THE MODERN LAW REVIEW
Modern Law Review
DOI: 10.1111/1468-2230.12750

ARTICLE

# Equity before 'Equity'

Stephen Humphreys*

The notion of 'equity' is undergoing conceptual repositioning in international law today, embracing individuals as well as states and gaining an association with human rights and the politics of protest. In the context of these developments, the present paper enquires into the premodern roots of this ancient and rich term through three historical vignettes: first, the emergence of *aequitas* in Roman law – as a source of law anchored in analogy and empathy – and in particular its relevance to the ambiguous status of slaves; second, the importance of 'natural equity' to the consolidation of 'natural rights' during the Franciscan poverty debate in 14th century Europe, and finally, 'common equity' in the rights-based constitutional order proposed by the Levellers in 1640s England. In its root sense, I conclude, what we might call 'radical equity' has historically lent itself to trenchant critique of the law, centred on the individual as subject of right.

Something interesting is happening to equity. Traditionally, in international law, 'equity' has referred to relations between countries, notably regarding land and sea boundaries and resource access. But recently the term has come to refer also to the treatment of individuals. This trend is visible in international climate law – where a 'principle' of equity initially referred, in 1992, not only to inter-state relations but also to 'present and future generations of humankind', and the 2015 Paris Agreement later extolling 'intergenerational equity' as well as 'equitable access' to 'sustainable development and eradication of poverty'.[1] But a similar trend has long been apparent at the World Health Organisation, where equity has been a key term of art since at least the 1980s, concerned with 'systematic differences in health status between different socioeconomic groups',[2] and also in more recent international proclamations such as the 2015 Sustainable Development Goals, which speak of 'equitable access' to education, drinking water, sanitation and hygiene for 'all people'. Beyond this again, 'equity' has come to inform global-level protests targeting *inequity*: ex-

*Associate Professor, School of Law, London School of Economics and Political Science. My thanks to Martin Loughlin, Susan Marks, and the anonymous reviewers for helpful, and in some cases indispensable, comments. Any mistakes are my own.

1 The United Nations Framework Convention on Climate Change 1992, 1771 UNTS 107, Art 3(1); Paris Agreement (adopted 12 December 2015, entered into force 4 November 2016), UN Doc FCCC/CP/2015/10/Add 1.

2 World Health Organization (M. Whitehead and G. Dahlgren), *Concepts and principles for tackling social inequities in health: Levelling up Part 1* (WHO, 2006).

tinction rebellion, gilets-jaunes, me-too, black lives matter, and occupy. In these cases, equity occasionally acquires a clear consonance with the register of human rights, a conceptual convergence that may appear – given that a vast literature on equity in law acknowledges no such association – both novel and tenuous.[3]

This recent development provides context for the present paper, but it is not my subject. I am rather concerned here to show, through historical and philological inquiry, that the current move is neither novel nor tenuous: equity has, at its conceptual root, repeatedly centred on the human person, and it moreover shares an intimate, indeed foundational, relation with the notion of human rights, at least at the moment of the latter's conceptual emergence in the form of ideas about natural rights. In making this case, I have canvassed much of the colossal literature on this rich and ancient notion – but I have also set aside much that is familiar, and indeed central, to most accounts of equity – in order to pick out a specific, somewhat neglected thread that, I suggest, connects the root notion of equity to its emerging contemporary significance.

This root sense of equity is 'radical' in several senses of the word. By 'radical equity' I am referring first to the etymological root of the word in the Latin *aequum/aequitas*, initially meaning level or equal. I mean, second, the degree to which some notion of equity played an indispensable catalytic function at the taproot of the very idea of law itself, in its earliest European articulations. Third, by radical equity I have in mind a historically repeated gesture towards an extra-legal ground by means of which the law is to be evaluated or assessed for its *adequacy* as law: a non-positive ground of law, which – for that reason – escapes final definition. Finally, by 'radical equity' I aim to reconnect equity with the likewise (initially) radical notion of human rights, where it is found in the seeds of the latter's own beginnings.

I proceed by revisiting three historical moments during which the notion of equity played a key role in raising or settling fundamental principles of law. A first vignette, centring on the ambiguous status of slaves in Roman law, examines the notion of *aequitas* as a kind of portal through which the non-legal enters the law by analogy. A second vignette visits 14th century Avignon – the famous Franciscan poverty debate – during which the appeal to natural equity provides critical ground for a new language of 'natural rights'. In a third moment, equity features at the heart of the novel claim to a rights-based constitutional order raised by the Levellers in revolutionary 17th century England.

Together these three periods span well over a millennium, more time than a single article can cover in detail. By moving between them, I aim to identify and clarify a core connotation that reiterates consistently over time, and that puts flesh on the skeletal aspirations haunting today's usage. In all three moments, equity refers to something held 'in common': in Roman law, it provides a basis for the *analogical extension of law* grounded in *imaginative (if limited) empathy*; for the Franciscans, equity speaks to the *legitimate power of the individual*, especially in times of *necessity*; for the Levellers, it becomes the *quasi-constitutional underpinning of individual rights*. In no case, however, does the invocation of equity

3 See for example M. Allen *et al*, 'Framing and Context' in V. Masson-Delmotte *et al* (eds), *Global Warming of 1.5°C. An IPCC Special Report* (IPCC, 2018) 55.

decide political outcomes: rather it marks the recurrence of structurally similar arguments over the *longue durée*. In my recounting of these episodes, I rely in the main on the significant scholarship already undertaken on these periods, returning to primary sources in each case to test and consolidate the argument.

Beginning with Roman law, and relying especially on the work of Peter Stein, Aldo Schiavone and Tony Honoré, I find equity first appearing – as *aequum* (with *bonum*) and *aequitas* – as a principle to allow the analogical 'finding' of something conceived of as 'unwritten law'. Equity in this sense allowed for extrapolation between different cases, by assuming a background yardstick against which to measure them – a notion of equality systematically invoked at the boundary between law/non-law to extend the law through imaginative engagement or empathy. Slaves were a paradigmatic example – outside law, they were sometimes brought within it under the auspices of 'natural equity' (not, in the first instance, 'natural law') – but only in very limited cases, as a close reading of Justinian's *Digest* shows. This was not a principle of universal equality; rather it was a kind of tissue connecting an abstract law to real-world human beings.

Usage of the term immediately before the Franciscan poverty debate, some centuries later, owed much to the (rediscovered) *Digest* and largely centred on whether and how 'unwritten law' was to be found. According to Charles Lefebvre and Lorenzo Maniscalco, one view held that the Pope/ emperor/ sovereign (and only he) may suspend existing law to exercise 'natural equity' in specific cases, generally aligning with mercy or compassion. A competing view was that equity was best understood as a judicial aid in interpreting existing law – which on this view *already* incorporates 'written equity' from prior decisions. For William of Ockham – a principal early exponent of 'natural rights' (I rely on Tierney, Robinson and Brett) – 'natural equity' was located not primarily or solely in the sovereign or the law, but in each individual a priori, providing a measure to evaluate the positive law and suspend it in times of necessity – in the face, for example, of hunger, thirst, or suffering. Natural equity is, in Ockham's hands, an *immediate* knowledge based on primary sensory experience, giving rise to an innate personal exercisable power prior to law. But it also describes a *limit* to what may, equitably, be legislated.

Turning to the Levellers, then, three centuries later, I focus on the extent to which they relied on a notion of 'common equity' clearly congruent with Ockham's 'natural equity' (I sketch, but do not detail, the genealogy), in assuming that a law- or even constitution-making faculty or power lies within each person. For the Levellers, 'common equity' underpins 'common rights', which comprise the fundamental rights of all (English)men, and which are, or ought to be, the *source* of law among equals, grounded in an intersubjective tolerance and mutual respect against religious purism. Other radicals at this time likewise invoke 'equity' to make strong political claims with a universal colouring. Although this usage of 'equity' did not survive the period, the notion of an extra-legal yardstick against which to evaluate or reform the positive law has carried forward, I conclude, in the language of natural or human rights.

In the common law world today, equity is a technical term for a body of rules or principles historically associated with the English Court of Chancery. I am not, in this paper, dealing with equity in this sense. Elsewhere, equity

translates loosely as 'fairness' in process or distribution – an essentially rhetorical criterion that need neither depend upon nor direct, in any predictable sense, the law. Radical equity, by contrast, is concerned with the fundamentals of law, but sourced outside it. If 'equity' is rarely deployed today in the radical sense I trace here, the invocation of the term in numerous contemporary contexts may owe, I suggest, a partial debt to this history – and might yet take some sustenance from it. It is not merely that comparatively vague notions of unfairness or inequity may be directed into a critique or wholesale re-evaluation of an existing body of law – a sense that rumbles away in climate law and in contemporary political protest. It is also that the locus of evaluation is conceived of as residing within the individual subject (an 'instinct of nature' as the 12th century Decretum put it) motivated to reclaim or take back the law. Equity even now signals an inchoate source of rights, protest and reform that harkens back to the ancient and tangled tradition I have attempted to capture and clarify here. The idea of radical equity does not (and did not) translate into a specific doctrine of law or programme of action. Rather it matters as an element in a larger conceptual landscape, pulling a general discourse further perhaps in one direction than it might otherwise have gone: constraining as well as liberating.

This conclusion is, however, more a starting than an end point for reflection and critique. We might want to examine the relevance of 'radical equity' to the emergence of the early modern *subject of right* (in Michel Foucault's words: *homo juridicus*), and of its relative eclipse from the mid-seventeenth century to the later dominant *subject of interest* (Foucault again: *homo oeconomicus*).[4] We might want to investigate how these closely wrought tissues were largely unthreaded across the modern period and with what effect. We might want to uncover the niches in which the radical tradition remained and returned – its prominent appearance, for example, in the call for a 'new international economic order' in the postcolonial era. But that inquiry awaits another day.

## ROME 61

In 61 CE, during the Emperor Nero's reign, the Roman city prefect Lucius Pedanius Secundus was murdered by a slave, triggering what the historian Tacitus described as an 'old custom' calling for the torture and execution of all the slaves under his roof – 400 including women and children.[5] The matter was brought before the Senate where, as Tacitus tells it, 'the rapid assembly of the populace, bent on protecting so many innocent lives, brought matters to the

4 M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France 1978-79*, G. Burchall trans (New York, NY: Palgrave MacMillan, 2008) esp chs 11 (notably 276-283) and 12.

5 Tacitus, *The Annals*, J. Jackson trans (Cambridge, MA: Harvard University Press, 1962) [Book XIV, xlii], at 175. I borrow also from the translation by A.J. Church in Tacitus, *The Complete Works of Tacitus* (New York, NY: Random House, 1942). The Silanian Senatorial Decree of 10 CE, codifying the custom, is given in Justinian's Digest at D. 29.5.1.1-38 (Ulpian). Slaves were to be 'questioned and executed'; 'we understand "questioning" to mean not only torture but all investigation and inquiry into the [master's] death' (D. 29.5.1.25). T. Mommsen *et al* (eds), *The Digest of Justinian* (Philadelphia, PA: University of Pennsylvania Press, 1985) (*Digest*) vols 1-4.

point of sedition'.[6] The senator and lawyer Gaius Cassius Longinus addressed the Senate in support of the penalty. He began with a comment on his approach to law. Although he had never doubted the superiority of the ancient laws, he said, he had in the past often acquiesced where the Senate chose to over-ride the 'customs and laws of our ancestors' with 'new decrees'. He could not do so in this case: 'By all means vote impunity! But whom shall his rank defend, when rank has not availed the prefect of Rome? Whom shall the number of his slaves protect, when four hundred could not shield Pedanius Secundus?'[7]

It is true, Cassius admitted, that in implementing the law, 'some innocent lives will be lost': 'But now that we have in our households nations with different customs to our own, with foreign religions or none at all, it is only through terror that such a motley rabble can be managed … There is something unfair [*aliquod ex iniquo*] in every great precedent, which, though harmful to individuals, pays off to public advantage.'[8]

On Tacitus's account, Cassius won out, but 'the decision could not be complied with, as a dense crowd gathered and threatened to resort to stones and firebrands,' until Nero himself stepped in with 'detachments of soldiers' to carry out the executions. Nero then vetoed a senatorial motion to exile all the freedmen in Pedanius's home 'lest', in Tacitus's words, 'gratuitous cruelty should aggravate a primitive custom which mercy had failed to temper'.[9] It is clearly Tacitus's view that the Senate had erred in applying an ancient law mechanically, failing to respond to the actual persons – slaves, foreigners – before them.

Aldo Schiavone examines this episode in his detailed account of the slow systematisation of Roman law, *Ius* (translated as *The Invention of Law in the West*). For Schiavone, Cassius's choice of the word *iniquus* stands out in this context as a deliberate signal within a wider legal debate of the day. Schiavone writes: 'It was easy to identify [Cassius Longinus's] adversaries: proponents of 'fairness'; supporters of the [maxim] *summum ius, summa iniuria* [who] had constructed a paradigm of equity at the intersection between Greek classics and Roman tradition …'[10]

What Schiavone wishes to clarify here – as his book makes clear – is an emerging doctrine of equity at the heart of Roman law – constructed in part from Republican sources that I explore below, in part from Greek, especially Aristotle's famous passages on *epieikeia* in the *Nicomachean Ethics* and *Rhetoric*.[11] In his discussions of justice and law, Aristotle had referred to *epieikeia* as a 'su-

6 Tacitus *ibid*, 175 [XIV, xlii].

7 *ibid*, 177 [XIV, xliii].

8 *ibid*, 179 [XIV, xliv]. The translation here is taken partly from A. Schiavone, *The Invention of Law in the West*, J. Carden and A. Shugaar trans (Cambridge, MA: Harvard University Press, 2012 [2005]) 350.

9 Tacitus, n 5 above, 181 [XIV, xlv]. Presumably thanks to the translator, Tacitus's language looks forward to Hostiensis's famous definition of equity: 'justice tempered by sweet mercy'. See text at n 121 below. See too Schiavone, *ibid*, 348.

10 Schiavone, *ibid*, 350. The maxim 'the more law the more harm' is attributed to Cicero. Aristotle's writing was known in the late Roman republic (to *Auctor ad Herennium* and Cicero, 295-302) and early Empire (to Labeo, 328-331).

11 See R.C. Bartlett and S.D. Collins, *Aristotle's Nicomachean Ethics* (Chicago, IL: University of Chicago Press, 2012) (Aristotle (2012)) 110-115 [5.10.1-8], and Aristotle, *The Art of Rhetoric*,

perior' kind of justice – a 'justice that goes beyond the written law' – which he feared could be frustrated by overzealous adherence to the letter of the law.[12] Equity (*epieikeia* was translated as *aequitas* in Latin) is 'a rectification of law where law is defective because of its generality'.[13] But it is also, in Aristotle, a call for moderation in the enforcement of law.[14]

For Schiavone, the Pedanius case brought to a head the differences between two schools of thought in Roman law.[15] The 'proponents of fairness', Cassius's adversaries, were Proculus, a fellow senator and jurist who gave his name to the Proculian school (though it predated him), and his friend Seneca, Nero's advisor. The competing school was known as 'Sabinian', named for Sabinus, a jurist and close friend of Cassius Longinus.[16] Both schools endorsed notions of 'equity' in law, but they disagreed (insofar as their differences were consistent) on what it meant to do so. A few decades after Pedanius, equity cropped up in the definition of law provided by Publius Iuventius Celsus, in an epigraph itself quoted, a century later, by Ulpian: a passage Tony Honoré described as 'sum[ming] up the Proculian tradition',[17] that would reappear 300 years later again as the celebrated opening paragraph of Justinian's *Digest*:[18] '[I]n Celsus's elegant definition, law is the art of the good and the equitable [*ius est ars boni et aequi*]. Of that art we are rightly called the priests. For we venerate justice [*iustitiam*] and profess knowledge of the good and fair [*boni et aequi*], separating equity from iniquity [*aequum ab iniquo*] [and] distinguishing legal from unlawful.'[19]

I will return to this passage, and to the schools, in a moment, but before I do so, a short note on etymology seems apposite. The English word 'equity' derives from Latin *aequitas*, which means 'having the quality of being *aequus*'.[20] *Aequus* simply means 'equal' – but across many senses of the term: its original sense, level, relates to territory; from there it comes to mean balanced or even, just, reasonable, impartial, calm, unruffled and of course 'fair'. Its noun form

J.H. Freese trans (Cambridge, MA: Loeb, Harvard University Press, 1926) (Aristotle (1926)) 1.13. 13-19.

12 Aristotle (1926), n 11 above, 1.13.13. See also Aristotle (2012), n 11 above, 5.10.4 and 5.10.5.

13 Aristotle (2012), *ibid*, 5.10.6. Aristotle (1926), n 11 above, 1.13.16 and 1.13.17.

14 Aristotle (1926), *ibid*, 1.13.14-19.

15 Schiavone, n 8 above, 343-53.

16 P. Stein, 'The Two Schools of Jurists in the Early Roman Principate' (1972) 31 *The Cambridge Law Journal* 8. Schiavone, n 8 above, 349. Pomponius (D. 1.2.2.47-53) traces the schools back through Ateius Capito (Sabinian) and Antistius Labeo (Proculian), and names the Sabinians 'Cassians' after Cassius Longinus (at 52).

17 T. Honoré, *Gaius* (Oxford: Clarendon Press, 1962) 37.

18 *The Digest*, n 5 above, commissioned by the Emperor Justinian and compiled by 16 experts, gathered 'law from every ancient source in a nutshell' into 50 books featuring extracts from the writings of 39 jurists. See the account of the *Digest*'s compilation in H.F. Jolowicz, *A Historical Introduction to the Study of the Roman Law* (Cambridge: Cambridge University Press, 3rd ed, 2009). *The Digest* – together with Justinian's *Codex Constitutionum*, *Institutiones*, and *Novellae* – were known (on being rediscovered c. 1100) as the *Corpus Iuris Civilis*.

19 Translations vary slightly: Schiavone, n 8 above, 416; Mommsen *et al*, n 5 above, 1; T. Honoré, *Ulpian: Pioneer of Human Rights* (Oxford: Oxford University Press, 2002) 76-77.

20 See entries under 'Aequitas' and 'Aequus' in C.T. Lewis and C. Short, *A Latin Dictionary* ['Founded on Andrews' edition of Freund's Latin dictionary, revised, enlarged, and in great part rewritten'] (Oxford: Clarendon Press, 1879) online at the Perseus Digital Library at www.perseus.tufts.edu (last visited 10 December 2021).

is '*aequum*' ('that which is level'), its antonym '*iniquus*', meaning unequal or, by analogy, unfair; the noun *iniquitas* giving the English iniquity, inequity, inequality, unfairness.[21] Translators of Latin have long used 'fair' and 'equitable', as well as 'equal' or 'level', for *aequus*, and 'equity' or 'fairness' for the derivative *aequitas* as well as for *aequum* itself.[22]

So where Cassius Longinus uses '*iniquus*' to mean (clearly from the context) unfair or unjust he implicitly both signals and denies the potential for equality between slaves and Roman citizens, the commonality of shared humanness that Romans both lived with every day and systematically denied as a matter of habit and law.[23] Schiavone's implication is that equity was on the rise, promising the redemption of a law that was frequently cruel. The case is made more strongly again in Tony Honoré's book on Ulpian – whom he calls a 'pioneer of human rights' since, Honoré claims, he 'expounds Roman law … based on the view that all people are born free and equal and that all possess dignity.'[24] These principles, Honoré suggests, activate law as 'art' notably whenever Ulpian invokes equity: 'Equity is related in [Ulpian's] thinking to equality, not directly, but in the sense that it requires the interests of each person to be taken into account and given equal weight. Equity requires that the parties should be on a level … Those who are weak or have been deceived must be protected against the strong and the deceivers.'[25]

Further below, focusing on the treatment of slaves in his writings, I will reject the view that Ulpian's *aequitas* was a vehicle for freedom, dignity, or for that matter equality – much less human rights – certainly as we would understand these terms today. Rather, as I will now aim to show, equity appears to have functioned to bridge the abstraction of law to the materiality of the world. It thus broached a fundamental problem of law – the difficulty of applying abstract rules to concrete situations.[26] That problem is, of course, broader than law – language itself suffers the same disconnect between abstract reiterative signifiers and concrete unique referents.[27] Like language, law in its abstraction cannot automatically calibrate to the facticity of the actual world: something always needs to be improvised, in a more or less stark manner.

Slaves provided a paradigmatic case of this disconnect. Denied personhood in Roman civil law, they were nevertheless regulated and regularly interpolated by the law. As such they epitomised a general problem in an acute way, and the improvisation was often extremely stark – as in the Pedanius case. In what follows, I will first look at the emergence and function of *aequum*/*aequitas* /equity in Roman law and then at its relevance to the institution of slavery.

21 Schiavone, n 8 above, provides an account of the relationship between *aequum* and *aequitas* at 436-442.
22 See the Oxford English Dictionary entry, at https://www.oed.com/view/Entry/63838 (last visited 3 February 2022).
23 Schiavone, n 8 above, 350.
24 Honoré, n 19 above, 76.
25 *ibid*, 93. Footnotes omitted.
26 Aristotle (1926), n 11 above, 1.13.13.
27 See text at n 150 below.

**Equity and method: lawfinding by analogy**

In a seminal text published in 1966, *Regulae Iuris*, Peter Stein synopsised the standard account of the distinction between the two Latin words for law, *ius* and *lex*.[28] *Ius*, he pointed out, was not (in early Rome) 'so much a body of law but what was recognised or "found" to be right in a particular case' by the college of pontiffs or patricians in the form of *responsae* to questions of law.[29] The word *lex*, which likely derived from *legere* (meaning to read aloud), Stein suggested, initially refers to a formal declaration, in written form, of this 'found' law.[30] 'The characteristic feature of *lex* as a form of *ius* was not only that it formulated the *ius* into a rule but also that it authoritatively declared that formulation to the public.'[31] Stein notes that as long as the 'finding' of eternal notions of right, *ius*, remained in the hands of patrician-pontiffs – the elite – suspicion might have arisen that it was, in fact, benefitting them more than others. With its declaration as *lex*, however, 'the whole people have committed themselves to a definite statement of *ius*, which can no longer be challenged. It has passed out of the exclusive possession of a particular group. It is in this sense that [1st Century BC grammarian] Varro contrasts *lex* with *aequum*, the declared law as opposed to unformulated ideas of what is right.'[32]

In time, *lex* will come to refer to enacted, rather than merely declared, law, and this will be part of Stein's story. But why, in the passage just cited, does Varro refer to *aequum* rather than *ius* for 'unformulated ideas of what is right'?

Stein doesn't say. But Schiavone provides a clue. He tracks the appearance of *aequum* in Roman legal text to a 'small set of documents' produced 'between the second and third centuries [BC]'.[33] The term 'always comes up', he writes, 'alongside *ius* or … with *lex*', in a usage he describes as 'striking[ly] stereotypical', aiming 'to succinctly and effectively describe … the set of rules that guided the social behaviour of the collectivity … the world of law—inasmuch as it was a complex of [lived] norms and values.'[34] 'Evidently', Schiavone adds, 'to indicate this function in its entirety … the word *ius* on its own was no longer sufficient. It needed to be complemented with a second noun capable of evoking another level of rules,' this being *aequum*. The point, Schiavone concludes, was to indicate 'a set of rules and evaluations different and complementary to those of *ius*', which he says, 'found its institutional anchor in the praetorian jurisdiction'.[35] The reference is to Roman officials known as Praetors, especially the Praetor Urbanus, who dealt on an ad hoc basis with citizens, and the

28 P. Stein, *Regulae Iuris* (Edinburgh: University of Edinburgh Press, 1966).
29 *ibid*, 4. On the *responsae*, Schiavone, n 8 above, esp 76-80.
30 Stein, n 28 above, 9-13.
31 Stein relates this to the common law conceit of being, like *ius*, a timeless law needing to be 'discovered' (*ibid*, 4-6).
32 *ibid*, 5-7, reiterating the view that the first written Roman law, the Twelve Tables of 450 BC, resulted from pressure from plebeians. See Schiavone, n 8 above, 96-108, on how this effort ultimately failed.
33 Schiavone, *ibid*, 149-153.
34 *ibid*, 150.
35 *ibid*, 151. W.J. Zwalve, 'The Equity of Law: Law and Equity Since Justinian' in E. Koops and W.J. Zwalve (eds), *Law and Equity Approaches in Roman Law and Common Law* (Dordrecht: Martinus Nijhoff, 2014) 19-23.

Praetor Peregrinus, who applied Roman law to foreigners and non-citizens, effectively 'legislating' in the form of an Edict.[36] The resulting law was known as *ius honorarium* or *ius praetorium*, 'which' to cite the *Digest*, 'in the public interest the Praetors have introduced in aid or supplementation or correction of the *ius civile*.'[37] Judging by the many references to the Edicts in the *Digest*, under the aegis of *aequum* the *ius honorarium* prioritised consensualism, reciprocity and good faith, and it is these qualities Schiavone locates in the general turn to *aequum* in law.[38]

Schiavone cites the addition, over time, of *bonum* to *aequum* as evidence of a 'rapidly consolidating technical language'.[39] This is in keeping with the reference to equity in the oldest extant textbook of Roman rhetoric, the Republican-era *Auctor ad Herennium* (c. 80 BCE): '[f]rom equity springs the kind of law which entails the truth and the public good. Out of it new law usually emerges according to the requirements of the time and the dignity of men.'[40] The point is not that Roman equity rested with the Praetors (whose jurisdiction would later cede to the emperor), but rather the reverse: a specifically praetorian approach to law was to imbue Roman law as a whole, resorting to equity whenever the law seemed gapped, inadequate or incorrect.[41]

From what material was this supplement constructed? Stein puts it as follows: '[*a*]*equitas* … connotes a social ethic derived from the common recurring experience of human life and from common moral feeling. *Bonum et aequum* is … the material out of which law, *ius*, is made.'[42] Equity refers, then, not to an outcome but a *source*: Stein's 'social ethic' or Schiavone's 'complex of norms and values'.[43] At stake is the *adequacy* of the law to actual lived experience (where the term 'ad-equate' too incorporates *aequum*, denoting *adequation* between text and world): '[i]n everything, but particularly in the law,' Paul, a contemporary of Ulpian's, would later write, '*aequitas* should be the prime consideration'.[44] Law, Stein glosses, 'is not … a vague, imprecise expression of what people approve of, but the product of a specific technique. It is a human creation, by contrast with a natural phenomenon; the recognised methods convert what is equitable into law.'[45]

But what were the 'recognised methods' that 'convert what is equitable into law'? Here I must return to the two schools, Sabinian and Proculian. Their dif-

36 P. Stein, 'The Roman Jurists' Conception of Law' in P. Stein and A. Padovani (eds), *The Jurists' Philosophy of Law from Rome to the Seventeenth Century* (Wiesbaden: Springer, 2016) 7-11.

37 D. 1.1.7 (Papinian). Also D. 1.1.8 (Marcian): 'For indeed the *ius honorarium* itself is the living voice of the *ius civile*.'

38 Schiavone, n 8 above, 151.

39 *ibid*, 152.

40 Cited in M. Hamburger, 'Equitable Law: New Reflections on Old Conceptions' (1950) 17 *Social Research* 441, 452. The *Auctor* or *Rhetorica ad Herennium* was an anonymous c. 85 BC book in which could be found, according to Stein, n 16 above, 10, 'the standard list of the sources on which … a legal decision in the late Republic' could be based. The sources were *lex*, *mos*, *natura* and *aequum et bonum*. See also Schiavone, *ibid*, 295-302.

41 Zwalve, n 35 above, 19-22. See below text at notes 114 and 125.

42 Stein, n 36 above, 20.

43 Schiavone, n 8 above, 336.

44 D. 50.17.90 (Paul). This is Stein's translation, n 53 above, 26, combining Watson's: 'In every context but particularly in the law, equity must be considered.'

45 *ibid*, 23.

ferences do not appear to have been consistent over the centuries, but in their heyday in the early Empire, their disagreement appears to have turned on the role of *aequitas* in supplementing law – or, as both schools conceived the matter, in *finding* a law that is *already there* but as yet 'unwritten'.[46] The Sabinians favoured custom or usage. Whereas, as Stein tells it, Labeo – the founder of the Proculians – was a grammarian: in seeking 'unwritten law', he turned to Varro's teaching on language, and in particular his intervention in a debate between two schools of thought on grammar, the *analogists*, for whom languages functioned according to regular rules – locatable by analogy, and the *anomalists*, who assumed they did not, focusing instead on usage.[47] Varro cut through the dispute by determining that language had four sources: authority, custom (or usage), nature and analogy.[48] On Stein's account, Labeo applied Varro's teaching on language to law holding that law could be 'discovered' by analogy – or, as it entered the canon, *ratio* (reason: Greek *ana-logos* meaning 'according to reason').[49] Stein reckons that Labeo 'almost certainly' established *ratio* as a source of Roman law.[50]

Like language, the argument goes, law follows rules: if the rules are known, a law can be identified even where not previously articulated, just as new sentences can be constructed once the rules of grammar are known.[51] For Stein, 'Labeo's method presupposed that beneath the rules of the unwritten law, which were waiting to be defined by the jurists, was a sub-structure of rational principles, and it was these rational principles which indicated, in cases of doubt, the limits of the rules themselves'.[52] Of course, the notion that law already exists in some 'unwritten' form awaiting elucidation is itself a political intervention – essentially conservative, and arguably typical of lawyers, who are thereby empowered. The point, though, is that the guide to finding law by analogy in a

46 Stein, n 16 above, 8; Schiavone, n 8 above, 344; Honoré, n 19, above 37; Jolowicz, n 18 above, 389. Some scholars claim that one or other school is marked by its reliance on equity. See, for example, T. Honoré, 'Proculus' (1962) 30 *The Legal History* 472, 472, 492, and T. Leesen, *Gaius Meets Cicero: Law and Rhetoric in the School Controversies* (Dordrecht: Martinus Nijhoff, 2010) 26-28, notably Moritz Voigt cited therein, 8, 93-94, making this case for the Proculians. But see Stein, n 36 above, 11-16, making a similar case for the Sabinians. In fact, the many varying accounts of the two schools agree on relatively little; Roman authors from both schools regularly invoke equity in the *Digest*.

47 Stein, n 28 above, 61-67.

48 Stein, n 16 above, 14-15.

49 Sabinus, by contrast, rejected analogical reason – see Schiavone, n 8 above, who describes Sabinus as 'the authentic anti-Labeo of the first Century' (345). On the etymology of 'analogy', see the Oxford English Dictionary at https://www.oed.com/view/Entry/7030 (last visited 10 December 2021). The Digest foregrounds analogical reasoning: D. 1.3.12 (Julian: 'It is not possible for every point to be specifically dealt with either in statutes or in *senatus consulta*; but … the president of the tribunal ought to proceed by analogical reasoning and declare the law accordingly') and D. 1.3.17 (Celsus: 'Knowing laws is not a matter of sticking to their words, but a matter of grasping their force and tendency.')

50 Stein, n 16 above, 15.

51 *ibid*, 16.

52 *ibid*, 14. The Sabinian school disputed precisely this point: 'The law may not be derived from a rule, but a rule must arise from the law as it is.' D. 50.17.1. See Schiavone, n 8 above, 345. A much later gloss on this maxim tellingly adds: 'in cases in which equity is the same, which are however not posited in the law, it does make a law.' Cited in William of Ockham, *A Short Discourse on Tyranny in Government* J. Kilcullen (ed), A.S. McGrade trans (Cambridge: Cambridge University Press, 1992) 47 (at editor's note 67).

system conceived in this way – the lodestar or yardstick of derivation of a rule in cases of doubt – is something called '*aequum et bonum*' or '*aequitas*'. Equity makes good law but it also makes law good.[53] If *aequitas* grounds law in a 'social ethic derived from common recurring experience', the ethos is not *just*, for the Proculians, its grounding in usage or custom; it is *also* some idea of 'the good': the law is robust for being rooted in lived experience mobilised through analogical reasoning.

In practice, this required jurists to empathise imaginatively with legal subjects in concrete, if often hypothetical, situations.[54] Thus, Ulpian (a Proculian successor to Labeo) imagines the position of someone prevented by duty from appearing in court,[55] or of a minor caught up in a legal dispute.[56] He examines each of the perspectives of the guarantor, debtor and creditor in a hypothetical financial dispute,[57] and of an exposed partner in a business that fails.[58] He considers the position of an heir facing unaffordable charges to execute a will;[59] of a grandfather, father and grandson in a complex adoption case;[60] of a mother, her preferred son, and her other sons at inheritance.[61] He even occasionally stands in the shoes, or rather sandals, of slaves.[62]

## 'Natural equity': slaves and the law

In support of his (baldly anachronistic) thesis that Ulpian, writing c.200 CE, was a 'pioneer of human rights', Tony Honoré highlights Ulpian's occasional qualification of equity as 'natural': *aequitas naturalis*. Equity aims at equality, but the 'special feature' of natural equity 'is that it operates even when the civil law does not cater for [a] problem'.[63] Honoré suggests that the 'nature' in *aequitas naturalis* reflects the Stoic view that kinship – extending from family to community – is 'natural' – and common to all humanity (and beyond).[64] The implication is that natural equity provides a means to bring law to bear also

53 Stein, n 36 above, 11.

54 The following are from Ulpian: D. 4.4.13.1 (assisting minors in disputes); D. 5.3.13.6 (citing Sabinus); D. 7.8.14.1 (citing Aristo); D. 17.1.19 (citing Pomponius); D. 29.5.3 (see text at n 101 below); D. 30.1.71.3 (paying the value instead of a good that is undeliverable with just cause); D. 36.1.23.3 (an heir need not restore a house lost through *usucapio*); D. 36.3.14 (inequitability of unnecessary *cautio*); D. 44.4.4.7 (inequitability of receiving both a slave and the penalty for non-delivery of the slave); D. 44.4.4.13 (citing Labeo: 'it is far more equitable that [a] plaintiff recover nothing from an act which was performed with perfidy'); D. 46.3.1 (citing Sabinus).

55 D. 2.11.2.1.

56 D. 2.15.8.22.

57 D. 17.1.29.6 (citing Julian).

58 D. 17.2.29 ('It is the least equitable kind of partnership, wherein a partner can suffer loss but see none of the profits').

59 D. 36.1.15.1.

60 D. 37.4.3.4. See also D. 37.8.1.1.

61 D. 36.3.1.19.

62 See for example D. 36.2.8 (citing Sabinus: a slave's legacy should not vest before he is freed, as otherwise he would lose it). Text at note 81 below.

63 Honoré, n 19 above, 93. 'For example, it takes account of agreements that are not enforceable by civil law [and] protects persons who have technically come of age but are immature …'

64 Honoré (*ibid*, 201) cites Cicero (from *On Ends*): 'The mere fact of their common humanity requires one man not to regard another as alien.' See also *ibid*, 203-205.

on those who are not legal subjects: notably slaves. Indeed, the *Digest* is replete with references to equity, and especially 'natural' equity, in regard to slaves.

The problem was that Roman civil law applied only to free persons – those who are *sui juris*.[65] Slaves having no legal personality and being *alieni juris* ('in the *potestas* of their masters'), are subjected rather to the private law of the master of the house.[66] Slaves were property, objects of law, not subjects. But slaves nevertheless interacted with citizens, they acquired debts and obligations, they enjoyed delegated control over property (the *peculium*),[67] and if manumitted (freed) they entered (somehow) into the civil law as legal persons.[68]

The solution appears to have been to resort to what was conceivable as 'natural' or 'equitable' (or both – the two increasingly elide) to bring slaves partially or indirectly within the law.[69] At one point, for example, Ulpian cites Labeo distinguishing between 'natural equity' and 'civil equity' to make the point that a slave should not be able to avoid a punishment that is 'by nature fair' just because there is 'no civil action'.[70] The slave was not subject to civil law and so not liable for legal remedy, but 'natural equity' required that he nevertheless pay his due. Indeed slaves (and others who are not *sui juris*, such as minors) repeatedly find themselves obliged 'by nature' rather than law in the *Digest*.[71] Honoré writes: '[n]atural equity is not fundamentally different from civil equity, but the equitable solution to a problem may or may not already have been embodied in the civil law'.[72] (I will return to this distinction below.)

65 See *Digest* Book 1.6 (D. 1.6.1-D. 1.6.11) distinguishing those who are *sui juris*, such as heads of households, from those who are *alieni juris*, such as slaves and sons-in-power.

66 D. 1.6.1 (Gaius): 'Slaves, then, are in the *potestas* of their master, this form of *potestas* being power in virtue of the *ius gentium*. … equally among all nations masters have had the power of life or death over their slaves.' But see D. 1.6.1.2 (Gaius); D. 1.6.2 (Ulpian).

67 From this perspective, the master-slave relation mirrored that of husband-wife under Roman law; my thanks to an anonymous reviewer for drawing my attention to this.

68 As Keith Bradley put it: 'Socially the slave was an alien and before the law the slave was rightless, an object to be controlled. But if legal regulation of slaves as a form of property was both desirable and necessary, in practical circumstances, real life if you will, it was impossible to deny the humanity of the slave… The slave, that is to say, could not be regulated like any other type of property and so generation after generation of lawyers, stumbling on this block, produced law that on occasion approached absurdity.' K.R. Bradley, 'Roman Slavery and Roman Law' (1988) 15 *Historical Reflections / Réflexions Historiques*, 477, 485; A. Watson, 'Seventeenth-Century Jurists, Roman Law, and the Law of Slavery' (1993) 68 *Chicago-Kent Law Review*, 1343. According to Bradley and Watson, slaves were often visually indistinguishable from citizens.

69 See Bradley's examples, *ibid*, 486-487.

70 D. 47.4.1.1.

71 For example D. 4.5.2.2 (Ulpian: 'Those who have incurred a change of civil status remain under a natural obligation with respect to matters which have arisen prior to such a change'); D. 4.5.8 (Gaius: 'obligations which are understood to hold good in natural law do not perish with change of civil status'); D. 12.4.3.7 (Ulpian citing Celsus); D. 12.6.26.12 (Ulpian); D. 12.6.13 (Paul: 'A slave can incur a natural obligation'); D. 12.6.28.1 (Africanus); D. 15.1.11.2 (Ulpian: '[with] the *peculium*, we look to what is due naturally, and it is equitable by nature that the son[-in-power] or a slave be relieved of liability when … what he collected was not due'); D. 15.1.50.2 (Gaius); D. 35.2.56.2 (Marcellus citing Scaevola on a slave's 'natural obligation'); D. 44.7.14 (Ulpian). And see D. 46.3.95.4 (Papinian: 'A natural obligation is automatically removed not only by payment of the money but also by a lawful pact or by an oath; the equitable bond which alone sustains it is dissolved by the equity of the pact'). See Honoré, n 72 above, 200; 203-204.

72 Honoré, n 19 above, 93.

Being held liable for a 'natural obligation' while formally unobliged and unprotected by law is surely a dubious benefit – and, *pace* Honoré, 'natural equity' in Ulpian's writing and more broadly in the *Digest* did not appear to hold out any real prospect, for slaves, of 'freedom, equality, and dignity'.[73] The institution of slavery remained fundamental to the legal world of the *Digest* in 530 CE, a half millennium after the Pedanius case, and Ulpian's entries along the way in no way disturbed this long-term stability.[74] Honoré notes without comment that Ulpian invokes equity to 'prevent slaves due to be freed from taking advantage of legal technicalities' (another dubious benefit),[75] but neglects Ulpian's statement that '[t]orture is to be applied to slaves not defended by their masters and to those who are destitute'.[76] He ignores Ulpian's lengthy and chilling discussion of the correct evaluation, under the *Lex Aquilia*, of compensation due to a master for a slave killed 'unlawfully'.[77] Ulpian's Stoic-sounding 'natural freedom' is appealing to a modern ear, but it is hardly a wellspring of human rights.

To the contrary, whereas natural equity may have facilitated legal relations where law itself could not, it had little if any bearing on the fundamental conception of 'human status' that underpinned Roman law.[78] A slave's debt may be treated 'equally' to that of a freeman without the slave thereby benefitting from 'equality'.[79] What happens rather is that by allowing non-legal persons and those *alieni juris* within the law's purview, the state's *ius civile* is brought to bear on matters that ordinarily fell within the private *patria potestas*, the power of the paterfamilias (generally, in practice, when that power is in abeyance for some reason). That is to say, the concept of *aequitas* appears to open a small breach in the public-private boundary in Roman law: a public law enters a private space.[80] A good example is Ulpian's discussion of manumission in book 40 of the *Digest*. According to one imperial decree, a slave may acquire his freedom (ie be manumitted) if he is purchased 'with his own cash'. Ulpian glosses: 'Now at first sight the expression 'purchased with his own cash' seems improper, since a slave cannot have cash of his own; but we are to close our eyes and suppose him to have been bought with his own cash, when it is not the cash of the purchaser which is used to pay the price…'[81]

The slave in this case exists in a liminal space between personhood and non-personhood, requiring a legal sleight of hand to traverse the abyss. We must, Ulpian says, 'close our eyes' to the letter of the law – ie to the fact that the commodity is not a commodity, and the buyer cannot lawfully buy anything

73 Though Honoré, *ibid*, 85-89, attenuates the claim somewhat.
74 See for example Book 1.5 (D. 1.5.1-D. 1.5.27) on the 'human status'.
75 Honoré, n 19 above, 93.
76 D. 2.1.7.3.
77 D. 9.2. For example D. 9.2.23.7: 'If a [slave] baby not yet a year old is killed [by someone other than the master], the better view is that this action will [refer] the valuation [of compensation to the master] to that part of the year for which he had lived.' See esp D. 9.2.22 and D. 9.2.27.
78 See D. 1.5 on the 'human status'.
79 For example D. 35.2.56.2 (Marcellus citing Scaevola).
80 With the significant caveat that the *ius civile* was explicitly defined by Ulpian as 'private law' as distinct from the public law governing 'the powers of magistrates and the state religion'. Here I am distinguishing the law of the land from that of the household. Stein, n 58 above, 23.
81 D. 40.1.4.1.

– and open our eyes instead to something anterior to the law – something we might think of as the 'spirit of the law' but is perhaps better conceived less mystifyingly, following Stein, as a connective social tissue or ethic (such as, indeed, money). To compensate for the absent agent, a third party 'nominal purchaser' must be found, but the latter purchases nothing – neither nominally nor actually – since ownership becomes, at the moment of purchase, impossible. At that moment, the law improvises.

Ulpian pursues this last point with a characteristic hypothetical: what if 'someone has bought a man with his own cash, subject to the covenant that he is *not* to manumit him'?[82] In such a case, the support for manumission appears legally even weaker, since the slave now has neither money nor civil rights. Ulpian responds that in this case 'the equitable view is that of those who say that he attains freedom'. *Aequitas* here imports the civil law, in its entirety, onto a body that had been entirely outside the law. It 'equalises' or 'levels' merely by acknowledging the (undoubted) human (that is to say 'natural') personhood common to both slave and non-slave, but absent in law: *aequitas* is not, here, some mystical authority 'above' the law: it is simply the recognition of a reality invisible to law (whose 'eyes' are closed). Nor is it a 'legal fiction': it is rather the acknowledgement of stubborn facts otherwise denied by law. It is, we might conclude, the law itself that generates fiction. Equity harks back to 'nature', so to speak (whereas law is 'art').

**Naturalising law**

The next synthetic step seems obvious, even natural: 'natural law'. Indeed Schiavone marks Labeo's distinction between 'natural' and 'civil' *aequitas* – seized upon by Ulpian and later Honoré – as the 'point of juncture' at which 'the natural law paradigm' entered Roman legal thought 'even without having been theorized directly'.[83] (The term 'civil equity', he points out, disappears from use immediately afterwards – for Ulpian it would already have been a 'conceptual fossil'.)[84] Ulpian is explicit: '[a]s concerns the civil law slaves are regarded as not existing, not, however, in the natural law [wherein] all men are equal.'[85] He adds that the institution of slavery must have 'originated in the *ius gentium*, since, of course, everyone would be born free by the *ius naturale*'.[86] Remarks such as these appear to prefigure later natural law theories of freedom, equality and rights – and play a significant part in commentaries such as Honoré's.[87]

But the *Digest* itself does not support this reading. For one, *ius naturale* is nowhere in the *Digest* characterised as superior to *ius gentium*.[88] Quite the re-

82 D. 40.1.4.7, emphasis added.
83 Schiavone, n 8 above, 305-306.
84 *ibid*, 306 ('subsequent thinkers would only be familiar with *aequitas naturalis* or simply *aequitas*').
85 D. 50.17.32 (Ulpian). Honoré, n 72 above, 202-203.
86 D. 1.1.4. See also D. 1.5.4 (Florentinus).
87 Honoré, n 19 above, 79-81; 86-88.
88 D. 1.5.4.1 (Florentinus): 'Slavery is an institution of the *ius gentium*, whereby someone is against nature made subject to the ownership of another.'

verse. For Ulpian, natural law is 'not … specific to mankind but is common to all animals,'[89] whereas '*[i]us gentium*, the law of nations, is that which all human peoples observe'.[90] Hermogenian, a later jurist, characterises *ius gentium* as the foundational human achievement.[91] Gaius, Ulpian's predecessor and a principal source for the *Digest*, writes: 'that law which natural reason has established among all human beings is … called *ius gentium*,' and finds there a relatively detailed basis for property and self-defence.[92] His 'natural reason' appears to align with the *Digest*'s many references to natural equity rather than natural law. Indeed, throughout the *Digest*, *ius naturale* lacks any precision or sophistication. It is raw as against the cooked – or civilised – regulation of the *ius gentium* and *ius civile*: law is art and jurists artists – whereas nature is rude and crude. Given its late and limited appearance, then, it seems right to conclude, as Schiavone does, that *ius naturale* – at least as a term of art in law rather than philosophy – is rather an offshoot of natural equity than vice versa.[93] Certainly natural equity has greater practical purchase in the *Digest* than natural law.

Second, insofar as natural law coincides with the 'natural freedom' of humans, it equally applies to animals: natural law does not distinguish between humans and animals.[94] And if freedom is 'natural' so is capture: Gaius says both animals and humans are subject to capture by 'natural reason', and by the same token both regain their freedom if they escape.[95] With regard to compensation, Gaius says 'the statute treats equally our slaves and our fourfooted cattle … sheep, goats,

89 D. 1.1.1.3. 'So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.'

90 D. 1.1.1.4. But see F. Pollock, 'The History of the Law of Nature' in F. Pollock, *Jurisprudence and Legal Essays* (New York, NY: St Martins Press, 1961) 125-127. In fact, Ulpian barely mentions *ius gentium*, perhaps because by his time – following the Antonine constitution – according to Honoré, 'Roman law [ie *ius civile*] had in effect become the *ius gentium*' (since all freedmen became citizens). Honoré, n 28 above, 80. But see, for example, D. 1.1.6. Other than D. 1.1.1.4 and D. 1.1.4, Ulpian's only references to *ius gentium* are D. 1.1.6 (distinguishing *ius civile*), D. 46.1.1 (on the liberality of *precarium*) and D. 46.4.4 ('formal release [of slaves] is a matter of the law of nations').

91 D. 1.1.5 (Hermogenian): 'As a consequence of this *ius gentium* … nations [were] differentiated, kingdoms founded, properties individuated, estate boundaries settled, buildings put up, and commerce established, including contracts of buying and selling and letting and hiring…'

92 D. 1.1.9 (Gaius). Gaius's many references to the *ius gentium* almost all concern the grounding of property claims; he refers to the *ius naturale* (rarely) to the same end. See D. 9.2.4 (right of self-defence); D. 44.7.1.9 (impossibility of fulfilment of contract as defence); D. 41.1.1 (ownership of animals by capture); D. 41.1.3 (property goes to 'first taker').

93 Cicero had earlier championed a *ius naturale* deriving from Stoic and earlier Greek notions of natural law, but few believe his theorising entered into Roman legal practice. See Jolowicz, n 18 above; Stein, n 16 above, 102-103 (Roman jurists 'turned their backs on Cicero's ideas of converting the civil law into a science composed of clear-cut rules'); Schiavone, n 8 above, 124-125 and 294 ('[T]he Roman jurists would almost always prefer not to speak of justice: the word is almost never found in their writings'). But see C. Douzinas, *The End of Human Rights* (Oxford: Hart 2000) 49-51.

94 D. 1.1.1.4 (Ulpian).

95 D. 1.1.1.3 (Ulpian). See too D. 1.1.1.4 (Ulpian); D. 41.1.1 (Gaius): 'All animals taken on land, sea, or in the air … become the property of those who take them'; D. 41.1.44 (Ulpian): 'animals caught on land or sea cease to belong to their captors on regaining their natural freedom'; D. 41.1.7 (Gaius): 'freemen are reduced to slavery but those who escape the power of the enemy regain their original freedom.'

horses, mules, and asses.'[96] Ulpian does not disagree.[97] Nothing in these texts expects either humans or animals to be 'free' due to some innate superiority of *ius naturale* over *ius gentium*.[98] The reverse seems truer: capture, like property, is human improvement of the wild. Ultimately, natural law remains at best 'a vague expression' in the *Digest*, as Alan Watson notes: '[s]ometimes it refers to the justice or fairness of a rule, but the view of natural law as a universal ideal order in any way contrasted with positive law is almost entirely absent'.[99]

To end this section, let me return to the Silanian Decree with which I began. Four centuries after Tacitus wrote, the Decree was reproduced in the *Digest*, in a 3,500-word passage penned by Ulpian 150 years after Pedanius. The Decree remained exceedingly harsh. For example, if a slave helped one or several masters where more were attacked, Ulpian says, 'the preferable view is that if he could in fact have helped all, although he helped some, he must suffer execution'.[100]

There are two references to equity in Ulpian's account of the Silanian Decree, pulling in somewhat different directions. A first finds that, in the case of 'a country house' with 'fields attached to it which are widely scattered' it would be 'more than inequitable [*plus quam iniquum*] that all the slaves who were in that district should be questioned and executed'.[101] It may be that this provision responds directly to the Pedanius case – a reading that seems plausible if undemonstrated.

If so, the notion of equity might have, as Schiavone clearly hoped, saved lives.

The second invocation of equity provides as follows: were any slaves to be freed according to the murdered master's will (opened on his death), these now-freemen 'are to be questioned and executed just as if they were slaves'.[102] This is because, Ulpian maintains, 'it is most equitable [*aequissimum*]' that 'the indulgence of masters … not stand in the way of their being avenged'. Indeed, the more a slave was so indulged, Ulpian says, 'the more severe penalty he will deserve'. In both cases Ulpian demonstrates his capacity, by reference to equity, for imaginative empathy – an empathy for masters (and of course he was one himself) as well as for slaves.

## AVIGNON 1332

In 1327 or so, the Oxford-based Franciscan William of Ockham – the 'Invincible Doctor' – arrived in Avignon, then seat of the pope, John XXII.[103] Soon

96 D. 9.2.2 (Gaius). Pigs, apparently, fall within this group, whereas dogs do not. The penalty for killing someone else's slave or four-footed animal is 'the highest value that the property had attained in the preceding year.'

97 D. 9.2.29 (Ulpian).

98 As Ulpian's contemporary Florentinus (D. 1.5.4) put it, 'freedom is one's natural power of doing what one pleases' – but it is constrained 'either by coercion or by law'. He adds: 'generals have a custom of selling their prisoners and thereby preserving rather than killing them' – making slavery appear almost benign.

99 Mommsen *et al*, n 5 above, vol I, xxiii. See also Watson, n 68 above, 1348-1349.

100 D. 29.5.3.4 (Ulpian).

101 D. 29.5.1.30 (Ulpian).

102 D. 29.5.3.17 (Ulpian).

103 Ockham, n 52 above, xv.

afterwards, he was accused of heresy and fled to Munich, where he resided, as did other Franciscan dissidents, with Ludwig of Bavaria, whose claim to the title of Holy Roman Emperor had been denied by John.[104] There, in 1332, he wrote his 'ninety-day work', the *Opus Nonaginta Dierum*, a book in which, on a number of accounts, a novel language of natural rights first emerged.[105] In brief – a fuller account follows below – Ockham argued that Franciscans (and indeed everyone) enjoyed a *natural right* (*ius naturale*) to basics such as food, clothing and shelter, which exists prior to, and independently of, any rights bestowed in positive law – and might therefore supersede the property rights of others. Of the various accounts of this story, I have found those of Brian Tierney, Jonathan Robinson and Annabel Brett most thoroughgoing and I rely on them below.[106]

The story as usually told centres on a problem of translation: the term '*ius naturale'* in Ockham's work cannot always be sensibly rendered as 'natural law' – it is sometimes clearly better translated as 'natural right', not in the overarching sense found in translations of Aquinas ('Natural Right') but in the sense of an actionable subjective individual claim.[107] Although the terms 'equity' and 'natural equity' recur repeatedly in Ockham's writings, as in those of his immediate predecessors and contemporaries, in connection with *ius naturale* – and although several scholars acknowledge the centrality of equity to Ockham's thought – equity is not foregrounded in today's principal accounts of the emergence of natural rights.[108] It appears to slip easily into the historical background like so much unremarkable 'context'.[109] At the same time, a separate body of scholarship tells a story centring on *aequitas* in connection with natural law across the same broad period, as Christian canon law emerged side-by-side with a new Roman-based civil law. In this section I aim to connect these two literatures in order to show how Ockham drew on a notion of *aequitas* situated at the inter-

104 *ibid*, xv. Though accounts differ.

105 The attribution of natural rights language to Ockham originates with Michel Villey, whom I do not examine here. See B. Tierney, 'Origins of Natural Rights Language: Texts and Contexts 1150-1250' (1989) 10 *History of Political Thought* 615, 623-624, 628, 644.

106 B. Tierney, *The Idea of Natural Rights* (Cambridge: Eerdmans, 1997); R. Tuck, *Natural Rights Theories: Their Origin and Development* (Cambridge: Cambridge University Press, 1979); J.W. Robinson, *William of Ockham's Early Theory of Property Rights: Sources, Texts, and Contexts* (PhD dissertation, 2012); A. Brett, *Liberty, Right and Nature: Individual Rights in Later Scholastic Thought* (Cambridge: Cambridge University Press, 1997).

107 Robinson points out that, such is its plasticity at this time, 'translating *ius* as always either "law" or "right" is a foolish enterprise.' Robinson, n 106 above, 54, at n 23.

108 See B. Tierney, 'Ockham, the Conciliar Theory, and the Canonists' (1954) 15 *Journal of The History of Ideas* 40; J. Robinson, 'Ockham, the Sanctity of Rights and the Canonists' (2014) 31 *Bulletin Of Medieval Canon Law* 147, 200. See also C.C. Bayley, 'Pivotal Concepts in the Political Philosophy of William of Ockham' (1949) 10 *Journal of The History of Ideas* 199, identifying equity as one of three pivotal concepts for Ockham (the others being 'necessity' and the 'common weal').

109 For example, Robinson, n 106 above, 33 and 61 (citing Wigand and Pennington on the centrality of natural equity to ideas of natural law at this time). Tierney, n 106 above, 123 at note 66 quotes from the Ordinary Gloss to the Decretum, without translation or discussion: '[w]hen something benefits me and does not injure you, it is equitable that you not forbid me to do it although the law fails to require this.' Gratian, *The Treatise on Laws* (Decretum DD. 1-20) A. Thompson trans, with the *Ordinary Gloss*, J. Gordley trans (Washington, DC: The Catholic University of America Press, 1993) 4. On this passage, see Robinson, n 106 above, 148.

face of positive and natural *law* to underpin the shift to a natural-over-positive *right*.

## Rude equity

The idea of equity was subjected to punctilious scrutiny in the early years of the second millennium – the finer points of which have been tracked in detail by Lorenzo Maniscalco in his doctoral thesis, which follows in part on Charles Lefebvre's seminal work.[110] Two principal groups of scholars are key to the story: the glossators or legists – legal commentators on Justinian's Digest, which was in a process of rediscovery from around the 1070s among scholars based in Bologna and led by Irnerius – and the Decretists or canonists – theological commentators on Gratian's Decretum of c.1150.[111] This would give rise to two formally distinct bodies of law, the canonical law of the Decretum and its Ordinary Gloss (the *corpus iuris canonica*) and the civil law of the *Digest* together with Justinian's other main texts (a *corpus iuris civilis*), with its own gloss.

To start with the civil law glossators: in their reception of Justinian, Lefebvre shows, they regarded equity as 'the supreme law' (though, he adds, 'it is not easy to discern just what influences led [them] to do so'):[112] 'equity is superior to *ius*, and it is toward equity that *ius* should tend.'[113] A much-cited maxim from Justinian's Codex, known as the *Lex Placuit* and attributed to the Emperor Constantine, said '[i]t has been decided that, in all things, the principles of justice and equity, rather than the strict rules of law, should be observed'.[114] Another key legist text, the *Brachylogus* says: '[j]udgment should be given in accordance with the dictates of equity even if they appear to contravene the written law.'[115] For the legists, then, '*aequitas* … is synonymous with justice' and above law.

Turning to the canonists: much of the early commentary on Gratian's Decretum aimed to resolve the many contradictions within the text.[116] Private property, for example, appeared to be both permitted and prohibited under natural law under the definitions reproduced from the influential 7th century *Etymologies* of St Isidore of Seville.[117] Although Gratian appears to have been largely unfamiliar with Justinian's *corpus*, he was acquainted with Irnerius's gloss.[118] So whereas the Decretists built on the work of the early civil law glossators – treating *aequitas* as synonymous with justice – the term itself rarely appeared in the

110 L. Maniscalco, *The Concept of Equity in Early-Modern Legal Scholarship* (PhD dissertation, 2018).
111 C. Lefebvre, 'Natural Equity and Canonical Equity' (1963) 8 *Natural Law Forum* 122-.
112 *ibid*, 123.
113 *ibid*, 125. Maniscalco, n 110 above, 13.
114 C.3.1.8. Lefebvre, 125.
115 The *Brachylogus* (c. 1110) cited *ibid*, 124. But see Zwalve, n 35 above and text at n 125 below.
116 The formal title of the Decretum – *Concordantia discordantium canonum* – indicates the dialectical theme, though Tierney, n 106 above, 629-631, doubts Gratian's awareness of the many contradictions in the text (see also 58-66).
117 Gratian, n 109 above, 6-7 [D. 1 C. 6-7]: 'Natural law is common to all nations … Such is … common possession of all things' yet 'the restitution of anything entrusted or money deposited … is never unjust and held to be natural and equitable.' See text at n 158 below.
118 Lefebvre, n 111 above, 125. See too W. Cahill, 'Development by the Medieval Canonists of the Concept of Equity' (1961) 7 *Catholic Lawyer* 112, 114-115.

Decretum, which was more concerned with *misericordia* (mercy).[119] Maniscalco shows how canonical scholars during this intensive period increasingly associated *misericordia* with *aequitas*, while at the same time 'distinguishing between canons given *ex rigore* and those given *ex aequitate*'.[120] Mercy was conceived as an exercise of discretionary equity, a deviation from legal rigour in the interests of compassion, culminating in the hugely influential definition provided by Hostiensis (aka Henry of Segusio; died in 1271): 'equity is justice tempered by sweet mercy'.[121] For the canonists, equity is, then, associated with leniency, flexibility, moderation, indulgence, *humanitas* – intending a superior form of justice to the strict law.[122] Maniscalco notes: '[i]ts meaning was very broad indeed, it came to stand for the guiding spirit of canon law as a whole, of the legislator seeking to develop the law, and of the jurist and judge in its interpretation.'[123]

At the same time, the glossators took *aequitas* in a different direction, focusing in particular on the distinction between *aequitas rudis* (raw, rough or rude equity) and the *ius scriptum* (written law). From the early 12th century, *aequitas rudis* was viewed as 'the ideal source from which the legislator [drew] to enact positive law'.[124] A sort of ur-source of law, then. But who gets to decide how equity 'finds' the law? A lengthy dispute ensued over the apparent inconsistency between two provisions of the *Codex*, the *Lex Placuit*, which seemed to expect judicial oversight, and the *Lex Inter aequitate*, also from Constantine, according to which 'Emperors alone may investigate the relationship between equity and law'.[125] Champions of the courts turned to *aequitas scripta* – 'written equity': under late Roman law this referred to the collection of imperial pronouncements on equity which were to be applied directly by the courts without further inquiry.[126] Those favouring 'rude equity' were inclined to privilege the discretion of the sovereign – Prince or Pope (alone).[127]

With time, the glossators generally preferred *aequitas scripta*, whereas the canonists continued to debate the merits of *aequitas rudis*.[128] The latter group included the 'greatest of the decretists', Huguccio, who in Lefebvre's reading gave 'a more general precedence to equity' and proclaimed a new *canonica aequitas* 'in which equity of a merciful and indulgent stamp has a position of prime importance'.[129] *Aequitas rudis* inspires *canonica aequitas*, making the canon 'more

119 Lefebvre, n 111 above, 126. Maniscalco, n 110 above, 19. A. Winroth, *The Making of Gratian's Decretum* (Cambridge: Cambridge University Press, 2004) chs 1 and 5.
120 Lefebvre, n 111 above, 123.
121 The widely cited quotation is found in Hostiensis's *Summa Aurea* (c. 1260) who attributes it to St Cyprian: '*Aequitas est iustitia dulcore misericordiae temperate*'. It was later repeated by Jean Gerson and Christopher St Germain, so making its way into early English legal conceptions of equity. See also Z. Rueger, 'Gerson's Concept of Equity and Christopher St. German' (1982) 3 *History of Political Thought* 1.
122 Maniscalco, n 110 above; Lefebvre, n 111 above.
123 Maniscalco, *ibid*, 20.
124 *ibid*, 14.
125 C 1.14.1. Maniscalco, n 110 above, 15-16; Lefebvre, n 111 above, 123.
126 Maniscalco, *ibid*, 17-19. Zwalve, n 35 above.
127 Between these two, Maniscalco also notes a middle position, whereby scholars 'were happy for equitable rules to be extended analogically … to supplant rules they looked upon as rigorous'. Maniscalco, *ibid*, 18.
128 Lefebvre, n 111 above, 127-132.
129 *ibid*, 128.

equitable' than the civil law.[130] By the early 13th century, Lefebvre writes, 'the canon law had made "natural equity" its lodestar'.[131] Hostiensis would put the point simply: *aequitas* is *ius*, whereas '*rigor non est ius*'.[132] Canonists now claimed canon law was founded on natural law (unlike the *corpus civilis*) and its *source* was this novel *canonical* equity.[133]

In the midst of all this (c. 1270), Thomas Aquinas published his *Summa Theologiae*, reviving the Aristotelian notion of *epieikeia* and linking it explicitly with Roman *aequitas*.[134] Asking whether we should always judge according to the written law, Aquinas posits *ius naturale* (often rendered as 'natural right' in translations of his work) as the relevant standard against which to measure the 'justice of the law'.[135] Aquinas contrasts 'natural right' with 'positive right' or written law.[136] The 'written law', he says, may contain natural right but it does not 'establish' it, and 'neither can it diminish or annul its force' because it cannot 'change nature'. So, says Aquinas, 'if the written law contains anything contrary to natural right, it is unjust and has no binding force'. In such cases, Aquinas says, we must turn to equity: '[L]aws that are rightly established fail in some cases when if they were observed they would be contrary to natural right [*ius naturale*] … in such cases judgment should be delivered not according to the letter of the law, but according to equity [*ad aequitatem*] …'[137]

Addressing *epieikeia* directly, Aquinas again prioritised *ius naturale* over the written law: '[t]o follow the letter of the law when it ought not to be followed is sinful'.[138] And in response to the *Lex Inter aequitate* (which, we might recall from above, reserved the power of deciding between law and equity to the sovereign alone), Aquinas countered: 'interpretation is permitted in doubtful cases, when the sovereign's interpretation of the letter of the law is required, but when the case is manifest there is need, not of interpretation, but of execution.' On its face, Aquinas appears to assume that in cases of necessity, the determination of equity falls to the individual – and this is backed up by his specific examples.[139] So even as the legists and canonical lawyers were reducing the formal scope for a discretionary equity that apparently favoured popes and sovereigns, a powerful

130 Maniscalco, n 110 above, 21.

131 Lefebvre, n 111 above, 129: Pope Honorius III (1216-1227) determined that 'in a case not covered by legislation, the dictates of equity are to be followed'.

132 Maniscalco, n 110 above, 20-21: Hostiensis argues that 'in certain circumstances (such as where what is at stake is the *periculum animarum* [danger to the soul]), *aequitas rudis* should be allowed to prevail over *scriptum ius*'.

133 Lefebvre, n 111 above, 129, who comments that it is this different source that differentiates the civil from the canon law – though one might also argue that *both* are founded, to some degree, on an idea of natural equity.

134 Maniscalco, n 110, 27, who notes that Aristotle's *Ethics* and *Rhetoric*, the two texts in which *epieikeia* is discussed, were both 'rediscovered' in translation across this period.

135 Thomas Aquinas, *Summa Theologiae, Secunda Secundae* 2nd ed (online ed: Fathers of the Dominical Province, 1920 [c. 1270]), Q60, art 5. For Ockham's debt to Aquinas, see Robinson, n 106 above, 203. See Brett, n 106 above, 90-97, for a complementary treatment of Q57-58 (on 'right', 'justice' and 'injustice').

136 Aquinas, *ibid*.

137 *ibid*.

138 *ibid*, Q120, arts 1-2.

139 See also Lefebvre, n 111 above, 132-134; Maniscalco, n 110 above, 27-29.

theological strain hinted that the capacity to determine the 'justice of the law', in specific cases, rested with individuals, under the rubric of equity.

## An 'instinct of nature'

Ockham's *Opus Nonaginta Dierum* was, as is well known, a line by line refutation of Pope John XXII's *Quia Vir Reprobus* of 1329, in which the pope had summed up seven years of arguments condemning Franciscan teachings on apostolic poverty.[140] The Franciscans lived frugally, farming on monasteries owned by the Church, and claiming to own nothing at all – their land, housing, clothing and even food was all in the formal possession of the Vatican – their own poverty, they said, reflecting the life of Jesus and his apostles. The Franciscans thus argued it is possible to live without *dominium*, or formal title, in anything, implying that property is not a *necessary* institution – and, taunting the Vatican, that those in poverty are closer to God than the propertied. Their position had been laid out in a 1279 papal bull of Nicolas III (*Exiit qui seminat*).

John XXII found absurd the idea that the Church retained full *dominium* over everything the Franciscans used and ate. He declared heretical the Franciscan 'fiction' that they had no rights in the goods they consumed.[141] Where the Franciscans argued (and the *Exiit* declared) that their use of these goods amounted to '*simplex usus facti*' – that is a simple matter of fact ('use in fact') rather than of right – John retorted that no such relationship was possible for consumable goods, since they cease to exist 'in fact' at the very moment their consumption is effected (ie once they are 'done': John's case relies nicely on the literal Latin *factum est*).[142]

With somewhat less sophistry (but again showing a flair for etymology), John also argued that for the use of these items to be *just*, it must be based on *ius* (*ius* being the root of *iustitia*, justice), and by corollary that if not based on *ius* (in the sense of law), their consumption was unjust.[143] If a friar had a 'licence' from the Vatican to use the thing in question, then the usage necessarily involved a *ius*, a law or legal right. The Franciscan insistence on non-ownership in the goods they used was, John said, either incorrect or tantamount to theft.[144] Better to end the fiction and own up to the inescapability of possessing legal rights in property used, if justly acquired. To underline the point, John transferred ownership of the Franciscans' actual effects from the Church to the Order.

In his *Opus*, William of Ockham accepted John's case that use must be based on *ius* to be just. But he then distinguished between a positive right (*ius positivum*) grounded in law, which (he continued to claim) the friars did not

140 Robinson, n 106 above, 1. Accounts of this debate can be found in Robinson, n 106 and Tierney, n 106 above.

141 Robinson, n 106 above, 32.

142 John also claimed that only a factive entity could have a factual relationship – but the Franciscan order, being a corporate entity, was fictive, and therefore could not, *ibid*, 48.

143 *ibid*, 48. Ulpian, in the opening passage quoted in the *Digest* and cited above, makes the reverse claim – that *ius* rather derives from *iustitia*. Schiavone, n 8 above, 418, supplies an explanation for this surprising untruth.

144 Robinson, n 106 above, 47.

enjoy in the clothes, food, and shelter they used, and a *natural right* (*ius naturale*) to these items, which rendered their consumption 'just' (as of *ius*, right, law), which is inalienable and exists for anyone anywhere.[145] The immediate point was not merely that *ius positivum* and *ius naturale* were distinct – and may even be opposed. The more radical point was that all legally-owned property might be liable to requisitioning by those in poverty – and so, closer to God – exercising their 'natural rights'.[146] Brett notices that whereas this 'natural right' primarily kicks in at times of necessity, at those times it 'is a right in the same strong sense as a positive right'.[147] This natural right is best understood as a *potestas* or 'power' in all of us, which is, in Robinson's inimitable turn of phrase, 'inherently irrenounceable'.[148] Brett quotes Ockham: 'the life of mortals cannot be without natural right, because no-one can renounce such a right.'[149]

So far so generally-agreed. What is often unnoticed is that this breakthrough, if such it is, appears largely premised on *aequitas* – and on Ockham's own appropriation of that concept. Ockham was a theologian-philosopher, not a lawyer, and his understanding of equity is best grasped through the distinctive epistemological theory he developed known as 'nominalism'. Ockham's nominalism posited that the individual is the locus of all knowledge, which is based directly on experience.[150] The soul has direct prelinguistic access to other singular entities through 'intuitive cognition' of 'natural signs' – a person is one such sign 'just as natural' to use Ockham's own poignant example, 'as a sigh is the sign of infirmity or pain'.[151] The move from *immediate* signs such as these to linguistic signs (*nominae*), being intersubjective, is by voluntary agreement: words ('signifiers', we might say) point not to actual referents (objects in the world) but to mental constructs or fictions ('signifieds'). This means that (i) the individual is the ultimate source of all knowledge; (ii) words apprehend imprecisely things grasped more precisely through prelinguistic 'intuitive cognition'; and (iii) universals (such as 'humanity') have no independent existence outside of the mind.[152] 'Right reason' involves grasping intuitive experience and successfully performing the adequation of signifieds with referents – ie the correct apprehension (and so representation in language) of 'natural'

145 Tierney, n 106 above, 122, citing Ockham, *Opus Nonaginta Dierum*.
146 Robinson, n 106 above, 82-83, 89-90.
147 Brett, n 106 above, 64.
148 Robinson, n 106 above, 90, 92.
149 Brett, n 106 above, 64. Though it seems *ius naturale* could be translated as 'natural law' here.
150 I rely on the following for accounts of Ockham's nominalism: J. Coleman, 'Ockham's Right Reason and the Genesis of the Political as "Absolutist"' (1999) 20 *History of Political Thought* 35; S.C. Tornay, 'William of Ockham's Nominalism' (1936) 45 *The Philosophical Review* 245; and M. McCord Adams, 'Ockham's Nominalism and Unreal Entities' (1977) 86 *The Philosophical Review* 144, who argues that Ockham's positions changed across his lifetime and were ultimately inconsistent.
151 Tornay, *ibid*, 251, citing Ockham's *Summa Totus Logicae*. For Tornay, '[t]he important word … is the word "natural". It gives us the clue to everything [Ockham] has to say concerning the conditions and validity of knowledge.' Coleman, *ibid*, 41, writes: 'The starting point of any knowledge of contingent facts is intuitive cognition. Only after intuitive cognition can we have other kinds of knowledge: abstractive, individual, universal, contingent, necessary or self-evident.'
152 Tornay, *ibid*, 256, cites Ockham's *Sentences* as follows: 'The universal is not some real thing having a psychological being (*esse subjectivum*) in the soul or outside of the soul. It has only a logical being (*esse objectivum*) in the soul and is a sort of fiction.'

signs 'intuitively' grasped.[153] The construction of second-order universals, then, is entirely predicated on empirical first-order experience, rightly reasoned.

Ockham was well-versed in Aquinas, though he was not a Thomist – indeed his nominalism entailed an explicit rejection of Thomist 'realism' (a belief in the objective existence of universal categories).[154] On every account he was well read in the canonists, less so the legists, but again he did not subscribe to canonist orthodoxy.[155] Indeed, Tierney points out that Ockham regarded contemporary canonists, the pope's allies, as his 'most dangerous enemies' and borrowed from the earlier canonists whatever suited his case against their successors.[156] His use of 'natural equity' appears to be such a borrowing: in any case, there seems little doubt Ockham's understanding of the term was premised to an extent on his own nominalism.[157]

The centrality of natural equity to Ockham's conception of natural rights can be grasped through the following four points.

First, equity was a critical consideration for all parties to the Franciscan poverty debate, directly related to the legitimacy of both property and poverty. Michael of Cesena, Ockham's Franciscan superior and principal ally, argued that the institution of private property itself was incompatible with natural equity: 'mine' and 'thine' were introduced, he quoted the Decretum, '*per iniquitatem*', that is 'through the customs of the *ius gentium*, contrary to natural equity'.[158] Property is iniquity. Although Michael's conclusion was not mainstream, his premise was. Unlike the contributors to the *Digest*, the authors of the Decretum and its Gloss clearly asserted the superiority of *ius naturale* over *ius gentium* and *ius civile*: human law only came about with the fall of humankind into the state of iniquity (a fall, etymologically speaking, from equity).[159] As we've seen the Decretum was ambivalent as to whether private property already existed under natural law or arrived only with human law.[160] As Tierney explains it, this conundrum was resolved by one Rufinus (in c. 1159), who declared that natural law was permissive, rather than prohibitive, on private property.[161] But this still left some loose ends. The Franciscan view was that *dominium* did not exist at all in *ius naturale* only arising with *ius gentium*. John's view was that *dominium* existed 'in common' before the fall (it must have for God to 'give' paradise to mankind), becoming 'divided' only afterwards.[162] (Evidently the entire discussion is prefigured by the *Digest* authors' distinction between *ius naturale* and *ius*

153 Coleman, n 150 above, 45-46; 56-57.
154 Tornay, n 150 above, 249.
155 Robinson, n 106 above, 153.
156 Tierney, n 106 above, 43.
157 Coleman, n 150 above.
158 Robinson, n 106 above, 103, citing Michael of Cesena's *Appendix Maior*, himself citing the *Ordinary Gloss* [OG] at C.12 q.1 c.2.
159 OG D.8 (Part 2): 'Now natural law … prevails by dignity over custom and enactments. So whatever has been either received in usages or set down in writing is to be held null and void if it is contrary to natural law'. OG D.5: 'For what is contrary to natural law is iniquitous.' See Coleman, n 150 above, 44-46.
160 St Isidore, cited in n 117 above. Contrast, for example, the *Quo Iure* from the Decretum: 'By natural law all things are common to all people … In contrast, by customary and enacted law, one thing is called "mine" and something else "another's".' Gratian, n 109 above, 24 [D. 8].
161 Tierney, n 106 above, 59-67.
162 Robinson, n 106 above, 34-35; 93-137.

*gentium*, their relative importance inverted by reference to the Biblical twist of a Fall from grace.) The Ordinary Gloss to the Decretum comments as follows: '[N]ature [in one sense] means an instinct of nature proceeding from reason … law proceeding from nature in this sense is called natural equity. According to this law of nature, all things are called common, that is, to be shared in time of necessity.'[163]

The text neatly reflects Ockham's own writing: and the key term bridging the human 'instinct of nature' (compare Ockham's 'intuitive cognition') to law (ius) is 'natural equity'. Equity is the portal between instinct and law – reflecting Ockham's own epistemological move from intuition into language. On this account, private property is not inherently iniquitous – but, as Coleman notes, if natural law is *permissive* with regard to property, participation must be voluntary not compulsory.[164] On this basis, Ockham could defend the Franciscan vow of non-participation in a law of property, while still having to access food, clothes and shelter. In times of necessity, things are to be shared according to a prior natural equity: equity neither entails nor prohibits private property, but signals its limits and its potentially inequitable exclusions.[165] In this formulation, private property is better understood as a liberty under natural law: as Janet Coleman points out, Ockham believes in natural *use* rights not natural *property* rights.[166]

Second, Ockham invokes natural equity at crucial junctures in building his case against John. At one point, for example, he borrows from St Augustine a distinction between *ius poli* – the law of heaven – and *ius fori*, the law of the court:[167] '*Ius poli* is nothing other than a power [*potestas*] conformed to right reason without any agreement [*pactione*]; *ius fori* is a power from some compact, sometimes concordant with right reason and sometimes discordant.' Ockham grounds the prior 'power' of *ius poli* in natural equity: '*Ius poli* means natural equity [*aequitas naturalis*] which is consonant with right reason [*rationi rectae*] without any human or purely positive [*pura positiva*] divine decree … this law is sometimes called natural law [*ius naturale*].'

In discussing this point, Tierney seems right to conclude that this 'power' amounts again to an assertion of a subjective proto-modern natural right, independent of the positive law. But it will be equally apparent that *ius poli* – 'conformed to right reason' and 'without any agreement' – reflects Ockham's nominalist epistemology. The grammar is clear: natural equity is *immediate* (or, again instinctive) – without any human intervention – and by means of it, with right reason, *ius poli* / natural law may be accessed.[168] Janet Coleman comments that *ius poli* is the '*knowledge* of natural equity consonant with right reason', a primary epistemological category, something actively experienced and intuitively grasped, just as the 'sigh' is grasped as the natural sign of pain.[169]

163 Gratian, n 109 above, 6 [D. 1 C. 7, OG]. See too 15 [D. 5 (Part 1), OG]: 'natural law in the sense of natural equity existed from eternity.'
164 Coleman, n 150 above, 53.
165 *ibid*, 52-54.
166 *ibid*, 44.
167 Tierney, n 106 above, 127-128. See too Brett, n 106 above, 66-67.
168 Robinson, n 106 above, 89.
169 Coleman n 150 above, 56-57, emphasis mine.

Indeed this latter specific example of Ockham's – the pained sigh as an empirical source of knowledge – merits a moment's thought, consonant as it is with the hunger, thirst or cold that gives rise to *necessity*: what triggers *immediate* sensory experiential knowledge for Ockham – the instinct of nature – is not, as it would later be with Descartes, a piece of wax, nor, as with Samuel Johnson's famous riposte to Bishop Berkeley, a rock: it is human suffering: pain, hunger, cold. We thus find empathy and necessity at the same intuitive (immediate) sources for Ockham, indicating natural equity and natural *ius*, prior to the move into the intersubjectivity of language and the positive law.

Third, in later work Ockham assiduously developed the equity/right relation buttressing the argument of the *Opus*. In his *Short Discourse on Tyrannical Government* (known as the *Breviloquium*), Ockham defines two kinds of *aequitas naturalis*. 'In one sense it means what is in conformity with right reason, which cannot be false or not right. The pope cannot do anything against natural equity in this sense'. To be clear, 'natural equity of this sort … is natural law' and anything undertaken against it is 'by the law itself … null'.[170] The second sort of *aequitas naturalis* is more intriguing: it is 'what should regularly be observed by those who have the use of reason, unless there is some special reason why it cannot be observed'.[171] For example, 'not to use something belonging to another against his will belongs to natural equity in this sense'. Yet 'in a time of extreme necessity' not just the pope but 'anyone … can occasionally act against natural equity in this sense'.[172] Ockham could be clearer here: he sets equity in one sense up against equity in another.[173] Equity in his second sense grounds the positive law: it is the portal through which natural law translates into positive law – but the positive law remains mutable should it conflict with natural equity/law in the first sense. The point is, in such cases natural equity – as natural law/right – provides cause to *anyone*: Ockham's methodological individualism here gives rise to a radical equality that of course reflects the etymological root of *aequitas*.

Fourth, equity for Ockham provides a ground to resist absolutism. In the *Breviloquium*, natural equity appears as a limit on the pope's 'fullness of power' (*plenitudo potestatis*). The old claim that the pope enjoyed an absolute power as God's representative on earth had been recently and vigorously developed and championed by Pope Innocent III (1198-1216) and, in particular, the canonist Hostiensis.[174] Hostiensis elaborated a quasi-absolutist account of papal authority: all law emanated from God and 'whatever the pope does, he acts on God's

170 Ockham, n 52 above, 69.
171 *ibid*.
172 *ibid*.
173 See also the discussion of Ockham's tripartite definition of 'natural law' from his unfinished *Dialogus*, justifying violence in self-defense on natural rights grounds, again sourced in natural equity. Tierney, n 106 above, 175-182; Ockham's text is provided in H.S. Offler (1977) 'The Three Modes of Natural Law in Ockham: A Revision of the Text' 37 *Franciscan Studies* 211. See too Brett, n 106 above, 67 and Pollock, n 89 above, 128. Ockham grounds all three definitions in 'an instinct of nature, that is of natural reason' [*instinctu nature hoc est naturalis rationis*] – which is, of course, the Ordinary Gloss definition of natural equity (see text at n 163 above).
174 K. Pennington, *The Prince and The Law* (Berkeley, CA: University of California Press, 1993) generally ch 2 'The Prince's Power and Authority, 1150-1270' and 45-46. See also 56-58 citing Innocent III: '*possumus supra ius dispensare*', which he gives as 'we can dispense from the law'.

authority, because he is the vicar of God and receives his authority from him'.[175] Like God – and through His authority – the pope enjoyed a *potestas absoluta*. As Kenneth Pennington notes, Hostiensis was here turning a familiar figure on its head: God had long been assumed to possess *potestas absoluta* – a capacity to act in principle contrary to the (divine) laws of nature – that He did not in fact exercise.[176] According to Hostiensis, the pope too enjoyed this power – one which he *might*, therefore, exercise: he is above law (*supra ius*), a figure to whom the Roman law maxim *princeps legibus solutus est* (the Prince is loosed from the law) applies.[177] Hostiensis, Pennington notes, blurs the distinction between the civilian authority (of the Prince) and that of the pope, and finds that, in his *plenitudo potestatis*, the pope is 'loosed' from Divine law.[178] Hostiensis was not, commentators agree, advocating arbitrary papal power – although he was immune from judgment, the pope must always act in a 'licit, proper and expedient' manner, only deviating from the law 'with cause'.[179] Yet it is at this point that Hostiensis's famous definition of equity ('justice tempered by sweet mercy') appears: it is in acting on equity that the pope is loosed from the law.[180] Equity here liberates absolutism.

We might understand this consequential formula – its long roots running from the *ius praetorium*, through the *Lex Inter aequitate*, and into the positions adopted in 17th century England by King James I and, in a different guise, Thomas Hobbes – as the necessary flipside of a subject-centred natural right.[181] Ockham, however, hopes to turn this principle around. In his hands, natural equity becomes the yardstick against which the pope's acts must be measured. Ockham asks whether 'the power of the pope is so great that he has power over things contrary to natural equity'?[182] Again and again in the *Breviloquium*, Ockham finds that natural equity, grounded in right reason, far from empowering the pope, *limits* his authority and freedom to act.[183] (The argument foreshadows Stein's synopsis of Labeo above: it is the unwritten 'rational principles' that indicate 'the limits of the rules themselves'.[184]) Ockham says 'it belongs to justice, which the supreme pontiff should cherish above all not to allow the workings of power but to safeguard what is equitable.'[185] Moreover, the pope does not have the power to make laws 'in all matters not against divine and natural law'. This is because 'law … should not without clear necessity be imposed on the just.'[186] As a *source* of law, then, in Ockham, natural equity *limits* lawmaking to

175 *ibid*, 51.
176 *ibid*, 54-55, 69. F. Oakley, 'Medieval Theories of Natural Law: William of Ockham and the Significance of the Voluntarist Tradition' (1961) 6 *Natural Law Forum* 65.
177 See B. Tierney, '"The Prince is not Bound by the Laws": Accursius and the Origins of the Modern State' (1963) 5 *Comparative Studies in Society and History* 378.
178 Pennington, n 174 above, 54, 60-61.
179 *ibid*, 62-69.
180 *ibid*, 69-70.
181 This paradoxical (at first glance) consonance, even conceptual coidentity, of the autonomous human subject and its apparent antithesis, the absolutist discretionary sovereign, is explored with great lucidity in Douzinas n 93 above, 69-81 and 220-221.
182 Ockham, n 52 above, 21.
183 *ibid*, 47, 65, 69.
184 Text at n 52 above.
185 Ockham, n 52 above, 28.
186 *ibid*, 30.

that which is just and necessary – but within those constraints it constitutes a *potestas* equally available to all – lowly Franciscan monk or pope alike – to determine what is or is not rightly law. This startingly radical doctrine looks set to trigger modernity.

## LONDON 1649

On 25 October 1649, Colonel Lieutenant John Lilburne was tried for treason by twelve judges at an 'Extraordinary Commission' in London's Guildhall.[187] Lilburne was accused of writing treasonous pamphlets against the Lord Protector Oliver Cromwell while in prison. He was arraigned under new laws that some believed had been drawn up specifically to facilitate his prosecution.[188] In a day of lengthy exchanges, according to Harold Wolfram's account: 'Lilburne never tired of reminding his judges, and the jury [that] there were rights and privileges, although never previously granted or perhaps even demanded, which "justice" and "common equity" required for an accused.'[189]

For example, told he would not be permitted legal representation, Lilburne replied 'I shall humbly crave as my right by law, and I am sure by common equity and justice, that I may have counsel and solicitors also assigned me.'[190] When the judge noted at one point that the very fact of his trial showed Lilburne was receiving 'more favour than ever … a prisoner that ever was accused of treason', he replied: '[i]t is no extraordinary favour that you have afforded me; it is but only my right by law and justice and common equity.'[191] (In the event, Lilburne was acquitted.)[192]

John Lilburne was, famously, a leader of the Levellers – as they came to be known (the moniker was initially pejorative) – who rose to prominence in 1646 but effectively disappeared following a Cromwellian purge in 1649.[193] Like Lilburne himself, the Levellers' platform repeatedly called for the recognition

187 Its full title was the 'Extraordinary Commission of Oyer and Terminer'.

188 H.W. Wolfram, 'John Lilburne: Democracy's Pillar of Fire' (1952) 3 *Syracuse Law Review* 213, 228.

189 *ibid*, 230.

190 *ibid*, 236.

191 *ibid*, 232.

192 M. Loughlin, 'The Constitutional Thought of the Levellers' (2007) 60 *Current Legal Problems* 1, 15, citing the Trial Record. Lilburne was tried again in 1653.

193 I am basing the account here on the following sources: I. Gentles, 'The Agreements of the people, 1647-1649' in M. Mendle (ed), *The Putney Debates of 1647* (Cambridge: Cambridge University Press, 2001); B. Worden, 'The Levellers in History and Memory, c. 1660-1960' in *ibid*; J.G.A. Pocock, 'The True Leveller's Standard Revisited: An Afterword' in *ibid*; H.N. Brailsford, *The Levellers and the English Revolution* (London: The Cresset Press, 1961); R.A. Gleissner, 'The Levellers and Natural Law: The Putney Debates of 1647' (1980) 20 *Journal of British Studies* 74; A.C. Houston, '"A Way of Settlement": The Levellers, Monopolies and the Public Interest' (1993) 14 *History of Political Thought* 381. On notions of law during the period more broadly, J.P. Sommerville, *Royalists and Patriots: Politics and Ideology in England, 1603-1640* (New York, NY: Longman, 1999). Ian Gentles traces the political demise of the Levellers to the Army's purge in Burford on 17 May 1649, which aimed to end Leveller agitation against the invasion of Ireland: I. Gentles, *The English Revolution and the Wars in Three Kingdoms, 1638-1652* (Abingdon: Routledge, 2007) 387. On 'the Levellers' as a pejorative term, see Worden, *ibid*, 280-282.

of certain 'common rights' or 'native rights' – which are in the main procedural, or proto-constitutional, notably separation of church and state, a broad franchise, freedoms of religion and speech, and equality before the law.[194] They repeatedly raised the imperative of 'equity' to support these rights.

Lilburne gave a fairly detailed account of his conception of the relationship between law and equity in his 1645 'England's Birth-right Justified'.[195] Written during the first Civil war (1642-1646), the pamphlet posits two different 'senses of law': 'an equitable and a literall sense'. In general these support one another, but when they do not, equity takes precedence over the letter of the law. When the 'Commander' goes 'against [the law's] equity', Lilburne writes, he 'gives liberty to the Commanded to refuse Obedience to the letter.' The Army therefore has a 'right of Disobedience' unless 'we think that obedience binds men to cut their own throats':

> [F]or the Law taken abstract from its originall reason and end, is made a shell without a kernell, a shadow without a substance, and a body without a soul. It is the execution of Laws according to their equity and reason, which (as I may say) is the spirit that gives life to Authority the Letter kills. Nor need this equity be expressed in the Law, being so naturally implyed and supposed in all Laws that are not meerly Imperiall…

If the poetry is sometimes tortured and the metaphors mixed, the sense is clear enough, and familiar: the binding of 'equity' to reason, its 'natural' expression through 'all laws that are not merely imperial', and its superiority to the 'letter' of law. Equity is the spirit – the soul – but more importantly the *source* – of law. And Lilburne derives from equity a right of disobedience – much as for Ockham equity underpins a natural right to disobey positive law *in extremis*.[196] As in Ockham, equity is not primarily conceived as a mode of interpretation of law: rather it is a *measure* – against which the law can be found wanting.

Other Leveller leaders raise equity in their writings to similar effect. In the July 1646 pamphlet *Remonstrance of Many Thousand Citizens*, generally considered the earliest Leveller statement, Richard Overton and William Walwyn wrote that the laws 'deserve from first to last to be considered and seriously debated, and reduced to an agreement with common equity and right reason, which ought to be the form and life of every government.'[197] Overton's 1647 *Appeal from the Commons* asserts, in language similar to Lilburne's: 'The equity of the Law is Superiour to the Letter, the Letter being subordinate and subject thereto, and looke how much the Letter transgresseth the equity, even so much it is unequalle, of no validity and force: Yea, if the Law should comptroule and

194 'An agreement of the people for a firm and present peace upon grounds of common right and freedom, 28 October 1647' (The First Agreement). This and, unless otherwise stated, other Levellers texts are online at https://oll.libertyfund.org/page/leveller-anthology-agreements (last visited 10 December 2021). See Loughlin, n 192 above, esp 24-27.

195 J. Lilburne, *England's Birth-Right Justified* (October 1645).

196 A chief demand was 'for the Commons to get a Copy of their Charters, and translate them into English, and print, them, that so every free-man may see and know his own rights.'

197 R. Overton and W. Walwyn, *A Remonstrance of Many Thousand Citizens* … (7 July 1646).

overthrow the equity, it is to be comptrouled and overthrowne it selfe, and the equity to be preserved as the thing, only legally, obligatory and binding.'[198]

In his *Gold Tried in the Fire*, Walwyn is more precise, justifying a series of procedural rights in terms of equity. Punishments inflicted 'upon the testimony of one witness' are, he says, 'contrary both to the law of God and common equity'. Laws, court rulings, and the duties of judges and other public officials should be published 'in the English tongue' (rather than in French), 'by which just and equitable means this nation shall be forever freed of an oppression.'[199] Nor were the Levellers unique in this. Numerous agitators during this revolutionary period drew on varieties of equity – including the influential barrister MP Henry Parker, the chiliastic Calvinist barrister John Warr, and the Digger Gerard Winstanley.[200]

But what is this 'common equity' on which the Levellers insisted? What does it have to do with the 'natural equity' of the Romans or that of the scholastics? How are we to understand its invocation 300 years after Ockham? In what follows I am not going to trace the convoluted route that takes us from Ockham to Lilburne, though I will glance at some milestones. Rather, I will try and capture some key elements of this term of art as it arose at this time and relate them to the larger canvass sketched above.

## Common equity

Interesting and specific to mid-17th century England is that the concept of equity had begun to crop up in every walk of life – producing what Mark Fortier in his book-length study refers to as a 'culture of equity': it was, he says, 'a concept in such widespread use in this period as to constitute one of the key ideas in general currency – in law, religion, politics, poetry'.[201] Fortier finds contemporary texts bristling with references to equity: 'God's law is equity, as is the king's law; the Christian conscience is guided by equity; the welfare of the people is equity': 'in the realm of early modern ideas, equity moves in the highest company [and] in the work of the most important writers.'[202]

198 R. Overton, *An Appeale From The Degenerate Representative Body The Commons of England Assembled At Westminster* (17 July 1647).

199 W. Walwyn, *Gold Tried in the Fire* (2 June 1647).

200 Warr advocated root-and-branch law reform, drawing on the principle of equity as a lodestar: 'equity in whom it is,' he wrote, 'should give law to those in whom it is not.' D. Hirst, 'In a Narrow Pass' (1992) 14 *London Review of Books* 9. See also on Warr, C. Hill, *The World Turned Upside Down: Radical Ideas during the English Revolution* (London: Penguin, 1975) 269-276; S. Sedley and L. Kaplan (eds), *A Spark in the Ashes: The Pamphlets of John Warr* (London: Verso, 1992). For Warr, equity is 'the divine principle', the 'clear reason and understanding of all things', 'the measure of all just laws' and the 'proper fountain of good and righteous laws, a spirit of understanding big with freedom, and having a single respect for people's rights', *ibid*, 91-92. G. Winstanley, 'The Law of Freedom in a Platform' in G.H. Sabine (ed), *The Works of Gerrard Winstanley* (New York, NY: Russell and Russell, 1965) 542-543, and text at n 243 below.

201 M. Fortier, *The Culture of Equity in Early Modern England* (Aldershot: Ashgate, 2005) 2.

202 *ibid*. He concludes, perhaps unhelpfully, that equity was at this time 'an essentially contested concept', ie 'one with many uses [but where] no one use … is generally accepted', *ibid*, 21.

Equity was also by now a central consideration for English lawyers, providing the basis for the jurisdiction of the Chancery court, initially conceived as a chamber wherein the 'King's conscience', in the person of the Chancellor, might be exercised to restore 'justice' where the common law courts had failed.[203] Christopher St Germain's *Doctor and Student* had, a century earlier, provided a systematic view of the English common law, in which he equated 'natural law' with the 'law of reason', propounding – in what became a widely read book – that 'the law of reason is written in the heart of every man' and 'all other laws … are grounded thereupon'.[204] St Germain's understanding of equity derived from Jean Gerson – who had himself adapted Ockham – viewing reason (and conscience) as ordinary human attributes that already informed the common law courts, leaving little need for 'exceptional' Chancery jurisdiction.[205] His treatise aimed, in its day, to defend the common law courts 'against the encroachments of the Chancery under [Cardinal] Wolsey, who had demonstrated that the Chancellor's conscience held unlimited power'.[206] This set of concerns had again arisen in the decades immediately before the Levellers' ascension, in the celebrated *Earl of Oxford* case, with, once again, the Chancellor (and Crown) ultimately prevailing.[207]

The Levellers' recourse to 'equity' appears to owe something to St Germain, but it ignores or brackets those earlier debates, distrusting alike the Chancery's equitable jurisdiction and the Crown's discretionary dispensation, instead appealing to an equitable reinfusion of the law as a whole.[208] In the maelstrom of the 1640s, the Levellers distilled and refocused certain available ideas about equity and its role in relating the positive law to a 'natural law', a term which was by now ubiquitous if polysemous.[209]

To qualify equity as 'common' was not itself common, and was plainly a deliberate choice by the Levellers. The historian Glenn Burgess finds Walwyn persuading Lilburne, in 1645, to 'give up his reliance upon the ancient constitution' and 'appeal instead to 'Reason, Sense and the Common Law of Equitie and Justice'.[210] Common equity here seems to chime with (or above) 'common

203 A. Cromartie, *The Constitutionalist Revolution* (Cambridge: Cambridge University Press, 2006) 17-21.

204 C. St Germain, *Doctor and Student, Or, Dialogues Between a Doctor of Divinity and a Student in the Laws of England: Containing the Grounds of those Laws, together with Questions and Cases Concerning the Equity thereof* ch 2. See Cromartie, *ibid*, 46-58; S. Dobbins, 'Equity: The Court of Conscience or the King's Command, the Dialogues of St. German and Hobbes Compared' (1991) 9 *Journal of Law and Religion* 113.

205 Rueger, n 121 above, 29-30. Pollock n 89 above, 149: 'St. German [sic] pointed out … that the words "reason" and "reasonable" denote for the common lawyer the ideas which the civilian or canonist puts under the head of "Law of Nature"'. See text at n 121 above.

206 Rueger, *ibid*, 28.

207 The case has generated an extensive literature. See for example D. Ibbetson, 'A House Built on Sand: Equity in Early Modern English Law' in Koops and Zwalve, n 35 above.

208 See the debates recounted in *ibid*, esp 61-74.

209 On the continuing centrality of natural law to 17th century thought and debate, Sommerville, n 193 above, 15-18. On the natural law dispute in the Putney debates, B. Taft, 'From Reading to Whitehall: Henry Ireton's Journey' in Mendle (ed), n 193 above, 175-196, 184-185. See text at n 239 below.

210 G. Burgess, 'Repacifying the polity: the responses of Hobbes and Harrington to the "crisis of the common law"' in I. Gentles, J. Morrill and B. Worden (eds), *Soldiers, Writers and Statesmen of*

law' but also to aim at a common sensibility beyond the entrenched religious division that saturated the politics of the period.[211] The qualifier 'common' remains largely specific to the Levellers at this time, one exception being the puritan preacher John Goodwin, a participant in the Putney debates and friend of Lilburne's, who, tellingly, defended the execution of the king thus: '[t]he laws of nature and of common equity are the foundation of all laws (truly and properly so called)'.[212] In fact the term is undoubtedly of puritan origin, apparently introduced by the Cambridge Calvinist William Perkins (whom Lilburne had certainly read) in the late 17th century.[213] Perkins's biographers consider him 'the most famous and influential spokesman for Calvinism in his day' and 'principal architect of Elizabethan puritanism'.[214] In his *Treatise of Conscience*, in a commentary on the Decalogue, he elaborated two 'laws' of equity: 'particular' ('none of them binde us because they were framed … to a particular people') and 'common', which are 'made according to the lawe or instinct of nature common to all men' and which 'bind the consciences [of all] mortall men subject to the order and lawes of nature'.[215] Perkins says a law is in keeping with common equity 'if wise men … have by natural reason and conscience judged the same to bee equall, just and necessary'.[216]

Perkins was elaborating Calvin's own teaching, in which equity was, according to one scholar, 'the central concept'.[217] Although his writings on the topic are not systematic, 'Calvin came to view equity as the core of the divinely ordained natural law against which all human laws had to be measured'. Calvin's principal discussion of equity appears at the culmination of his lengthy *Institutes*, in a short chapter entitled 'On Civil Government', in which he aims to show that the diversity of the world's legal systems tends to converge on the law of the Decalogue. '[E]quity' is that 'on which the enactment [of law] is founded

*the English Revolution* (Cambridge: Cambridge University Press, 1998) 202, 204–205. J. Lilburne, *An Impeachment of High Treason against Oliver Cromwell, and His Son in Law Henry Ireton Esquires* (10 August 1649).

211 For example Gentles, n 193 above, 163. Lilburne added a petition that [parliament] 'be most earnestly pressed, for the ridding of this Kingdom of those Vermine and Caterpillars, the Lawyers', *ibid*, 164; Anon, *The Second Agreement of The People (15 December, 1648): Foundations of Freedom, or An Agreement of the People* (1648).

212 J. Goodwin, *Right and Might Well Met* (1649) reproduced in A.S.P. Woodhouse, *Puritanism And Liberty, Being The Army Debates (1647-9) From The Clarke Manuscripts With Supplementary Documents* (Chicago, IL: University of Chicago Press, 1951) at https://oll.libertyfund.org (last visited 10 December 2021). M. Braddick, *The Common Freedom of the People: John Lilburne and the English Revolution* (Oxford: Oxford University Press, 2018) 114, 295.

213 *ibid*, 5.

214 Fortier, n 201 above, 41, citing Thomas Merrill and Gerald Sheppard.

215 W. Perkins, 'A Treatise of Conscience' in W. Perkins, *The Workes of That Famous and Worthy Minister of Christ in the Universitie of Cambridge, Mr William Perkins*, vol. 1 (London: John Legatt, 1626) at digitalpuritan.net (last visited 10 December 2021) 520.

216 *ibid*.

217 D. Catterall, 'Review, "The Concept of Equity in Calvin's Ethics" by Guenther H Haas' (1997) 28 *The Sixteenth Century Journal* 1488. References to equity are scattered throughout Calvin's *Institutes*, but all indicate an overarching principle for determining law. Interestingly, Calvin ends his long dedication of the book to the (French) King with the word: 'Most illustrious King, may the Lord, the King of kings, establish your throne in righteousness and your sceptre in equity', J. Calvin, *The Institutes of the* Christian Religion, H. Beveridge trans (online ed: Christian Classics Ethereal Library, 1845 [1536]) 21.

and rests' and is 'prescribed' in 'that conscience which God has engraven on the minds of men … Hence it alone ought to be the aim, the rule, and the end of all laws.'[218] But 'as it is natural, it cannot be the same in all', and so specific 'constitutions' may differ: 'there is nothing to prevent their diversity, provided they all alike aim at equity as their end.'[219] Calvin then introduces the familiar yardstick: '[w]herever laws are formed after this rule [of equity], directed to this aim, and restricted to this end, there is no reason why they should be disapproved by us, however much they may differ from the Jewish law'.[220] This admonition foreshadows a critical discussion of whether and when disobedience might be warranted, which unfolds over several subsequent chapters, concluding in the book's final paragraph: sovereign tyranny releases us from obedience to the law: '[i]f they command anything against Him let us not pay the least regard to it'.[221]

Calvin's discussion is notable for relying almost entirely on Old and New Testament sources (plus Augustine), largely avoiding reference to Roman law or even the Scholastics.[222] Nevertheless, if his radical evaluation of law by reference to 'equity' echoes Ockham, his strong binding of equity to individual conscience subjectivises what had been a (putatively) objective measure in Ockham. Ockham's contemporaries had already connected equity to 'synderesis' – the 'pilot light' of conscience in later Scholastic thought – whereas St Germain had aimed to displace (a subjective) conscience at the English Chancery with (objective) equity.[223] The distinction matters: conscience signifies an individual's supposed direct access to a metaphysical God, whereas equity, in the tradition traceable to Ockham, signifies rather the immediacy of the physical world (nature).

The Levellers hewed less closely to scripture than Calvin and they were not – neither consistently nor zealously – puritan: Lilburne himself clearly draws on a radical Protestant tradition, but after 1645 he avoided a puritan register.[224] Overton and Walwyn's religious thought was closest to Anabaptism, Familism or Quakerism.[225] Protestant radicalism is channelled through 'common equity' but without, it seems, any denominational prejudice.[226] The religious 'toleration' of the Levellers is strikingly egalitarian, at a time when radical politics was insistently shaped by faith: their *Third Agreement* would have prohibited parliament from making any laws 'to compel … any person to any thing in or about matters of faith … or to restrain any person from the profession of his faith, or exercise of religion according to his conscience'.[227] An absolute

218 *ibid*, 908-909 (4.20.16). See also *ibid*, 136: 'For while men dispute with each other as to particular enactments [of justice], their ideas of equity agree in substance.'
219 *ibid*, 908.
220 *ibid*, 909.
221 *ibid*, 917.
222 Aquinas and Ockham are mentioned once apiece across sixty chapters.
223 For example, Tierney, n 106 above, 63, citing Odo of Dover and Simon of Bisignano. See Rueger, n 121 above, 1, citing Barton. On the relation between synderesis and conscience, see S. Humphreys 'Conscience in the Datasphere' (2016) 6 *Humanity* 361.
224 Braddick, n 212 above.
225 Gentles, n 193 above; D.B. Robertson, *The Religious Foundations of Leveller Democracy* (New York, NY: King's Crown Press, 1951) 64-70; Hill, n 205 above, 25-35.
226 Robertson, n 225 above, 71.
227 *An Agreement of The Free People of England* (1 May 1649).

freedom of conscience was one, then, of several 'common rights' grounded in equity.

## Common rights

Despite their failure at the time, many of the Levellers' political positions have come to seem prescient. Ian Gentles points to their attempts to inaugurate a written constitution during the Putney army debates in 1647 (dashed by the Cromwellian faction).[228] Keith Thomas has made a persuasive case that the Levellers supported a universal (manhood) franchise, regardless of property, status, or employment, likewise dashed by the Cromwellians.[229] And Martin Loughlin has argued, again persuasively, that the Levellers put in place in skeletal form (through their three *Agreements of the People*) basic principles of contemporary constitutional arrangements – again unsuccessfully.[230] The Levellers articulated constitutional principles in terms of 'basic' (to use Loughlin's language), 'common', 'native' or 'birth' (to use their own) *rights*, many of which reappear today in various text – following much conceptual evolution – as 'universal human' rights.[231] This is my focus in this final section.

Richard Overton's opening to his 1646 pamphlet, the often entertaining 'Arrow against all tyrants' (by, he says cheekily, the 'prerogative archer to the arbitrary House of Lords, their prisoner in Newgate') – fastens 'rights and liberties' to a natural property in the self: 'every individual in nature' enjoys a 'self-propriety' which cannot be deprived 'without manifest violation and affront to the very principles of nature and of the rules of equity and justice'.[232] This is simple (even simplistic) and succinct: the very premise of an existing legal order is handily revised here in terms of innate rights founded on 'principles of nature' and 'rules of equity'. An explicit nature-equity-rights-law nexus recentres the polity around the individual rights-bearer. Implicit is the constitutional *potestas* located in each person: 'No man', he says (women continuing to be astonishingly absent from this story), 'has power over my rights and liberties, and I over no man's … even so are we to live, everyone equally and alike to enjoy his birthright.' The promise of equity is reasserted – a power to remake law founded on a principle of equality.

We have seen that with 'common equity' the Levellers challenge the existing law and identify rights that limit the sovereign ('imperial') reach. Rights language progresses sequentially through the Levellers' Agreements. The first posits freedom of religion, freedom from conscription, and equality under the

228 Gentles, n 193 above, esp 153 and 157.

229 K. Thomas, 'The Levellers and the Franchise' in G.E. Aylmer (ed), *The Interregnum: The Quest For Settlement, 1646-1660* (London: Macmillan, 1972) 57-78. His essay takes issue with the well-known case made in C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 2011 [1962]) 107-159.

230 Loughlin, n 192 above.

231 *ibid*, 24-27.

232 R. Overton, *An Arrow Against All Tyrants* (12 October 1646) at https://www.constitution.org (last visited 3 February 2022). See also Macpherson, n 229 above, 139-141 and Tuck, n 106 above, 5-32 (on the assimilation of *ius* to *dominium*).

law: 'these things we declare to be our native Rights'.[233] The later agreements add rights to vote and to petition, and freedoms of the press, of speech, of religion, and of conscience, the removal of the death penalty and institution of various procedural rights in arraignment.[234] As Martin Loughlin comments, these nascent 'basic' rights are to be consolidated and effected through proto-constitutional principles and safeguards – popular sovereignty, representation, accountability of government, the autonomy of public and private spheres, separation of powers, and judicial independence.[235] These are a different set of rights to those in Ockham, though their effect is to constrain – as do his – the lawmaker.

A question arises as to whether 'common' rights foreshadow 'universal human' rights. 'Native rights' are etymologically close to 'natural rights', but in practice the Levellers did not use the latter term. Does it matter? Possibly. To the modern ear 'native' sounds nativist whereas 'natural' feels universal. We might characterise Roman *aequitas* as fundamentally constrained by a kind of nativism even in its cosmpolitanism. We might counterpose the doomed aspirational catholicism of Ockham. The Levellers frequently refer to the rights and birthrights of, specifically, 'Englishmen'; they invoke the rhetoric of English exceptionalism (Norman yokes and ancient constitutions); and their reiteration of the qualifier 'common' apparently references quintessentially English notions of 'the commons', commoners and a common law. Noting his dislike of Scots, disinterest in the Dutch, and silence on the Irish, Lilburne's biographer Michael Braddick says of him that '[h]is legal campaign really does seem narrowly English … He defended the rights and liberties of the English civil state.'[236]

This seems less immediately true of Walwyn. In a debate over Cromwell's plans to invade Ireland in 1649, Walwyn is thought to have authored the oppositional pamphlet, 'English Souldiers Statement': 'For consider, as things now stand, to what end you should hazard your lives against the Irish: have you not been fighting these seven years in England for Rights and Liberties, that you are yet deluded of?' Moreover, 'will you go on stil to kil, slay and murther men, to make [your superiors] as absolute Lords and Masters over Ireland as you have made them over England?' A counter-pamphlet entitled *Walwins Wiles* sharpens these points, attributing to Walwyn the view 'that this is an unlawful war, a cruel and bloody work to go and destroy the Irish Natives for their Consciences … And to drive them from their proper natural and native Rights'.[237] Both Henry Brailsford and Christopher Hill, in their (remarkable) histories of the period, suggest these views may indeed represent Walwyn's own.[238] In the event, whatever the principled case – it does not appear to have been made –

233 Wolfe n 194 above, 223-234.
234 *ibid*, 311-321 and 397-410.
235 Loughlin, n 192 above, 17-27.
236 Braddick, n 212 above, 282.
237 W. Haller and G. Davies (eds), *The Leveller Tracts 1648-1653* (Gloucester, MA: Peter Smith, 1964) 288-289, 310, 315.
238 Brailsford, n 193 above, 489-500. Brailsford makes a strong case for Leveller opposition to the Irish campaign pointing also to 'Eighteen Queries', a text that survives only in its rebuttal. Hill, n 200 above, 336-337.

it is clear there were, at a minimum, tactical limits to invoking 'universal' rights at this time.

What about the Ockham-era incursion of natural rights over property? In the Putney debates it is not the Levellers but the impeccably erudite Cromwellian Henry Ireton who leans on a caricature of a 'right of nature' to forecast a war of all against all and the collapse of property – 'by the same right of nature [one man] has the same equal right in any goods he sees: meat, drink, clothes, to take and use them for his sustenance'.[239] Ireton's position, deliberately or not, caricatures the Franciscan poverty debate in the vernacular, with he himself taking up John's case. Against the charge that the 'right of nature' will 'take away all property', the Leveller William Rainsborough could only counter 'sir, to say because a man pleads that every man has a voice by right of nature, that therefore it destroys by the same argument all property, this is to forget the Law of God. … Thou shalt not steal' – adding, 'I wish you would not make the world believe we are for anarchy'.[240] Lilburne subsequently released a pamphlet clarifying that 'we never had it in our thoughts to Level mens estates'.[241] Although Keith Thomas shows the Levellers were supportive of a dispensation to the unpropertied in extremis, this is not their central position.[242]

By contrast, Christopher Hill argues that 'natural rights' were invoked elsewhere at this time precisely to question the institution of property itself – by the 'true levellers' as the Diggers called themselves – or at any rate by Gerrard Winstanley their leader – and by the authors of a radical tract entitled 'Light Shining in Buckinghamshire'.[243] Both Winstanley and the 'Light Shining' authors advocated the abolition, or at least curtailment, of property. If Overton recalls Ockham in the smaller drama of 1640s London – and Ireton is John – Gerrard Winstanley plays Michael of Cesena. But Hill is wrong on one important detail. Neither Winstanley nor the Light Shining authors had much or anything to say about 'natural rights' anywhere in their texts. Rather both rely heavily on a different concept: that of – you guessed it – *equity*. The Light Shining authors ground their four demands (including 'a just portion for each man to live, that so none need to begge or steale for want') on 'common right and equity'.[244] Winstanley refers repeatedly in his work to the 'law of reason and equity'. He writes: 'When this universall law of equity rises up in every man and woman then none shall lay claim to any creature, and say, This is mine, and

239 Clarke Manuscripts, n 212 above. Hill, n 200 above, 118-120.

240 Clarke Manuscripts, *ibid*.

241 J. Lilburn, W. Walwyn, T. Price and R. Overton (attributed mainly to Walwyn), *A Manifestation from Lieutenant Col. John Lilburn et al (14 April 1649)*. See Braddick, n 212 above, 289: '[Lilburne] consistently disavowed the name Leveller and any socially levelling ambition; indeed he explicitly argued that a fully representative Parliament would be a safeguard against social levelling, because it would inevitably protect property – property rights being central to the common law tradition that he championed'.

242 Thomas, n 229 above.

243 Hill, n 200 above, 118-119.

244 Anon, *Light Shining in Buckinghamshire, in* Sabine, n 200 above. Hill, n 200 above, 117, believes the pamphlet is penned not by Winstanley but by 'a local group of Levellers'.

that is yours … There shall be no buying nor selling, no fairs nor markets, but the whole earth shall be a common treasury for every man.'[245]

The deeper radicalism Hill wishes to attribute to 'natural rights' in the 1640s is radically hitched to the concept of equity. If so, however, this marks the outer perimeter of a concept that was quickly domesticated in the political settlement that followed. And that is another story.

## CONCLUSION

At the outset of this article, I suggested the term 'equity' has taken a new turn in international law, extending to individual subjects of law and acquiring an apparently novel association with human rights. Rather than pursuing that development in the present paper, I have aimed instead at the past, to show that, far from being novel, an ancient exegetical tradition – now somewhat neglected – sources equity within the human person and gives rise to natural rights. That case is, I hope, clearly made in the foregoing, even if the work of grasping the specific character of emerging current usages remains to be done. It may be that to raise equity in any given context is less to make an assertion than to frame a debate, to enter or shift conceptual parameters, to legitimise or delegitimise adjacent terms, and to recall and foreground the existence of *in*equity. That is certainly the work of equity when invoked today as it so often is: in global climate law, in healthcare, and in political protest of various shades.

In this paper, I examined three key moments in the conceptual history of equity, in order to clarify and revive an important but neglected semantic thread. Roman era 'equity' provided a means to bring the extralegal into law, extending the law's reach through analogical reasoning and imaginative empathy – though it made no assumptions of general freedom or equality. In William of Ockham's nominalist-inflected claim for 'natural rights', equity provides a power suspending the positive law in times of necessity. Here, equity continues to be grounded in individual experience and empathy, but it now also entails radical equality, a source of law present in all persons but also constraining the prince. For the Levellers in the 1640s, equity brought rhetorical force into their new claims for individual rights and constitution-building, though on a relatively vague, intuitive, and theoretically undeveloped ground.

In revisiting this history, I have left unexamined many familiar legal connotations and historical landmarks associated with equity. A quite different story could be told concerning equity's evolution as a principle of judicial interpretation, as a source for discretionary imperial, papal and otherwise sovereign prerogative, or as a vehicle for creative property arrangements. All these stories – familiar in one form or another, including in the history of the English Chancery court – can be traced in some degree to the one I tell here – but I

245 He continues: 'Surely this is both ful of reason and equity; for the earth was not made for some, but for al to live comfortably upon the fruits of it.' G. Winstanley, *The New Law of Righteousnes Budding Forth, in Restoring the Whole Creation from the Bondage of the Curse* (London: Giles Calvert, 1649).

have chosen to focus on a historically parallel development: the significant conceptual work done by this premodern term in opening a very modern aperture. By the early modern period, then, the notion of equity joined and even initiated a vocabulary that stood to 'empower' individual subjects of law, providing a register that assumed they already in fact possessed the power and right to evaluate law's adequacy and choose in principle to consent or not (subject to limitations). It is (or so one might argue in another piece) precisely this radical aspect of equity that Thomas Hobbes targeted in the extensive consideration given to equity in his writings, just as the story I tell here came to a close.[246]

Radical equity didn't quite vanish, though Hobbes, on one hand, and the Chancery court, on the other, took the concept in a quite different direction. It would be another century or more after the Levellers before the radical impulse bloomed in the French and American Revolutions. When the 'rights of man' burst forth in their mature(ish) form, they took over the role of extra-legal *measure* of fairness, reason and equality with which to critique and reform the law that had historically been the domain of equity.[247] The equitable claim to empathy persisted, perhaps, in notions of fraternity and solidarity in that later period. Later again, it is partly by reference to 'equity' that English colonial authorities would attempt to simultaneously permit and constrain 'native' law in the colonies, and it is by reference to 'equity' that some of those same polities would, once independent, aim to remake international law.

Radical equity, in the sense I have attempted to describe here, is not a programme or doctrine: it is merely an entry point to political engagement with law – it does not indicate a pathway or exit. Slavery was not abolished in Rome, the Franciscans did not succeed against the Pope, the Levellers' constitutional agitation failed. In each case, at best, if something was ceded, something else was seeded: a ground, perhaps, for dissatisfaction and remaking the law. If 'equity' is everywhere today, it is partly, presumably, because some shoots have successfully taken off from the roots I have described here. And it may also be due to the fact that so many global challenges are today unfolding with such starkly inequitable effects.

246 See Dobbins, n 204 above; D. Klimchuk, 'Hobbes on Equity' in D. Dyzenhaus and T. Poole (eds), *Hobbes and the Law* (Cambridge: Cambridge University Press, 2012).

247 This heritage is signalled in Sieyès's failed attempt to establish a 'court of natural equity' to safeguard the newly acquired rights of man. M. Goldoni 'At the Origins of Constitutional Review: Sieyès' Constitutional Jury and the Taming of Constituent Power' (2012) 32 *Oxford Journal of Legal Studies* 211.