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Aristotle's Conception of Equity in Context

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Abstract: Aristotle’s discussion of equity (ἔπιείκεια) in the *Nicomachean Ethics* and the *Rhetoric* is examined in its proper historical legal and political context in order to present an informed understanding of equity and its role in Aristotle’s thought. Contemporary interpretations have invoked anachronistic legal features, and these interpretations, as a result, have failed to capture the proper understanding of the text. After an examination of relevant features of Athenian legal practice, this thesis argues that the Athenian institution of arbitration exemplifies the proper role of equity, a role in which equity is that type of justice that approaches the higher virtue of friendship. Having developed this understanding of Aristotelian equity, this thesis will examine its treatment in the philosophy of Aristotle’s great scholastic interpreter, Thomas Aquinas, arguing ultimately that Aquinas’s doctrinal commitments prevent him from understanding and embracing equity in this manner developed in this thesis.

In the *Nicomachean Ethics* and the *Rhetoric*, Aristotle discusses the concept of equity (ἔπιείκεια). Plato had contrasted equity with justice in the *Laws*,¹ arguing that equity, because it is distinct from strict justice (which is good), cannot itself be good. Aristotle explicitly rejects Plato’s analysis, claiming that, although equity is not *identical* with strict justice, it is, nonetheless, a *kind* of justice. Both equity and legal justice are species of generic justice. In the two texts Aristotle uses the term “equity” in two senses, referring both to the equity of a judge and to the more general equity of the equitable man. Although this thesis will focus initially on an examination of the legal sense of equity, Aristotle’s conception of the equitable man will inform its ultimate analysis of his account, according to which equity is that species of justice that comes closest to the superior virtue of friendship.

¹ See 757a-e. In *Plato: Complete Works*, ed. John M. Cooper, trans. Trevor Saunders, (Indianapolis: Hackett Publishing Company, 1997), 1433.

Aristotle's account of equity has generated a number of modern interpretations. A distinction between law and equity existed in classical Roman law,² and it has been a central feature of both European civil law³ and Anglo-American common law⁴ since the Middle Ages. Aristotle's brief treatment of the subject has been held up as the inspiration for and foundation of the entire Western legal tradition of equity.⁵ Similarly, Aristotle's apparent reference to the "gap-filling" function of equity has been used in the larger Hart-Dworkin debate as both an argument in favor of judicial discretion and, contradictorily, as a demand for judicial deference to legislative intent.⁶ These interpretations of Aristotle suffer from anachronism and the imposition of concepts drawn from foreign legal systems onto the Athenian legal regime with which Aristotle was most familiar. In short, many have sought to ground their own contemporary

² "Ius autem civile est, quod ex legibus, plebis scitis, senatus consultis, decretis principum, auctoritate prudentium venit. Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam." D. 1.1.7. Paul Krueger and Theodor Mommsen, trans., *Corpus Iuris Civilis: Digesta* (Berlin: Apud Weidmannos), 1.

³ "Equity, Imerius stated, meditating on a fragment of the *Digestum vetus*, although a part of justice, differs from it: it can be perceived in things and in human relations, but it only becomes 'justice' (a juridically defined and juridically relevant phenomenon) when there exists the will to give it a 'form'—a verbal garb and a cogent value. Only the emperor, 'lex animata in terris' (living law on earth), had the power to transform equity into justice, because the Roman people had delegated its own original power to the emperor once and for all. Thus all the Roman laws determined by Emperor Justinian constituted 'justice': justice was indeed distinct from equity, but it had emerged out of equity and was still and would forever be connected with equity." Manlio Bellomo, *The Common Legal Past of Europe 1000-1800*, trans. Lydia G. Cochrane (Washington: The Catholic University of America Press, 1995), 160.

⁴ "The notion [of equity] was well know to medieval lawyers. *Glanvill* [English lawyer and reputed author of *Tractatus de legibus et consuetudinibus regni Angliae*; d. 1190] mentions it as a feature of the common law, and throughout the year-book period it was applied to the interpretation of statutes." J.H. Baker, *An Introduction to English Legal History* (London: Butterworths, 2002), 106.

⁵ See Max Hamburger, *Morals and Law: The Growth of Aristotle's Legal Theory* (New York: Biblio and Tannen, 1965).

⁶ See Roger A. Shiner, "Aristotle's Theory of Equity," in *Justice, Law, and Method in Plato and Aristotle*, edited by Spiro Panagiotou (Edmonton: Academic Printing & Publishing, 1987), 173-192.

legal theories in the Aristotelian text without regard for the legal and historical context in which Aristotle lived.⁷

Although there is some recent scholarship that attempts to contextualize Aristotle's writings on equity, there remains much work to be done. This thesis will examine two key yet unfamiliar features of Athenian law in an attempt to demonstrate how Aristotle's interpreters have misconstrued his conception of equity. These two features are: 1) the relationship between judges and legislators, and 2) the status of a *corpus juris*. These features of the legal system of classical Athens differ radically from modern understandings. Having addressed the importance of these features of Athenian law, this thesis will examine the institution of arbitration as it existed in classical Athens as a means of understanding the relationship between legal equity and the equity of the equitable man. Once this relationship has been explored in light of Athenian legal practice, the first section of this thesis will conclude by arguing that Aristotle's conception of equity has a decidedly extra-legal aspect: equity is the preferred means of resolving the disputes of a society because it is the species of justice that most resembles the superior virtue of friendship. This understanding of equity stands in stark contrast not only to that of Plato, but also to that of Western law as generally understood.

Having argued for a novel interpretation of Aristotle's theory of equity, this thesis in its second section will examine the ways in which Thomas Aquinas makes use of the

⁷ Although this paper focuses on Athenian law, each Greek city had its own legal regime. Aristotle's reputed research of over one hundred Greek constitutions in preparation of his *Politics* ensures that he would have been familiar with many of the features of other legal systems in the Greek world. This paper assumes that the differences between Athenian law and the laws of other Greek cities are less significant than the similarities; nonetheless, it is conceivable that a broader analysis of Greek law, i.e., an analysis that extends beyond Athenian law, would uncover facts that undermine this thesis.

Aristotelian concept in his own system. Although Aquinas addresses *epieikeia*, friendship, and questions of statutory interpretation in the *Summa Theologiae*, his treatment of these themes does not support an interpretation similar to that argued for by this thesis regarding the philosophy of Aristotle. This second section will conclude by suggesting that the cause of this disparity lies in the doctrinal commitments that Aquinas faced as a philosopher within the Western, Catholic medieval tradition.

I. Equity in the Athenian Context

As stated above, Aristotle's account of equity explicitly critiques that of Plato. Before examining the various Aristotelian texts, it is helpful to review two Platonic dialogues, the *Laws* and the *Statesman*, each of which addresses the general topic of the relationship between law and justice. Although the claims of these two dialogues appear somewhat contradictory at first, they in fact can be reconciled, and when read together in this way they present a coherent position that Aristotle must challenge in his own account of equity.

Platonic Precedents

Plato addresses equity in the *Laws*, Book VI, where he holds it to be in opposition to justice. This reference to equity occurs in a passage wherein Plato addresses the necessity of differentiating equality imposed by law from natural equality, i.e., inequality arising from natural differences in virtue.

But the most genuine equality, and the best, is not so obvious. It needs the wisdom and judgment of Zeus, and only in a limited number of ways does it help the human race; but when states or even individuals do find it profitable, they find it very profitable indeed. The general method I mean is to grant much to the great and less to the less great, adjusting what you give to take account of the real nature of each—specifically, to confer high recognition on great virtue, but when you come to the poorly educated in this respect, to treat them as they deserve. We maintain, in fact, that statesmanship consists of

essentially this—strict justice. That is what we should be aiming at now, Clinias: this is the kind of ‘equality’ we should concentrate on as we bring our state into the world. The founder of any other state should also concentrate on this same goal when he frames his laws, and take no notice of a bunch of dictators, or a single one, or even the power of the people. He must always make *justice* his aim, and this is precisely as we’ve described it: it consists in granting the ‘equality’ that unequals deserve to get. Yet on occasion a state as a whole (unless it is prepared to put up with a degree of friction in one part or another) will be obliged to apply these concepts in a rather rough and ready way, because [equity] and toleration, which always wreck complete precision, are the enemies of strict justice.⁸

Plato espouses a theory of “equality” that is certainly not one of equality of outcome, but, rather, is roughly one of giving each man his due, i.e., of granting “much to the great and less to the less great.” With this standard of equality in mind, the laws should ensure virtuous citizens receive more than the common citizens. This distribution of wealth is both strictly just and “very profitable” to the state as a whole. Plato claims, however, that political pressures will often require that this form strict, legal justice give way to a less precise, i.e., less just, distribution of goods. The derogation of justice is brought about by the application of equity and toleration, which are, in Plato’s conception, “enemies” of justice itself.

Although in the *Laws* Plato suggests that law is, at least in theory, capable of effecting perfect justice, he presents a seemingly conflicting argument in a passage in the *Statesman*. Here, Plato’s Visitor and Young Socrates examine the possibility of a king ruling without laws.⁹ Based on the passage from the *Laws* cited above, it would seem that justice requires law. The Visitor states, however, that rule by experts is best for a city, “whether they rule according to laws or without laws.” This claim is

⁸ Plato, *Laws* 757a–e. Note that Saunders translates *epieikes* as “complaisance.”

⁹ Plato, *Statesman* 293c–297e. In *Plato: Complete Works*, ed. John M. Cooper, trans. C.J. Rowe, (Indianapolis: Hackett Publishing Company, 1997), 337–342.

startling not only to a modern reader but also to Young Socrates, who notes that the idea that law is unnecessary is “something [hard] for a hearer to accept.”¹⁰

The Visitor insists, however, that not only is the rule of law no better than expert rule, it is in fact inferior. He argues that law can “never accurately embrace what is best and most just for all at the same time,” and, therefore, it is unable to prescribe precisely that which is best in every case. This imprecision is not a feature of some particular law, but rather is inherent in the notion of law itself; whereas law is uniform in application, human conduct is unpredictably diverse. “[T]he dissimilarities between human beings and their actions...prevent any sort of expertise whatsoever from making any simple decision in any sphere that covers all cases.” Therefore, even the best law would still be imperfect as a plan of governance.¹¹

Having argued that law is inherently limited, the Visitor maintains through an analogy with physical training, that, nonetheless, there are reasons for which it is proper for the king to make laws. The first of these is that, in general, it is practically impossible for a trainer to make personalized prescriptions for each trainee, rather “they regard it as necessary to make rougher prescriptions about what will bring physical benefit, as suits the majority of cases.”¹² Likewise a legislator drafts laws according to general principles since it is impossible to give individualized instructions to each person. Furthermore, when a trainer intends to be absent from the city for a long period of time, it is appropriate that he leave written instructions for the trainees to

¹⁰ *Statesman*, 293d-e.

¹¹ *Id.*, 294b.

¹² *Id.*, 294e.

observe in his absence. Yet, when the trainer returns to the city, there is no reason to think that he would not “propose other prescriptions, contrary to the ones he had written down, when things turned out to be different, and better, for his patients” nor that he trainees would object. In contrast, citizens resist changes to law, even when made by an expert king.¹³

Ultimately, the Visitor concedes, however, that those cities without expert rulers, i.e. actually existing cities, ought to imitate the governance of the expertly-ruled city and employ the principle that “no one in the city should dare to do anything contrary to the laws, and that the person who dares to do so should be punished by death and all the worst punishments.”¹⁴ As such, Plato concludes that laws (in those cities not governed by expert rulers) should be obeyed even though they are imperfect. Although the positions found in these two dialogues oppose each other to some degree, they can be reconciled, however, by treating the expert king as an unattainable (or at best, rarely attainable) ideal, leaving the law as the stand in, so to speak, as the best substitute for the expertise of the king. The laws are therefore generally to be shown the same respect and obedience as the expert ruler. Whereas the decrees of an expert would constitute a perfection of the rule of law, equity and toleration remain a derogation of the same.

The Aristotelian Texts

Book V Chapter 10 of the *Nicomachean Ethics* deals particularly with the question of equity:

¹³ *Statesman*, 296d-e.

¹⁴ *Id.*, 297d-e.

Our next subject is equity and the equitable (to *epieikes*), and their respective relations to justice and the just. For on examination they appear to be neither absolutely the same nor generically different; and while we sometime praise what is equitable and the equitable man (so that we apply the name by way of praise even to instances of the other virtues, instead of 'good' meaning by *epieikestebon* that a thing is better), at other times, when we reason it out, it seems strange if the equitable, being something different from the just, is yet praiseworthy; for either the just or the equitable is not good, if they are different; or, if both are good, they are the same.

These, then, are pretty much the considerations that give rise to the problem about the equitable; they are all in a sense correct and not opposed to one another; for the equitable, though it is better than one kind of justice, yet is just, and it is not as being a different class of thing that it is better than the just. The same thing, then, is just and equitable, and while both are good the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. The reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct. In those cases, then, in which it is necessary to speak universally, but not possible to do so correctly, the law takes the usual case, though it is not ignorant of the possibility of error. And it is none the less correct; for the error is not in the law nor in the legislator but in the nature of the thing, since the matter of practical affairs is of this kind from the start. When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present, and would have put into his law if he had known. Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law where it is defective owing to its universality. In fact this is the reason why all things are not determined by law, that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.

It is plain, then, what the equitable is, and that it is just and is better than one kind of justice. It is evident also from this who the equitable man is; the man who chooses and does such acts, and is no stickler for his rights in a bad sense but tends to take less than his share though he has the law off his side, is equitable, and this state of character is equity, which is a sort of justice and not a different state of character.¹⁵

¹⁵ Aristotle, *Nicomachean Ethics*, 1137a31–1138a3. In *Introduction to Aristotle*, ed. Richard McKeon, trans. W.D. Ross, (New York: The Modern Library, 1992), 447–9.

Aristotle is aware of the inherent tension between justice and equity, and he recognizes Plato's argument that if equity is opposed to justice, and if justice is good, then it appears that equity must not be good. In contrast to Plato, however, Aristotle holds that this tension exists not between equity and justice as such, but instead between equity and a particular type of justice. Equity does stand in opposition to *legal justice*, but not to absolute justice. Aristotle therefore accounts for the opposition between equity and law, not by denigrating equity, but instead by distinguishing between strict justice and legal justice.

Whereas Plato claimed in the *Laws* that law is, more or less, equivalent to strict justice, Aristotle instead argues that law is by nature incapable of encapsulating justice. Law is universal, and inevitably there arise particular situations for which the universal rule is inapposite. This argument bears some resemblance to that of Plato in the *Statesman* (a resemblance that Aristotle does not explicitly acknowledge), and, moreover, this facet of Aristotle's account of equity suggests an understanding of the text consonant with modern usage. Although this thesis will argue ultimately that such an understanding is unwarranted, it is helpful to see first how a modern interpretation of the text might proceed before critiquing such interpretations. Consider, as an example, a law that requires all vehicles traveling on highways to be powered by gasoline or diesel engines. The law was enacted with the intention of keeping slow-moving and relatively unsafe vehicles, e.g., bicycles, off the highway. The use of an electric car, however, would fall afoul of this law, even though it is not the sort of vehicle that the legislators wished to prohibit.

Aristotle emphasizes that, in such a situation, neither the law nor the legislator is at fault. Rather, such outcomes are the result of law's inherent inability to determine the just outcome in every case. No matter what vehicles the law permitted, some type of vehicle, unforeseen (and unforeseeable) by the legislators, would be prohibited by the letter of the law even though the legislators would not prohibit it were they aware of it. Aristotle argues that, when faced with such a case, it is appropriate for the judge to apply equity. In this context equity appears to involve a form of statutory interpretation that seeks to reflect legislative intent. A judge ruling upon the case of a driver of an electric car should determine how the legislators would have treated the case had they considered it in forming the law. The judge should consider that the intent of the statute was to keep small, slow-moving vehicles off the road, and, therefore, that there is no reason to prohibit full-sized electric cars from operating on the highway. Such an interpretation is equitable, which, Aristotle claims, is better than legal justice.

Having distinguished equity, legal justice, and generic justice by introducing what at first appears to be a sophisticated theory of statutory interpretation, Aristotle's brief description of the equitable man is somewhat puzzling.¹⁶ By definition (or so it would seem), the equitable man is one who performs equitable acts. Aristotle does connect the equitable man with law, not as a judge, but rather as one of the disputants. An equitable man, Aristotle claims, is one who demands and is satisfied with less than

¹⁶ References to the equitable man in other passages of the *Nicomachean Ethics* are not particularly illuminating, though they reinforce the connection (and the distinction) between equity and justice. In discussing the virtue of truthfulness, Aristotle maintains, "We are not speaking of the man who keeps faith in his agreements, i.e., in the things that pertain to justice or injustice (for this would belong to another virtue), but the man who in the matters in which nothing of this sort is at stake is true both in word and in life because his character is such. But such a man would seem to be as a matter of fact equitable." 1127a33-b3.

his share, even though the law is on his side. The importance of this somewhat obscure relation between the equity of the equitable man as party to a dispute and the equity of a judge as a decider of law will be examined in detail below.

In addition to the account in the *Nicomachean Ethics*, Aristotle also addresses equity in Book I Chapter 13 of the *Rhetoric*, a chapter that deals with a number of topics related to justice and injustice as they pertain to the exercise of judicial rhetoric.

Since there are two species of just and unjust actions (some involving written, others unwritten laws), our discussion has dealt with those about which the [written] laws speak; and there remain the two species of unwritten law. These are, on the one hand, what involved an abundance of virtue and vice, for which there are reproaches and praises and dishonors and honors and rewards—for example, having gratitude to a benefactor and rewarding a benefactor in turn and being helpful to friends and other such things—and on the other hand things omitted by the specific and written law. [Equity], for example, seems to be just; but [equity] is justice that goes beyond the written law. This happens sometimes from the intent of the legislators but sometimes without their intent when something escapes their notice; and [it happens] intentionally when they cannot define [illegal actions accurately] but on the one hand must speak in general terms and on the other hand must not but are able to take account only of most possibilities; and in many cases it is not easy to define the limitless possibilities; for example, how long and what sort of weapon has to be used to constitute “wounding”; for a lifetime would not suffice to enumerate the possibilities. If, then, the action is undefinable, when a law must be framed it is necessary to speak in general terms, so that if someone wearing a ring raises his hand or strikes, by the written law he is violating the law and does wrong, when in truth he has [perhaps] not done harm, and this [latter judgment] is [equity].

If, then, [equity] is what has been described, it is clear what kind of actions are [equitable] and what are not [equitable] and what kind of human beings are not [equitable]: those actions that [another person] should pardon are [equitable], and it is [equitable] not to regard personal failings [*hamartēmata*] and mistakes [*atukhēmata*] as of equal seriousness with unjust actions. Mistakes are unexpected actions and do not result from wickedness; personal failings are not unexpected and do not result from wickedness; [and] unjust actions are not unexpected and do result from wickedness. And to be forgiving of human weakness is [equitable]. And [it is also [equitable]] to look not to the law but to the legislator and not to the word but to the interest of the legislator and not to the action but to the deliberate purpose and not to the part but to the whole, not [looking at] what a person is now but what he has been always or for the

most part. And [it is [equitable]] to remember the good things one has experienced [because of him] rather than the bad, and good things experienced [because of him] rather than done for him. And [it is [equitable]] to bear up when wronged. And [it is [equitable]] to wish for an issue to be decided by word rather than by deed. And [it is [equitable]] to want to go into arbitration rather than to court; for the arbitrator sees what is [equitable], but the jury looks to the law, and for this reason arbitrators have been invented, that [equity] may prevail. On the subject of things that are fair let definitions be made in this way.¹⁷

The first half of the passage repeats in large part Aristotle's theory of the equity of the judge in the *Nicomachean Ethics*. The second portion of the passage serves to develop further Aristotle's account of the equitable man by indicating contexts other than a legal dispute in which equity is manifest. The equitable man will tend to forgive the mistakes and personal failings of another, because these, unlike unjust actions, do not result from the other's wickedness, but, rather, are the result of human weakness. Similarly, he will remember the good done rather than the bad, etc., i.e., he will be charitable and forgiving in dealing with others. Returning to the context of legal proceedings, Aristotle states that the equitable man will prefer arbitration to litigation, claiming that, unlike the jury, which looks to the law, the arbitrator is concerned with what is equitable. Aristotle provides a small piece of (likely specious) legal history, noting that the institution of arbitration arose so that parties could achieve equitable results. Any attempt to understand this passage by reference to contemporary practices of arbitration will result in anachronism: arbitration was a well-defined, technical procedure in Athens, and it will be examined below.

Although Aristotle's two discussions of equity, i.e., that of the *Nicomachean Ethics* and that of the *Rhetoric*, are not identical, they are clearly compatible, and it is

¹⁷ Aristotle, *On Rhetoric: A Theory of Civil Discourse*, trans. George A. Kennedy, (Oxford: Oxford University Press, 2007), 99-100, 1374a15-b15. Note that Kennedy translates *epiieikeia* as "fairness."

possible to identify two general notions of equity expressed in the text. The first of these has to do with legal equity, i.e., the equity that serves to correct the law in its rough implementation of justice. Legal equity centers on Aristotle's proposed method of statutory interpretation, according to which a judge should look to the intent of the legislator in deciding a case that falls outside of the law's general understanding.¹⁸ The second notion of equity is concerned with personal equity, i.e., the behaviors that identify the equitable man. The equitable man forgives mistakes and personal failings, and, in general, regards others charitably by focusing on positive traits and overlooking negative actions.¹⁹

Aristotle connects the equitable man to law in two ways. First, the equitable man is simply one who refrains from demanding all that is due to him under the law. Second, the equitable man is one who prefers arbitration to litigation, precisely because arbitrators employ equity in arriving at their decisions, whereas juries employ law. Before turning to an account of the relationship between the equity of the judge and the equity of the equitable man, this thesis first will review briefly a number of interpretations of Aristotelian equity. These interpretations all share the flaw of failing to pay sufficient attention to the legal regime in which Aristotle lived.

¹⁸ In his discussion of the intellectual virtue of judgment in the *Nicomachean Ethics*, Aristotle explicitly identifies the exercise of the virtue with the discrimination of the equitable. "What is called judgement, in virtue of which men are said to 'be sympathetic judges' and to 'have judgement', is the right discrimination of the equitable. This shown by the fact that we say the equitable man is above all others a man of sympathetic judgement about certain facts." 1143a19-23.

¹⁹ Aristotle elsewhere praises the ability of a man to overlook wrongs suffered in connection with the virtues of pride and temperance. "Nor is [the proud man] mindful of wrongs; for it is not the mark of a proud man to have a long memory, especially for wrongs, but rather to overlook them." *N.E.* 1125a3-a6. "[F]or the good-tempered man is not revengeful, but rather tends to make allowances." *N.E.* 1126a2-4.

Contemporary Interpretation

Both the equity of the judge and the equity of the equitable man have attracted modern commentary, although legal equity has been the primary focus. One of the more accessible interpretations of Aristotle's conception of equity is that of Max Hamburger. Hamburger's rather effusive praises of Aristotle's alleged novelty²⁰ should not detract from his analysis, which identifies the relevant texts and provides an interpretation informed by Hamburger's legal knowledge. His conclusions, however, reflect an anachronistic and unwarranted imposition of twentieth-century civil law²¹ onto an ancient Athenian context. For example, Hamburger argues, based on a passage from the *Rhetoric* dealing with the relationship between legislation and adjudication,²² that the "true meaning" of Aristotle's theory of equity depends on a particular notion of law. "The law should be as complete as possible. The judge should have to decide as little as possible with regard to legal points, which should be defined in the law. He should merely ascertain the facts of the case and subsume them under the appropriate legal rule."²³ Hamburger thus interprets Aristotle's conception of equity to be one relating to the precise relationship between legislators and judges, a relationship wherein legislators should precisely set forth the conditions of the law and judges are to limit themselves to application of the law to facts. This relationship between legislator

²⁰ "No matter what Greek equity was or was not, the Aristotelean *epieikeia*...was so clear a conception that Roman law and modern law...adopted and expanded it." Hamburger, 97. Hamburger was influenced both by W.D. Ross and Paul Vinogradoff to endorse this allegedly Aristotelian pedigree of legal equity.

²¹ I.e., the modern law of continental Europe grounded in Roman law, as opposed to English common law.

²² See *Rhetoric* I.1 1354a28-1354b16.

²³ Hamburger, 104.

and judge is precisely that existing (at least in theory) in post-codification civil law,²⁴ the legal regime in which Hamburger studied and practiced. As a result, Hamburger reduces equity to nothing more than a means toward an end—“right law, true justice”—that Aristotle does not espouse. Law, for Aristotle, is never equivalent to strict justice but only one limited species of the same, and Hamburger’s attempt to import this notion into Aristotle’s theory of equity is flawed.

Later scholars have interpreted Aristotle in a more guarded manner. Constantine Georgiadis attempts to create a coherent theory for both legal and personal equity (which he terms value-equity and virtue-equity).²⁵ Roger Shiner seeks to refute attempts to read Aristotle’s theory of equity as evidence in the Hart-Dworkin debate.²⁶ Garrett Barden argues that equitable judgment is an expression of “the communal sense of justice which the judge learns by his living in the community and by his study of the laws and precedents of the community which are the expression of [its judicial] habit.”²⁷ Jacques Brunschwig has performed an intense textual analysis that he believes provides Aristotle’s fundamental rule of equity: that of the judge implementing the intent of the legislator in deciding cases.²⁸ More recently, Allan

²⁴ “The jurist, however, had neither the obligation nor the capacity to innovate, nor could he modify, amplify, or limit the dictates of the code or of individual laws, but was expected only to understand them and enunciate their content and their meaning, retracting the legislator’s thoughts and coming to a faithful and ‘declarative’ interpretation of the measure in question.” Bellomo, 12.

²⁵ Constantine Georgiadis, “Equitable and Equity in Aristotle,” in *Justice, Law, and Method in Plato and Aristotle*, edited by Spiro Panagiotou (Edmonson: Academic Printing & Publishing, 1987), 159-172.

²⁶ Shiner, 173-192.

²⁷ Garrett Barden, “Aristotle’s Notion of Eipieikeia,” in *Creativity and Method: Essays in Honor of Bernard Lonergan*, edited by Matthew L. Lamb (Milwaukee: Marquette University Press, 1981), 353-368.

²⁸ Jacques Brunschwig, “The Aristotelian Theory of Equity,” in *Rationality in Greek Thought*, edited by Michael Frede and Gisela Striker (Oxford: Clarendon Press, 1996), 115-156.

Beever has countered suggestions that Aristotle's conception of equity implies untrammelled judicial discretion in the name of strict justice, arguing instead that Aristotle believes that law as such does embody a type of justice, in particular the distributive justice decided upon (for better and for worse) by the polis.²⁹ Darien Shanske has proffered an account of Aristotle's theory of equity informed by Heidegger.³⁰

All of these interpretations err, to varying degrees, in imposing a modern legal system and sensibility onto Aristotle's concept of equity. As argued above, Hamburger constructs a model of Athenian law that bears an uncanny resemblance to civil law. Other commentators make similarly anachronistic comparisons. Beever, for example, contrasts the political, legislative body of Athens with "aristocratic judges."³¹ Brunschwig similarly distinguishes legislators from judges and refers to a "legislative code."³² Without belaboring the point further, these interpretations variously refer earnestly to judges, legislators, and codified bodies of written law. (Shanske appears to have the best grasp of the realities of Athenian law; he is, however, more interested in making a novel connection with Heidegger that he can relate to contemporary law than in presenting an informed analysis of Aristotle's notion of equity.) Aristotle's interpreters have failed to consider context in which he constructed his theory of equity, and, as a result, they have distorted it.

²⁹ Allan Beever, "Aristotle on Equity, Law, and Justice," *Legal Theory* 10 no. 1 (2004): 33-50.

³⁰ Darien Shanske, "Revitalizing Aristotle's Doctrine of Equity," *Law, Culture and the Humanities* 4 no. 3 (2008): 352-381.

³¹ Beever, 48.

³² Brunschwig, 153-4.

The Athenian Background

Aristotle's theory of equity—indeed all of his legal thought—should be considered, not in light of contemporary, medieval, or even classical Roman law, but, rather, in its proper context, that of ancient Athens. This thesis will use primarily the work of one contemporary legal historian, Adriaan Lanni,³³ to develop the historical basis for analyzing Aristotle's theory of equity. The legal system of Aristotle's Athens bears little resemblance to a modern judicial system.³⁴ In contrast to our highly professional legal functionaries, amateurism was the ideal in Athens. "At nearly every state in the legal process, the functioning of the system relied on private initiative. There was no police force to maintain public order or investigate crime. It was entirely up to the victim of damage or theft, for example, to seek out witnesses and act as his own private investigator."³⁵ Once in court, litigants tried their cases in front of juries, chosen by lot, and generally ranging from 201 to 501 in size. The parties were limited only in the amount of time allotted, but they were free to engage in what would today be considered extra-legal argumentation. "Launching personal attacks unrelated to the charges in the case, for example alleging that one's opponent is sexually profligate, or

³³ This choice is based solely on my personal knowledge of Prof. Lanni's work; as a law student I had the opportunity to take a course she taught on Athenian law.

³⁴ Of the ten principal characteristics of the Western legal tradition postulated by Harold Berman, ((1) the distinction between legal institutions and other institutions, (2) the administration of legal institutions by legal professionals, (3) the existence of a body of legal learning, (4) the existence of a legal science, (5) the existence of a *corpus juris*, (6) the belief in the law's capacity for growth over time, (7) the belief in an internal logic in the law's growth over time, (8) the concept of the law's supremacy over political authorities, (9) the coexistence and competition within the same community of diverse jurisdictions, (10) a tension between the ideals and the reality of the system), Athenian law can be said to have only the first and perhaps the eighth. See Harold J. Berman, *Law and Revolution: The Formation of the Western Legal Tradition*, (Cambridge: Harvard University Press, 1983), 7-9.

³⁵ Adriaan Lanni, *Law and Justice in the Courts of Classical Athens*, (Cambridge: Cambridge University Press, 2006), 31-2.

that he is descended from slaves, was commonplace. The character and reputation not only of the litigants but of their ancestors and family members were regular topics of discussion.”³⁶ As such, this system, in which amateur litigants handled the entire prosecution and defense of litigation and tried their cases in front of hundreds of randomly chosen fellow-citizens by resorting to a mixture of law, facts, and rhetoric, had no “judge” in the modern sense, i.e., a professional, impartial trier of law and fact educated in a particular body of law.

Furthermore, there was in Athens no clearly-distinguished legislator who created the laws. Rather, much like the legal system, the legislative process was run by amateurs drawn from the entire citizenry. “Adult male citizens voted in the Assembly [the legislative institution of Athens] on nearly every decision of the Athenian state, from the making of war and peace to honoring individuals with a free dinner.”³⁷ The smaller Council of 500, which prepared the agenda for the Assembly, was itself an amateur affair, for which each *deme* supplied a certain number of men chosen by lot and for which a new *epistatês* (president) was chose by lot daily. In short, the “legislators” of Athenian law were, more or less, the same people who judged cases. There was no specialized body that debated, crafted, and then promulgated law; Athens was a rough democracy, not a serene republic. Thus, the reference to or assumption of the discreet roles of legislators and judges in the modern interpretations of Aristotle discussed above is not grounded in the realities of Athenian law.

³⁶ Lanni, 41.

³⁷ *Id.*, 31.

Perhaps even more problematic than importing the existence of clearly-defined “judges” and “legislators” into Aristotle’s theory of equity is reading in a modern understanding of “law.” Given the amateur, democratic nature of the Assembly, it is not surprising that written laws as such were not formalized or even necessary for litigation. “The laws were inscribed on large stone blocks (*stélai*) erected in various public areas of Athens...Litigants were responsible for finding and quoting any laws that helped their case...but there was no obligation to explain the relevant laws, and in fact some speeches do not cite any laws at all.”³⁸ The Hart-Dworkin debate has generated a number of metaphors to illustrate the idea of “gaps in the law,” e.g., a doughnut, cloth, dough. None of these bears any resemblance to the legal system in Athens, which was physically embodied in the system of *stelai*: a sea of rhetoric, custom, and social relations dotted with the occasional law. To speak of equity filling in “gaps in the law” is clearly wrong; one would more accurately speak of law filling “gaps in rhetoric, custom, and social relations.”

Having shown that Aristotle’s interpreters have failed to consider the actual legal environment in which Aristotle lived, it is helpful to consider an institution that lies at the intersection of legal equity and the equity of the equitable man: arbitration. As stated above, in the *Rhetoric* Aristotle praised the practice of arbitration, stating that the equitable man will prefer to present his case to arbitrator rather than to a jury. Furthermore, the process of arbitration is purely equitable; whereas a jury applies law, an arbitrator looks only to equity. Thus, an understanding of what Aristotle means by arbitration should shed light on his theory of equity.

³⁸ Lanni, 37-8.

Arbitration in Athens had both a private and public form. Private arbitration³⁹ was completely extra-legal: rather than initiate a suit in court, a party could (with the consent of the opposing party) choose to have the matter resolved by arbitrators agreed upon by both parties.⁴⁰ Arbitrators were not expected to be impartial; rather, they were typically friends of at least one party and ideally of both.⁴¹ The outcome of arbitration was based on what Adele Scafuro terms “an ideology of friendship.” “Documents purporting to be the terms of reconciliation and the narratives that paraphrase either those terms or the awards of arbitral verdicts are cast in language that pays heed to the values of friendship, to mending disturbed relationships and to maintaining restored ones, to the giving of gifts rather than the paying of forced penalties.”⁴² Arbitration agreements often explicitly required that the parties treat each other as friends rather than enemies. As such, arbitration sought to repair the damage done to the relationship between the parties in a manner that preserved honor while also redressing the injury itself. Arbitration in Athens did not, as modern arbitration does, seek to implement law in an informal setting, but, rather, both its means and its end were quite different. The means consisted in using the norms of friendship to arrive

³⁹ Public arbitration was required for certain cases prior to a jury trial. The decisions of the arbitrator were non-binding, but it is beyond the scope of this thesis to delve into the substantive differences between public and private arbitration. It suffices to state that private arbitration, as a completely voluntary process, embodies Aristotle’s notion of equity to a higher degree than the mandatory public form. Lanni, 36.

⁴⁰ “The *sine qua non* of arbitration appears to be the agreement of the disputants both to the procedure and to the *personae* involved.” Adele C. Scafuro, *The Forensic State: Settling Disputes in Graeco-Roman New Comedy*, (Cambridge: Cambridge University Press, 1997), 131.

⁴¹ “[W]e can infer that balance rather than strict impartiality was the goal of representation, that is, a balance in favor of both sides alike at the outset rather than a balance with favor to neither.” *Id.*

⁴² *Id.*, 134.

at a conclusion honorable for both parties, with a goal of reconciling the parties rather than of simply assigning fault.⁴³

The Text Revisited, Friendship, and Conclusions

As Aristotle indicates in the *Nicomachean Ethics*, the equitable man is one who takes less than what he could have obtained from a jury. This is consistent with the account of Athenian arbitration above, wherein a party accepts an amount less than that to which he is entitled by law but also avoids the public spectacle of arguing in front a jury. As a result, the social order is minimally disturbed, and relations with the other party can (ideally) proceed in a mutually advantageous manner. As Aristotle states in the *Rhetoric*, the parties seek to resolve the dispute by word rather than by deed. The directive to view one's opponent in the most charitable manner, i.e., to remember the good received rather than the harm received and to remember the good received rather than the good given, is consistent with the nature of Athenian arbitration, and it would be quite natural for these maxims to function as rhetorical elements in successful resolutions.

With the proper understanding of Athenian "judges", "legislators", "law", and, most importantly, arbitration, now in place, it is clear that Aristotle's theory of equity is more substantial than his interpreters have recognized. Equity for Aristotle is not

⁴³ Aristotle refers to the middle class as a metaphorical arbitrator between the poor and the wealthy in the *Politics*, reinforcing arbitrations social nature. "But the legislator should always include the middle in his constitution: if he is establishing oligarchic laws, he should aim at those in the middle, and if democratic ones, he must bring them in by these laws. And where the multitude of those in the middle outweighs either both of the extremes together, or even only one of them, it is possible to have a stable constitution. For there is no fear that the rich and the poor will conspire together against these, since neither will ever want to serve as slaves to the other...For they would not put up with ruling in turn, because they distrust one another; and an ARBITRATOR is most trusted everywhere, and the middle person is an arbitrator." 1296b34-97a5. *Politics*, trans. C.D.C. Reeve (Indianapolis: Hackett Publishing Company), 1998.

simply a method of statutory interpretation to fill perceived gaps or shortcomings in the law itself. Instead, as a method for resolving disputes, it is distinct from and truly opposed to law. Athenian law is universal in many ways: its rules (such as there are) are universal in application, the source of the law is the entire polis, and the trier of law is again the entire polis. Equity, in contrast, works completely at the level of particular cases. There are no quasi-legal “rules” of equity, only the “ideology of friendship,” which involves particular relations between particular parties, e.g., between the disputants, and between each disputant and the arbitrators.

This connection between equity and friendship has significant implications. Friendship and justice are closely related in Aristotle’s thought; they are “concerned with the same objects and exhibited between the same persons.”⁴⁴ The claims of justice and friendship vary depending on the nature of the particular relationship, but, as a general rule, “the demands of justice also seem to increase with the intensity of the friendship.” This positive correlation, Aristotle claims, “implies that friendship and justice exist between the same persons and have an equal extension.”⁴⁵ The relation between equity and friendship is not, however, merely one of coextension. Rather, Aristotle regards friendship as superior to justice as a virtue, a superiority which has striking consequences:

We may see even in our travels how near and dear every man is to every other. Friendship seems too to hold states together, and lawmakers to care more for it than justice; for unanimity seems to be something like friendship, and this they aim at most of all, and expel faction as their worst enemy; *and when men are*

⁴⁴ *N.E.*, Book VIII, Ch. 9, 1159b26-8.

⁴⁵ *Id.*, 1160a7-9.

*friends they have no need of justice, while when they are just they need friendship as well, and the truest form of justice is thought to be a friendly quality.*⁴⁶

Friendship, then, is so clearly superior to justice, that the latter is needed only when the former is absent; were a city composed entirely of friends, justice would be unnecessary. In such a city the equitable resolution of conflict, i.e., a resolution based on the “ideology of friendship,” renders the need for a legally just outcome moot. Equity, because it is a part of justice, is not identical with friendship. Yet, because equity is “friendly” justice, it is that species of justice that comes closest to the higher virtue of friendship, and arbitration is its process of resolving disputes. Recourse to law is just, but it is not friendly; in a city in which all men are friends, litigation would be unneeded.⁴⁷

Once equity is understood as that species of justice most closely resembling the superior virtue of friendship, the proper role of equity in legal adjudication is more readily apparent. An Athenian jury cannot truly apply equity because it lacks a relationship with the disputants (and, moreover, among its own members) sufficiently familiar to direct them to an equitable resolution. Furthermore, that the two litigants have been unable to resolve their dispute in arbitration indicates that they are not able to deal with each other within the ideology of friendship. In short, the parties involved are not friends.⁴⁸ Nonetheless, when faced with a case in which a strict result is

⁴⁶ *N.E.*, Book VIII, Chap. 1, 1155a22-8 (emphasis added).

⁴⁷ See also *N.E.* 1134a29-32. “For justice exists only between men whose mutual relations are governed by law; and law exists for men between whom there is injustice; for legal justice in the discrimination of the just and the unjust.”

⁴⁸ Such lack of friendship was more likely the rule than the exception in Athens. Based on a census taken in 317 B.C.E. (after the fall of the democracy and the imposition of Macedonian rule), Lanni estimates the adult male citizen population of Athens at approximately 40,000. There were an additional 60,000

possible, the jury should strive for an equitable decision, i.e., a decision that treats the losing party charitably, as one would treat a friend.⁴⁹ Since Athenian juries are essentially “legislating from the bench” when they decide a matter, they ought to legislate in such a way as best preserves and encourages (or at least simulates) friendship.

Although the judgment of a jury, as an expression of the Athenian legal system, is indeed possessed of a certain type of justice, it is for Aristotle a lowly type, suitable only to the resolution of disputes between parties who are not friends. True friends, it would seem, need neither court litigation nor formal arbitration to resolve disputes, but treat each other charitably as a result of their friendship. Equity is the best form of justice, because it most resembles the related and superior virtue of friendship, yet it is not equivalent with friendship. As such it occupies a middle ground between purely informal dispute resolution between friends and recourse to law. For Aristotle, equity *is* better than law because it is that species of justice most like friendship. Accordingly, the task of equity is not to remedy deficiencies in the law, but rather deficiencies in the makeup of the polis itself. Were all Athenians friends, justice would have no role to play. Such a polity is possible, at least in theory. Even though “[o]ne cannot be a

citizen women and children, along with 40,000 metics (resident aliens) and 150,000 slaves. This yields a total population of close to 300,000, i.e., slightly less than the population of St. Louis City. Lanni, 19-20.

⁴⁹ Kathy Eden argues that rhetoric appealing to equity mirrors tragic poetry: “The audience’s reaction to the tragic action, in other words, corresponds to the psychological response of the judge or jury leading up to an equitable judgment. When a reasonably good man like ourselves commits a tragic error, the completed play demonstrates, much as the forensic speech tries to do, that the protagonist deserves a milder judgment: not the rigid justice of the law, but pity, equity, and pardon.” *Poetic and Legal Fiction in the Aristotelian Tradition*, (Princeton: Princeton University Press, 1986), 59. Eden’s account is, overall, too laden with concepts drawn from contemporary legal practice, but her insight on this point merits further consideration.

friend to many people in the sense of having friendship of the perfect [i.e., virtuous] type,” there is no absolute limit to the number of practical or pleasurable friendships a person may have, though in a city as large as Athens, this may be practically unfeasible.⁵⁰ Moreover, friendship can exist most fully in a democracy because of the resulting widespread equality.⁵¹ Despite the possibility of widespread friendship, all Athenians are in fact far from being friends. In this social environment, the exercise of equity is preferable to recourse to law because the former most closely resembles the ideal of friendship and has the potential in fact to bring about the same. Such a conception of equity as the resolution of disputes through employing the ideology of friendship is far removed from the overly legalistic analyses of Aristotle’s contemporary interpreters.

II. Aspects of Aristotelian Equity in the Philosophy of Thomas Aquinas

Were an examination of Aristotelian equity in the philosophy of Thomas Aquinas to be limited exclusively to the technical topic of *epieikeia*, such examination would be unduly brief. Aquinas devotes only a short, relatively terse question to the subject in the *Summa Theologiae*, and his treatment of the relevant passage in his

⁵⁰ “One cannot be a friend to many people of many people in the sense of having friendship of the perfect type with them, just as one cannot be in love with many people at once (for love is a sort of excess of feeling, and it is the nature of such only to be felt towards one person); and it is not easy for many people at the same time to please the same person very greatly, or perhaps even to be good in his eyes. One must, too, acquire some experience of the other person and become familiar with him, and that is very hard. But with a view to utility or pleasure it is possible that many people should please one; for many people are useful or pleasant, and these services take little time.” *N.E.* 1158a10-17. Aristotle does, however, believe that there is in fact a limit to the size of a city. “But as regards *good* friends, should we have as many as possible, or is there a limit to the number of one’s friends, as there is to the size of a city? You cannot make a city of ten men, and if there are a hundred thousand it is a city no longer.” *N.E.* 1170b28-31. *But see supra* n 47.

⁵¹ “But *qua* man one can; for there seems to be some justice between any man and any other who can share in a system of law or be a party to an agreement; therefore there can also be friendship with him in so far as he is a man. Therefore while in tyrannies friendship and justice hardly exist, in democracies they exist more fully; for where the citizens are equal they have much in common.” *N.E.* 1161b6-10.

commentary to the *Nicomachean Ethics* is largely unremarkable. Thus it appears that Aquinas has little to say (at least explicitly) on the subject. A broader inquiry within the Thomistic corpus does reveal, however, an engagement with the larger themes implicated in this thesis' interpretation of Aristotelian equity, namely, the occasional conflict between the universality of law and the facts of particular situations and the relation between friendship and justice. In order to achieve a richer comparison of Aristotle's and Aquinas's conception of equity, this thesis will endeavor to complete this broader inquiry. Having examined these themes as they appear in Aquinas's writings, this thesis will conclude by arguing that the Aristotelian understanding argued for in the first portion of this thesis is not to be found in Aquinas's philosophy, and it will conclude by suggesting possible reasons for the incompatibility of this theory of Aristotelian equity and Aquinas's worldview. The gap between Rome and Athens is, so to speak, too great, and the Aristotelian conception of equity argued for in the first part of the thesis is simply incompatible with the legal and doctrinal commitments that Aquinas, writing in the medieval Catholic west, holds.

Epieikeia in Thomistic Philosophy

Thomas Aquinas's treatment of equity is, again in a narrow sense, quite straightforward. He devotes a short question in the *Summa Theologiae* explicitly to the topic of "*epikeia*,"⁵² wherein he considers two articles, namely, whether *epieikeia* is a virtue and whether it is distinct from justice. The first of these seeks to answer the charge that deviation from legal justice cannot be good, i.e., it responds to the Platonic argument found in the *Laws*. The second provides a positive, largely Aristotelian

⁵² *S.T. IIa-IIae*, q. 120. Thomas Aquinas, *Summa Theologica*, trans. Fathers of the English Dominican Province (New York: Benziger Brothers), 1947.

account of the relationship between equity and justice. Although both of these topics (and Aquinas's treatment of the same) are firmly grounded in the Aristotelian text, there are some interesting features that merit closer examination.

In the first article concerning *epieikeia*, Aquinas considers three objections to the claim that it is a virtue. The first of these is essentially that of Plato (though Aquinas does not credit him),⁵³ while the second⁵⁴ and third⁵⁵ are drawn from Augustine and the *ius civile* respectively. Responding to weighty objections based in each of the Greek, Patristic, and Roman traditions, Aquinas brings forth the Aristotelian notion of the conflict between “contingent singulars[,] innumerable in their diversity” and law, which “attend[s] to what commonly happens.” As an example of this conflict, Aquinas states that law “requires deposits to be restored, because in the majority of cases this is just.” If, however, a man were to deposit a sword and seek its return while in a state of madness or “in order to fight against his country,” the common good and, therefore, justice requires that the letter of the law be set aside.⁵⁶ This setting aside the letter of

⁵³ “It seems that ‘epieikeia’ is not a virtue. For no virtue does away with another virtue. Yet ‘epieikeia’ does away with another virtue, since it sets aside that which is just according to law, and seemingly is opposed to severity. Therefore ‘epieikeia’ is not a virtue.” *I S.T.* IIa-IIae, q. 120, a. 1, ob. 1.

⁵⁴ “ ‘With regard to these earthly laws, although men pass judgment on them when they make them, yet, when once they are made and established, the judge must pronounce judgment not on them but according to them.’ But seemingly ‘epieikeia’ pronounces judgment on the law, when it deems that the law should not be observed in some particular case.” *Id.*, ob. 2.

⁵⁵ “But it belongs to the sovereign alone to interpret the intention of the lawgiver, wherefore the Emperor says in the Codex of Laws and Constitutions, under Law i: ‘It is fitting and lawful that We alone should interpret between equity and law.’” *Id.*, ob. 3. Cf. “Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere.” C 1.14.1.

⁵⁶ The first version of this example is found (again uncited by Aquinas) in the opening pages of the *Republic*. “Everyone would surely agree that if a sane man lends weapons to a friend and then asks for them back when he is out of his mind, the friend shouldn’t return them, and wouldn’t be acting justly if he did.” 331c. In *Plato: Complete Works*, ed. John M. Cooper, trans. G.M.A Grube, rev. C.D.C. Reeve, (Indianapolis: Hackett Publishing Company, 1997), 975.

the law is equity, and, as it is directed toward the common good, it is nonetheless clearly a virtue.

In response to three objections raised in the second article, Aquinas establishes the precise relationship between *epieikeia* and justice. The first of these objections claims that, based on Aquinas's own division of justice into two sorts (particular and legal), *epieikeia* cannot be a part of justice. Like legal justice, *epieikeia* is universal (and therefore not particular), and, because "its operation is beside that which is established by law," it cannot be a part of legal justice either. Because both law and equity have the same extension, the latter must lie outside the former. The second objection is etymological in nature. Because *epieikeia* literally means "above the just," it is claimed that it cannot be a part of justice. The third concerns the translation of *epieikeia* as "*modesta*" in the Vulgate and the claim of Cicero that modesty is part of temperance, not justice.

In response to these objections, Aquinas refers to his tripartite theory of virtues. According to this understanding, parts are of three kinds: integral, subjective, and potential. Integral parts are those parts that compose something ("as wall, roof, and foundations are parts of a house"), subjective parts are the species of a genus ("as ox and lion are to animal"), and potential parts are those parts of something that do not have the full power associated with the whole ("as the nutritive and sensitive powers are parts of the soul").⁵⁷ Virtues are analogously divisible into these same three parts, with the notion of subjective part (again, the relation between species and genus) being relevant for Aquinas's discussion of equity, as he now has a framework to support

⁵⁷ S.T. IIa-IIae, q. 48, a. 1.

Aristotle's claim *that* *epieikeia* is a type of justice precisely because it is a subjective part of justice. Moreover, because legal justice is subject to it, equity is a "higher rule of human actions."⁵⁸

Aquinas's account of *epieikeia* is firmly grounded in the text of the *Nicomachean Ethics*, and it reflects Aristotle's claims that equity is good (even though it is opposed at times to legal justice) precisely because it is one species of generic justice. Nevertheless, this account is relatively prosaic, and it does not touch on either the theory of statutory interpretation or the relationship between equity and friendship discussed above. Aquinas does address these themes, but not within his treatment of *epieikeia*.

Aquinas on Legal Interpretation

Although Aquinas provides only a brief example of how equity can trump the strict letter of the law in his explicit discussion of *epieikeia*, he does address the issue in his celebrated *Treatise on Law*.⁵⁹ In the sixth article of question 96 on the power of human law, Aquinas considers whether those under the law may act beside the letter of the law. Of the three objections raised, the most notable is the second: "Further, he alone is competent to interpret the law who can make the law. But those who are subject to the law cannot make the law. Therefore they have no right to interpret the intention of the lawgiver, but should always act according to the letter of the law."

Aquinas responds to the objections by noting that the end of every law is "the common weal of men," and, in fact, it is only virtue of this end that it "derives the

⁵⁸ *S.T.* IIa-IIae, q. 120, a. 1.

⁵⁹ *S.T.* Ia-IIae, qq 90-108.

force and nature of law.”⁶⁰ Law is not an end in itself, but only a means toward the common good. Therefore Aquinas states, citing the Digest, that “[b]y no reason of law, or favor of equity, is it allowable for us to interpret harshly, and render burdensome, those useful measures which have been enacted for the welfare of man.”⁶¹ A law may, in general, be conducive to the common good, yet in particular instances be harmful. This is (much like in the account of *epieikeia*) no fault of the lawgiver, who “cannot have in view every single case,” and therefore “shapes the law according to what happens most frequently.” Should a case arise in which the observance of law would be harmful, the law should be set aside. Aquinas presents the example of a law that the city gates be kept closed during a siege. Obviously such a law is generally conducive to the good of the city, yet, if it happened that citizens of the city were fleeing from the enemy outside the city walls, it would in actuality be harmful to leave the gates closed and helpful to open the gates to allow the citizens to escape the enemy and enter the city. In such a case, Aquinas claims, “the gates ought to be opened, contrary to the letter of the law, in order to maintain the common weal, which the lawgiver had in view.”

Having illustrated the general principle through an example, Aquinas makes an interesting note regarding the limits of the application of this principle. Unless the particular circumstance is one of “sudden risk needing instant remedy,” only those with proper authority are “competent...to expound what is useful and what is not useful for

⁶⁰ *S.T.* Ia-IIae, q. 96, a. 6.

⁶¹ *Cf.* D. 1.3.25. “Nulla iuris ratio aut aequitatis benignitas patitur, ut quae salubriter pro utilitate hominum introducuntur, ea nos duriore interpretatione contra ipsorum commodum producimus ad severitatem.” Although Aquinas attributes this statement to “the jurist,” the Digest actually attributes it to Modestinus, a student of Ulpian.

the state.” Those with authority are properly able to dispense from the laws even in cases that are not truly emergent. Only when faced with a true emergency that precludes the possibility of bringing the matter to an authority is the question of whether to set aside the law left to any person: “the mere necessity brings with it a dispensation, since necessity knows no law.”

By framing this question as one of dispensation, Aquinas indicates that, although this discussion is materially similar to that of *epieikeia*, he is here not attempting to demonstrate that deviation from the letter of the law can be virtuous, but instead that there exist situations where it is appropriate to dispense with the law as such in order to attain the common good. Dispensation is a technical term at canon law, and it is explicitly defined as something other than *epieikeia*: “Dispensation differs from abrogation and derogation, inasmuch as these suppress the law totally or in part, whereas a dispensation leaves it still in vigour; and from *epikeia*, or a favourable interpretation of the purpose of the legislator, which supposes that he did not intend to include a particular case within the scope of his law, whereas by dispensation a superior withdraws from the power of the law a case which otherwise would fall under it.”⁶² Dispensation is, therefore, not a type of statutory interpretation at all, which claims to

⁶² Jules Besson, “Dispensation,” in *The Catholic Encyclopedia* (New York: Robert Appleton Company, 1909), <http://www.newadvent.org/cathen/05041a.htm> (accessed March 14, 2013).

It lies far beyond the scope of this paper to investigate the full history of dispensation. It suffices to point out that sources suggest that the term is well defined and sufficiently technical to warrant careful attention. See, e.g., P. Trudel, *A Dictionary of Canon Law* (St. Louis: B. Herder Book Co., 1920), 78. “In special cases and for good reasons a pastor may dispense individuals and families subject to him from the laws of fasting and abstinence. He has no ordinary power of dispensing. A just and reasonable cause is necessary for a dispensation. If given by one with delegated power the dispensation would be invalid without this cause.”

apply the law as intended. Rather, it is a procedure in which the law is simply not applied to a particular case.⁶³

Such a distinction may be overly formal. In applying equity, a judge determines that a set of facts was not contemplated in the law as written, and he therefore rules as the legislator would have intended had those facts been considered and written into the law.⁶⁴ In making a dispensation, a proper authority determines that the application of the law to the facts would be harmful and therefore declines to apply the law in that case. The result is the same, even though the formal process is different. Law is, however, by nature a formal process, and, accordingly, Aquinas's decision to address this situation by means of dispensation is sufficient to show that *epieikeia* is simply not a part of his analysis.

Aquinas on Friendship

Given the prominent role of friendship in Aristotle's ethical system, it is perhaps somewhat puzzling that Aquinas never authored any single work dedicated to the topic and that, furthermore, a cursory review of the *Summa Theologiae* suggests that he largely ignores the topic therein as well.⁶⁵ Such a review will be shown to be in fact erroneous, but some effort is required to see how Aristotelian friendship is incorporated

⁶³ "Ex definitionibus autem quæ circumferri solent hæc videtur sufficiens: Dispensation est *legis humana relaxatio*." Francisco Suárez, *Tractatus de legibus* Lib. VI.X, in *Opera Omnia*, ed. Charles Berton (Paris: Ludovicum Vivés, 1856), 50.

⁶⁴ One can argue reasonably that the application of *epieikeia* is not properly speaking itself a matter of statutory interpretation. "En fin, la reconducción práctica no es una *interpretación* de la ley. Pues una ley tiene necesidad de ser *interpretada* cuando hay en ella palabras oscuras o disposiciones ambiguas. La interpretación busca la claridad, haciendo ver que el texto así interpretado o explicado es el que mayor expresa la voluntad del legislador: pone claridad en la formación de la ley, sin cambiarla." Juan Cruz Cruz, "Reconducción práctica de las leyes a la ley natural: la epiqueya," in *Anuario Filosófico* 41 (2008), 160.

⁶⁵ "Aquinas never wrote a work, or even a section of work, with the title '*De Amicitia*'." Daniel Schwartz, *Aquinas on Friendship* (Oxford: Clarendon Press, 2007), 1.

in Aquinas's philosophy. One challenge is linguistic: the expected translation of the Greek *philia* into Latin is *amicitia*, yet Aquinas appears to identify *amicitia* with *affabilitas*, the relatively minor social virtue of affability: "Therefore affability, which is what we mean by friendship, is a special virtue."⁶⁶ Aquinas claims, however, that *amicitia* has in fact two meanings. One "consists merely in outward words or deeds," while the other "consists chiefly in the affection whereby one man loves another and may result from any virtue."⁶⁷ This latter meaning of friendship most resembles the Aristotelian, and Aquinas states it is subsumed within the virtue of charity (*caritas*).

For Aquinas, charity is, along with faith and hope, a theological virtue. Unlike the practical virtues, which have their source in classical Greek thought, the theological virtues are entirely Christian in origin, and they involve a relationship to the divine that is absent in pagan philosophy. Charity is friendship, but, more specifically, "charity is the friendship of man for God."⁶⁸ Although charity is primarily a friendship of man for God, it extends to others as well. "Hence it is clear that it is specifically the same act whereby we love God, and whereby we love our neighbor. Consequently the habit of charity extends not only to the love of God, but also to the love of our neighbor."⁶⁹ In this way, Aquinas can maintain that Aristotelian friendship has been subsumed into the virtue of charity as the derivative love of one's neighbor resulting from one's love of God.

⁶⁶ *S.T. IIa-IIae*, q. 114, a. 1, s.c. "Ergo affabilitas, quae hic amicitia dicitur, est quaedam specialis virtus."

⁶⁷ *Id.*, ad 1.

⁶⁸ *S.T. IIa-IIae* q. 23, a. 1 co. "Unde manifestum est quod caritas amicitia quaedam est hominis ad Deum."

⁶⁹ *S.T. IIa-IIae* q. 25, a. 1 co. "Unde manifestum est quod idem specie actus est quo diligitur Deus, et quo diligitur proximus. Et propter hoc habitus caritatis non solum se extendit ad dilectionem Dei, sed etiam ad dilectionem proximi."

There is, however, one significant impediment to viewing friendship as neatly folded up within charity, namely, that Aquinas believes that “true” practical virtues are not to be found in unbelievers. “If, on the other hand, this particular good be a true good, for instance the welfare of the state, or the like, it will indeed be a true virtue, imperfect, however, unless it be referred to the final and perfect good. Accordingly no strictly true virtue is possible without charity.”⁷⁰ Unless a person’s actions are directed “to the final and perfect good,” i.e., God as understood in the orthodox Christian tradition, his actions are inherently flawed in that they are directed toward an imperfect end. Thus, for example, when an unbeliever acts justly, his action cannot be completely virtuous because it is not directed toward the ultimate end. Moreover, should an unbeliever perform an action that might otherwise be described as charitable, e.g., “as when they clothe the naked, or feed the hungry and so forth,”⁷¹ in accordance with his own (un)belief, that act is by nature sinful.⁷²

By imposing a requirement of belief upon otherwise virtuous acts, Aquinas’s conception of charity cannot be viewed as simply Aristotelian friendship plus friendship for God, since it renders acts that would be regarded as truly friendly by Aristotle as at best imperfectly friendly. Thus, it is hardly surprising that Aquinas neither believes that

⁷⁰ *S.T. IIa-IIae* q. 23, a. 7 co.

⁷¹ *S.T. IIa-IIae* q. 23 a. 1 arg. 1.

⁷² *Id.* ad 1. “The act of one lacking charity may be of two kinds; one is in accordance with his lack of charity, as when he does something that is referred to that whereby he lacks charity. Such an act is always evil: thus Augustine says (*Contra Julian.* iv, 3) that the actions which an unbeliever performs as an unbeliever, are always sinful, even when he clothes the naked, or does any like thing, and directs it to his unbelief as end.”

friendship renders justice unnecessary⁷³ nor that the “friendly justice” described in the first half of this thesis is of any great value. Friendship between men is reduced to something dependent upon the theological virtues, and therefore hardly robust enough to serve for the ordering of a city.

Conclusion

Although the Aristotelian influence is evident in Aquinas’s writings on *epieikeia* and on charity (but completely absent in the issue of dispensation, which presumably reflects a separate, canon law tradition), such influence is relatively formal. Nowhere does it develop or even imply the conclusion defended in the first section of this thesis, namely, that the exercise of Aristotelian equity is intended to simulate and stimulate friendly relationships among citizens, and in so doing it obviates the need for recourse to law. Aquinas’s lack of engagement this topic is most likely a result of his Catholic worldview and its doctrinal commitments.

Whereas for Aristotle the polis constitutes the highest forum for human interaction, Aquinas believes in the possibility of a human relationship with an all-loving God. More importantly, while Aristotle lived in a culture in which the laws were seen clearly to be a product of human activity and only one of many guides (and a relatively minor guide at that) to human action. For Aquinas, human law is derived from natural law,⁷⁴ which is itself participation in the eternal law,⁷⁵ which “is nothing

⁷³ See Schwartz, *supra*, 123-27.

⁷⁴ See *S. T.* Ia-IIae q. 95 a. 2.

⁷⁵ See *S. T.* Ia-IIae q. 91 a. 2.

else than the type of Divine Wisdom, as directing all actions and movements.”⁷⁶ Even twice removed from “the plan of government in the Chief Governor,”⁷⁷ human law is for Aquinas a much greater authority and certain guide to human action than it is for Aristotle.⁷⁸ As such, Aquinas simply is unable to consider Aristotelian friendship as a guide to human action superior to law, and, accordingly, his philosophy has no space for (nor any need of) a theory of equity like that of Aristotle.⁷⁹ Through this examination of the thought of one of Aristotle’s great medieval disciples, the friendly justice argued for in the first section of this thesis is thus further shown to be a product of the context in which it was formed, that of ancient Athens.

⁷⁶ *S.T. Ia-IIae* q. 93 a. 1.

⁷⁷ I.e., the eternal law. *S.T. Ia-IIae* q. 93 a. 3.

⁷⁸ This seems generally true even if one considers the issue of the relationship between human law and natural law to be weakened by the (in)famous maxim that “a law that is not just, seems to be no law at all.” *S.T. Ia-IIae* q. 96 a. 4.

⁷⁹ It should be noted that Aquinas faces much more flexible doctrinal constraints than do philosophers working in the Islamic or Jewish traditions. Such philosophers must grapple with a robust, detailed, and divinely mandated legal framework, and, not surprisingly, they do not explore issues of equity, dispensation, or friendship in the context of law. “Theology occupied an important, but definitely ancillary, place within the religious sciences in Islam. It was never considered the highest religious science or the ‘queen’ of the sciences as in Latin Christianity. That position was occupied by jurisprudence, whose practitioners were the custodians of the divine law. The authority to ascertain the principles of the law rested with them; they determined how it should be applied in new circumstances, and, what is more important, they alone had the final authority to pronounce on what constituted true belief and right action.” Musin S. Mahdi, *Alfarabi and the Foundation of Islamic Political Philosophy* (Chicago: The University of Chicago Press, 2001), 39. Further complicating the matter, it appears that Book V Chapter 10 of the *Nicomachean Ethics*, which contains Aristotle’s account of *epiēikeia*, was not translated into Arabic, and so would have been unknown medieval Jewish and Muslim philosophers.

This thesis had intended to conduct a comparative analysis of the concepts of equity as developed in the philosophy of Aquinas, Averroes, Alfarabi, and Maimonides, but the paucity of sources even tangentially related to the questions of equity, statutory interpretation, and friendship rendered such a plan relatively pointless. Nonetheless, it is perhaps somewhat fruitful consider to see how doctrinal commitments of deference to jurisprudence, when taken far beyond the Catholic framework in which Aquinas works, can affect the treatment of these topics.

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