense of propriety is a very particular value, one associated with the aristocratic elite. Aristotle himself uses a form of *epieikeia* to refer to the aristocrats in contrast to the people later on in the *Ethics* (NE 1167b2). A few sentences later Aristotle says that the “same-mindedness” that is political friendship can only exist among those who have *epieikeia* (NE1167b5), who are contrasted with the mean. These meaner people are characterized, among other things, as shirking their liturgical obligations (NE 1167b12). But only wealthy citizens could even have such obligations, which makes the point rather clear that this is a virtue that ordinary citizens are not in a position to exhibit, though they are in a position to admire, like a protagonist on stage.⁹⁵

⁹⁵ This is a bit of an understatement insofar as in Thucydides the Athenians describe themselves collectively as having *epieikeia* in contrast to other cities (1.76.4), and it is precisely this *epieikeia* that the demagogue Cleon would like the Athenians *not* to demonstrate in connection with another city, i.e. he wants the other city massacred for revolting from Athens (3.40.2). In a similar way, it is common to associate all of Athens with its great elite tragic protagonists, like Oedipus or Ajax. And thus in a direct participatory (and imperial) democracy there was a substantive sense in which all citizens could be called upon to engage in *epieikeia*.

There may seem to be nothing particularly metaphysical about an appeal to preexisting elite values and the curious way they were absorbed into the Athenian democracy. This may be granted, but the point would still remain that when Aristotle urges a litigant to present himself as a man of *epieikeia*, he is appealing to an external value system at least as, if not more, specific and dispositive than an appeal to divine or natural law. Furthermore, this is an external system at least as unavailable and unappealing as divine law or natural law. Or at least it should be – I think that some appeals to equity appeal to a pre-existing elite consensus in a related way. For instance, there is the example of Max Radin telling a meeting of the ABA in San Francisco that “we” have nothing to fear from his deflationary account of adjudication, an account that happily gives judges enormous discretion.⁹⁶

That said, there is a metaphysical component to Aristotle’s acceptance of elite values, namely his belief that some people are naturally superior. As Winthrop puts it, “according to Aristotle, a just and good political regime is the consequence not so much of making justice one’s end as of acknowledging a rank order of human needs and the human beings who exhibit them.”⁹⁷

It could be objected that this reading gives Aristotle too little credit. Already from the passages cited above we know that Aristotle does not associate political excellence with being well-born in any automatic way (e.g. a well-born citizen can shirk his duty) and, more importantly, that he gives enormous importance to friendship. Winthrop plausibly argues that Aristotle’s account of friendship is meant to replace and

⁹⁶ Max Radin, *The Theory of Judicial Decision: Or, How Judges Think*, 11 A.B.A. J. 359-360.

⁹⁷ Winthrop, *supra* note __, at 1214.

not merely supplement his account of justice in the *Ethics*.⁹⁸ Put simply, the general guidance of the wisest lawgiver cannot guide us towards our common ends, but the mutual solicitude of friends can. Here is Philippe Nonet’s related gloss on the same passage just discussed as establishing that the appeal to *epieikeia* is the appeal to elite values:

The law of friendship is the law of understanding. We are friends in that we understand each other, and so free and allow each other to be who we are, namely the mortals to whom it is given to understand.... As understanding, as the [being with] of the beings who feel and think, friendship is ... temporal dwelling together, i.e. the sharing of a historical world.

With this recognition of mutual understanding, the unity of friendship is sealed. Out of the shining of their [well-mindedness] in [temporal dwelling together], friends form [the same-mindedness], in and through which they know themselves as the same in their difference, in such a way that each is to the other like another self... Such harmony reigns among men who render each his own [this is how Nonet translates “those men who have the characteristic of *epieikeia*”], for such men think in harmony with themselves as well as with each other...

In their unity, friends constitute what Kant would call a kingdom of ends...⁹⁹

This richer argument concerning *epieikeia* thus sees Aristotle as a precursor to Kant in the sense that it posits binding obligations that we have to one another that are beyond the positive law. Also like Kant, there is a sense in which doing one’s duty out of mere fear of the positive law is an affront to one’s dignity – i.e. it would render one a mere stickler for law. To the extent that a city is an “imperfect friendship,”¹⁰⁰ then Aristotle’s espousal of speaking about equity, indeed positing legal institutions as meant to actualize equity (i.e. arbitration), is consistent with an attempt to perfect civic friendship. Aristotle’s ethics is dispositional and is not based on cultivating an absolutely good internal will

⁹⁸ *Id.*

⁹⁹ Philippe Nonet, *Judgment*, 48 VANDERBILT L. REV. 987, 994-5 (1995).

¹⁰⁰ Winthrop, *supra* note __, at 1215.

(*contra* Kant), and, as such, having the right institutions in place and making the appropriate arguments are central to creating ethical dispositions. From this perspective, Aristotle's account of equity is related to that of Hegel.

Critique of Some Contemporary Returns to Aristotle

At this point, if nothing else, it should be clear that appealing to the equity tradition requires a great deal of clarity as to which aspect of equity one is appealing to since there is neither a unitary concept nor a simple evolutionary history. Furthermore, though it may pain our post-modern sensibility we ought also to demand that the metaphysical background of the relevant aspect of equity be explored. Not to engage in this careful elucidation is to court confusion and undermine oneself in the very important fight for equity. I will consider two examples that both relate to the question whether there is an inherent connection between narrative and equity as mercy.

Kathy Eden finds an argument that there is such a connection in Aristotle. Rightfully and skillfully, Eden notes the parallels between how Aristotle constructs the perfect tragedy (a protagonist not too good or bad and who makes an error), and how he suggests that one conduct a defense when the facts are against you (i.e. this defendant is like you and just made a mistake).¹⁰¹ Because the defendant is just like you, you the jury should pity him and show mercy. There is truth to this argument,¹⁰² but, as discussed

¹⁰¹ KATHY EDEN, POETIC AND LEGAL FICTION IN THE ARISTOTELIAN TRADITION 58-59 (1986).

¹⁰² Especially when one looks at Rhetoric 2.8, where Aristotle discusses how to arouse pity in language that explicitly conjures up his theory of tragedy, but note that this is another book and amidst a systematic discussion of the emotions that one can develop in the audience. I would suggest reading the two passages together to understand Aristotle as maintaining that one may well want to stoke the audience's pity without also arguing to that audience that they should decide on the basis of pity.

above, Nussbaum was right not to see in Aristotle an appeal to mercy because to show mercy is to succumb to “slavishness.” The “thinking with” that Aristotle’s litigant wishes to achieve with the jury is not so much that they show him mercy, so much as he show them that he is an equitable man, e.g. a man who is no stickler for the law, who does not even know the law well and has tried arbitration etc., and thus deserves to win this contest. These values, e.g. the value of not going to the law, are themselves outside of the law; this is the communal, particularly elite, sense of what is proper.¹⁰³ It is the call to what is proper that we no longer hear, and it is this strong communal sense of propriety that gives equity substance beyond mere pity for those who suffer as you may.

Nussbaum too wants to connect narrative and mercy. Her argumentative structure as regards appeals to the equity tradition is odd, tending to sweeping gestures and subtle, but devastating, concessions. As noted above, she does not ultimately believe that Aristotle sees a role for mercy, but suggests that this is a mere “stopping short” of no deeper significance.¹⁰⁴ In many ways, in fact, her argument parallels that of Eden, even labeling tragedy a “school of equity.”¹⁰⁵ After Aristotle, she turns to Seneca. Though a Stoic, Seneca is an outlier in the Stoic tradition insofar as he sees a place for equity, whereas traditional Stoicism does not (there is only justice rigidly applied by the Stoic philosopher who discounts the phenomena of the world, including human suffering).¹⁰⁶ Seneca, according to Nussbaum, does find a place for equity because he recognizes that all men err.¹⁰⁷ Seneca also adds that retributive anger distorts the one who would punish

¹⁰³ Or perhaps the communal sense of what is proper among friends.

¹⁰⁴ Nussbaum, *supra* note __, at 97.

¹⁰⁵ *Id.* at 95.

¹⁰⁶ *Id.* at 98-99.

¹⁰⁷ *Id.* at 100.

into someone much like the target of that anger.¹⁰⁸ At last then Nussbaum has found an ancient source for equity as mercy. Yet what does Seneca really add to an argument that Nussbaum could make in her own name?

Another way to consider this is to note Posner's pointed argument that a looser procedure and greater discretion for empathy through narrative is as likely to generate mercy as greater harshness.¹⁰⁹ What then, on Nussbaum's account, is compelling the judge thinking equitably to mercy? Releasing one's retributive anger is hardly a guaranteed recipe for leniency (consider an incapacitationist), much less greater knowledge of a criminal's life. Looking to the tradition, equity informed by Christianity could be seen as creating a positive obligation towards mercy, though certain crimes against God may well deserve a higher penalty. If the spirit of the law could be known and equity could be derived by reason alone, then we could know the grounds for why one narrative merits mercy while another does not. An aristocratic code of elite friendship might also decree that *that* is simply not done, at least not to *that* person for *that* crime, but at the same time such a code may require harsher penalties for interlopers – Achilles may upbraid Agamemnon, Thersites, a commoner, may not. Hegel would presumably allow for no mercy in this context, since punishment defines crime and vice versa through their being in strict proportion to one another. That said, Hegel's strict retributivism looks lenient in the age of Three Strikes. What all these sketched

¹⁰⁸ *Id.* at 101.

¹⁰⁹ *Id.* at 114. Nussbaum says she will return to Posner's critique, though I do not see how she does, except to agree with him that discretion should be limited when "the whole complex history of the life in question" and the "inclination to [learn it] in a sympathetic manner" is unavailable. *Id.* at 117. This off-hand concession would seem to assure that this appeal to the equity tradition has no bite at all, which Nussbaum seems to recognize in limiting her analysis to the mitigation phase of death penalty cases. *Id.* at 116. This is the story of this article – Nussbaum does not really say anything false, say that Aristotle or the Stoics espoused mercy or her holistic narrative approach is practicable, but she almost says all of these things and in fact I have heard a respected scholar (at a conference) claim that Nussbaum said the equity tradition mandated leniency in sentencing.

approaches gleaned from the tradition offer is an external standard that directs the judge to mercy in some cases but not in others, which is precisely what Seneca's idiosyncratic argument, as reproduced by Nussbaum, does not offer.¹¹⁰

Nussbaum would like to argue for mercy without metaphysical baggage, as is her right. Yet her confused gesture to the equity tradition does not answer Posner's challenge. The equity tradition does offer answers, but, as we have seen, they do not come cheap.¹¹¹

Conclusion

This Note is meant to enable better appeals to equity in the future and thus reaches no particular conclusion about equity. The call of equity is inscribed in the structure of our legal system, indeed in our Constitution, as well as throughout our legal history. Throughout the law, appeals to equity, returning all the way to Aristotle, are still made, and the implicit continued polemic traction of such appeals is heartening. Yet our tradition has not whittled down equity to its essence; rather the aspects of equity have been multiplied over time. Returning to Aristotle does not restore the lost essence of equity either, but only reveals almost all of the divergent aspects were already there from the beginning. Grappling with the complexities of the tradition is thus not a shortcut to the essence of equity, a mere means to an end, but the grappling is a key part of the thing itself and should be a sine qua non of an appeal to equity.

¹¹⁰ Interestingly, Nussbaum notes that Seneca has a political agenda because he would like the emperor to show mercy. *Id.* at 104-05.

¹¹¹ I actually am inclined to believe that equity as mercy is a dead-end, i.e. mercy is given content by Christianity and cannot be secularized. It seems to me that the problem Eden and Nussbaum are trying to address is not so much the absence of mercy, but of justice, though not according to the dictates of the current positive law. The Three Strikes law is not unmerciful, it is unjust. Again, if one is inclined to follow Hegel's metaphysics of punishment, then one can pinpoint the injustice in the disproportionality. Perhaps Aristotle's equitable man would simply label it "base."