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ARISTOTLE'S THEORY OF EQUITY

Roger A. Shiner*

I. INTRODUCTION

Analytic jurisprudence for several decades has been preoccupied with the debate between legal positivism and natural law theory. The two theories differ on many issues in legal philosophy.¹ One of them concerns adjudication in hard cases and the question of whether in hard cases courts have discretion. The thought that courts do have discretion is associated with legal positivism. Positivism defines the existence of law in terms of a social or institutional source. This definition leads easily to the ideas that a legal system is a limited system, that there are gaps in the law, and that to adjudicate in hard cases the court must go beyond the law. Natural law theory, by contrast, holds that the positive or human law of a jurisdiction does not exhaust the law of that jurisdiction as such. Other values or principles—natural, moral, metaphysical, and theological—are also part of the law. Discretionary gaps in the law are closed.

Another issue in recent legal theory has concerned the nature of legal rules. Legal positivism has tended to be more concerned with this issue because of its inclination to equate the law of a jurisdiction with the rules of that jurisdiction.² But the nature of legal rules can be discussed

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1. In ROGER A. SHINER, *NORM AND NATURE: THE MOVEMENTS OF LEGAL THOUGHT* (1992), I identify and discuss at some length seven such issues.

2. See H.L.A. HART, *THE CONCEPT OF LAW* (1961). Hart is perhaps the most well-known positivist. Joseph Raz, *Legal Principles and the Limits of Law*, 81 *YALE L.J.* 823 (1972), and NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* 152-56 (1978) have both defended a positivist theory of legal principles. For further discussion, see SHINER, *supra* note 1, at 71-87.

without presupposing legal positivism.³ Such discussions typically highlight the over- and underinclusiveness of rules. Schauer, for example, introduces the terminology of *particularistic* versus *rule-based* decision making.⁴ The former treats rules as “weightless rules of thumb”: The focus is always on the particularities of the supposed instantiation of the rule, and the rule is discarded as soon as following it in the instant case would not serve the underlying justification. Rules may or may not be formulated. If they are, and they are regarded as always capable of modification at the moment of application to the instant case, then such particularistic decision making is extensionally equivalent to decision making, according to the justifications alone. Rules are, in particularistic decision making, “transparent” to their underlying justifications. By contrast, in rule-based decision making, rules are not transparent to their underlying justifications. Rather, rules are “essentially frustrating, exercising their influence by getting in the way. They impede access to those facts that would otherwise, under a given theory of justification, be relevant to making the decision, and they interpose facts that would otherwise be irrelevant.”⁵

These issues seem to converge in the concept of equity. Equitable decision making accepts as the overall goal of adjudication the realization of justice in decision making. It accepts too the opacity of rules to their justification in terms of justice as the goal of adjudication. It seemingly involves courts in going beyond the law to reach the goal of justice in adjudication. Nonetheless, this appearance of convergence, I believe, is misleading from the point of view of legal philosophy. The issues of the nature of equity and of the existence of judicial discretion in hard cases are quite different. The earliest account of the nature of equity and equitable judgment is found in the writings of Aristotle. In this Article I aim to fulfill two projects simultaneously. The first project is the scholarly one of presenting a more satisfactory account of Aristotle's theory of equity than presently exists. The second project is to defend the theoretical claim just made: that the contemporary issue of judicial discretion in hard cases and the nature of equitable judgment are different issues. The two projects are complementary because, properly understood, Aristotle's theory of equity displays the distinctness of the two theoretical issues.

3. See FREDERICK SCHAUER, *PLAYING BY THE RULES* (1991) for the most detailed and helpful account. I have discussed Schauer's theory in Roger A. Shiner, *Rules of Power and the Power of Rules*, 6 *RATIO JURIS* 279 (1993).

4. SCHAUER, *supra* note 3, at 77-78.

5. *Id.* at 87.

Let us first, with as unprejudiced an interpretive eye as possible, look at some of the passages in which Aristotle talks about equity. The terms in Aristotle's Greek standardly translated "equity" and "equitable" are *epieikeia* and *epiekēs*, respectively. He uses them frequently throughout the *Nicomachean Ethics*, and often in the *Rhetoric* and *Politics* too.⁶ As he himself notes, he uses the terms in two senses.⁷ By far the most common meaning is the general one—*epieikeia* means simply "excellence" or "goodness." The *Nicomachean Ethics* illustrates typically this sense. In one passage, Aristotle says that, from the point of view of justice in rectification, it is indifferent whether a good man has defrauded a bad man or vice versa; the word for "good" is *epieikeis*, contrasted with *phaulos* for "bad."⁸ In three passages, however, Aristotle uses the terms to refer to a specific virtue, commonly said to be the virtue of equity, a particular kind of excellence.⁹ Aristotle pithily characterizes *epieikeia* in the specific sense as an *epanorthoma nomou, hei elleipei dia to katholou*,¹⁰ "a correction of law, where law falls short because of its universality." The *Rhetoric* describes the equitable as *to para to gegrammenon nomon dikaion*,¹¹ "that justice which lies beyond the written law." Understanding Aristotle's theory of equity is largely a matter of unpacking these dense remarks.

II. GAPS IN THE LAW

The image contained in the terms *elleipein* and its cognates¹² seems to recall recent discussion of judicial discretion and the issue of whether

6. I use here the Oxford Classical Text editions of these works: ARISTOTLE, *ARS RHETORICA* (W.D. Ross ed., 1959) [hereinafter *ARS RHETORICA*]; ARISTOTLE, *ETHICA NICOMACHEA* (I. Bywater ed., London, Oxford Univ. Press 1894) [hereinafter *ETHICA NICOMACHEA*]; ARISTOTLE, *POLITICA* (W.D. Ross ed., 1957) [hereinafter *POLITICA*]. Translations are my own.

7. *ETHICA NICOMACHEA*, *supra* note 6, at 1137a34-b2 ("We use the name by transference instead of 'the good' when praising other virtues.").

8. *Id.* at 1132a2-4; *see also id.* at 1121b24.

9. *ARS RHETORICA*, *supra* note 6, at 1374a18-b23; *ETHICA NICOMACHEA*, *supra* note 6, at 1137a31-38a3, 1143a19-32. Terence Irwin translates the specific virtue as "decency." *See* ARISTOTLE, *NICOMACHEAN ETHICS* 1137a33-b6 (Terence Irwin trans., 1985). This may serve for extended uses of *epieikeia* outside the specialized context of adjudication, but it does not make sense within that context. As I shall argue below, a judge is not simply being a decent chap when he or she judges equitably. It is part of the role of the judge so to act. Aristotle is an important legal theorist for having realized this.

10. *ETHICA NICOMACHEA*, *supra* note 6, at 1137b26-27.

11. *ARS RHETORICA*, *supra* note 6, at 1374a27-28.

12. *Cf. also* *ARS RHETORICA*, *supra* note 6, at 1374a26 (*elleimma*); *ETHICA NICOMACHEA*, *supra* note 6, at 1137b22 (*elleiphthen*). For reasons that will later become clear, *see infra* part V, I will not now assay a translation of the term. It is the root of our notions of "ellipsis" and "elliptical."

there are "gaps" in the law. The terms are indeed translated by some in the language of "gaps."¹³ The idea of "justice beyond the law," occurring also as it does amid the contrast between "natural" and "conventional" justice¹⁴ and "unwritten" and "written" law¹⁵ recalls the standard contrast between "natural" and "positive" law.¹⁶ Let me therefore begin by outlining some of the modern discussions and applications of the notion of "gaps in the law."

In *The Concept of Law*, H.L.A. Hart presented a certain theory of legal concepts and their application in adjudication. The following is a sketch of Hart's theory.

There are certain paradigm or clear cases of legal concepts; adjudication in cases involving such paradigms involves no fresh judgment and is straightforward. In other cases that come before the courts—hard cases, if you like—the application of legal concepts is unclear and a matter of dispute. The cases are borderline instances of legal concepts, or clear cases of more than one competing concept. In these hard cases the court, according to Hart, exercises discretion: It chooses itself how to proceed. It performs a quasi-legislative or rule-producing function. It acts creatively, not mechanically. It acts beyond the limits of the formally enacted standards and legal authorities that bind it.¹⁷

Hart's account of adjudication in hard cases is complex, and the above is intended to be no more than a brief summary sufficient for our purposes here. Hart puts it forward by way of defending a version of legal positivism. A few years later, Ronald Dworkin severely criticized Hart's emphasis on discretionary choice in his analysis of adjudication in hard cases.¹⁸ Dworkin distinguished three senses of "discretion"—two "weak" senses and a "strong" sense.¹⁹ A person may have discretion in a weak sense when (1) the decision that person must reach cannot be made mechanically but demands the use of judgment, while being nonetheless open to criticism for being badly made; or (2) when the decision a person

13. See, e.g., W. VON LEYDEN, *ARISTOTLE ON EQUALITY AND JUSTICE* 93-97 (1985); Constantine Georgiadis, *Equitable and Equity in Aristotle*, in *JUSTICE, LAW AND METHOD IN PLATO AND ARISTOTLE* 159, 160 (Spiro Panagiotou ed., 1987).

14. See *ETHICA NICOMACHEA*, *supra* note 6, at 1134b17-18.

15. See *ARS RHETORICA*, *supra* note 6, at 1368b7-9, 1374a19.

16. See Donald N. Schroeder, *Aristotle on Law*, 4 *POLIS* 17 (1981), for valuable skepticism as to the degree to which Aristotle's views may be thought of as "positivism" or "natural law theory" in the modern sense.

17. HART, *supra* note 2, ch. 7.

18. See Ronald M. Dworkin, *The Model of Rules*, 35 *U. CHI. L. REV.* 14 (1967), reprinted in RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* ch. 2 (1977) [hereinafter *TAKING RIGHTS SERIOUSLY*].

19. *Id.* at 32-34, reprinted in *TAKING RIGHTS SERIOUSLY*, *supra* note 18, at 31-33.

must reach is delegated to that person and is not open to review by anyone else. A person has discretion in a strong sense when he or she is simply not bound by standards set by authority: The decision may be criticized from the point of view of general rationality, but not from the point of view of the relevant discretion-granting institution. According to Dworkin, Hart wrongly attributes to judges in hard cases this latter kind of discretion. Dworkin denied the existence of "interstices" or discretionary "gaps" in the law. He argued for the presence in the law of legal principles as well as rules. Legal principles are standards which are requirements of justice or fairness or some other dimension of morality, but which are nonetheless properly legal standards, and standards which courts are as bound to follow as they are to follow Hartian legal rules.

In a characteristically striking image, Dworkin remarks that "[d]iscretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction."²⁰ Note how heavily spatial this image is—the image evokes the idea of a "gap in the law" in a fairly literal way. Other terms typically used in discussions of these issues—terms like "boundary," "limit," "outside," "adjoined," "covered," and so on—further exploit the resonances of this spatiality. Hart seems to assert and Dworkin to deny the existence of such "gaps in the law."

A discussion of spatial gaps in the law seems most appropriate in a case of first impression—an issue that has never come before a court or legislature, and with respect to which there is neither persuasive nor binding authority on which the court hearing the case may rely for guidance.²¹ Dworkin, however, in his criticism of Hart, supposes that legal positivism is committed to the notion of gaps in the law not only in cases that are "hard" in the sense of cases of first impression, but also in cases that are hard because, as Joseph Raz neatly puts it, "the law speaks with an uncertain voice or where [the law] speaks with many voices."²² Ac-

20. *Id.* at 32, reprinted in *TAKING RIGHTS SERIOUSLY*, *supra* note 18, at 31. Dworkin introduces the "doughnut" image prior to distinguishing his three senses of "discretion." By implication, therefore, he intends it to apply to all three. This seems to me a mistake; the image is most suited to the third "strong" sense, almost as much to the second "weak" sense, but hardly at all to the first "weak" sense. A person applying standards that demand the use of judgment in their application is hardly operating within a space between standards.

21. The question of whether computer programs and software are protected by current copyright legislation may be such a case. In general, striking technological leaps provide a steady source of such cases. See David I. Bainbridge, *Computers and Copyright*, 50 *MOD. L. REV.* 202 (1987); see also Andrew Grubb, *The Emergence and Rise of Medical Law and Ethics*, 50 *MOD. L. REV.* 241 (1987) (discussing impact of advances of medical science on development of law and ethics).

22. JOSEPH RAZ, *Legal Reasons, Sources, and Gaps*, in *THE AUTHORITY OF LAW* 53, 77 (1979).

according to Dworkin, legal positivism's thesis that courts have "strong" discretion in hard cases applies in both these latter kinds of cases. Dworkin himself argues that, because legal principles cover the whole area of law, in cases of first impression as much as in other hard cases, there is no hole within the doughnut and no discretion for judges.

III. EQUITY AND GAPS

This is not the place to try to settle the disagreement between Hart and Dworkin. I mention the debate only to illustrate how modern jurisprudence raises the issues of gaps in the law. The question now to be asked concerns the nature of equity and equitable judgment. Are we to regard equitable judgment as judgment occurring within gaps in the law? It seems plausible to answer affirmatively. Here is a standard contemporary text:

Developed systems of law have often been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship. Rules formulated to deal with particular situations may subsequently work unfairly as society develops. [Modern equity] is the body of rules which evolved to mitigate the severity of the rules of the common law. Its origin was the exercise by the Chancellor of the residual discretionary power of the King to do justice among his subjects in circumstances in which, for one reason or another, justice could not be obtained in a common law court.²³

It is not difficult to give an explanation of equitable judgment in terms of the spatial metaphors exploited by the idea of gaps in the law.

In the early stages of the development of a legal system there are few laws. This is not a problem until the society becomes more complex. Then situations arise that are not covered by the laws, or where a decision by way of strict application of those laws would be unjust. Courts should then exercise equitable judgment in the open area not covered by the laws. However, the body of law will grow, by both legislative and judicial activity. The area open for equitable judgment will decrease. In a fully developed modern legal system, there will be very little room for equity in the original sense at all. The law of equity is now constituted by legal rules of an orthodox kind; and is one specific branch of the law among others.

23. HANBURY & MARTIN: MODERN EQUITY 3-4 (Jill E. Martin ed., 14th ed. 1993) (footnote omitted).

Such a way of construing equity and equitable judgment, however, forces apart judicial discretion and equitable judgment. As the foregoing, brief account of the Hart-Dworkin debate has indicated, the issue of whether courts have strong discretion, of whether there are any "holes" in the legal "doughnut," is debated over the whole area of modern law. Even in an area of modern law that is extensively developed, followers of Dworkin and Hart will debate whether courts have strong discretion or whether they are bound by legal principles. If judicial discretion operates in a "gap" that is unaffected even by extensively developed law, and equity operates in a "gap" increasingly diminished by extensively developed law, it follows that each is a poor model for the other.

Judicial discretion supposedly operates even in a hard case that lies at the intersection of two or more rules. But that seems more like too much law than too little law, too stodgy a dough rather than a hole in the doughnut. Analogously, if a legal principle is sufficient to remove a "gap" in the law, legal principles pervade the whole of law, and equity operates only in gaps, then the whole notion of equitable judgment paradoxically seems mistaken from the start—paradoxically, because there just is preanalytically such a thing as equity and equitable judgment in adjudication. Moreover, it is a question of historical fact whether a legal system is at a stage of development such that there is extensive room for equity. The United Kingdom's legal system was in such a position several centuries ago; it is not now. Conversely, it is not a question of historical fact whether a legal system contains legal principles.²⁴

It seems theoretically more appropriate, therefore, to try to find a way of understanding equity and equitable judgment that does not construe equity merely in terms of quasi-literal gaps in the law. I shall now try to argue that the signal virtue in Aristotle's account of equity is to provide such an alternative account—to provide an account of equitable judgment that does not link it to gaps in the law.

IV. ARISTOTLE ON EQUITY

Equity in the specific sense is for Aristotle, and rightly so, a unique virtue. It is a moral virtue, discussed in Book V of the *Ethica Nicomachea* under the general heading of "Justice."²⁵ It is a virtue

24. Dworkin often seems to give the impression that the issue between himself and Hart is factual. I believe this impression to be deeply misleading, and have argued the point elsewhere. See SHINER, *supra* note 1, at 71-75.

25. Barden refers to equity as "an intellectual virtue or habit." Garrett Barden, *Aristotle's Notion of Epieikeia*, in *CREATIVITY AND METHOD* 353, 362 (Matthew L. Lamb ed., 1981).

paradigmatically of the judge and of others by extension. It is not a matter of making just any old sensitive judgment about a particular case.

Equity as a specific virtue has a specific social function: It is an *epanorthōma*, a “rectification,” of law. Such rectification is needed for a specific reason. Law, *nomos*, and the term may include both hardened custom as well as written or positive law, is *katholou*, “universal”²⁶ or *haplōs*, “simple.”²⁷ *Katholou* here does not mean “universal because of its subject matter.” *Katholou* means “is phrased in universal terms.” *Haplōs* means “simple” in the sense of “absolutely or without qualification.” A law says, “Stealing is forbidden,” “Assault is forbidden,” or whatever—with no apparent exceptions. But we are in fact operating in the domain of things about which there can only be truth for the most part.²⁸ In fact, despite what the law says, stealing is for the most part wrong, and so on. So the mien of universality worn by the written law is misleading.²⁹ Mechanical application of the law forbidding stealing will fail to do (as we say) justice to the legitimate exceptions to this universally phrased prohibition—as, for example, when one takes without permission a neighbor’s garden hose to fight a fire in one’s own house. There is therefore a need in adjudication for an accurate judgment as to whether the case before the court is one of the legitimate exceptions—for accurate judgment as to whether the ends of justice will be better served by, for example, finding in the defendant’s favor despite his or her being technically liable. Aristotle gives the example of a person who brushes against another while wearing a finger-ring, thus becoming technically guilty of assault.³⁰ Decisions whether to proceed with a prosecution may have the same form as decisions to be taken by a court.³¹ Equity is the Aristotelian virtue that represents the exercise of making such tailor-made, particularized judgments.³²

This is a mistake. Barden illegitimately infers from the fact that *phronēsis*, “practical wisdom,” plays a role in the exercise of equity that equity is itself an intellectual virtue.

26. Cf. ARS RHETORICA, *supra* note 6, at 1374a30-31; ETHICA NICOMACHEA, *supra* note 6, at 1137b13-15, 1137b20-21, 1137b27.

27. Cf. ARS RHETORICA, *supra* note 6, at 1374a34; ETHICA NICOMACHEA, *supra* note 6, at 1137b22, 1137b25.

28. ARS RHETORICA, *supra* note 6, at 1374a31; ETHICA NICOMACHEA, *supra* note 6, at 1137b15-16.

29. ARS RHETORICA, *supra* note 6, at 1374a30-b1; ETHICA NICOMACHEA, *supra* note 6, at 1137b13-16.

30. ARS RHETORICA, *supra* note 6, at 1374a32-b2.

31. Cf. ETHICA NICOMACHEA, *supra* note 6, at 1137b33-38a2.

32. Barden rightly sees that the judge must both see the case as *prima facie* falling under the rule and see the case as, if it is, an equitable exception. Barden, *supra* note 25, at 358-66. But he regards the two “seeings” as systematically distinct, one being universal and the other particular. Each, however, is “particular,” though the first might be an exercise of justice in a

These points constitute the core of Aristotle's developed theory of equity as an *epanorthōma* or rectification of law, the rectification being required because of law's misleading universality. If we are to assess aright the merits of the theory, we must look more deeply into its underlying rationale.

V. DISCRETION AND GAPS

There is a sense in which both Dworkin and Hart agree that as a matter of fact judges in hard cases frequently *exercise* strong discretion—that is, that judges frequently act as though they were not bound by anything other than finite legal rules. Dworkin, however, does not think judges are entitled so to act—that is, that judges do not *have* strong discretion³³—whereas Hart thinks that judges are entitled so to act, and do have strong discretion. Dworkin's explanation of the fact that judges operate as if there are gaps in the law is in terms of contingent fact—judicial blindness, stupidity, laziness, failure to read Dworkin, or whatever. For Dworkin the metaphysics of adjudication do not underwrite the existence of strong discretion.³⁴

Hart's own explanation for why judges have discretion is unclear, and even muddled. In the space of three pages he canvasses three different accounts while seeming to regard them as all versions of the same account.³⁵ He writes: "Particular fact-situations do not await us already marked off from each other, and labelled as instances of the general rule, the application of which is in question; nor can the rule itself step forward to claim its own instances."³⁶ This remark suggests that every recognition of a case as falling under a rule is discretionary. Such a thought is more characteristic of Rule Skepticism³⁷ than of Hart's own view, which rejects Rule Skepticism as much as it does Formalism and "mechanical jurisprudence." In the same vein he speaks of general lan-

wider sense than equitable justice. Barden has again been misled by his overintellectualizing of moral judgment. *See infra* part VI.

33. The distinction between "having" and "exercising" discretion is made, and its importance shown, in Wilfrid J. Waluchow, *Strong Discretion*, 33 PHIL. Q. 321 (1983).

34. Dworkin addresses the metaphysical dimension of his theory in TAKING RIGHTS SERIOUSLY, *supra* note 18, chs. 4, 6. But this is not to say that Dworkin has an adequate metaphysics. I have argued elsewhere that he does not. *See* SHINER, *supra* note 1, chs. 7, 8, 12.1-2.

35. HART, *supra* note 2, at 123-25.

36. *Id.* at 123.

37. *See, e.g.*, CARLETON KEMP ALLEN, LAW IN THE MAKING 290 (7th ed. 1964) ("The humblest judicial officer has to decide for himself whether he is or is not bound, in the particular circumstances, by any given decision of the House of Lords.").

guage itself as being "open-textured"³⁸—as vivid a metaphor as talk of "gaps" and "doughnuts," and seemingly similar in its spatial connotations. Second, Hart suggests that there will be plain cases where the general term is clearly applicable, and that there is uncertainty only at the borderline.³⁹ This suggestion would imply that courts can exercise discretion only in hard cases. Third, he speaks in a well-known passage of "the human predicament" and our twin "handicaps" of "relative ignorance of fact" and "relative indeterminacy of aim."⁴⁰ These thoughts suggest an explanation of the having of discretion in terms of human psychology, not human language. Missing except for one allusion is any deeper account at the metaphysical level of why it is that these things are so. Hart postulates a world "characterized only by a finite number of features," which would be "a world fit for 'mechanical' jurisprudence"⁴¹—that is, a world in which courts have no discretion. But, he continues, "plainly this world is not our world."⁴² He then immediately reverts to psychological talk—to the inability of human legislators to anticipate the future.⁴³ However, is that all we can do? Must we simply assert without a deeper metaphysical account that the world is infinite and rely heavily on issues of epistemology and psychology to explain nonmechanical adjudication?

VI. EQUITY NOT A MATTER OF "GAPS" FOR ARISTOTLE

I find one signal virtue of Aristotle's account of equity to be that he does not associate equity with gaps in the law, and that he does attempt to give a deeper explanation of the need to "go beyond the written law."

The *ellepein* image, which, as already noted⁴⁴ is an integral part of Aristotle's theory of equity, does not connote "gaps" in the hole-in-a-doughnut sense. The image, rather, connotes a distance between two things, a falling short.⁴⁵ Aristotle's use of the term *elleipsis* and its cog-

38. Hart borrows the term "open texture" from Friedrich Waismann. See Friedrich Waismann, *Verifiability*, in LOGIC AND LANGUAGE 117 (Antony Flew ed., 1963).

39. HART, *supra* note 2, at 124-25. In an earlier work Hart had applied the metaphors "core" and "penumbra" to concepts. See H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 607-08 (1958), reprinted in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 49, 63-64 (1983).

40. HART, *supra* note 2, at 125.

41. *Id.*

42. *Id.*

43. *Id.*

44. See *supra* notes 12-13 and accompanying text.

45. The technical use of the term *elleipsis* in geometry came long after Aristotle. Moreover, it does not connote "gaps" either. An ellipse is the figure produced when a cone is cut obliquely by a plane making a smaller angle with the base than the side of the cone makes with

nates in his theorizing about practical judgment focuses on the celebrated doctrine of the mean, which recurs constantly in the *Nicomachean Ethics* and the *Politics*. Virtue is a mean between two vices, the vices of exceeding the mean and of falling short of the mean (*kat' elleipsin*); the vices fall short (*elleipein*) or exceed what is required in both passions and actions, while virtue finds and chooses that mean.⁴⁶ For instance, injustice is defined in terms of an "excess" or "falling short" (*elleipsis*) with respect to justice.⁴⁷ Elsewhere Aristotle uses the verb *parekbainein*—literally "to step aside from"⁴⁸—and that has connotations far from holes in doughnuts and open-weave cloth.

"Falling short" and "exceeding" are of course still spatial metaphors. Moreover, whenever any person or thing falls short of a standard, there is in a sense a "gap" between the point on the scale actually reached and the point on the scale of the standard. Fallings short, however, are not doughnut-style or open-weave gaps. The dominant idea is that of a linear deviation from a line or mark. Aristotle means by his use of *elleipsis* and its cognates in his discussion of equity simply that the written law falls short of a standard. Equity rectifies written law by compensating for the deficiency of its inevitably universal schema. Written law inevitably falls short of the standard of applicability that it wears on its linguistic face. Written law speaks universally and absolutely, but it has no right to do so. Equity corrects that deficiency.

Aristotle does of course invite the analogy with Dworkinian hole-in-a-doughnut discretion and gaps in the law by his references to the hypothetical judgment of the legislator.⁴⁹ In particular, when Aristotle remarks that the equitably just is something that the legislator *ei hēdei enomothetēsen*,⁵⁰ "would have legislated if he had known," he seems to imply that further legislation would fill a gap that, absent such legislation, is the job of equity to fill. The passage is also reminiscent of Hart's talk of indeterminacy of aim and ignorance of fact. The position of the legislators with respect to equity is mentioned in the *Rhetoric*.⁵¹ There Aristotle says that the defect in the law remedied by equity is partly *akonton* and partly *hekonton*. The Oxford translation is "not in-

the base. It is not the "gap" between the said plane and the side of the cone that is significant, but rather the falling-short of the plane from the side.

46. *ETHICA NICOMACHEA*, *supra* note 6, at 1107a2-6.

47. *Id.* at 1134a6-12.

48. *Cf.*, e.g., *id.* at 1109b19; *POLITICA*, *supra* note 6, at 1325b6.

49. *See* *ARS RHETORICA*, *supra* note 6, at 1374a29-b2; *ETHICA NICOMACHEA*, *supra* note 6, at 1137b22-24.

50. *ETHICA NICOMACHEA*, *supra* note 6, at 1137b23-24.

51. *ARS RHETORICA*, *supra* note 6, at 1374a27-b1.

tended,"⁵² but this translation is misleading. Such terms make it sound as though the legislators willed the law to be deficient or not, as the case may be. But Aristotle does not mean that so much as "unwillingly" or "wishingly."⁵³ Aristotle paints the legislators as unaware or aware, as the case may be, of the inevitable deficiencies of the laws they pass. In the latter case, the legislator "wishes for" the equitable correction in the court; he accepts with equanimity the court's decision as being in some way the result he really intended—the just result. Likewise, the legislator is described as *ouk agnoon to hamartomenon*,⁵⁴ "not unaware of the mistake," of legislating universally in the domain of truth-for-the-most-part. In acting in full awareness of mistake, however, the legislator is still acting in *ouden hēton orthōs*,⁵⁵ "no less rightly," in passing laws cast in universal mode.

Here we can see a connection with Schauer's work on rule-based decision making and on the inevitable under- and overinclusiveness of rules, and the opacity of rules to their justification. Aristotle is entitled really only to talk about "mistakes" in scare-quotes. The failure of the legislative rule to cover every case that might occur is not a fault in the rule, but a characteristic, even defining, feature of an enacted rule. As Schauer shows in *Playing by the Rules*,⁵⁶ there can be many good reasons for deploying a regime of rule-based decision making. If the rule that the equitable judge transcends is part of such a justified scheme, then the legislator indeed acted rightly in enacting the rule, and—especially if he or she has read *Playing by the Rules!*—can indeed conceptualize and even wish for the court's "correction" as something envisaged by the legislative act which produced the rule.

VII. ARISTOTLE ON THE ONTOLOGY OF EQUITY

The element that uniquely distinguishes Aristotle's discussion of equity is the emphasis on *hulē*, "matter," on the subject matter itself of equitable judgment. The emphasis is explicit only in the *Nicomachean Ethics*.⁵⁷ The mistake, Aristotle says, is really in neither the law nor the legislator, but "in the nature of the business,"—*euthus gar toiautē hē ton*

52. 2 ARISTOTLE, RHETORIC, in THE COMPLETE WORKS OF ARISTOTLE 1374a28 (Jonathan Barnes ed. & W. Rhys Roberts trans., 1984). *The Complete Works of Aristotle*, is a two-volume compilation of English translations of Aristotle's work.

53. I am grateful to Michael Stokes both for suggesting this translation and for clarifying the philosophical issues involved.

54. ETHICA NICOMACHEA, *supra* note 6, at 1137b16-19.

55. *Id.* at 1137b17.

56. *See supra* note 3.

57. *See Ethica Nicomachea, supra* note 6, at 1137b17-19.

prakton hulē estin,⁵⁸ for from the very start such is the matter of practical affairs. The same emphasis is implicit in the references to the domain of truth-for-the-most-part,⁵⁹ and to indefiniteness—*hotan mē dunontai diorissai, aoriston*.⁶⁰

Hulē, “matter,” is a technical term in Aristotelian metaphysics, and we are to hear the technical resonances in the references to *hulē* in the account of equity. “Matter” plays a crucial role in Aristotle’s classification of the sciences.⁶¹ Aristotle distinguishes systematically between the theoretical sciences and the practical sciences, and within the former between those that study material objects and those that study immaterial objects. Proper universality is attainable in the abstract sciences because these sciences study immaterial objects. In them, there is universal truth, not merely schematically universal language, and there is demonstration.

The situation is different for both the theoretical sciences that study material objects and the practical sciences. Universality in each case is at the mercy of matter. Materiality brings with it accident, and so physics and biology are vulnerable to chance and spontaneity. The practical sciences can claim but truth for the most part, *hōs epi to polu*.⁶² This distinction in the kind of truth attainable by each kind of science reflects the nature of the subject matter of each kind of science, a feature of the *hulē*, “matter,” with which the scientist or the practical agent has to work.

It is the mark of an educated man, Aristotle tells us in a famous passage, to look for precision in each class of things just so far as the nature of the subject permits.⁶³ Consider likewise, in the discussion of equality, the modality of the expression *hōste psēphisma dei*, “so a decree is necessary,” and the force of the “lesbian moulding” analogy.⁶⁴ Decrees and “flexible lead” rules are necessary because of the subject matter, not because of inefficiency and poor craftsmanship. It would be a failure of craftsmanship *not* to use such devices. No craftsman is perfect, but that is in part because the materials contain imperfections. Some craftsmen are the best they can be—that is to say, the best.⁶⁵

58. *Id.* at 1137b19.

59. See ARS RHETORICA, *supra* note 6, at 1374a30; ETHICA NICOMACHEA, *supra* note 6, at 1137b15-16.

60. See ARS RHETORICA, *supra* note 6, at 1374a30-34; ETHICA NICOMACHEA, *supra* note 6, at 1137b28-29.

61. See ARISTOTLE, METAPHYSICA 1025b3-26a22 (W. Jaeger ed., 1957).

62. ARS RHETORICA, *supra* note 6, at 1374a31.

63. See ETHICA NICOMACHEA, *supra* note 6, at 1094b23-25.

64. See *id.* at 1137b29-32.

65. Sorabji exploits the “lesbian rule” analogy quite properly: “Equity arises because the written formulae of the law are too general to fit all the variations of particular circumstances

Aristotle's thought in the second of the passages mentioned at the very beginning⁶⁶ links *phronēsis*, "practical wisdom," and both the general and the specific senses of *epieikeia*. Aristotle says of the intellectual virtues and their associate state of mind that *eulogōs eis tauto teinousai*⁶⁷—"as one might expect, they all converge." The point on which they converge is that *eschaton eisi kai kath' hekaston*⁶⁸—"they all deal with particular cases." The exercise of *phronēsis*, as one isolable element in ethical practice, is precisely the successful managing of constraints placed upon the agent by his or her subject matter. Judgment about a particular case in the area of practice is ineluctably particular: It is always necessary for the judge to determine whether the case in question is one of the "many" or one of the exceptions.

Practical wisdom consists generally in judging correctly about the particular case when, because of the "matter" of practical judgment, there are no absolutely universal truths to determine judgment as to what shall be done. Equity consists also in correct judgment about a particular case in the face of an absence of universal truth. Legislators pass laws that are universal in form—*katholou* or *haplōs*;⁶⁹ the form is "Everyone who" Their subject matter, however, being practical, countenances merely assertions that are for the most part, *hōs epi to polu*.⁷⁰ The judge has to deal with the particular case, and it may or may not fit neatly within a universally phrased law.⁷¹ The kind of judgment exhibited when a court judges equitably is therefore a paradigm of the kind of judgment exhibited in any case of the exercise of practical wisdom.

The emphasis on matter, however, is only part of a larger doctrine. Speaking very crudely, one might within metaphysics distinguish epistemology and ontology. My complaint against modern discussions of judicial discretion and gaps in the law might be construed as a complaint that they ignore the ontology of adjudication. Aristotle's emphasis on matter supplies an ontological account of why equity is needed as a correction of law. But it must not be supposed that Aristotle ignores the epistemology of practical judgment in general, and a fortiori of equitable judgment. He gives *aisthēsis*, "perception," and *nous*, "intuition," a cru-

. . . cases which the generalisations of the written law do not fit." RICHARD SORABJI, *NECESSITY, CAUSE, AND BLAME: PERSPECTIVES ON ARISTOTLE'S THEORY* 261 (1980).

66. *ETHICA NICOMACHEA*, *supra* note 6, at 1143a19-32.

67. *Id.* at 1143a25.

68. *Id.* at 1143a29.

69. *ARS RHETORICA*, *supra* note 6, at 1374a30-31; *ETHICA NICOMACHEA*, *supra* note 6, at 1137b13-17.

70. *ARS RHETORICA*, *supra* note 6, at 1374a31.

71. *Id.* at 1374a34-35; *ETHICA NICOMACHEA*, *supra* note 6, at 1137b20-24.

cially important role in Book VI, chapters 8 and 11, of the *Nicomachean Ethics* in the analysis of practical judgment.⁷² Perception and intuition are intrinsic to practical judgment, because they and only they are modes of appreciation of the particular, and practical judgment is also inevitably of the particular. Epistemology and ontology are symbiotic here; each is the complement of the other.

Here too a comparison with Schauer on rule-based decision making is instructive. Even though, as I indicated above, Schauer draws the valuable distinction between rule-based and particularistic decision making,⁷³ he does not confront the underlying ontological issue in any overall theory of decision making—namely, to what extent is particularistic decision making coherent at all as a mode of decision making? Particularistic decision making in the legal context is nothing more than so-called palm tree justice, the wise person of the tribe considering every individual case on its merits and coming up with the just decision. We recognize that to be a fantasy in the modern world. But we do not face the constant power that the fantasy has over us when we think about justice in adjudication.⁷⁴ Nor do we face the consequences for theories of adjudication of this image being both powerful and a fantasy.⁷⁵ To take fully on board the Aristotelian claim that attention to the particular case is the essence of adjudication, even though adjudication must proceed via under- and overinclusive rules, is the first step towards understanding, and so breaking, the hold of the fantasy of Hercules and of the ideal palm tree judge.

It is true, I realize, that perhaps only from our vantage point where there is a great deal of settled, positive, written law can we clearly see the conceptual difference between equitable judgment and discretionary adjudication in hard cases. It would be rather easy for Aristotle to conflate the fact that a written law wrought injustice because it claimed universality where it could not have it, and the fact that a written law wrought injustice because the legislature did not get it right the first time, or had not yet gotten around to dealing with the issue. And of course also at that time there would have been any number of those gaps in the law that

72. The relevant passages are *ETHICA NICOMACHEA*, *supra* note 6, at 1142a23-30, 1143a25-b14. I have defended the significance of the emphasis on *aisthēsis* elsewhere. See Roger A. Shiner, *Aisthēsis, Nous and Phronēsis in the Practical Syllogism*, 36 *PHIL. STUD.* 377 (1979); Roger A. Shiner, *Ethical Perception in Aristotle*, 13 *APEIRON: J. FOR ANCIENT PHIL. & SCI.* 79 (1979) (The longer typescript referred to therein remains unpublished. *Id.* at 84 n.3.).

73. See *supra* notes 3-5 and accompanying text.

74. Dworkin's idealized judge Hercules, who gets every case right, is an embodiment—and a powerful one too—of this fantasy. See *TAKING RIGHTS SERIOUSLY*, *supra* note 18, at 105-30.

75. Cf. SHINER, *supra* note 1, chs. 7-8.

do result from legislatures not yet getting around to legislating on the matter. So Aristotle's conflation of the two is excusable.

Nonetheless, it is easy to say confusing things about Aristotle's view. Von Leyden, for instance, translates the crucial phrase *ta de tou idiou nomou kai gegrammenou elleimma*⁷⁶ as "covers a gap left uncovered by law proper."⁷⁷ Nonetheless, the quite appropriate thrust of much of von Leyden's explication is to insist that an equitable judgment confirms, rather than refutes, the general rule that it "corrects."⁷⁸ He regards the general rule as already tacitly containing the qualification that equity proffers. But if that is so, then equity operates under the umbrella, as it were, of the rule, rather than in a gap left by the rule. Equity does not refute the rule because the rule has the exception already built into it. No gaps in the law exist here. Von Leyden also takes *katholou* to mean "vague" or "indeterminate."⁷⁹ This is a mistake; Aristotle does not mean to say that the truths of abstract sciences and the first principles of demonstration are vague. However, it is this mistaken construal that underwrites the talk of "gaps."

VIII. CONCLUSION

Let me now sum up this discussion of equity and gaps in the law. There are four features of Aristotle's theory of equity that may tempt interpreters to see him as speaking to the same issues as modern jurisprudential writers analyzing judicial discretion: (1) Aristotle uses the language of *elleipsis* and its cognates; (2) he speaks of equity as supplementing the judgment of the legislature; (3) he speaks of the legislator as restricted by the impossibility of anticipating every possible circumstance in which the law might apply; and (4) he regards equity as a properly judicial virtue. All the same, it would be misleading to look at Aristotle from the perspective of these recent discussions. It is wrong to construe the *elleipsis* image in terms of "gaps." There are for Aristotle no universal truths in the domain of the practical, which mundane minds feebly and inadequately aim to capture. Rather, for Aristotle, practical judgment is ineluctably perceptual and intuitive; the subject-matter of *praxis*, "practice," ensures as much. Equity is the virtue shown by one particular kind of agent—a judge—when making practical judgments in the face of the limitations of one particular kind of practical rule—those

76. ARS RHETORICA, *supra* note 6, at 1374a25-26.

77. VON LEYDEN, *supra* note 13, at 96 (footnote omitted).

78. *Id.* at 95-97.

79. *Id.* at 93.

hardened customs and written laws that constitute for some society that institutionalized system of norms that is its legal system.

In his discussion of *epieikeia*, "equity," Aristotle speaks in other ways that have tempted commentators to construe him as a contributor to modern debates. In the *Rhetoric*, he distinguishes *nomos idios*, "particular law," and *nomos koinos*, "universal law."⁸⁰ The latter is law *kata phusin*, "law in accord with nature." The former is divided into *nomos agraphos*, "unwritten law," and *nomos gegrammenos*, "written law." Particular unwritten law comprehends both acts that are above and beyond the call of standard virtue and acts of equity.⁸¹ In the *Nicomachean Ethics*, Aristotle, having distinguished *to haplōs dikaion*, "the absolutely just," and *to politikon dikaion*, "the just in a state,"⁸² then divides the latter into *to phusikon*, "the natural part," and *to nomikon*, "the conventional part."⁸³ The latter is also characterized as *nomikon kai sunthēkēi*,⁸⁴ "conventional and by agreement," *kata sunthēkēn kai to sumpheron*,⁸⁵ "by agreement and expediency," and *anthrōpina*,⁸⁶ "human." Equity is then said to be *ou kata nomon*,⁸⁷ "not according to law," but an *epanorthōma nomimou dikaiou*,⁸⁸ "a correction of the conventionally just."

It is clearly tempting to see in these texts a distinction between "positive law" and "natural law" as those terms figure in modern debates. The talk of "unwritten law," "natural justice," and so forth makes the temptation almost irresistible. Nonetheless, it must be resisted, for two different reasons. The first reason is philosophical and two-fold. One, as a supposed systematic and technical distinction in jurisprudence, the contrast of natural law and positive law is a child of medieval legal theory, and in particular Thomas Aquinas. No one denies the influence of the Philosopher on Aquinas, but nonetheless one must be wary of reading back into Aristotle Aquinean doctrines—descendants though the latter may be of Aristotelian doctrines. Thus, we must be careful in the present case not to see Aquinean notions of positive and natural law in the Aristotelian texts. Two, it would be a mistake to suppose that—as might occur in a positivistic statement about the separation of law and

80. ARS RHETORICA, *supra* note 6, at 1373b4-6.

81. *Id.* at 1374a18-26.

82. ETHICA NICOMACHEA, *supra* note 6, at 1134a25-26.

83. *Id.* at 1134b18-19.

84. *Id.* at 1134b32.

85. *Id.* at 1134b35.

86. *Id.* at 1135a3.

87. *Id.* at 1137b12-13.

88. *Id.*

morals—the notion of “separation” has some simple, clear, theory-independent, and established meaning. Even Hart distinguishes many different things that such a “separatist” claim and its denial might amount to, the separatist version of some of which even a legal positivist like Hart feels justified in rejecting.⁸⁹ We therefore need to look very warily at any claim that for Aristotle natural law is separate from positive law—and, for that matter, equally warily at any claim that for Aristotle natural law is not separate from positive law.

The second reason concerns the Greek text itself. As has been remarked by scholars,⁹⁰ *nomos* does not mean exclusively “enacted” or “written” law—that is, “positive law” in the modern legal positivist’s sense. It comprehends both customs and formal enactments. The Oxford translation’s “by human enactment” for *anthrōpina*⁹¹ is simply a mistake; nothing in the Greek text corresponds to “enactment.” *Nomos gegrammenos*, of course, means “written law.” Aristotle is careful, however, as I have just noted, to say both in the *Rhetoric* that the law of a particular state comprehends both a written and an unwritten part, and in the *Nicomachean Ethics* that “political justice” comprehends a “natural” part. It is important also to notice the constructions of the different Greek phrases. To speak generally of “natural law” or “natural justice” disguises the fact that only rarely does Aristotle use the adjective *phusikos* with a noun. Instead, we find *nomon koinon ton kata phusin*,⁹² “universal law in accord with nature,” and *dikaion phusei*,⁹³ “just because of nature.” Even in the *Nicomachean Ethics*, while the word *phusikon* is functioning as a noun for a part of justice,⁹⁴ and the expression *ta phusika dikaia* occurs shortly thereafter,⁹⁵ there are in between six occurrences of the *phusei* construction and immediately thereafter one of the *kata phusin* construction.

I cannot of course here attempt a full exposition of what exactly Aristotle takes to be the connection between “law” or “convention” and “nature.” The project of exposition would be a major one. The essay by Schroeder⁹⁶ begins this task, and Schroeder’s conclusion is properly a

89. HART, *supra* note 2, at 198-207.

90. See, e.g., 3 W.K.C. GUTHRIE, A HISTORY OF GREEK PHILOSOPHY 56-57 (1969); VON LEYDEN, *supra* note 13, at 76; Schroeder, *supra* note 16, at 22, 28.

91. ETHICA NICOMACHEA, *supra* note 6, at 1135a4; 2 ARISTOTLE, NICOMACHEAN ETHICS, in THE COMPLETE WORKS OF ARISTOTLE, *supra* note 52, at 1729 (W.D. Ross trans., revised by J.O. Urmson).

92. ARS RHETORICA, *supra* note 6, at 1373b6.

93. *Id.* at 1373b7, 1373b10-11.

94. ETHICA NICOMACHEA, *supra* note 6, at 1134b18-19.

95. *Id.* at 1135a4-5.

96. Schroeder, *supra* note 16.

cautious one: "Aristotle's legal ideas fit into neither the natural law nor the postivist tradition, but have certain features in common with both."⁹⁷ Aristotle's conception of ethics, politics, and law is fundamentally organic—the state and its citizens, their decisions and its laws, are part of the natural world. The natural life of the human creature is a political life. Humans live in states and make laws as naturally as they procreate and die. Aristotle's theory of equity, both in its content and in its underlying metaphysics, is an essential part of this total view. By nature we need equity and according to nature we judge equitably as the situation demands. Some concept of "written" or "enacted" law is needed to make sense of the former, and some concept of "natural" law to make sense of the latter. But that these concepts are the "positive law" and "natural law" of contemporary debates is unlikely.

There is a tendency for certain pictures to hold captive contemporary legal theory. One of the most powerful is what I have elsewhere called the "concentric spheres" model of the relation between law and morality.⁹⁸ In this model the sphere of the individual is the widest of all. Within that the (mature) individual makes choices as to where, when, and how to enter the sphere of moral life. Within moral life is the narrower sphere still of law. Having made the choice of his or her moral values, the individual further chooses whether to accept or reject the authority of law. Law is a limited institution. Largely, it is a matter of fact what laws there are and what they enjoin. When the command of law is uncertain, moral judgment or policy comes to the aid of the court—some would say by the exercise of a possessed discretion, others would say through a judicial obligation to follow moral principle.

I want to note here in closing two things. First, consider how far the concept of "morality" and the concept of "law" in this picture are interdependent.⁹⁹ Morality is defined by exclusion from law as much as law by exclusion from morality. Morality is "beyond" the "limits" of law, which is "inside" morality. One may stand "outside" law to judge its authoritativeness. The same spatial metaphors as we have been discussing are deeply influential. Second, consider how far Aristotle's theory of law, as typified by his theory of equity, does not combat the "concentric spheres" model directly. Aristotle does not accept such a concept of "morality" and then argue against legal positivism that "law"

97. *Id.* at 30.

98. For a fuller discussion of the "concentric spheres" model, see SHINER, *supra* note 1, at 301-21.

99. I have said much more about this interdependence and its significance for legal theory in Roger A. Shiner, *Justice in the Garden of Eden*, 63 PHIL. 301 (1988).

in that sense is not "separate" from "morality" in that sense after all. Nor does he argue that "morality" in that sense covers "gaps" in the "law" in that sense. Rather, his metaphysical, organic, and holistic vision of how the individual, law, and society function together to promote the simultaneous flourishing of citizen and city offers a radically different perspective on human social life and its complexities. The real failure of those who find in Aristotle's theory of equity talk of gaps in the law and "natural" and "positive" law is profound. They fail to realize how total is the opposition between the Aristotelian and the liberal individualist visions of social life.¹⁰⁰ The issue of the correct interpretation of Aristotle's theory of equity is but one skirmish in a far broader and deeper confrontation.

100. This is of course becoming recognized in that variety of recent political theory dubbed "communitarian." The argument is developed at length by ALASDAIR MACINTYRE, *AFTER VIRTUE* chs. 9-19 (2d ed. 1984); see also MICHAEL SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* (1982); CHARLES TAYLOR, *HEGEL AND MODERN SOCIETY* (1979).