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ARISTOTLE ON EQUITY, LAW, AND JUSTICE*

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I. INTRODUCTION

In a famous passage in his *Ethics*, Aristotle considers the nature of equity and its relation to justice.[1] His conclusion seems to be that equity's role is to prevent the law from adhering too rigidly to its own rules and principles when those rules and principles produce injustice. Hence equity permits judges to depart from legal principle in order to promote justice. In this article, however, I argue that this conclusion is problematic as it is inconsistent with other claims Aristotle makes, both in his short discussion of equity in the *Ethics* and elsewhere. Accordingly, I suggest a reinterpretation of Aristotle's view that explains more satisfactorily the connection between law, in its various senses, and justice.

II. FORMS AND KINDS OF JUSTICE

For Aristotle, "justice" has both a particular and a general meaning. In its general sense, it is a synonym for virtue; the just man being the virtuous or good man. Conversely, in its more particular sense, the only sense with which we are interested here, justice is concerned with only part of virtue: giving persons their due. Aristotle maintains that particular justice has two forms: distributive and corrective.[2] He also describes a kind of justice—legal justice—and identifies equity in relation to both legal justice and particular justice.

* I would like to thank John Gardner and the anonymous reviewer for *Legal Theory*.

1. ARISTOTLE, ETHICS, 198–200 [1137a32–1138a3] (J.A.K. Thomson, trans., 1976). *See also* Aristotle, *Rhetoric*, *in* ARISTOTLE: THE COMPLETE WORKS 2152, 2188 [1374a25–b23] (Jonathan Barnes ed., 1984). I adopt Thompson's translation of the *Ethics* for the most part because it is most friendly to the view I argue against.

2. The translation is often "commutative justice" or "rectificatory justice." I choose to adopt "corrective justice" as that is the term most familiar to lawyers. In the following, I ignore the problem that it is unclear whether criminal law belongs to distributive or corrective justice on this schema.

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In order to understand the relationship of these concepts, it is necessary to comprehend the distinction between forms or species of justice[3] and what I refer to as kinds or types of justice. There are many kinds of justice. Aristotle focuses on legal justice and political justice, but there are many others: justice within the family,[4] between academic colleagues, and so on. Justice comes in kinds because the content of justice varies with respect to different activities.[5] Justice in the home is different from justice amongst one's colleagues. Nevertheless, all kinds of justice are species of the overarching particular justice—I refer to this here as "absolute justice." Hence one action may be just from the perspective of one kind of justice, unjust from the perspective of another, but absolutely just or unjust. Imagine that I have a son and a daughter and that my daughter is one of my students. If I spend much time on all of my students then, as a matter of distributive academic justice (if we can speak of such), I may be obliged to spend time with my daughter that means that I cannot spend an equal amount of time with my son. But this may be said to be inconsistent with distributive parental justice. Nevertheless, it will be possible to say that some action—likely to be some sort of compromise—is absolutely distributively just.

On the other hand, the forms of justice correspond to general methods of evaluating justice: either in terms of the overall spread of "honour or money or such other assets as are divisible among members of the community" (distributive justice) or in terms of rectifying "the conditions of a transaction" (corrective justice).[6] Hence there are only two forms of justice.

At least in theory, there are some actions to which neither form of justice applies: those that do not distribute honor, money, or other relevant assets and do not involve gains and losses in transactions. Other actions involve one form of justice, and some involve both. With respect to that last set of actions, distributive and corrective justice may come into conflict. For instance, an action may be correctively unjust but distributively just (stealing from the rich to give to the poor?) or vice versa. In such circumstances, it is impossible to say that the action is just or unjust overall. There is no overall form of justice that captures both distributive and corrective justice. Hence, while such an action may be *good* or *bad* overall—because, say, the distributive justice is more *important* than the corrective injustice—we cannot say that it is absolutely *just* or *unjust*.

Accordingly, there are two forms of absolute justice: absolute distributive justice and absolute corrective justice. In cases in which only one type of justice is relevant, this presents no difficulty. However, in cases involving both forms of justice, the conflict between distributive and corrective justice is important and, as discussed below, relates to Aristotle's doctrine of equity. For the sake of simplicity and clarity, I postpone that discussion for the moment

3. ARISTOTLE, NICOMACHEAN ETHICS, 70 [1130b30–131a1] (Terence Irwin, trans., 1999).
4. ARISTOTLE, ETHICS, *supra* note 1, at 189 [1134b10–13].
5. *Id.*
6. *Id.* at 176–177 [1130b30–1131a1].

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and assume that the cases under investigation involve actions that are relevant either to distributive justice or to corrective justice but not to both.

III. JUSTICE AND EQUITY

One consequence of the above is that legal justice is not absolute justice (distributive or corrective) but is the kind of justice appropriate to the activity of doing law, in a sense to be elucidated below. In consequence, Aristotle maintains that legal justice exhibits certain deficiencies from the perspective of absolute justice. One reason for this is that "all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms."[7] The latter claim is a product of Aristotle's view that in ethics "we must be satisfied with a broad outline of the truth; that is, in arguing about what is for the most part so from premises which are for the most part true we must be content to draw conclusions that are similarly qualified."[8] We may summarize this by saying that for Aristotle, ethical truth is too complex to be captured by any finite consistent set of principles. Hence a system that insisted on the observation of principles could not realize justice.

Here, then, we can see why Aristotle would hold that legal justice cannot perfectly map onto absolute justice. As "all law is universal"—that is, as all law is expressed in terms of universal principles—it is guaranteed to generate unjust results in some cases.

Equity fills the gap between legal justice and absolute justice. The content of equity consists of those judgments required to reconcile the former with the latter. Say that legal justice dictates that A is bound to do X but it is (all things considered) unjust to require A to do X. Legal justice is that part of morality that dictates that A is to do X; absolute justice is the part that permits A not to do X; and equity is the part that acts on legal justice to restrict its operation so that A does not in fact have to do X. Equity, then, is not justice itself but the part of morality that corrects the deficiencies of legal justice.

> [W]hen the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.[9]

In a recent exploration of this view, John Gardner maintains that this implies an essential separation between law and justice. Because law must be expressed too generally to map onto absolute justice, "the fact that they ought to be just . . . tells *against* legal systems being too true to their ruly

7. *Id.* at 199 [1137b14–17] (reference omitted).
8. *Id.* at 64 [1094b20–23].
9. *Id.* at 199 [1137b20–24].

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natures."[10] He insists that equity permits judges to depart from law in order to realize justice: equity is justice's rebellion against law.[11] In the following, I refer to this as "the doctrine of equitable discretion." The notion is that Aristotle argues that judges have the authority to depart from legal justice and from legal rules on the basis of equity. According to Gardner, therefore, Aristotle does not accept the view of legal formalists that "grotesquely self-congratulatory doctrine that law, so long as it remains true to its own distinctive form, cannot but be just."[12]

IV. PROBLEMS

A. Legal Justice

The claim that equity permits judges to depart from legal justice in order to realize absolute justice makes the interpretation of legal justice problematic. What is legal justice? The intuitive answer is that it is the justice enforced in courts of law. But, given the doctrine of equitable discretion, courts of law do not enforce legal justice. Rather, due to the operation of equity, the courts implement absolute justice. What, then, is legal justice?

One answer is provided by translating these issues into the language of the common law. According to this view, legal justice is the justice applicable to the common law, equity is the justice applicable to Equity,[13] and absolute justice is the result of the combination of common law and Equity.

But this solution trades inappropriately on the peculiar meanings of the words "law" and "Equity" in the common law. For common lawyers, "law" and "common law" have two relevant meanings. Speaking roughly, the terms relate either to the decisions of courts minus the application of Equity or simply to the decisions of courts. One might say that law equals law plus Equity. But these distinctions were of no significance in ancient Greece. For Aristotle, "law" cannot refer to what we call law-as-in-law-minus-Equity; rather, it must refer to what we call law-as-in-law-plus-Equity. The conclusion must be that legal justice is not the justice that the law enforces; but without explanation, that is a curious position.

A second answer to our question is that legal justice is synonymous with the positive law or perhaps with a coherent account of the positive law. On

10. John Gardner, *The Virtue of Justice and the Character of Law*, 53 CURRENT LEGAL PROBS. 1, 18 (2000).

11. *Id.* at 16. At least, this must be Gardner's argument if it is to connect with the views he intends to attack. For instance, though he rejects Weinrib's formalism, that theory does not apply to issues such as law reform outside the courtroom. *See, e.g.*, ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 70, 210–211 (1995). For similar interpretations of Aristotle to Gardner's, *see, e.g.*, Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839 (1999); Richard W. Wright, *The Principles of Justice*, 75 NOTRE DAME L. REV. 1859 (2000); Emily Sherwin, *Restitution and Equity: An Analysis of The Principle of Unjust Enrichment*, 79 TEXAS L. REV. 2083 (2001).

12. Gardner, *supra* note 10, at 12. Gardner's chief target here is Ernest Weinrib.

13. For clarity I capitalize "Equity" when referring to the area of Anglo-American law.

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this view we might say, in the language of the modern common law, that legal justice equates with precedent or with extant legal principle, and the role of equity is to reform the law—through judicial overruling, legislation, and so on—so that legal justice (the positive law) better reflects absolute justice.

On this interpretation, it is easy to see why Gardner would regard legal formalism as "grotesquely self-congratulatory."[14] If the form of the law corresponds to legal justice, and legal justice is identified with the positive law, then the formalist claims that the positive law must be just *whatever it is*. Clearly, Gardner is right that this is not Aristotle's view.

However, the idea that legal justice equates with the positive law does not sit well with Aristotle's discussion. For Aristotle, the various kinds of justice are not merely descriptions of beliefs about justice or conventional accounts of virtue. Rather, the kinds of justice are parts of virtue. Accordingly, unless we have good reason to do otherwise, "legal justice" should be read as referring to the way that the law should be, not necessarily to the way that it is. Legal justice is the justice that the law should instantiate.

Moreover, it is impossible to understand Aristotle's claim that legal justice dictates that law be expressed in general terms[15] on the reading that legal justice equates with the positive law. Aristotle maintains that, when the law is too general to capture absolute justice, "the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case."[16] But if legal justice was synonymous with the positive law, then surely it would follow that legal justice is at least occasionally inappropriately general. Consequently, the exploration of legal justice must be read as an examination of the natural law and not merely a reflection of the positive law of some society.[17]

This demonstrates that even were Gardner right to identify the form of the law with legal justice, in an important sense "so long as it remains true to its own distinctive form [the law] cannot but be just."[18] On Gardner's reading, the law's form is legal justice, which is a kind of justice according to Aristotle, though it is to some extent deficient.[19]

More important, if the doctrine of equitable discretion were correct, then it would be unintuitive to regard the form of the law as corresponding to legal justice. For a legal formalist, the law's form dictates how judges should decide cases.[20] Hence, accepting the doctrine of equitable discretion, the

14. Gardner, *supra* note 10, at 12.
15. *Supra* note 1, at 199 [1137b20–24].
16. *Id.* at 199 [1137b15–20].
17. *Cf.* Tony Burns, *Aristotle and Natural Law*, 19 HIST. POL. THOUGHT 142, 162–166 (1998) (exploring Aristotle's natural law theory).
18. Gardner, *supra* note 10, at 12.
19. It may appear incoherent to argue that a kind of justice can be deficient: If it is deficient, then it is not justice. However, it must be recalled that legal justice, like political justice, is the justice relevant to some kind of activity. In Aristotle's view, the justice relevant to some types of activity may be appropriate to that activity but to some extent inconsistent with absolute justice. *See infra*, text accompanying notes 43–59, 67.
20. Weinrib, *supra* note 11, at ch. 2.

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form of the law could relate only to legal justice plus equity and not to legal justice alone. On this approach, legal formalism does not appear at all "grotesquely self-congratulatory";[21] ironically, it appears to match Gardner's own view.[22]

The above leads to a third answer to our question as to the nature of legal justice. Perhaps the idea is that *legal rules* should be generated according to legal justice. However, as no rules of any kind can perfectly capture absolute justice, courts are permitted to depart from legal rules when they are inconsistent with legal justice. This seems to be Gardner's view in arguing that "the fact that they ought to be just . . . tells *against* legal systems being too true to their ruly natures."[23] On its face, this asserts that it is in the nature of the law to depart from its own nature. However, Gardner should be taken to mean that courts should not be bound by legal rules, even if those rules equate to justice as closely as it is possible for rules to do.

On this view, legal rules are generalizations true for the most part[24] and hence are not binding on judges. However, while these "rules" may serve to remind judges of salient moral considerations and may give an appearance of predictability to the law, as they are in no way binding, it seems odd to describe them as legal rules. Moreover, on this view, legal justice is the kind of justice that underlies legal "rules." But legal rules do not oblige courts of law and hence do not capture the justice that the law actually enforces. Though this is not incoherent, one would have thought that legal justice was more important and had more to do with the decisions of courts than that.

I conclude that the interpretation under examination cannot readily explain the nature of legal justice.

B. Law and Arbitration

The second problem with the notion that Aristotle argues in favor of equitable discretion is the following. Almost immediately after the quotation above, thought to assert that judges may depart from law on the basis of equity,[25] Aristotle goes on to say that "[t]his in fact is also the reason why everything is not regulated by law: it is because there are some cases that no law can be framed to cover, so that they require special ordinance."[26] If Aristotle argues for the doctrine of equitable discretion, then it is hard to know what to make of this. Aristotle appears to claim that some areas of human life are ill suited to regulation by law because they are so complex that justice with respect to them cannot be captured by universal principles.

21. Gardner, *supra* note 10, at 12.
22. *Id.* at 18.
23. *Id.*
24. *Cf.* John McDowell, *Virtue and Reason*, 62 MONIST 331, 336 (1979) (exploring the nature of moral "rules" in Aristotle's thought).
25. *See supra,* text accompanying note 9.
26. *Supra* note 1, at 200 [1137b28–29].

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But this is meant to be true of all areas of human life. Moreover, if equity is capable of remedying the law's inflexibility, then what is the problem? If equity permits judges to depart from legal justice when it is inconsistent with absolute justice, then it should follow that no area of human life is too complex to be regulated by law with a larger or smaller dose of equity.[27]

However, perhaps Aristotle meant to argue that some areas of human life are so complex that it is impossible to fashion laws with respect to them that approximate justice even for the most part. For an unstated reason, this may be said to lead to the conclusion that law should not regulate in these areas. Hence the suggestion is that Aristotle's considered position is that it may be appropriate for law to regulate those areas of human life in which justice is capable of being closely approximated by general principle—though general principle will never completely capture justice in any area of life—while law must refrain from regulating those areas of life in which general principle cannot even approximate justice.

However, it is worth remembering that this is not what Aristotle actually says. Moreover, it is not clear that the reply succeeds. Rather, the correct conclusion seems to be that in complex areas of life it is equity rather than law that should do most of the actual governing. Hence Aristotle's conclusion that these areas require governance by "special ordinance" does not follow, as the judicial enforcement of equity is supposed to be *de rigueur*.

For this reason, this reading cannot make sense of Aristotle's distinction between legal decision-making and arbitration. An "arbitrator goes by the equity of a case, a judge by the law, and arbitration was invented with the express purpose of securing full power for equity."[28] But according to the doctrine of equitable discretion, this is no less true in law. On this view, a judge too goes by the equity of the case: equity trumps. For Aristotle, the distinction between judging and arbitrating involves a difference in kind, but on the view expressed here it is at most a difference in degree.

C. Law Is General Principle

The above discussion also begs the following question—our third problem: If courts are permitted to depart from legal rules when they conflict with absolute justice, why does Aristotle insist that the law be expressed in terms of general rules? Of course it is possible to invent reasons—for example, to give

27. Of course, there may be reasons other than complexity why the law should not regulate in certain areas: privacy, liberty, etc. This is of no relevance to this argument and is in any event not mentioned by Aristotle.

28. Aristotle,*Rhetoric*, *supra* note 1, at 2188 [1374a18–1374b23]. J.A.K. Thompson suggests that when Aristotle refers to judges, he intends arbitrators. ARISTOTLE, ETHICS, *supra* note 1, at 180, note 2. However, this is mistaken. In contemporary Athens, judges were jurors representative of the citizenry as a whole, whose role was to enforce law. Arbitration was a separate matter. For instance, in private cases, arbitration was an alternative dispute resolution mechanism available to parties who could agree on an arbitrator. RUSS VERSTEEG, LAW IN THE ANCIENT WORLD 203–204, 214–216 (2002).

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the law a veneer of predictability—but these arguments are not Aristotle's. Moreover, in the *Politics* Aristotle insists:

> it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars. Hence we infer that sometimes and in certain cases laws should be changed; but when we look at the matter from another point of view, great caution would seem to be required. For the habit of lightly changing the laws is an evil, and, when the advantage is small, some errors both of lawgivers and rulers had better be left . . . .[29]

This caution is in tension with the notion that judges are free to depart from legal rules whenever they generate injustice. First, if the legislator must not alter legislation, even when there is a small advantage in doing so, why is it appropriate for judges routinely to depart from law on the basis of equity? Second, it is not clear why small changes in the law are required at all. If judges may depart from law on the basis of equity, then small, perhaps even large, alterations to the law may effectively be made by judges.

Further:

> The advocates of kingship maintain that the laws speak only in general terms, and cannot provide for circumstances; and that for any science to abide by written rules is absurd . . . . Hence it is clear that a government acting according to written laws is plainly not the best. Yet surely the ruler cannot dispense with the general principle which exists in law . . . .[30]

Although Aristotle is not expressing his own view as to the desirability of kingship in this passage—Aristotle appears prepared to accept kingship if it is clear that the king is significantly superior in virtue and wisdom to the citizens[31]—it is clear that Aristotle is of the view that *if* a society opts for the rule of law rather than the rule of man, then rulers must utilize general principle. But if that is true of the rulers, then surely it must also be true of judges.

Moreover, given Aristotle's supposed attachment to equitable discretion, his claim that the law must be expressed in terms of legal rules seems incoherent. According to the doctrine of equitable discretion, the law in fact is not capable of being expressed in terms of general rules.[32] Certainly, legal rules are capable of being so expressed, but these are mere guidelines, rules of thumb, rather than rules proper. The conclusion seems therefore to be,

29. ARISTOTLE, THE POLITICS AND THE CONSTITUTION OF ATHENS, 49 [1269a10–16] (B. Jowett, trans., 1996) (hereinafter "POLITICS").

30. *Id.* at 85–86 [1286a10–16].

31. *Id.* at 87 [1286b9–21]. *But see* ETHICS, *supra* note 1, at 188 [1134a35–1134b3] (arguing that the rule of law is to be preferred).

32. Remembering that we are not entitled to help ourselves to the jurisdictional distinction between law and Equity.

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despite Aristotle's explicit claims to the contrary, that law is not capable of being expressed in general principles.

D. The Equitable Man

Finally, the doctrine of equitable discretion seems inconsistent with Aristotle's description of the equitable man. The equitable man "is one who chooses and does equitable acts, and is not unduly insistent upon his rights, but accepts less than his share, although he has the law on his side."[33] The equitable man is one who does not always stand on his rights. But what are his rights? The answer seems to be his entitlements according to legal justice. But that answer is unsatisfactory. If courts enforce absolute justice rather than legal justice, then there is no right to legal justice. The answer implausibly implies that one has a legal right to something that a court will not and should not enforce. Moreover, Aristotle claims that the equitable man has law on his side, rather than on the side of justice. But again, this seems to make sense only if we anachronistically rely on a jurisdictional distinction between law and Equity.

We have seen, then, that there are serious problems with the idea that Aristotle accepts the doctrine of equitable discretion. His view of the relationship between equity, justice, and law must be more complex and nuanced than suggested. In the following section, I propose an alternative reading of Aristotle's view designed to avoid the problems encountered above.

V. SOLUTIONS

A. Legal Justice

If legal justice is not the justice that should motivate judges, then what is it? Despite the tendency of common lawyers to read Aristotle otherwise,[34] I submit that his answer is clear: legal justice is the kind of justice appropriate to legislation.[35] For Aristotle, then, legal justice applies not to judges but to legislators; it is not a judicial justice but a legislative justice.

Hence Aristotle says that equity is:

> the sort of justice which goes beyond the written law. Its existence partly is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate universally where matters hold only for the most part; or where it is not easy to be complete owing to the endless

33. ETHICS, *supra* note 1, at 200 [1137b35–1138a3].
34. *See supra* note 11.
35. *See also* John E. Pattantyus, *Aristotle's Doctrine of Equity*, 51 MODERN SCHOOLMAN 213, 217 (1974).

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> possible cases presented, such as the kinds and sizes of weapons that may be used to inflict wounds—a lifetime would be too short to make out a complete list of these. If, then, a precise statement is impossible and yet legislation is necessary, the law must be expressed in wide terms; and so, if a man has no more than a finger-ring on his hand when he lifts it to strike or actually strikes another man, he is guilty of a criminal act according to the written words of the law; but he is innocent really, and it is equity that declares him to be so.[36]

And when he discusses the role of equity in remedying this error, he maintains that:

> when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.[37]

The claim, then, is not that law in general—including our common law (here meaning common law as opposed to statute law)—corresponds to legal justice from which judges may depart. Rather, the notion is that legislators should be motivated by legal justice, although it is understood that legislation will be overly general:

> in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. And the law is none the less right; because the error lies not in the law nor in the legislator, but in the nature of the case . . . .[38]

Because of this understanding, judges are permitted to depart from a literal interpretation of legislation when it is clear that such would produce a result that the legislators would not have intended.[39] There are two relevant circumstances. First, the legislators may have passed legislation that would produce a result that they would not have intended if interpreted literally in circumstances that they did not consider. Here, Aristotle argues that judges may interpret the legislation more flexibly to reflect the intentions the legislators would have had had they turned their minds to such circumstances. Second, the legislators may have known that in a certain circumstances the legislation interpreted literally would work injustice, but may have been

36. *Rhetoric*, *supra* note 1, at 2188 [1374a18–1374b23].
37. ETHICS, *supra* note 1, at 199 [1137b20–24].
38. *Id.* at 199 [1137b15–18].
39. *Cf.* ZIVILGESETZBUCH art. 1 (Switzerland). "In the absence of an applicable legal provision, the judge pronounces in accordance with customary law and, in the absence of a custom, according to the rules that he would establish if he had to act as legislator." The content of legal justice is discussed *infra* notes 49, 55.

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unable to frame the legislation to avoid this. In such circumstances, Aristotle maintains that judges may realize the actual intentions of the legislators rather than their intentions as literally expressed in the legislation. The role of equity in law, then, is to realize the intentions of the legislator not captured by the general principles expressed in the legislation. As we would say, equity directs attention to the spirit rather than to the letter of the law.

Note that this does not mean that judges have the power to interpret statutes in the light of absolute justice. Aristotle's claim is only that judges may attempt to realize the intent of the legislator, given that that intent will not and cannot be captured in the form that legislation must take. This, then, is far from the view that equity is justice's rebellion against law.

B. Law Is General Principle

That equity in law is a principle of statutory interpretation also explains Aristotle's endorsement for societies governed by the rule of law of the claim that "surely the ruler cannot dispense with the general principle which exists in law."[40] This is not an assertion of a moral principle—an assertion completely unsupported by argument—but rather the following practical point. If a society is governed by more than one person, then a decision-making procedure must be found for determining the decisions that are to govern the society. The content of these decisions cannot be discovered merely by asking any one individual. Hence the decisions must be *expressed* in some objective manner. In practice, this means that decisions must be expressed in legislation, and legislation must be expressed in terms of general principles, there being no other way of writing it.

Seeing that Aristotle's discussion of equity in law is focused on legislation allows us to solve two of our problems: the meaning of legal justice and the need for law, meaning legislation, to be expressed in terms of general principle. Two problems remain. These are understanding the equitable man and the claim that some areas of life must be governed by arbitration rather than by law. These are solved by shifting our attention away from law.

C. The Equitable Man

To whom is Aristotle's discussion of equity directed? The usual answer is that it is directed at the judge: Aristotle is concerned to elucidate appropriate judicial decision-making. No doubt this is one of Aristotle's aims, as discussed earlier in this section. However, it is not his sole objective. Recall that Aristotle's discussion of equity occurs in the context of a examination of virtue. The goal of the *Ethics* is not to provide a theory of law or of politics (at least as we understand the latter term), but to present an account of how citizens

40. POLITICS, *supra* note 29, at 86 [1286a15–16].

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should live their lives. The focus, then, is not solely on the role of equity in law but also on its place in ordinary life. In particular, the discussion is concerned with the role equity plays in making a person just. This becomes more apparent if we turn from J.A.K. Thompson's translation of Aristotle's passage on the equitable man to Terence Irwin's. "It is also evident from this who the decent person is; for he is the one who decides on and does such actions, not an exact stickler for justice in the bad way, but taking less than he might even though he has the law on his side."[41]

First, note that Irwin chooses the term "decency" rather than "equity," making clear that the focus is not on judges in courtrooms but on citizens in their daily lives. It is also clear that the equitable or decent man is one who accepts less than the law will give him. This does not mean that he takes less than legislation would have given him were it not for the principles of statutory interpretation (i.e., equity in law). It means what it says: the equitable man is one who sometimes declines to enforce his legal rights. In order to see why this would be, it is necessary to examine further Aristotle's view of the connection between justice and law.

i. Distributive Justice and the Law

As indicated above, Aristotle distinguishes between distributive justice and corrective justice. Unsurprisingly, he argues that the content of the former is essentially political. This is because distributive justice relies on a conception of equality that is politically controversial.[42] Thus:

> Everyone agrees that justice in distribution must be in accordance with merit in some sense, but they do not all mean the same kind of merit: the democratic view is that the criterion is free birth; the oligarchic that it is wealth or good family; the aristocratic that it is excellence.[43]

Accordingly, Aristotle is unable to elucidate the content of distributive justice in the *Ethics*. That task must await a full exploration of political justice in the *Politics*.

In Aristotle's view, the aim of politics is to produce virtue and thereby happiness in citizens.[44] However, Aristotle recognizes that people disagree as to the content of virtue and happiness; hence people disagree as to the appropriate content of politics. Aristotle describes this dispute as conflict over the constitution[45] and characterizes the dispute as related to distributive

41. NICOMACHEAN ETHICS, *supra* note 3, at 84 [1137b35–1138a3]. The interpretation I offer in the following does not rely specifically on this translation, though this translation is more suggestive than others.

42. ETHICS, *supra* note 1, at 177–178 [1131a20–25].

43. *Id.* at 178 [1131a25–29].

44. POLITICS, *supra* note 29, at 13 [1252b29–30]. *Compare* TERENCE IRWIN, ARISTOTLE'S FIRST PRINCIPLES 425 (1988) (arguing that Aristotle's theory is ambiguous as to whether politics aims for the good of society as a whole or for the good of each individual).

45. The remainder of POLITICS deals with how the constitution is best implemented in practice.

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justice.[46] In the *Politics*, Aristotle elucidates and defends his conception of the best constitution. Nevertheless, Aristotle insists that "the best is often unattainable, and therefore the true legislator and statesman ought to be acquainted, not only with that which is best in the abstract, but also with that which is best relatively to circumstances."[47] Hence, although ideally all states should adopt the best constitution, Aristotle recognizes that this is impractical and that in practice states should adopt the best constitutions they are able to adopt.[48]

Aristotle also insists that the laws of the state that relate to distributive justice should reflect the constitution *as it is* rather than an ideal constitution. "[T]he laws are, and ought to be, framed with a view to the constitution."[49] This means that a society's laws may not and in fact are unlikely to capture absolute distributive justice. Accordingly, with respect to these laws, the equitable man is the one who declines to enforce in his favor the laws that instantiate the constitution's conception of distributive justice when such enforcement would conflict with distributive justice as it is in fact.

For instance, imagine that a state with an oligarchic constitution passes a law that generates an obligation in the poor to serve the wealthy. Assume also that democracy, rather than oligarchy, is consistent with absolute distributive justice. Hence, while the law in question is compatible with the constitution, it is inconsistent with absolute distributive justice. In such circumstances, an equitable wealthy man would decline to enforce that law in his favor. He would do so because, while he recognizes that the law is in accordance with the conception of distributive justice captured in the constitution, he also recognizes that the law is incompatible with absolute distributive justice. Hence he takes "less than he might even though he has law on his side."[50]

It is important to note that it does not follow that a judge is permitted to refuse to enforce that law. To do so would be to undermine the notion that a state is governed in accordance with its constitution. Were the equitable man to find himself a judge, he would be obliged to enforce the law.[51]

ii. Corrective Justice and the Law

As indicated above, Aristotle is unable to give an account of the content of distributive justice in the *Ethics* as he recognizes that that form of justice is inescapably political. On the other hand, Aristotle does provide an account

46. POLITICS *supra* note 29, at 73 [1280a7–22]; Francisco L. Lisi, *The Concept of Law in Aristotle's Politics*, *in* 16 PROC. BOSTON AREA COLLOQUIUM ANCIENT PHIL., 29, 40–41 (John J. Cleary & Gary M. Gurtler, eds., 2001).

47. POLITICS, *supra* note 29, at 92 [1288b25–28].

48. *Id.* at 92–93 [1288b34–1289a25].

49. *Id.* at 92 [1289a13–15]. The constitution, then, determines the content of distributive legal justice.

50. NICOMACHEAN ETHICS, *supra* note 3, at 84 [1138a2–3].

51. Similar points have led some to conclude that Aristotle was a legal positivist; *see, e.g.*, Hans Kelsen, *Aristotle's Doctrine of Justice*, *in* WHAT IS JUSTICE? JUSTICE, LAW, AND POLITICS IN THE MIRROR OF SCIENCE: COLLECTED ESSAYS 110, 125–136 (2000). For discussion, *see* Burns, *supra* note 17, at 162–166.

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of the content of corrective justice in the *Ethics*. He is able to do so because the concept of equality operative in corrective justice is not politically controversial.[52] Hence, for example, "it makes no difference whether a good man has defrauded a bad one or vice versa, nor whether a good man or a bad one has committed adultery; *all that the law considers is the difference caused by the injury*."[53] Therefore the focus of corrective justice "is restricted and retrospective; it does not consider either the common good, or even the principles of distributive justice, but considers only the harm that has been done and the means of restoring the *status quo ante*."[54] Accordingly, for Aristotle, the content of corrective justice is apolitical and does not depend on the constitution.[55]

Now, Aristotle clearly believes that some areas of law appropriately instantiate corrective justice.[56] As the content of corrective justice does not depend on politics or on the nature of the constitution, legal justice with respect to those laws that instantiate corrective justice is coextensive with absolute corrective justice. Hence in this area the equitable man cannot be one who declines to enforce his legal rights *because* he recognizes that they do not correspond to justice in fact. Here, then, an alternative explanation of the equitable man is required.

One must recall that corrective justice is only part of justice. Accordingly, the areas of law governed by corrective justice may conflict with distributive justice. Moreover, modern experience has taught us that this conflict will occur frequently.

A good example of this clash between the forms of justice can be observed in the decision of the House of Lords in Bolton v. Stone.[57] Members of the defendant cricket club were playing against a visiting team when one of the visitors drove the ball out of the ground and onto an adjacent little-used road. The ball struck and injured the plaintiff. The court estimated that a ball was driven out of the ground on average once every five years. The House of Lords ruled that as the chance of injury was so low, the defendant was not negligent. However, the cricket club had paid damages to the plaintiff after it had been found liable in negligence by the Court of Appeal, and the club made no effort to recover those damages after the decision of the House of Lords. This is sometimes taken as evidence that the common law is out of step with justice.[58] For Aristotle, this conclusion is simplistic. The common law may be entirely consistent with absolute corrective justice and

52. ETHICS, *supra* note 1, at 180 [1132a5–6].
53. *Id.* at 180 [1132a1–6] (emphasis added).
54. Irwin, *supra* note 44, at 429.
55. Hence the content of corrective legal justice is absolute corrective justice itself. Note that this does not imply that whether corrective justice or distributive justice should be implemented in any one case is an apolitical question. *See* Weinrib, *supra* note 11, at 70, 210–211.
56. ETHICS, *supra* note 1, at 179–186 [1131b25–1134a15].
57. 1951 App. Cas. 850 (H.L. 1951).
58. *See, e.g.,* HAROLD LUNTZ & DAVID HAMBLY, TORTS: CASES AND COMMENTARY 196–197 (4th ed., 1995).

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hence with the kind of justice appropriate in this area of the law. However, corrective justice is not all there is to justice, and hence the cricket club may have been acting equitably in not standing on its legal rights and allowing the plaintiff to retain the damages originally paid. Here, then, we may say that the defendant was right (as a matter of distributive justice) to allow the plaintiff to retain the money and the House of Lords was right (as a matter of corrective justice) to find for the defendant and hence allow the defendant (also as a matter of corrective justice) to insist on the return of that money.

With respect to this area of law, then, the equitable man is the one guided by justice as a whole rather than by corrective justice alone. As there is no form of justice that stands above distributive justice and corrective justice, the equitable man must judge as to which should rule when those forms of justice come into conflict. In some cases, the equitable man will be prepared to accept less than his share according to law because he recognizes that the law enforces only a part of justice.[59]

D. Law and Arbitration

The above also enables us to resolve our final outstanding problem: the need for arbitration. In Aristotle's view, law is unfit to govern some areas of human life because justice with respect to those areas cannot be approximated either by general principle, and hence by legislation, or by corrective justice. These are the areas in which distributive justice is most appropriate but cannot be approximated in legislation. In these areas, judges should be replaced by arbitrators who are to rely on their sense of absolute justice.

In conclusion, then, equity plays two distinct roles. In law, it enables judges to implement the intent of legislation rather than its literal meaning. Outside law, it requires citizens to question whether their legal rights are absolutely just. It bears little resemblance to Equity in the common law and has nothing to do with rebellion against law.

VI. PUBLIC AND PRIVATE LAW

The above suggests, though it does not *necessarily* imply, a neat distinction between public and private law. On this view, private law is based on corrective justice, which is independent of distributive justice and politics, and hence could operate outside specific legislation.[60] On the other hand, public

59. *See also* Pattantyus, *supra* note 35, at 215–216. This argument also applies to the law based on distributive justice. That is, sometimes the equitable man would decline to enforce in his favor a law that correctly instantiates distributive justice, because that law is inconsistent with corrective justice. This follows because there is no relationship of priority between corrective and distributive justice. *See infra,* text accompanying note 67.

60. ETHICS,*supra* note 17, at 179–186 [1131b25–1134a15].

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law would be designed to reflect the nature of the constitution and would correspond to the conception of distributive justice captured in the constitution. This would rely predominantly, or perhaps exclusively, on legislation.[61] As I now show, an argument for this view is at least latent in Aristotle's theory.

In the *Politics*, though arguing that aristocracy—the rule of the virtuous—is the ideal form of government, Aristotle also insists that it is unlikely to be realizable in practice.[62] This is because aristocracy depends on the ability to determine and promote to power the truly virtuous and because it supposes that there will be agreement on such. Because this is unrealistic, Aristotle settles for polity, a combination of democracy and oligarchy in which decision-making is distributed (unequally) through the citizenry. But if that is so, then it cannot be appropriate for judges to decide matters of distributive justice. Issues of distributive justice are political questions rightly to be decided by political bodies, not by aristocratic judges. In this sense, in court equity is "a mute divinity who cannot be heard."[63] On this view, then, because of its inherently political nature, distributive justice is not an appropriate subject for the courtroom unless embedded in legislation.

That argument, however, would not apply to corrective justice, as that form of justice does not rest on political controversial views.[64] Accordingly, the judicial enforcement of corrective justice would not amount to judicial aristocracy.

VII. ARISTOTLE'S FORMALISM

Whether or not the model enunciated in the previous section of this article would have been accepted by Aristotle, the distinction between the kind of law designed to reflect distributive justice and the kind of law based on corrective justice is important in assessing whether Aristotle accepted a version of legal formalism. Clearly Aristotle holds no formalist theory with respect to the creation of law based on distributive justice. Distributive justice possesses a form, but that form generates specific content only in conjunction with a conception of virtue and happiness. But there are many such conceptions, and it is the task of politics to choose between them.

However, this does not justify Gardner's claim that Aristotle rejects the notion "that law, so long as it remains true to its own distinctive form, cannot but be just."[65] This is because, on Aristotle's view, the kind of law that relates to distributive justice (public law?) should reflect the conception of distributive justice captured in the constitution. Hence, though the form of distributive justice itself cannot generate specific content, in conjunction

61. Burns, *supra* note 51, at 163; Kelsen, *supra* note 51, at 133.
62. POLITICS, *supra* note 29, at bk. IV.
63. Immanuel Kant, *The Metaphysics of Morals*, *in* PRACTICAL PHILOSOPHY 353, 391 [6:234] (Mary Gregor, ed., 1996).
64. *See supra,* text accompanying notes 53–54.
65. Gardner, *supra* note 10, at 12.

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with a constitution it does do so. In a democratic society, the form of this area of the law will be the form of democratic distributive justice. Hence, in such a society, if the law relevant to distributive justice remains true to its form—namely, democratic distributive justice—then it cannot but be just. Certainly this does not mean that the law is absolutely just, as the democratic conception of distributive justice may be false. Nevertheless, Aristotle insists that this area of the law *should* reflect the constitution—"the laws are, and ought to be, framed with a view to the constitution"[66]—and hence even if the constitution is itself unjust, the law is just *in the appropriate sense* if it reflects the constitution. In other words, for Aristotle, the appropriate (ideal) perspective from which to evaluate the justice of those laws relevant to distributive justice is not absolute distributive justice but the conception of distributive justice as captured in the constitution. Accordingly, Aristotle's position at this point is recognizably formalist. On the other hand, Aristotle holds that the appropriate perspective from which to evaluate the justice of the constitution is absolute distributive justice. Unsurprisingly, Aristotle is not a political formalist.

I turn now to the area of law governed by corrective justice (private law?). The form of this law is corrective justice, and that form of justice in itself generates specific content. Now, the form of this law is not justice in total but it is a part of justice. Hence in this area too, if the law remains true to its form then it cannot but be just.

But is this not a merely Pyrrhic victory? If an area of law instantiates only corrective justice or only distributive justice, then it is not coextensive with justice as a whole. It is, therefore, not *really* just. However, it is important to remember that distributive and corrective justice are both forms of justice. Aristotle does not argue that there is any priority between the two forms.[67] It is not that distributive justice is real justice while corrective justice is only a pale approximation, or vice versa. Nor is the view that there is a higher form of justice of which corrective and distributive justice are elements. Rather, corrective justice and distributive justice are the two forms of justice. Corrective justice, then, is a part of justice, but it is not a partial justice. Hence if the law instantiates corrective justice, then it really is just—not just in all senses of the term "justice," but nevertheless really just. Similarly, a law that accurately captures distributive justice is genuinely just, though it is unlikely to be consistent with corrective justice and hence is not just in all senses of that term.

Note that it is no part of Aristotle's view—and no part of the view of any modern legal formalist—that the positive law that exists or has existed at any point in time is necessarily just.[68] Rather, the claim is that the positive law is to be judged from the perspective of a particular form of justice—corrective

66. POLITICS *supra* note 29, at 92 [1289a13–15].
67. *See supra* note 59.
68. Weinrib, *supra* note 11, at 195, note 57.

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justice or the conception of distributive justice found in the constitution—and hence that a form of justice can be said to underlie the positive law.

There is nothing self-congratulatory about this position. It is the view that it is the task of the law—and hence the task of those whose responsibility it is to shape the positive law—to actualize corrective justice or the conception of distributive justice found in the constitution. This is, of course, quite consistent with the view that the positive law in many places fails to instantiate these types of justice and is therefore objectionable. The position is self-congratulatory only if "law" and "the form of the law" are anachronistically equated with "positive law." The criticism, then, involves a positivistic caricature of legal formalism and distorts our understanding of Aristotle's views.

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