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Interpretatio ex aequo et bono

The Emergence of Equitable Interpretation in European Legal Scholarship

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Introduction

In modern legal scholarship, equity is often associated with *epieikeia*, a concept introduced by Aristotle in his *Nichomachean Ethics* allowing for the correction of legal rules in situations where their application would be absurd, unjust, or where the legislator would not have wanted them to apply.[1] However, the history of the association of equity with *epieikeia*, in particular the origins of this association among jurists on the European continent and its development as a legal concept, remain rather obscure. Existing legal historical studies of the association of equity and *epieikeia* in legal scholarship divide mostly along two branches. Some have assumed that the two concepts have always been associated in the minds of lawyers from the earliest times.[2] Others, while recognising it as an early modern event, have discussed it solely within the context of legal humanism, without exploring either its development as a legal doctrine or its impact within legal scholarship more broadly.[3]

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[1] This association is certainly commonplace in common law systems and can be found in most handbooks dealing with the concept of equity as related to the jurisdiction of the Court of Chancery. See, e.g., J. McGhee (ed.), *Snell's Equity* (London: Sweet & Maxwell, 2017), para. 1-002; A. Hudson, *Equity and Trusts*, 9th ed. (Abingdon: Routledge, 2016), para. 1.1.3.

[2] These approaches are dealt with in the second part of this paper. See text at nn. 4–8 below.

[3] See, e.g., G. Kisch, *Erasmus und Die Jurisprudenz Seiner Zeit* (Basel: Helbing und Lichtenhahn, 1960) and V. Piano Mortari, *Aequitas e Ius nell'Umanesimo Giuridico Francese* (Rome: Accademia Nazionale dei Lincei, 1997), p. 141.

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The main object of this paper is to provide an account of how the concepts of equity and *epieikeia* were first brought together, and to argue that the assimilation of these two concepts led early modern legal scholars to depart from medieval theories of *aequitas* and mould equity into a doctrine of interpretation often referred to as *interpretatio ex aequo et bono* (interpretation according to what is equitable and good). An important theme of this paper is that both the origin of the association of equity and *epieikeia*, and the development of the doctrine of equitable interpretation were the product of interactions and borrowings across a wide-ranging network of scholars, which included humanist philologists and jurists, scholastic theologians, and more traditional writers of Roman and canon law commentaries.

In the first part of this paper, I will make the point that, at least among European lawyers in the *ius commune* tradition, the explicit association of *epieikeia* and *aequitas* was an early modern phenomenon which owes its origin to the interaction of humanistic philology with legal humanism. In the second part, I will show that later sixteenth-century legal scholars departed from medieval theories of equity and redeveloped equity as a doctrine of interpretation of the law, a process variously referred to as *interpretatio ex aequo et bono*, *interpretatio aequitatis*, *interpretatio per epikeiam* and so on. Interpreting by equity meant, for these legal writers, to depart from the words of the law in favour of the intention of the legislator. A difficulty with this rather broad definition of equitable interpretation is that it seemed indistinguishable from the traditional theories of interpretation – *interpretatio extensiva* and *restrictiva* – developed by legists and canonists throughout the medieval period. In the third part of this paper, I will show that there was a parallel development of equity or *epieikeia* as a theory of interpretation among early modern scholastic theologians. I will argue that this understanding of equity was fundamentally different from that of humanist jurists in that it did not involve an interpretation of the intention of the legislator, but rather the disapplication of rules in cases where their application would be unjust. The fourth and final part is centred on the example of Franciscus Suarez's theory of equity and its effect on later scholarship on equity. Suarez's account of equity brought together the two parallel theories of equitable interpretation discussed in the second and third section, and sought to find a better-defined place for it alongside the existing doctrines of *interpretatio extensiva* and *restrictiva*. This understanding of equitable interpretation would have a long-lasting impact

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among canon lawyers well into the eighteenth century. While it would be impossible to map out, in this piece, the full development of equity as a doctrine of interpretation in early modern times, the trajectory of *interpretatio ex aequo et bono* traced in this piece, travelling from the early accounts of humanist philologists and jurists, through early modern scholastic theology, and back into the legal works of eighteenth century canon lawyers, is a telling example of the complex and varied networks of scholars that affected the development of the concept of equity in legal scholarship.

The Association of Equity and *epieikeia* in the Medieval Period

In order to appreciate the importance of the association of equity and *epieikeia* and their development as a theory of interpretation in early modern times, the first issue to address is how equity was discussed in the writings of medieval legists and canonists and whether equity was related in that time with either *epieikeia* or interpretation. The first point to take away from this section is that there is little, if any, evidence that equity was related to *epieikeia* in medieval legal works. The second point is that equity did not play a substantive part in medieval legal theories of interpretation. In the last part of this section, I will also outline and distinguish the parallel, but wholly separate development of equity among scholastic theologians from Thomas Aquinas onwards, where equity was explicitly related to *epieikeia*. As we shall see in the following sections of this chapter, the early modern association of equity and *epieikeia* brought down the barrier that divided law and theology throughout the medieval period. This enabled scholars in these two disciplines to form new scholarly networks within which to develop their ideas about equity. The concept of equity provides one of the most striking examples of how the links among humanists, lawyers, and theologians formed in the early modern period could further the development of original ideas.

Equity in the Medieval ius commune

Let us first consider whether equity as discussed by medieval glossators and commentators bore any relation to *epieikeia*. The development of equity, or rather *aequitas*, in the medieval *ius commune* has been the

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object of much legal historical research.[4] However, despite the attention this topic has received in the past, no study has yet systematically considered all European medieval legal sources in order to map occurrences of equity.

A number of studies on the legal history of equity have argued that the medieval concept of equity was related to Aristotelian *epieikeia*. For instance, Marguerite Boulet-Sautel has argued that discussions of medieval legal writers on equity were part of an 'almost uninterrupted tradition going back to Ancient Greece'.[5] Others, such as Pier Giovanni Caron and Norbert Horn, have sought to identify the influence of *epieikeia* on the development of concepts of equity in the fourteenth century, over canon lawyers and the writings of Baldus de Ubaldis (d. 1400) respectively.[6] These views have been the object of strong criticisms, mainly on the basis that *epieikeia* goes unmentioned in the works of legists or canonists that deal with equity.[7] This is not to say that legists and canonists were not aware of Aristotle's discussion of *epieikeia*,[8] but simply that the available sources suggest they saw no need to associate that doctrine with the legal concept of *aequitas*.

[4] The literature is vast, but examples include H. Kantorowicz and W. W. Buckland, *Studies in the Glossators of the Roman Law*, 3rd rev. ed. (Cambridge: Cambridge University Press, 1969); C. Lefebvre, *Les Pouvoirs Du Juge En Droit Canonique* (Paris: Sirey, 1938), pp. 164–193; E. M. Meijers, 'Le Conflit Entre L'équité et La Loi Chez Les Premiers Glossateurs', *Tijdschrift voor Rechtsgeschiedenis*, 17 (1941), 117–135; H. Lange, 'Ius Aequum Und Ius Strictum Bei Den Glossatoren', *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 71 (1954), 319–347; E. Cortese, *La Norma Giuridica*, 2 vols. (Milan: Giuffré, 1964), vol. 1, pp. 331–355.

[5] M. Boulet-Sautel, 'Equité Justice et Droit Chez Les Glossateurs Du XIIe Siècle', *Recueil de Mémoires et Travaux de l'Université de Montpellier*, 2 (1951), 1–11 at 6.

[6] See N. Horn, *Aequitas in Den Lehren Des Baldus* (Cologne-Graz: Böhlau Verlag, 1968); P. G. Caron, *'Aequitas' Romana, 'Misericordia' Patristica ed 'Epicheia' Aristotelica Nella Dottrina dell 'Aequitas' Canonica* (Milan: Giuffré, 1971).

[7] Kisch, *Erasmus*, pp. 36–48. See also G. Kisch, *Claudius Cantiuncula Ein Basler Jurist Und Humanist Des 16. Jahrhunderts* (Basel: Helbing und Lichtenhahn, 1970), p. 96. For further criticisms see L. Maniscalco, 'The Concept of Equity in Early Modern Legal Scholarship', PhD thesis, University of Cambridge (2019), para. 1.2.2. Only a handful of legal sources ever refer to *epieikeia* to start with, and, when they do, these sources seem to keep the concept distinct from *aequitas*. See G. Le Bras and C. Lefebvre, *Histoire Du Droit et Des Institutions de L'église En Occident, Tome VII, L'Age Classique 1140–1378* (Paris: Sirey, 1965), pp. 411–412.

[8] A rare reference to *epieikeia* can, for instance, be found in Johannes Monachus (d. 1313), in J. Monachus, *ad Extrav. Com., 2, 3, 1, non obstantibus, in Corpus iuris canonici emendatum et notis illustratum*, 5 vols. (Rome: In aedibus Populi Romani, 1582), Vol. 3, pp. 226–232.

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Another (and perhaps the stronger) argument to reject the idea that medieval legists and canonists saw a connection between *aequitas* and *epieikeia* is that the way in which they thought judges and jurists should use the former was plainly inconsistent with Aristotle's (or indeed moral theological)[9] writings about the latter. As we shall see later in this paper, this is also the reason why early modern legal writers had to depart from medieval doctrines about the use of equity as soon as they identified the link between *aequitas* and *epieikeia*.

The context in which equity was dealt with in most detail by legists and canonists in the medieval period was that of its opposition to rigor (*ius strictum*). That opposition was drawn out in the *Corpus Iuris Civilis* specifically in a passage of the *Code of Justinian* – C.3.1.8 – instructing judges to prefer equity over rigor.[10] The debates among early glossators about how best to interpret this rule are well-documented, but by the thirteenth century, most legal writers were in agreement that C.3.1.8 did not endow judges with a power of correction or interpretation of strict law.[11] The main reason for this was the presence in the *Code* of another rule – C.1.14.1 – that seemed to leave that interpretive or corrective power to the emperor.[12] Instead, in the interpretation of medieval lawyers, C.3.1.8 referred to the judge's duty to prefer 'written' equity over rigor.[13] In other words, medieval legists and canonists read C.3.1.8 as instructing judges to prefer written rules that enjoyed the quality of being 'equitable' over rules that didn't (and were therefore 'rigorous'). This reading of C.3.1.8 was consistently developed and refined in later medieval scholarship. By the fourteenth century, a further distinction could be found according to whether an equitable rule was written specifically to cover a particular case (*in specie*) or as a more general abstract rule (*in genere*). Applying the *regula iuris* that *species derogat generis*, it was argued that a rigorous rule written *in specie* should be

[9] See nn. 20–24 below.

[10] C.3.1.8: 'Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem.'

[11] The sources listed at n. 4 above all deal with this in detail.

[12] C.1.14.1: 'Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere.'

[13] In fact, from the time of Azo onwards, an interlinear gloss can be found in some manuscripts of the *Code* adding the word 'scriptae' after 'aequitatisque'. See, e.g., Azo, *Summa Codicis ad* C.3.1.8 (MS Paris BN, lat. 4519, f. 49r). Up until the seventeenth century editions of the *Code* can be found featuring the word 'scriptae' as part of the main text. See, e.g., C.3.1.8 in *Corpus Iuris Civilis*, 6 vols. (Venice: Apud Iuntas, 1606), vol. 4, para. 592.

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preferred to an equitable one written *in genere*, but that a written equitable rule should be preferred to a rigorous one if both were written either *in genere* or *in specie*. It was only where no rule at all was available that one could have recourse to unwritten equity.[14] This more refined interpretation was the almost[15] universal reading of C.3.1.8 throughout the medieval period, and indeed survived well into early modern times among legal writers who rejected the early modern association of equity and *epieikeia*.[16] The main point to take away from this analysis of *aequitas*, however, is that it was utterly incompatible with the idea of *epieikeia*. While the opposition of rigour and equity may have some superficial resonance with Aristotle's idea of *epieikeia* as moderating the 'rigour' of written rules, it is clear that medieval legal writers did not think equity had anything to do with the correction of written legal rules. The medieval understanding of equity among lawyers makes more sense if one views it as a synonym of some form of natural justice, sometimes associated with equality, sometimes with mercy,[17] which could inspire the legislator in the formation of certain written rules (*aequitas scripta*) or be used to fill gaps in the law where no rule at all

[14] Charles Lefebvre traces this distinction back to Dinus Mugellanus (Dino Rossoni, d. ca.1300) who was, interestingly, also the compiler of the added title *de regulis iuris* in the *Liber Sextus*, where the rule that *species derogat generi* appears. See VI, 5, 12, *de regulis juris*, 34. See Lefebvre, *Les Pouvoirs du Juge*, p. 192.

[15] A notable dissenting voice was that of Jacobus de Ravanis (Jacques de Révigny, d. 1296), *ad* C.3.1.8, in J. de Ravanis, *Lectura Super Codicem* (1519, repr. *Opera Iuridica Rariora* (Bologna: Forni, 1967), vol. 1, f. 127v. Others are mentioned in Ancharanus (Pietro d'Ancarano d. 1416) *ad* X, 1, 36, 11 in P Ancharanus, *In Quinque Decretalium Libros Facundissima Commentaria* (Bologna: Societas Typographiae Bononiensis, 1581), p. 326. These are discussed at greater length in Maniscalco, 'Concept of Equity', para. 1.1.2.

[16] See the comments to C.1.14.1 of Bartolus (d. 1357), Baldus (d. 1400), Salicetus (Bartolomeo da Saliceto d. 1411), and Paulus Castrensis (Paolo di Castro d. 1441). See also Petrus Bellapertica (d. 1308), *ad* C.1.14.1 (Cambridge, Peterhouse College, MS 34, f. 87v; Florence, Biblioteca Medicea Laurenziana, Plut. 6 Sin. 6, f. 43rb) and Baldus, *ad* C.3.1.8 in *Lectura Super Codice* (Venice, 1490), f. 168v–169. As late as the early sixteenth century we find the rule restated by the canonist Philippus Decius (d. ca. 1535), *De Regulis Iuris* (Lyons: Apud Antonium Vincentium, 1556), p. 306: 'Et quantum ad regulam hic quae dicit, quod aequitas praefertur rigori: primo regula intelligitur quando aequitas sit scripta: secus si scripta non sit: quia tunc rigor scriptus praefertur aequitati non scriptae .... Secundo regula procedit in aequitate scripta in specie. Secus si esset scripta in genere: quia rigor scriptus in specie illi praefertur: ut no[tat] Cyn[us] Bal[dus] Ange[lus] et Sali[cetus] in [C.3.1.8] ... et Abb[as Panormitanus] in [X.1.36.11] ad hoc facit, quia species derogat generi'. It persisted, among canon lawyers especially, well into the sixteenth century, see n. 85 below.

[17] This is discussed at greater length in Maniscalco, 'Concept of Equity', para. 1.1.3.1.

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was available (the residual role of *aequitas non scripta*) – but there is no sense in which it played a role in allowing judges or jurists to amend or correct existing written rules (i.e., to perform the role of Aristotle's *epieikeia*).

Another question is, regardless of any association between *aequitas* and *epieikeia*, whether medieval legists and canonists associated *aequitas* with interpretation. Based on the analysis above, it is clear that the doctrinal development of equity around C.3.1.8 and C.1.14.1 had little to do with interpretation – the whole point being that C.3.1.8 allowed a judge to make use of written 'equitable' rules, but said nothing about interpreting them. However, it is important to note that equity was sometimes mentioned by medieval legal writers within the context of interpretation. There are generally two ways in which medieval writers did this. One way was by occasionally adopting it as a word synonymous with *causa*, *ratio*, or *mens legis*; in this sense the *aequitas legis* was the spirit of the law.[18] A second way was to use it more generally as the guiding principle of all interpretation.[19] That said, equity did not inform a substantive doctrine of interpretation in either case. There was no development of any notion of equitable interpretation in medieval sources. The only separate substantive treatment of equity was that centred on *aequitas scripta* and *non scripta* outlined above. A better way to view these uses of equity is as extensions from the more general meaning of *aequitas* as 'justice' in the medieval period, that is, in the first sense, the *ratio*, *causa*, or *mens* of the rule can be seen to be the fundamental justice underpinning it, while in the latter case justice is viewed as the guiding principle of any exercise in interpretation. As we shall see below, it was only with the early modern association of these two concepts that equity (and indeed *epieikeia*) became a substantive doctrine of interpretation.

Equity in Medieval Scholastic Theology

The second branch of scholarship where equity was developed during the Middle Ages was that of scholastic theology. Theologians did not know the concepts of *aequitas scripta* and *non scripta*, and the

[18] Cortese, *La Norma*, vol. 1, pp. 268–271, 275–293.

[19] See, for instance, Baldus *ad* C.6.55.9: 'Aequitas est fundamentum interpretandi leges et pacta.' The statement is repeated very frequently in medieval and early modern sources dealing with interpretation.

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development of equity among theologians had little in common with the *aequitas* of lawyers. The reason for this is that among scholastic theologians from Aquinas onwards, *aequitas* was treated as a synonym of *epieikeia*, and their approach was therefore modelled on Aristotle's theory of equity.

In his *Summa Theologiae*, Aquinas explained that the role of *epieikeia* is to allow a subject of the law to disregard a rule of law whenever following the words of the law would lead to an unjust result, for example, one contrary to natural law[20] or the common good.[21] Aquinas was not unconcerned with sources from the *Corpus Iuris Civilis*, and he was aware of the prohibition against preferring equity to law in C.1.14.1. However, he avoided this difficulty in a way that bore no resemblance to the contemporary approach of lawyers. For Aquinas, C.1.14.1 was specifically a prohibition about interpreting a law in light of the intention of the legislator to do equity. This prohibition, for Aquinas, was consistent with patristic texts leaving interpretations of the law to the sovereign alone.[22] The solution was, for Aquinas, that *epieikeia* properly understood involves no interpretation of the law at all, in so far as interpretation is meant to resolve ambiguities relating to the meaning the words of the law should bear. It rather takes place where the meaning and applicability of the law is perfectly clear, but it is also clear that following it will

[20] Aquinas, *IIaIIae*, q. 60, art. 1: 'si Scriptura legis contineat aliquid contra ius naturale, iniusta est, nec habet vim obligandi . . . Et ideo nec tales Scripturae leges dicuntur, sed potius legis corruptiones, ut supra dictum est. Et ideo secundum eas non est iudicandum . . .. [I]ta etiam leges quae sunt recte positae in aliquibus casibus deficiunt, in quibus si servarentur, esset contra ius naturale. Et ideo in talibus non est secundum litteram legis iudicandum, sed recurrendum ad aequitatem, quam intendit legislator.' I refer to the Leonine edition of the *Summa*, see Aquinas, *Summa Theologiae in Opera Omnia iussu impensaque Leonis XIII edita* (Rome: Ex Typographya Polyglotta, 1888–1906), which is conveniently available online at www.corpusthomisticum.org. Accessed 21 May 2019.

[21] Aquinas, *IIaIIae*, q. 120, art. 1: 'in aliquibus casibus [legem] servare est contra aequalitatem iustitiae, et contra bonum commune, quod lex intendit . . . Et ad hoc ordinatur epieikeia, quae apud nos dicitur aequitas.'

[22] Aquinas, *IIaIIae*, q. 120, art. 1: 'Augustinus dicit, in libro de vera Relig[ione], in istis temporalibus legibus, quanquam de his homines iudicent cum eas instituunt, tamen cum fuerint institutae et firmatae, non licebit iudici de ipsis iudicare, sed secundum ipsas. Sed epieikes videtur iudicare de lege, quando eam aestimat non esse servandam in aliquo casu. Ergo epieikeia magis est vitium quam virtus . . .. Praeterea, ad epieikeiam videtur pertinere ut attendat ad intentionem legislatoris, ut philosophus dicit, in [*Ethics*, bk. 5, ch. 10]. Sed interpretari intentionem legislatoris ad solum principem pertinet, unde imperator dicit, in [C.1.14.1], inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere. Ergo actus epieikeiae est illicitus.'

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result in injustice.[23] This leads us to the second important point concerning Aquinas's views on equity, one that, as we shall see below, would become a central feature of early modern theological theories of equity. The second point is that equity or *epieikeia* is not an exercise centred on the interpretation of the intention of the legislator. It is rather focused on avoiding the injustice (e.g., breach of natural law or of public good) that an application of the law would bring about. It is, for these purposes, irrelevant what the legislator intended the law to achieve, because it would in any event not be within his power to bring about injustice. The intention of the legislator, in other words, only matters in so far as one presumes that the legislator did not intend to do what was in any event not within his power to do.

Medieval scholastic theologians following Aquinas continued to use equity and *epieikeia* as synonyms. Though they developed Aquinas's thoughts on this topic significantly, a full account of these writings is not central to the argument of this paper. The main developments of Aquinas's thought that would eventually influence the thoughts on *aequitas* of legal writers, and which are dealt with further below, occurred in early modern times and were in any case based on Aquinas's original writings in the *Summa* and not on the works of later medieval theologians.[24]

Differences between the Two Theories

It is well-known that glossators and commentators drew occasionally from scholastic theology, and indeed from Aristotle, when developing legal doctrine.[25] And the fact that scholastic theologians from Aquinas

[23] Aquinas, *Summa IIaIIae*, q. 120, art. 1: 'Ad tertium [i.e., the objection based on Augustine and C.1.14.1] dicendum quod interpretatio locum habet in dubiis, in quibus non licet absque determinatione principis a verbis legis recedere, sed in manifestis non est opus interpretatione sed executione.'

[24] In his well-known study, Riley discusses Henry of Hesse (d. 1397), Gerson, and Antoninus of Florence (d. 1459) as later writers on the topic. See L. J. Riley, *The History, Nature and Use of Epikeia in Moral Theology* (Washington, DC: The Catholic University of America Press, 1948), pp. 52–56. For the development of *epieikeia* in Egidius Romanus (d. 1316) and Johannes Gerson (d. 1429), see Maniscalco, 'Concept of Equity', para. 1.2.1.2. A broader discussion of the medieval development of *epieikeia*, also including the writings of political theorists like Marislius of Padua (d. 1342) can be found in F. D'Agostino, *La tradizione dell'epieikeia nel Medioevo latino* (Milan: Giuffré, 1976).

[25] See, e.g., Helmut Coing, 'Zum Einfluß Der Philosophie Des Aristoteles Auf Die Entwicklung Des Römischen Rechts', *Zeitschrift für Rechtsgeschichte, Romanistische Abteilung*, 69 (1952), 25–59. See also Norbert Horn, 'Philosophie in Der Jurisprudenz Der Kommentatoren: Baldus Philosophus', *Ius commune*, 1 (1967), 104–149.

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onwards associated *epieikeia* and *aequitas* in their writings may be part of the reason why legal historians have either assumed or sought a similar link among legal writers. However, as can easily be inferred from the analysis above, the concept of equity among medieval legists and canonists and its operation as *aequitas scripta* had nothing in common – in fact, it was plainly incompatible – with Aquinas's theory of *epieikeia*.

The reason for this may have something to do with the chronological development of each theory. The writings of glossators that first introduced the dichotomy *aequitas scripta* (or *constituta* in earlier texts) and *non scripta* to resolve the tension between C.3.1.8 and C.1.14.1 go back to the mid-twelfth century.[26] Throughout the twelfth century, however, the writings of Aristotle were (1) not widely available translated in Latin and (2) when available, did not translate references to *epieikeia* as *aequitas*, reporting them simply transliterated.[27] Before the diffusion of Aquinas's *Summa*, it does not seem that there was any obvious way for a jurist to see a link between equity and Aristotle's references to *epieikeia* in his works. However, by the time Aquinas had popularised the assimilation of equity and *epieikeia* among theologians, the doctrine of legists and canonists centred on *aequitas scripta* had had the time to harden for over a hundred years. This may have made Aquinas's writings on equity seem irrelevant to the treatment of that concept in legal scholarship in so far as they seemed inconsistent with the well-established point that equity could be a quality of written law.

It should also be pointed out that, even after the writings of Aquinas assimilating *aequitas* and *epieikeia*, the available Latin translations of Aristotle's works continued to transliterate occurrences of *epieikeia*, rather than translate them as *aequitas*. These medieval translations of Aristotle remained the only way to access Aristotle in Latin until a new wave of translations of Aristotle were produced by humanist philologists. This change and its impact on lawyers, in particular humanist jurists, is the object of the next section.

[26] For instance, Rogerius's (fl. ca. 1150) *Enodationes uper Codice*. Rogerius's text is edited in Kantorowicz and Buckland, *Studies in the Glossators*, pp. 281–284. See also Rogerius, *Summa*, 1–7 and I. 12.7–9, quoted by Meijers, 'Le Conflit', 119.

[27] For the diffusion of Aristotle's *Ethics* in the Middle Ages, see J. Poblete, 'Itinerario de las traducciones latinas de Ethica Nicomachea durante el siglo XIII', *Anales del Seminario de Historia de Filosofia*, 31 (2014), 43–68. The only available translation of the *Ethics* in the mid-twelfth century would have been an anonymous one sometimes attributed to Burgundio Pisanus (d. 1193). For the medieval translations of the *Rhetoric* see Aristotle, 'Rhetorica', in B. Schneider (ed.), *Aristoteles Latinus*, vol. 31 (Leiden: Brill, 1978).

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Humanist Jurists and Philologists: The Origins of Equitable Interpretation

In the previous section, I have argued that medieval legal writings did not assimilate equity and *epieikeia* or develop equity as a doctrine of interpretation. Studies by Guido Kisch and Vincenzo Piano Mortari have shown in the past that the explicit association of equity with *epieikeia* was an early modern phenomenon, and one that started with the writings of Gulielmus Budaeus (d. 1540).[28] These studies have, however, confined their discussion of this association as a peculiarity of legal humanism, without reference to the doctrinal development of theories of equity in legal scholarship. In this section, I will show that the conceptual shift identified by Piano Mortari and Kisch among humanist jurists can be related back to the development of humanistic philology, and that its true significance lies in the re-conceptualisation of equity as a doctrine of interpretation.

The Origins of the Association

From the fifteenth century onwards, a number of humanist scholars endeavoured to produce new editions of Greek philosophical works.[29] As a part of this movement, a new translation of Aristotle's *Ethics* was produced by Leonardus Aretinus (d. 1444) which translated all occurrences of *epieikeia* as *aequum et bonum*.[30] In a treatise he published in 1420 called *De interpretatione recta*, Aretinus explained this choice by reference to passages in the *Digest* including D.1.1.1pr, where Celsus is quoted as having said that 'law is the art of the good and the equitable (*ars boni et aequi*)'.[31] Aretinus's translation was generally very popular in

[28] See n. 3 above.

[29] For a brief introduction to the transmission of Aristotle in this period, with particular reference to his *Nichomachean Ethics*, see C. B. Schmitt, 'Aristotle's Ethics in the Sixteenth Century: Some Preliminary Considerations', in W. Rüegg and D. Wuttke (eds.), *Ethik im Humanismus* (Boppard: Boldt, 1979).

[30] L. Aretinus, '*Aristotelis Ethicorum Libri Decem*', in J. F. Stapulensis (ed.), *Decem Librorum Moralium Aristotelis, tres conversiones* (Paris: Simonis Colinaei, 1535), ff. 57v–58v.

[31] Leonardus Aretinus, 'De Interpretatione Recta.' For a modern edition see P. Vitti, *Sulla Perfetta Traduzione –Leonardo Bruni* (Naples: Liguori, 2004). Aretinus, 'De Interpretatione Recta', p. 120: '"Epiichia" est iustitiae pars quam nostri iureconsulti "ex bono et aequo" appellant. "Ius scriptum sic habet – inquit iurisconsultus – debet tamen ex bono et aequo sic intelligi, et aliud ex rigore iuris, aliud ex aequitate." Et alibi inquit: "ius est ars boni et aequi." Cur tu ergo mihi "epiichiam" relinquis in Graeco, verbum mihi ignotum, cum possis dicere "ex bono et aequo", ut dicunt iurisconsulti nostri? Hoc non est interpretari, sed confundere, nec lucem rebus, sed caliginem adhibere.' On the humanistic

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the fifteenth century and, most importantly, his approach to *epieikeia* quickly spread to other humanistic translations of Aristotle.[32] To mention a few, Aretinus's approach to *epieikeia* was adopted by Iohannes Argyropoulos (d. 1487), who produced perhaps the most popular early modern translation of the *Ethics* about half a century later,[33] by Georgius Trapezuntius (d. 1472) in his edition of the *Rhetoric* of 1443,[34] and by Georgius Valla (d. 1500) in his translation of the *Magna Moralia* – though the latter translated *epieikeia* as *aequitas*.[35]

Gulielmus Budaeus was the first legal writer to have unambiguously and explicitly argued, in his *Annotationes in Pandectas* published in 1508, that references to equity in the *Corpus Iuris Civilis* were references to Arisotle's *epieikeia*.[36] Budaeus's approach to *epieikeia* reveals his familiarity with the humanist translations of Aristotle.[37] In particular, he associated *epieikeia* not with *aequitas*, as Aquinas and many others since had, but more specifically with *aequum et bonum*, as the humanist translations did. He also specifically drew on D.1.1.1pr, the passage that had inspired Aretinus in his philological choice, to depart from the medieval learning on that passage and read Celsus's statement about 'the art of the good and the equitable (*ars boni et aequi*)' as referring to *epieikeia*.[38] That said, aside

approach to translation and Leonardo Bruni see P. Botley, *Latin Translation in the Renaissance* (Cambridge: Cambridge University Press, 2004). Latin translations of the *Ethics* continued to be an important genre through the sixteenth century, and at least seven other full translations were produced in the course of the sixteenth century. See Schmitt, 'Aristotle's Ethics', pp. 102–103.

32 Schmitt, 'Aristotle's Ethics', pp. 98–99.

33 See, for instance, the translation by Iohannes Argyropoulos, in Kisch, *Erasmus*, pp. 475–476.

34 G. Trapezuntius, *Aristoteles Rhetoricorum Libri III* (Venice: In Aedibus et Andreae Asulani Soceri, 1523), f. 117r.

35 G. Valla, 'Aristotelis Magnorum Moralium . . . Georgio Valla Placentino interprete', in Stapulensis (ed.), *Tres Conversiones*, f. 127v. Compare with the medieval translation by Bartholomeus de Messina (d. before 1266) in Biblioteca Apostolica Vaticana MS Pal. Lat. 1011, f. 142r.

36 Kisch, *Erasmus*, pp. 177–226.

37 There are strong parallels between Budaeus's text discussing equity and the Argyropoulos translation of the *Ethics*. Interestingly, in 1497, a book including three translations of the *Ethics* (by Bruni, Argyropoulos, and the medieval edition by Grosseteste), as well as Valla's translation of the *Magna Moralia* was published which featured a dedication of Valla's work to Budaeus himself. See Stapulensis (ed.), *Tres Conversiones*, f. 116r (dedication to Budaeus), f. 127v (*Magna Moralia* on *epieikeia*). I refer to the 1535 edition for convenience – earlier editions do not seem to be paginated.

38 G. Budaeus, *Annotationes in Pandectas* (1551). For a more detailed analysis of Budaeus's work and of the parallels between his text and that of early modern translations of Aristotle see Maniscalco, 'Concept of Equity', para. 2.2.3.

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from insisting on the philological accuracy of associating references to *aequum et bonum* in the *Digest* with *epieikeia*, Budaeus did not make many points of substance. He neither tried to draw links with the theological approach to *epieikeia* nor with the medieval legal writings on equity. Budaeus instead focused on providing a number of generally polemical points against rigorous approaches to law which should, in his view, be tempered by the use of *epieikeia*, without drawing links to any particular doctrine within the *ius commune*.[39] Budaeus's work was instead mostly successful in influencing other legal writers to import the humanistic philological approach to equity into the field of legal studies. Within a few decades, references to Budaeus's work on equity could be found in the works of most French humanist jurists.[40] More importantly for our purposes, as the association of *aequitas* and *epieikeia* reached legal writers who were more familiar with the medieval approach to equity centred on *aequitas scripta*, a branch of scholarship emerged which sought – on the one hand – to dismiss the medieval learning on equity and – more importantly on the other hand – to mould equity as *epieikeia* into a doctrine of interpretation.

Interpretatio ex bono et aequo: Equity As Interpretation

The first author to have taken this step seems to have been Marius Salamonius (Mario Salamoni degli Alberteschi d. 1557) in his *Commentarioli*, written in 1525.[41] Salamonius was a Roman humanist, political theorist, and jurist of repute.[42] Though his political writings are today better known than his legal ones, his approach to equity was extremely influential on later authors and provided the foundation for the early modern development of equity among legal scholars as a doctrine of interpretation.

In the *Commentarioli* he started, relying on Budaeus, by explaining that *aequum et bonum* was but a synonym for *epieikeia*, and that even *aequitas* did not convey quite the exact equivalent for the Aristotelian

[39] His more general polemic points are typical of some other humanist legal writings, which sought to link the narrow scholastic approach taken by legal scholars to what they saw as the dire conditions of legal scholarship and practice. See, e.g., J. L. Vives, *Aedes Legum* (Leuven: Th. Martens, 1519). On Vives's work see Kisch, *Erasmus*, pp. 69–89.

[40] Piano Mortari, 'Aequitas e Ius', pp. 141–279.

[41] M. Salamonius, *Commentarioli in Librum I Pandectarum* (Rome: Aedibus F. Minitii Calvi, 1525).

[42] For a few details on Salamonius's life see V. Cian, *Un Trattatista Del 'Principe' A Tempo Di N. Machiavelli* (Turin: Carlo Clausen, 1900).

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concept.[43] However, unlike Budaeus, Salamonius was clearly familiar with the medieval learning on equity and specifically with the fact that identifying equity with *epieikeia* would have been inconsistent with the medieval learning on *aequitas scripta*. As he put it, 'the distinction between written and unwritten equity is not a true one. Equity can be said to be contained in writing only improperly, as [whenever it is written down] it changes into a different kind of law'.[44] If equity was to operate consistently with Aristotle's account of *epieikeia* within the legal system, Salamonius thought that it would not be able to be reduced to written rules, but would rather have to operate on them, either as a power of interpretation or amendment – he therefore identified interpretation and amendment as the two functions of equity.[45] Crucially, he thought that only the former function – interpretation – fell within the domain of judges, while that of amendment remained the prerogative of the legislator only. A judge therefore gives effect to equity or *epieikeia* through an *interpretatio ex aequo et bono*, 'when he prefers the will to the letter of the law, when he follows what is benign ... when he adds what has been omitted and, generally, when he carries out whatever right reason requires'.[46] Salamonius does not go into great detail regarding this doctrine, and it is never clear whether in this passage he wished to list three different applications of the same principle or three separate principles.[47] The better view seems to be – and indeed it is the one that inspired later humanist jurists – that all three express the idea that an

[43] Salamonius, *Commentarioli*, pp. 7–13: 'Et doct[ores] male colligunt aliud bonum esse, aliud aequum ... nam hae duae dictiones bonum et aequum unum eundemque significatum habere in omnibus iuris partibus videmus .... Usurpatum est etiam dici una voce aequitatem quam Aristoteles epiciam vocat, non autem simul bonitatem et aequitatem dicimus.' That said, Salamonius used the word *aequitas* throughout his text as shorthand to refer to *aequum et bonum*.

[44] Ibid., p. 12: 'Et propterea vereor vera ne non sit illa distinctio de aequitate scripta et non scripta, quia improprium videtur aequitatis scripto contineri, quin in aliam speciem et nomen iuris transeat.'

[45] Ibid., p. 7: 'Quoniam aequitatis duae sunt partes, interpretatio et emendatio.'

[46] Ibid., p 8: 'Quod [i.e., ex bono et aequo interpretari] tum efficiemus cum voluntatem potius quam scriptum, cum quod benignius est, sequemur, cum quod omissum est, suppletur, et generaliter quicquid recta dictat ratio, perficitur.'

[47] He supports all three by reference to *Digest* passages directly, but never explains what role the intention of the legislator should have, or whether these three aims could ever be at odds with one another. Preferring the will of the law to its words is related to a case of purposive interpretation at D.27.1.13.2. The preference for more benign solutions finds support in D.50.17.56. It is only the third point about adding words to the law that finds a solution explicitly involving the *mens legislatoris*, see n. 48 below.

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equitable interpretation goes beyond the words of the law to give effect to the intentions of the legislator. This is consistent both with Salamonius's specific argument that one should only add words to a law which it is clear the legislator would have added,[48] and, perhaps more importantly, with his general argument that equitable interpretation should only take place where the intention of the legislator is in agreement with it – confining other cases to equitable amendment.[49] A great number of later jurists followed in Salamonius's footsteps from the mid-sixteenth century onwards, reconceptualising equity as a doctrine of interpretation and departing from the medieval learning on written and unwritten equity. In particular, his approach was popularised by Franciscus Connanus (d. 1551) and Franciscus Duarenus (d. 1559) and provided the foundation for the majority of later legal writings on equity,[50] finding its way into pedagogical works and legal dictionaries.[51]

48 Salamonius, *Commentarioli*, p. 8: 'De tertio scilicet quod aequitatis sit interpretatione supplere, quod multifariam potest contingere, interdum suppletur verbum quod ad perfectionem orationis desideratur, et dictum non scriptum. Etiam si non probetur dictum et verisimile sit fuisse dictum [D.35.1.102]. Item quando verisimile est si cogitatum fuisset, aut casus accidisset eo tempore quo scribebatur, dictum fuisset, [Accursius *ad* "exceptionem" D.2.14.40.3] ubi eleganter Accursius conflando regulam, nota inquit de iure id esse servandum, licet statutum non sit, quod verisimile est, statutum fuisset, si quaesitum fuisset, Aristoteles, emendetur omissum quod et legislator ipse, si adesset, utique faceret.'

49 This is Salamonius's interpretation of C.1.14.1. Ibid., pp. 9–10: '[C.1.14.1] de interpretativa aequitate non loquitur, quia iuris prudentibus et iudicibus id munus creditum fuit .... Suppletur itaque aut interpretatione, si mens legislatoris concurrit, aut emendatione, id est consitutione si praeter mentem accidat .... [Q]uae utraque emendatio suppletiva et correctiva est principis et eorum quibus princeps, vel lex delegavit, de qua [C.1.14.1].'

50 See F. Connanus, *Commentariorum Iuris Civilis Libri X*, 2 vols. (Paris: Apud Iacobum Kerver, 1553), vol. 1, ff. 44r–49v; F. Duarenus, *Opera Omnia* (Lyons: Apud Guilelmum Rovilium, 1558), pp. 19–29, 84–85 (commentary on the *Digest*), 492–493 (*Disputationes Anniversariae*, vol. 2). For other humanist writings see, e.g., J. Corasius, *De Iuris Arte Libellus* (Lyons: Apud Antonium Vincentium, 1560), pp. 50–51; A. Bolognetus, *De Lege, Iure et Aequitate Disputationes* (Rome: Apud Haeredes Antonii Bladii, 1570), cap. 28–34; F. Martini, *De Summo Iure et Aequitate Theses Iuridicae* (Freiburg: Typis Theodori Meyeri, 1623), unpaginated, th. 13–14; H. Donellus, *Commentariorum de Iure Civili Libri Viginti Octo*, 5 vols. (Hanau: Typis Wechelianis apud heredes Ioannis Aubrii, 1610), vol. 1, pp. 31–54; L. Charondas, *Pandectes Ou Digestes Du Droit François* (Lyons: J. Veyrat, 1597), p. 45; G. Maranus, *De Aequitate Sive Iustitia Commentarii Duo* (Toulouse: Apud Dominicum & Petrum Bosc, 1622); D. Gothofredus, *ad C.1.14.1* (Lyons: In Officina Bartholomaei Vincentii, 1583), col. 88; P. Faber, *Ad Titulum De Diversis Regulis Iuris Antiqui* (Lyons: Apud Franciscum Fabrum, 1590), pp. 233–238; H. Vulteius, *Institutiones Iuris Civilis a Iustiniano Compositas Commentarius* (Marburg: Apud Paulum Egenolphum, 1598), pp. 8–9.

51 See, e.g., B. Brissonius, *De Verborum Quae Ad Ius Civile Pertinent Significatione. Libri XIX*, 2 vols. (Lyons: Excudebat Ioannes Tornaesius, 1559), vol. 1, paras. 24–25 and P. Prateius, *Lexicon Iuris Civilis et Canonici* (Lyons: Per Martinum Lechler, 1567), ff. 11rb–vb.

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In short, the role of equity as put forward by the majority of legal writings throughout the sixteenth century and well into the seventeenth century as inspired by Salamonius, Connanus, and Duarenus was that equitable interpretation empowered the judge to move beyond the words of the law and give effect to the intention of the legislator. The points these writings made generally ran as follows. First, they dismissed the medieval learning on *aequitas scripta* and *non scripta* as incorrect. Secondly, they associated references to *aequitas* throughout the *Corpus Iuris Civilis* with *aequum et bonum* or *epieikeia*. Third, they argued that the role of equity so understood was that of either (1) allowing a departure from the words of the law in favour of the intention of the legislator or (2) in cases where no equitable interpretation would do, allow the legislator to amend or abolish the rule in question – the processes at (1) and (2) were referred to, by the times of Connanus, as uses of 'civil' and 'natural' equity respectively.[52]

These novel accounts of equity had, however, a problem in common. They did not do much to explain how this kind of interpretation would affect or interact with the learning on interpretation that had been developed throughout the medieval period by legists and canonists. The notion of interpreting a rule beyond its words to give effect to the intention of the legislator was not unknown to the medieval *ius commune*, and it was mostly articulated through the doctrines of *interpretatio extensiva* and *restrictiva*. These were two doctrines that determined in what circumstances a judge or jurist would be allowed to read the words of legal rules to, respectively, extend them to cases not covered by their plain meaning or to exclude cases covered by it. It is not clear how interpreting a rule by equity would add anything to the existing rules about *interpretatio extensiva* or *restrictiva*. Yet, legal writers such as Salamonius, Connanus, and Duarenus seem to have found this unproblematic, as did later writers who continued to define equity as *epieikeia* in the broadest terms well into the seventeenth century.[53] As will be shown in the following sections, the legal writers who sought to answer this

[52] While this was the view of the overwhelming majority of legal writings within this period, it was not unanimous. Traditional commentaries on canon law remained long anchored to the medieval definition, see n. 85 below. Even among humanist-influenced works, however, there were several dissenting voices in the period going up to 1550, including most famously Philipp Melanchthon (d. 1560) and Johannes Oldendorpius (d. 1567). See Maniscalco, 'Concept of Equity', paras. 2.3.3, 2.4.

[53] This is true of all the works listed at nn. 50–51 above.

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problem had to turn to the theories of *epieikeia* that were developed among early modern scholastic theologians.

Humanist Jurists and Early Modern Scholastics: Developing a Doctrine of Equitable Interpretation

The development of equity as a legal doctrine of interpretation based on *epieikeia* in early modern times was not the product of legal humanism alone. In this section, we look at a revival in studies on equity that took place in the sixteenth century among early modern scholastic theologians, and which mirrored and was probably influenced by the one that took place among lawyers. As I will show, the writings of lawyers and theologians on equity would end up being treated as part of the same body of scholarship, and drawn upon by legal writers who wished to deal with equity in more detail and identify its role more precisely.

Foundations of the Theological Theory of Equity

While Aquinas was the first scholastic theologian to bring together *aequitas* with *epieikeia*, his approach to equity had little in common with that taken by humanist jurists. As shown above, the key point in Aquinas's theory of equity was that equity applies in cases where it is obvious that a law would have no binding power because its application would be contrary to the public good, to natural law, or otherwise unjust. This did not depend on any interpretation of the law, in fact, Aquinas read C.1.14.1 as specifically prohibiting those sorts of interpretations. To reiterate the point, in Aquinas's analysis, the legislator's will could make no difference at all to whether the application of the law would do injustice, and interpreting it was not the business of *epieikeia*.

Between 1507 and 1517, Cajetan (Tommaso de Vio, d. 1534) produced a gloss on Aquinas's *Summa Theologiae*.[54] It is useful to look at Cajetan's approach, because his writings preceded the substantive development of equity as *epieikeia* among legal writers and were therefore

[54] For biographical details, see E. Stöve, 'De Vio, Tommaso', in *Treccani – Dizionario Biografico Degli Italiani* (Rome: Istituto della Enciclopedia Italiana, 1991), pp. 567–578. I refer throughout to Thomas Aquinas and Thomas De Vio, *Divi Thomae Aquinatis … Primam Secundae et Secundam Secundae Summae Theologiae. Cum Commentariis … Thomae de Vio* (Venice: Apud Dominicum Nicolinum, 1593).

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entirely independent from them. Cajetan's gloss therefore developed *epieikeia* purely along the lines set by Aquinas, and did so in two respects.

The first one is that it emphasised that *epieikeia* is concerned with preventing laws from doing wrong, rather than interpreting them. He specified that it is not enough for the *ratio* of a rule to be missing in a particular case for this to happen – there needs to be what Cajetan calls an 'oblique' failure of the *ratio*, by which he means that the application of the rule must cause injustice.[55] Crucially, a missing *ratio legis* was often discussed in medieval legal doctrines of interpretation as the kind of evidence that might indicate the legislator had no intention to bind in a particular case – this was therefore often cited by legal writers dealing with equity in early modern times as the kind of scenario where *epieikeia* might be used to depart from the words of the law in favour of the intention of the legislator.[56] However, for Cajetan, any evidence the *ratio legis* might provide as to the intention of the legislator is irrelevant, because *epieikeia* doesn't have anything to do with the legislator's intentions.[57]

The second point that Cajetan made was that *epieikeia* could never work to extend a rule from one case to another, it could only avoid the injustice that the application of a broadly worded rule would cause in particular cases. If a law did not provide for a certain case, then it seems that Cajetan did not think it plausible it could cause injustice by omission.[58] Again, this is very different from the approach adopted by sixteenth-century legal writers. For them, the role of equity was to give effect to the intention of the legislator, and the extension of a narrowly

[55] Ibid., f. 284r: 'Diligentissime quoque notandum est quod non de quocunque defectu legis, propter universale, est sermo in hac distinctione Aristotelis, sed de defectu obliquitatis .... Contrarie autem deficit lex propter universale, quando evenit casus, in quo non solum cessat ratio legis, sed inique ageretur, servando legem.'

[56] See, e.g., Bolognetus, *De Lege*, cap. 34, para. 8; Donellus, *Commnetariorum*, vol. 1, p. 31n51.

[57] De Vio, *Thomae Aquinatis*, f. 284r: 'Non nam aequitatis est interpretari, an in hoc casu servanda sit lex, sed ubi manifeste lex deficit propter universale, dirigere.'

[58] Ibid., f. 283v: 'In quaestio 120 nota primo quod quid est epiiciae, seu aequitatis, ut Latine loquamur in lingua Latina. Ut enim ex [Aristotelis, *Ethicorum*, bk. 5] patet, aequitas est directio legis ubi deficit propter universale ... Dicitur propter universale, quia causa defectus eius ad hoc, ut aequitas habeat locum, non est quaecumque, sed sola ista, scilicet si propter universale deficit, hoc est, si ideo deficit, quia quod universaliter statutum esse in hoc particulari casu deficit .... Nam si deficeret lex in casu aliquot propter privilegium aliter praecipiens, quam lex communis, non spectat directio actuum privilegii ad aequitatem: quam non deficit tunc lex propterea quia erat universalis, sed quia legislator derogavit legi quo ad hos privilegiator: et simile est si ex quacumque alia causa lex deficiat. Nunquam enim spectat directio ad aequitatem nisi deficiat propter universale.'

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worded rule to a case the legislator would have wished to cover was a stock example of equitable interpretation. These two aspects of *epieikeia* became the foundation of the early modern theological concept of equity, and the majority of theologians who developed the concept through the sixteenth century – most influentially Domingo de Soto (d. 1560) – followed the line set by Cajetan, confining equity to restrictions of rules in cases where their application would cause injustice.[59]

As discussed above, throughout the Middle Ages interactions between the theological concept of equity developed by Aquinas and that put forward by legists and canonists seem to have been almost non-existent.[60] The opposite is true of the early modern period for two main reasons. On the one hand, it is well-known that early modern (sometimes referred to as 'late') scholastic theologians were interested in law and often engaged in writing works of a thoroughly legal nature. It is therefore unsurprising that in their theological works (where *epieikeia* was often discussed in greater detail) one can find references to the concept of equity as discussed by humanist jurists or other legal writers.[61] On the other hand, legal writers themselves found the approach of theologians to *epieikeia* a useful resource to draw on for the simple reason that, having abandoned the medieval focus on *aequitas scripta* and shifted their attention to Aristotle's *epieikeia*, legal works now appeared to cover the same topic as theological ones.

[59] See D. de Soto, *De Iustitia et Iure Tomus Primus*, 5 vols. (1556 repr. Madrid: Instituto de Estudios Políticos, 1967–1968), vol. 1, q. 6, art. 8; q. 7, art. 3. See also B. de Medina, *Expositio in Primam Secundae Angelici Doctoris D. Thomae Aquinatis* (Venice: Apud Petrum Deluchinum, 1580), pp. 533–534; P. de Aragón, *In Secundam Secundae* (Lyons: Expensis Petri Landry, 1597), p. 18; G. Vázquez, *Commentariorum Ac Disputationum in Primam Secundae S. Thomae Tomus Secundus* (Complutum: Ex Offican Iusti Sanchez Crespo, 1605), disp. 176, art. 2, p. 296; J. De Salas, *De Legibus* (Lyons: Sumptibus Laurentii Durand, 1611), pp. 269–270. See Maniscalco, 'Concept of Equity', para. 3.3.1.

[60] See text at nn. 25–26 above.

[61] This movement is often collectively identified with the name of 'School of Salamanca', 'second scholasticism', or 'late scholasticism'. For the School in general see, among many others, M. A. Pena González, *La Escuela de Salamanca. De La Monarquía Hispánica Al Orbe Católico* (Madrid: Biblioteca de Autores Cristianos, 2009). The literature on the contributions of the School of Salamanca to juridical thought is extremely vast, a general treatment of the subject in English can be found in J. Gordley, *The Jurists: A Critical History* (Oxford University Press, 2013), pp. 82–110. For a useful bibliography on this subject, an easily accessible resource is the working paper by T. Duve and others, 'The School of Salamanca: A Digital Collection of Sources and a Dictionary of Its Juridical-Political Language: The Basic Objectives and Structure of a Research Project', 2014, conveniently available at https://d-nb.info/1053012446/34. Accessed on 22 May 2019.

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Influence of Legal aequitas *over Scholastic* epieikeia

Regarding the influence of the equity of legal humanists over the *epieikeia* of theologians, the earliest effect is better identified as a change in language rather than substance. It can first be observed in the 1550s in Domingo de Soto's comment on Aquinas's *Summa*. In this work, Soto described interventions of equity as instances of interpretation of the law, variously referred to as *epieikeia interpretari*, *interpretatio per epieikeiam*. On at least one occasion he refers to it as *interpretatio ex aequo et bono*, clearly betraying some familiarity with the language growing in popularity among legal writers.[62] The same approach can be found in the theologians who followed Soto.[63] This was, as we have seen above, inconsistent with the approach of Cajetan and of Aquinas himself, but by the times of Franciscus Suarez (d. 1617), it was uncontroversial that equity was a doctrine of interpretation.[64] However, for the majority of theologians up until the time of Suarez, this change in language does not seem to have affected their doctrinal approach to equity. Despite being associated with interpretation, it did not follow for Soto and his followers that *epieikeia* required an interpretation of the intention of the legislator, and they agreed with Cajetan that equity was confined to narrowing the scope of broadly framed rules when their application in particular cases caused injustice.[65]

It should be pointed out that a minority of theologians did, in this period, adopt the approach of legal writers in substance as well as language, explicitly departing from Cajetan and Soto as a result. A notable example is Navarrus (Martin de Azpilcueta, d. 1586). In his commentary on X.2.1, Navarrus referred to the early modern legal approach to equity and to medieval legal writings on interpretation to argue that equity had, at its core, the departure from the words of the law

[62] See Soto, *Iustitia et Iure*, vol. 1, q. 7, art. 3.

[63] See, e.g., Medina, *Expositio*, pp. 533–534 (*ex aequi et iusti interpretatione*); Vazquez, *Commentariorum*, p. 296 (*ex aequitate interpretari*).

[64] See nn. 50–51 above.

[65] See, e.g., Soto, *Iustitia et Iure*, vol. 1, p. 73: 'Patet ergo discrimen quid epieikeia non est subditum per licentiam eximere casu quo teneretur, sed explicate quod in illo casu non tenebatur: dispensatio autem est licentiam concedere . . .. Sed arguis contra: si Praelatus non potest sine causa dispensare, sit ut dispensatio nihil aliud sit quam declaratvio causae ob quam ratio legis in tali casu deficit . . .. Nam etsi ratio legis in hac persona deficiat, non ideo protinus a vinculo legis enodatur. Aliud enim est quod observatio humanae legis rationi sit contraria, ubi epieikeia locum habet: aliud vero quod ratio legis in hac persona deficiat, ubi nihilominus necessaria est dispensatio.' Soto and other writers applied some modifications to Catejan's theory. Some of those are discussed in Riley, *Epieikeia*, pp. 60–67.

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in favour of the intention of the legislator, and that it could therefore both intervene where the *ratio* of a rule did not apply[66] and interpret a rule extensively.[67] A similar approach was taken by Diego de Covarrubias (d. 1577) and Luis de Molina (d. 1600), but this remained very much a minority position among early modern theologians.[68]

Influence of Scholastic epieikeia *over Humanist* aequitas

On the other hand, as lawyers departed from the medieval learning to deal with equity as *epieikeia*, the writings of scholastic theologians gained new relevance to understand exactly how the latter would work as a doctrine – in particular, how *interpretatio ex aequo et bono* was meant to interact with existing doctrines of interpretation such as *interpretatio extensiva* and *restrictiva*.

One notable example is Ferdinandus a Mendoza (fl. ca. 1570), the author of a treatise on D.2.14 seemingly first published in 1586.[69] Mendoza's discussion is centred on the introductory passage to *De Pactis*, where Ulpian stated that the Praetor's Edict on pacts is founded on

[66] Regardless of whether injustice ensued, in so far as the absence of *ratio* could be taken to indicate that the intention of the legislator was that the rule should not apply.

[67] M. de Azpilcueta, *Commentarius Utilis in Rubricam de Iudiciis* (Rome: In Officina Iacobi Tornerii et Iacobi Bericchia, 1585), paras. 71–73: 'An autem aequitas, sive bonum et aequum duplex sit: altera limitans, qua excluduntus casus inclusi: altera extendens, qua includuntur casus non inclusi, quaestio pulchra est. . . . Deciu[s] proba[t] casum exceptum a regula extendi ad alium similem per aequitatem, sive epiiciam: et palam est, per illam extensionem non emendari lege deficientem per universale, sed deficientem per particulare. Ergo epiicia, sive aequitas invenitur in emendatione legis deficientis per particulare, sicut in emendatione legis deficientis per universale. . . . [I]nsignis et utilis quaestio est, an aequitas, sive bonum [sic] excludat a lege generaliter statuentem omnes casus, in quibus deficit ratio legis? Ad quam responded Caiet[anus] [ad iiaiiae, q. 120, art. 1] quod non . . . nisi quando non potest servari illa absque alio peccato. . . . Contra quos tamen facit, quod ratio legis est anima legis secundum Dyn[us] . . . probat legem factam principaliter ad aliquem finem, illo cessante non ligare.'

[68] D. de Covarrubias, *Relectio Regulae, Possessor Malae Fidei. De Regulis Iuris, Liber Sextus*, in *Opera Omnia* (Antwerp: Apud Gulielmum Lesteenium, 1627), p. 425; L. de Molina, *Disputationes de Contractibus* (Venice: Apud Sessas, 1607), p. 15. For another example, see also M. B. Salon, *Commentariorum in Disputationem de Iusitia* (Valencia: Apud Alvarum Francum, 1591), p. 2. One of the reasons why these authors may have preferred the views of legal humanists rather than their predecessors may have been that they were engaging in works of a rather distinctly legal nature: Navarrus and Covarrubias commenting on specific sources from canon or civil law, while Molina was writing a treatise on contracts.

[69] F. a Mendoza, *Liber Primus Disputationum Iuris Civilis in Difficiliores Leges ff. de Pactis* (Complutum: ex Typographia Ferdinandi Ramirez, 1586).

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natural equity.[70] Mendoza's discussion of this passage and of the meaning of 'natural equity' within it led him to a more general discussion of equity as a doctrine of interpretation. He began by referring to the position of Duarenus and other early modern jurists that we set out earlier, arguing that the medieval distinction of 'written' and 'unwritten' equity was unsound. He agreed with these authors that equity was by its very nature unwritten, and that whenever there is 'a clear and certain equity on one side and the rigour of the law on the other, it is permissible to follow equity'.[71] As we have seen, the authors he was relying on generally interpreted this aspect of the doctrine to mean that equity would allow a judge to interpret the law in line with the intentions of the legislator where these intentions can be gathered. However, this broad definition carried with it the problem of making equity seemingly coextensive with any exercise of interpretation, and therefore rather redundant.[72] Mendoza sought to resolve that problem by drawing on the writings on *epieikeia* by late-scholastic theologians, arguing that an equity will only be 'clear' if the law in its application suffers from a clear defect of universality and if its *ratio legis* fails 'contrarily'.[73] Both requirements are set out by Mendoza both in terms of terminology and of content following very closely the line of Cajetan[74] and Soto.[75]

[70] D.2.14.1.pr: 'Huius edicti aequitas naturalis est. Quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt servare?'

[71] Mendoza, *de Pactis*, ch. 3, para. 9: '[I]n dicta lege placuit [i.e., C.3.1.8] verbum illud (scriptae) additum est ab eis qui vim aequitatis non intellig[ebant] . . . in omnibus vetustis condicibus . . . verbum id (scriptae) abesse testatur . . . Franciscus Duarenus . . .. [V]erus hic sensus, ut dicat . . . quod quotiescumque sit aequitas (non scriptam debes intelligere) certa tamen et clar ex una parte et ius strictum ex alia, sequi licet aequitatem . . . quando autem possis discernere aequitatem claram ab obscura docebo postea.'

[72] See n. 52 above.

[73] Mendoza, *de Pactis*, ch. 3, paras. 15–16: 'Quod modo nobis reliquum est . . . explicare in quo consistat formalis et vera ratio clarae aequitatis, quam diximus inferiores iudices spreto verborum legis rigore sequi posse . . . quod ad constituendam formalem rationem aequitatis . . . duo copullative requiruntur, quorum si aliquod desit, aequitas vera non erit, primum est ut lex quae deficit, deficiat claro propter universalitatem seu generalitatem . . .. Secundum autem est quod ratio legis deficiat non pure negative, sed contrarie.'

[74] Ibid., para. 15: 'Dixi primo, oportere universale et clarum legem deficere, secundus Arist [oteles] nam si aliquo casu propter privatum prilivegium lex deficieret, non spectaret directio actus privilegii ad aequitatem, quia tunc non deficit lex propter clarum universale, sed propter universale obscurum, etsi clarum ipsi legislatori, qui scientia propria et experientia rationem unviersalem legis cessare cernit, quoad personam privilegiatam.' Compare with Cajetan: 'Nam si deficeret lex in casu aliquo propter privilegium aliter praecipiens quia . . . non spectat directio actuum privilegii ad aequitatem.'

[75] Ibid., para. 16: 'Secundum autem est, quod ratio legis, deficiat non pure negative, sed contrarie. Pro cuius maiori declaratione adverto, quod tunc dicitur ratio legis negative

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This provided Mendoza with the tools to distinguish interpretation generally from the more specific case of equitable interpretation, but it is not an exercise in which he fully engaged. He did not fully spell out his thoughts on the relationship between other kinds of interpretation and equity. He is nevertheless an interesting example of how civil lawyers following the innovations of legal humanisms could borrow back from theologians in order to develop their understanding of equitable interpretation, as the two traditions, until then firmly kept separate, became part of the same body of scholarship.[76]

Interpretatio ex aequo et bono and Interpretation in Legal Scholarship: The Case of Suarez and His Influence on Canon Law

Providing a full account of how the approach of theologians and of lawyers mixed into different attempts to identify precisely the scope of *interpretatio ex aequo et bono* would require a much lengthier piece. I will therefore instead focus in this section on the narrower but telling example of Franciscus Suarez (d. 1617), who provided one of the best developed and most influential accounts of equitable interpretation, and of its long-lasting influence on theories of equity found in canon law works.

cessare, quando accidit casus, inquo cessat sic totaliter ratio legis, ut legislator de hoc certus a principio, illum non obligaret, et de hoc etiam requisitus, tollet certo quoad illum authoritatem legis. Si tamen interim lex servetur, nil sequitur mali obliqui aut inordinati.' Compare these two extracts: Mendoza, *De Pactis*, cap. 3, para. 15: '[puta legem] quod equitem non vehantur mulabus . . . Ponas equitem circundatum peditis hostibus, aliter periculum mortis, vel servitutis, vel aliud quodcumque grave, evitare non posse, si mulam non ascendat . . . certe in his casibus lex propter universale claro deficit, et sic servanda non erit in casu occurrenti.' Soto, *Iustitia et Iure*, vol, 1, p. 73: 'Item dum vetaret lex ignobiles homines et infames equos ascendere, si occurreret eorum cuipiam casus, ut nisi se equo eriperet, in manus hostium incideret, tunc epieikeia eum docet lege se illo casu non obligari. At vero etsi contingeret qempiam illius classis hominem utilem esse bello, non subinde equo liceret uti, sed tamen ratio dispensationis emergeret.'

[76] Another example is Donellus, who probably relied, albeit indirectly, on the writings of scholastic theologians to distinguish equitable interpretation from interpretation more generally, see Donellus, *Commentariorum*, vol. 1, pp. 37–47. For another example of indirect reliance on theologians for the same purpose, see A. Turamini, *Ad Rubricam Pandectarum de Legibus Libri Tres* (Florence: Apud Franciscum Tosium, 1590), p. 156. Conversely, we find in Bolognetus references to scholastic theologians such as Soto and Aquinas, but in this case the references, while explicit, seem to be purely cosmetic, Bolognetus remained firmly adherent to a concept of equitable interpretation linked with the intention of the legislator. See, e.g., Bolognetus, *De Lege*, cap. 34, para. 23.

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Franciscus Suarez's Theory of Equity

The best developed account of equitable interpretation, incorporating both the theological and the legal learning on equity, and the one that most successfully distinguishes interpretation by equity from other kinds of interpretation is to be found in the work of a theologian: Suarez's *Tractatus de legibus ac deo legislatore* published in the early seventeenth century. Suarez has been acknowledged in the past as the writer who contributed the most to the theological development of *epieikeia*, but it is only within the broader context of equity's early modern development as a juridical concept that the importance of Suarez's work can be fully appreciated.[77]

In *De Legibus*, equity is, first of all, unambiguously aligned with legal interpretation. The sixth book of this work deals with the interpretation of the law, and the eighth chapter is concerned with interpretations by equity.[78] From the start, it is clear that Suarez is aware of the two functions that equity had developed in theological and legal works, respectively. He explained that 'one can distinguish two ways of doing *epieikeia*, one taking a case out of the power of the legislator, the other out of his will only' because '*epieikeia* also takes place in a case where the legislator did not lack the power to bind, but it is clear from the circumstances that it was not his intention'.[79] The first of these two limbs is clearly aligned with the theological approach to equity, disapplying rules in cases where they would violate natural law or the common good. The second is aligned with that of lawyers, simply giving effect to the intentions of the legislator, regardless of whether the rule infringes natural law. Suarez is the first author to expose this distinction with analytical clarity.

He is also the earliest legal writer to explicitly deal with the difference between equitable interpretation and other kinds of interpretation. He made it clear that 'not every kind of interpretation is *epieikeia*, but only that through which we interpret that a law has such a defect of universality that it cannot be followed rightly in a certain case'. Suarez discussed equitable interpretation alongside the other two kinds of interpretation, *interpretatio extensiva* and *restrictiva*. Both are dealt with in entirely

[77] See, e.g., Riley, *Epikeia*, p. 67: 'No theologian treats so comprehensively the concept of *epikeia* as does Suarez.'

[78] F. Suarez, *Tractatus De Legibus Ac Deo Legislatore* (Antwerp: Apud Ioannem Keerbergium, 1613), bk. 6, ch. 8.

[79] Ibid., pp. 439–441.

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separate chapters of his work and never referred to when Suarez deals with equity.[80] Jurists discussing equity usually blended the ideas of extending and restricting laws by interpretation and interpreting them equitably, whereas Suarez evidently saw the affinity between the ideas and sought to draw a conceptual and doctrinal distinction.

How then is interpreting by equity to be distinguished from other exercises in interpretation? In so far as Suarez thought that interpreting by equity involves the correction of a 'defect of universality', and therefore works to restrict broadly framed rules, it may seem to overlap entirely with *interpretatio restrictiva*. Suarez made it clear, in line with the medieval learning on legal interpretation, that the purpose of any kind of interpretation – including interpretatio *restrictiva* – would be that of fulfilling the intentions of the legislator. *Interpretatio restrictiva* would therefore serve to read the words of the law narrowly where it appears that the legislator did not intend them to apply to a particular case which they seem to cover. The problem is that, for Suarez, the second limb of equitable interpretation serves to avoid the application of a rule generally framed if 'it is clear from the circumstances that it was not his intention' to bind. Both therefore seem to perform the same function and, under this reading, *interpretatio restrictiva* is entirely absorbed by the second limb of equitable interpretation.

Suarez does not address this problem head on – in fact, he discusses the two in entirely separate chapters without ever drawing comparisons between them. That said, from some passages in Suarez, it is possible to gather that he saw the difference between equitable interpretation and other kinds of interpretation – both *extensiva* and *restrictiva* – to lie in the type of interpretive exercise involved. So much can be gathered from his introductory passage to equitable interpretation, where he says that 'to avoid confusing *epieikeia* with the general interpretation of the laws, I draw attention to the fact that . . . to ask about the meaning of the words, whether they be universal and include this or that case, or whether they are to be taken in one or the other signification . . . pertains to the general doctrine [of interpretation] discussed in the preceding chapters [i.e., the chapters on *interpretatio extensiva* and *restrictiva*] . . . where there is no issue of emendation of the law, but of [finding] its meaning'.[81]

[80] Suarez discusses those in chapters 1 to 5. See Ibid., pp. 421–435.

[81] Ibid., bk. 6, ch. 6: 'Ut . . . non confundatur epiikia cum generali interpretatione legum, adverto, aliud esse inquirere de sensu verborum, an universalia sint, et hos, vel illos casus comprehendant, seu an in hac, vel illa significatione accipiantur, et hoc pertinet ad

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From this passage, it seems that interpretations other than equitable are, for Suarez, about identifying the content of the obligation that the law purports to impose. Suarez therefore explains *interpretatio restrictiva* and *extensiva* as doctrines seeking to establish the meaning of the words of the law, whenever it is not apparent. This is consistent with his approach in the chapters on extensive and restrictive interpretation, where Suarez draws on the works of Tiraquellus and Constantius Rogerius to deal with how one may interpret the meaning of words.[82] The main point he makes is that in construing the meaning of the words of the law, words have to be taken, first, in their proper meaning – by which Suarez means either their everyday usage or their technical legal meaning. If it is clear, however, that their proper meaning cannot have been what the legislator intended, then the words may be stretched to whatever 'improper' sense the legislator meant them to bear, and this is usually what an *interpretatio extensiva* and *restrictiva* will perform.[83] If this interpretation is correct, the distinction between these exercises in interpretation and equitable interpretation lies in the fact that, for Suarez, equitable interpretation is confined to cases where an application of the law would either cause injustice or violate the wishes of the legislator, and there is no possible sense that the words could bear to avoid this, so that the law clearly purports to bind in a certain case, but has to be amended because it loses its binding power. This is a plausible reading of the role of equitable interpretation for Suarez, but not one that he ever spells out explicitly.

Later Influence of the Suarezian Approach

More research is required to map out exactly which jurists took up on Suarez's attempt to distinguish equitable interpretation from interpretation in general, and how quickly this approach to equity spread out

generalem doctrinam datam capitibus precedentibus . . . ibi non agitur de emendatione legis, sed de eius sensu.'

[82] See Maniscalco, 'Concept of Equity', para. 4.2.4.1.4. See Suarez, *De Legibus*, bk. 6, ch. 8, pp. 418–421.

[83] Suarez, *De Legibus*, bk. 6, ch. 1: '[Si mentem legis] sufficienter cognita sit, esse verbis praeferendam . . .. Hoc denique modo dicitur in [D.1.7.18] a verbis legis recedi, ubi de mente legislatoris constat. Dicimus autem a verbis legis recedere . . . quando a proprietate verborum aliquantulum recedimus: quod etiam facere licet, quando necessarium est, ut a mente legislatoris non recedamus quia tunc verba re vera non significant voluntatem legislatoris secundum suam proprietaetm, sed secundum aliquam translationem.'

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among legal writers.[84] However, there is clear evidence that Suarez's approach to equity, in confining it to corrections of 'defects of universality' but at the same time distinguishing it from *interpretatio restrictiva*, became popular among canon lawyers.

When it comes to their analysis of equity, canon lawyers were a very conservative group of legal writers. Up until the mid-sixteenth century, commentaries to canon law sources still referred to *aequitas scripta* in the medieval sense.[85] The earliest works of canon law explicitly adopting the early modern understanding of equity as *epieikeia* seemingly appeared in the mid-seventeenth century[86] with Emanuel Gonzalez Tellez's (d. 1649) commentary to the decretals. Commenting on X.1.36.11,[87] Tellez cited Suarez alongside a number of other juridical sources to explain equity in terms of interpretation.[88]

Tellez did not distinguish equity and interpretation as clearly as Suarez had but, by the eighteenth century, one can find canon lawyers expressly adopting Suarez's way of distinguishing equity from interpretation more generally, as well as from *interpretatio restrictiva*, in

[84] Or, indeed, whether other authors beside Suarez succeeded in providing a successful distinction between equitable interpretation and interpretation generally. For the diffusion of Suarez's idea among theologians see Maniscalco, 'Concept of Equity', para. 4.2.4.2.

[85] See F. Sandeus (d. 1503), *ad X.2.27.2 in Commentaria . . . in V. libros Decretalium*, 4 vols. (Basel: Ex Officina Frobeniana, 1567), Vol. 3, paras. 397–398. P. P. Parisius (d. 1545), *ad X.2.19.11 in Commentaria Super Capitulo In Presentia Nec Non* (Venice: Per Baptistam de Tortis, 1522), ff. 25vb–26ra. M. M. Benavides (d. 1582), *Isagogicus perquam brevis modus ad tollendos fere quoscunque licet inexplicabiles argumentorum nodos* (Venice: Apud Gabrielem Giolitum de Ferraris, 1544), pp. 201–205, A. Beroius (d. 1554), 'ad X, 2, 19, 11', in *In Primam Partem Libri I Decretalium Commentarii* (Venice: Apud Dominicum Nicolinum, 1578), p. 109.

[86] This is not to say that canon lawyers were not aware or did not acknowledge the developments among humanist jurists, for instance Hippolytus Bonacossa's (d. 1591) *De Aequitate Canonica* mentions the view that equity and *epieikeia* may be related, referring explicitly to Budaeus and Salamonius's views, but reverted to the doctrine of *aequitas scripta* to explain how equity operated to moderate rigour. See H. Bonacossa, *De Aequitate Canonica* (Venice: Apud Damianum Zenarium, 1575), p. 6.

[87] X.1.36.11 is the *locus* where canon lawyers often exposed the theory of *aequitas scripta* in comments and glosses throughout the Middle Ages and early modern times.

[88] E. G. Tellez (d. 1649), *Commentaria Perpetua in . . . Decretalium* (Lyons: Sumptibus Annison et Joannis Posuel, 1673), ad X.1.36.11, p. 680: 'Ubi enim ius apertum est, et verborum legis, vel sententiae nulla pugna est, etiamsi quod statutum est, perdurum sit, observandum est, et tantum Princeps potest aequitatem interpretari, [D.26.7.24.1]. . .. Quod si aliud verba legis significant, aliud ex mente, et sententia eius deducatur, tunc iudex neglecto summo iure aequitatem servare debet [C.3.1.8] . . .. Cum enim innumera sint negotia, nec omnia quotidie emergentia legibus comprehendi possint [D.1.3.10] [D.1.3.12] tunc iudex supplere debet partem aequitatis, ubi legislator deficit.'

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order to fit *interpretatio ex aequo et bono* within their broader theories of interpretation. Two examples can be provided here to make the point. One is the Franciscan theologian and canon lawyer Anaklet Reiffenstuel (Johann Georg Reiffenstuel d. 1703) who, in his *Ius Canonicum Universum*, first published in 1700, followed Suarez in distinguishing *interpretatio restrictiva* from *epieikeia*. He followed early modern legal writers in describing *epieikeia* as 'a benign interpretation of the law, according to *aequum et bonum*' and then specified that '*epieikeia* differs very much from interpretation in that through the latter we interpret the words of the law when they are obscure or convey an ambiguous meaning. With *epieikeia* we rather interpret the intention of the legislator, where it is clear that the words have a universal meaning, but one is in doubt about the intention of the legislator, whether in that particular case he would, or indeed could, include the particular case under the general words of the law.'[89] All the elements of Suarez's theory are encompassed. Interpretations by equity may only restrict general rules, and they may do so in two circumstances: either where demanding an application of the law would not be within legislator's power, or where it is clear he would not have intended it to apply. Reiffenstuel also seems to have spelled out more clearly that he saw the distinction between equitable and non-equitable interpretation as centred on whether one was interpreting the words of the law or moving beyond them. A second example, that of Francis Xavier Schmalzgrueber (d. 1735), is helpful to show that, while clearly influenced by Suarez's mixture of humanistic and scholastic theories of equity, canon lawyers as late as the eighteenth century did not all interpret it in the same way. In his own *Jus Canonicum Universum*, Schmalzgrueber preferred to bring together *epieikeia* and *aequum et bonum* as aspects of *interpretatio restrictiva*, rather than distinguishing them from it.[90] This is not an altogether unsurprising interpretation of Suarez, since the distinction between *epieikeia* and *interpretatio restrictiva* seemed, as discussed above, tenuous at best.

[89] See A. Reiffenstuel, *Jus Canonicum Universum* (Munich: Typis Mariae Magadalenae Rauchin, Viduae, 1700), p. 156.

[90] See F. X. Schmalzgrueber, *Jus Ecclesiasticum Universum, Tomus Primus* (Venice: Apud Josephum Bortoli, 1738), p. 68. This interpretation of Suarez had, among scholastic theologians, been popularised by Paul Laymann (d. 1635) in the previous century, and it is likely that Schmalzgrueber relied on Laymann's *Theologia Moralis*. For Laymann's take on Suarez see Maniscalco, 'Concept of Equity', para. 4.2.4.2.2.

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Conclusion

The history of the association of equity and *epieikeia* has traditionally been seen as either one of continuity within the tradition of the *ius commune* from medieval times onwards,[91] or as a purely humanistic phenomenon spreading from Budaeus to various circles of humanist jurists, but of otherwise little consequence for legal writers.[92] The former view seems unsupported by the evidence. As shown in the second section of this paper, medieval theories of equity among legists and canonists did not refer to *epieikeia*, and focussed instead on a doctrine of equity centred on the concept of *aequitas scripta*, which had nothing to do with the correction of written rules and seemed opposed to rather than influenced by Aristotle's *epieikeia*. The latter view has the merit of identifying part of the picture. There was a clean break with the medieval theories of equity in early modern times, and legal humanists were probably the earliest scholars to bring it about – arguably, as shown in the third section of this paper, under the influence of developments in humanistic philology. However, the development of equity as *epieikeia* and into a legal doctrine of interpretation was not a purely humanistic phenomenon, and its effect was felt far beyond the circle of early legal humanism.

The association of equity with *epieikeia*, its reconceptualisation as a theory of interpretation, and its adoption by legal writers in their comments to legal sources was instead the product of interactions among scholars in different disciplines. The two examples of Reiffenstuel and Schmalzgrueber provided at the end of this paper no doubt only scratch the surface of the diffusion of theories of equitable interpretation among later early modern legal scholars, but they serve to show that the early modern transformation of the concept of equity has to be understood within the complex network of ideas that travelled across among humanist jurists, scholastic theologians, and more traditional legists and canonists.

[91] See, e.g., the works mentioned in nn. 5–6 above.
[92] See n. 3 above.

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