

## Aristotle, Equity, and Democracy

Forthcoming in *Polis*

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**Abstract:** Aristotelian equity (*epieikeia*) has often been relegated to scholarly discussions of retributive justice. Recently, however, political theorists have recast equity as the virtue of a sympathetic democratic citizen. I build on this literature by offering a more precise explanation of equity's internal structure and political significance. In particular, I reveal equity's deliberative dimension. For Aristotle, equitable citizens, statesmen, and legislators correct or go beyond the law, as appropriate, not only when they render retrospective judgments about matters of punishment or distribution, but also when they deliberate about future-oriented questions of legislation or political action. In addition, I show, more concretely, the role of equity in democratic citizenship. Drawing upon the Aristotelian *Constitution of the Athenians*, I argue that the Athenian demos exemplified equity when it brought about the reconciliation and the amnesty of 403 B.C. Attention to this episode clarifies the conceptual linkages between equity, deliberation, sympathy, and democracy.

**Keywords:** Aristotle—equity—*epieikeia*—democracy—amnesty—Athens

Equity is a familiar term in contemporary law courts and news media, but a critical question remains: what is equity, exactly, and why is it important?<sup>1</sup> Attempting to answer this question, many political and legal theorists have turned to Aristotle. According to one prominent interpretation, Aristotelian equity (*epieikeia*)<sup>2</sup> refers to the precise yet sympathetic judgment of the good judge, who attends to the facts of the case and corrects the law (as appropriate) in order to eschew issuing an overly severe verdict or penalty.<sup>3</sup>

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<sup>1</sup> For example, K. Johnson, J. Turkewitz, and R. Pérez-Peña, ‘Verdict in Oregon Draws Surprise and Questions About Equity’, *The New York Times* (October 28, 2016). *Black’s Law Dictionary* defines equity as ‘justice administered according to fairness as contrasted with strict rules of common law’. Cited in E. Zahnd, ‘The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law’, *Law and Contemporary Problems*, 59 (1996), p. 263.

<sup>2</sup> Equity is the most common translation of *epieikeia*. For the etymology of *epieikeia* and the history of its usage, see J. de Romilly, *La Douceur dans la Pensée Grecque* (Paris: Les Belles Lettres, 1979), pp. 53-63; J. Brunschwig, ‘Rule and Exception: The Aristotelian Theory of Equity’, in *Rationality in Greek Thought*, ed. M. Frede and G. Striker (Oxford: Clarendon Press, 1996), pp. 119-26; D. Shanske, ‘Four Theses: Preliminary to an Appeal to Equity’, *Stanford Law Review*, 57 (2005), pp. 2053-85.

<sup>3</sup> See, for example, Brunschwig, ‘Rule and Exception’, p. 136; M. Nussbaum, ‘Equity and Mercy’, *Philosophy & Public Affairs*, 22 (1993), pp. 93-7.

So understood, Aristotelian equity has influenced the philosophy of law from Aquinas to Roscoe Pound.<sup>4</sup>

Yet, more recently, Danielle Allen, Darien Shanske, and Jill Frank have suggested that the purview of Aristotelian equity may extend far beyond issues of retributive justice.<sup>5</sup> For example, appealing to Aristotle, Allen writes that ‘democratic citizenship entails turn-taking at displays of equity’, which she characterizes as ‘the core of friendship and trust production’.<sup>6</sup> Although Allen, Shanske, and Frank each employ a distinctive interpretative approach, a common refrain among them is that equitable persons make good democratic citizens, since being equitable requires both excellent judgment and sympathy for one’s fellow citizens.

I build on this literature by offering a more precise explanation of the internal structure and the political significance of Aristotelian equity. Toward this end, I begin

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<sup>4</sup> Aquinas, *Summa Theologica* 2.2.20; R. Pound, ‘The Decadence of Equity’, *Columbia Law Review*, 5 (1905), pp. 20-35.

<sup>5</sup> D. Allen, *Talking to Strangers: Anxieties of Citizenship since Brown v. Board of Education* (Chicago: University of Chicago Press, 2004); D. Shanske, ‘Revitalizing Aristotle’s Doctrine of Equity’, *Law, Culture and the Humanities*, 4 (2008), pp. 352-81; D. Shanske, *Thucydides and the Philosophical Origins of History* (Cambridge: Cambridge University Press, 2007); J. Frank, *A Democracy of Distinction: Aristotle and the Work of Politics* (Chicago: University of Chicago Press, 2005). The recent literature evokes R. Beiner, *Political Judgment* (London: Methuen, 1983).

<sup>6</sup> Allen, *Talking to Strangers*, pp. 154-6.

with careful analysis of *Nicomachean Ethics* 5.10, which has received short shrift in the literature.<sup>7</sup> My reading of *NE* 5.10 illuminates equity's deliberative dimension. In *NE* 5.10, Aristotle introduces equity as a virtue that encompasses and surpasses ordinary lawfulness, which Aristotle often calls justice 'in general' (*NE* 5.6.1134a15, 5.10.1137b13-14).<sup>8</sup> In particular, the equitable person applies the laws with imagination and foresight to the concrete circumstances of political life, frequently correcting or going beyond the law for the sake of the end at which the law itself aims, namely, the common advantage of the regime (*NE* 5.10.1137b20-32). Aristotle holds up the ideal

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<sup>7</sup> For all that Shanske has written on equity, he offers only cursory treatments of *NE* 5.10. See Shanske, 'Four Theses', pp. 2066-7; Shanske, 'Revitalizing Aristotelian Equity', pp. 355-6; and Shanske, *Thucydides*, p. 110.

<sup>8</sup> Unless otherwise noted, translations of Aristotle belong to T. Irwin, trans., *Nicomachean Ethics* (Indianapolis: Hackett 1999); C. Lord, trans., *Aristotle's Politics*, 2<sup>nd</sup> ed. (Chicago: University of Chicago Press, 2013); J.H. Freese, trans., *The Art of Rhetoric* (Cambridge: Harvard University Press, 1926); J.M. Moore, trans., 'Constitution of the Athenians', in *Aristotle and Xenophon on Democracy and Oligarchy* (Berkeley: University of California Press, 1975), pp. 147-207. I often favor, over Irwin, R. Bartlett and S. Collins, trans., *Aristotle's Nicomachean Ethics* (Chicago: University of Chicago Press, 2011). My own translations and transliterations refer to I. Bywater, ed., *Ethica Nicomachea* (Oxford: Clarendon, [1890] 1963); A. Dreizehnter, ed., *Aristoteles Politik* (Munich: W. Fink, 1970); F.G. Kenyon, ed., *Atheniensium Respublica* (Oxford: Clarendon, 1920).

legislator as his exemplar of equity, since the legislator combines deliberative rationality with comprehensive knowledge of and devotion to the regime and its laws (*NE* 5.10.1137b23-5). Moreover, in *NE* 9.6, Aristotle suggests that ordinary citizens can approach the equity of the legislator through deliberation that attends to both the common advantage of the regime and the demands of the opportune moment. As a supremely deliberative species of justice, equity is an ethical virtue of patent political import.

While it is crucial to recognize equity's deliberative dimension, doing so should not efface its more well-known critical dimension. In the paper's second movement, I examine Aristotle's reflections on equitable approaches to issues of corrective justice because this material shines a bright light on the link between equity and sympathetic judgment foregrounded in the scholarship. Aristotle's account of equitable corrective judgment raises the question: why should the particularized and flexible decisions of the equitable judge tend toward sympathy rather than severity? A variation of this problem arises in the recent accounts of equitable democratic citizenship. When equitable democratic citizens choose to act beyond or against the law in extraordinary circumstances, why and in what sense are their actions sympathetic?

To address these questions, I turn in the paper's third section to the *Constitution of the Athenians* (*Athēnaiōn Politeia*). The Aristotelian author of this text—whether Aristotle himself or one of his immediate students—lauds the Athenian demos for its behavior during the historical episode of factional strife and reconciliation at Athens in

404-403 B.C.<sup>9</sup> Having prevailed over the oligarchic faction in full-blown civil war, the Athenian democrats had the power to exact revenge. Instead, however, the demos surprisingly issued an amnesty and repaid the debts of the oligarchs. These actions went beyond the people's legal obligations and re-founded the democracy altogether (*Ath. Pol.* 39-41.2). By explaining the amnesty using the same conceptual language found in Aristotle's expositions of equity, the Aristotelian author of the *Ath. Pol.* strongly suggests that the demos exhibited equity during this historical episode.

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<sup>9</sup> Keaney, Ostwald, and Mara ascribe the *Constitution of the Athenians* to Aristotle. See J. Keaney, *The Composition of Aristotle's Athēnaiōn Politeia* (New York: Oxford University Press, 1992), pp. 12-14; M. Ostwald, *From Popular Sovereignty to the Sovereignty of Law: Law, Society, and Politics in Fifth-Century Athens* (Berkeley: University of California Press, 1986), pp. xx-xxi; G. Mara, 'The Culture of Democracy: Aristotle's *Athēnaiōn Politeia* as Political Theory', in *Aristotle and Modern Politics: The Persistence of Political Philosophy*, ed. A. Tessitore (Notre Dame: University of Notre Dame Press, 2002), pp. 310-13. I follow the more cautious approach of J. Ober, *Political Dissent in Democratic Athens* (Princeton: Princeton University Press, 1998), pp. 352-3; J. Frank and S. Monoson, 'Lived Excellence in Aristotle's *Constitution of Athens*: Why the Encomium of Theramenes Matters', in *Cambridge Companion to Greek Political Thought*, ed. S. Salkever (Cambridge: Cambridge University Press, 2009), pp. 243-70; and P.J. Rhodes, *Commentary on the Aristotelian Athēnaiōn Politeia* (Oxford, UK: Clarendon Press, 1981), pp. 62-3.

More importantly, the Aristotelian presentation of the Athenian reconciliation and the amnesty clarifies equity's deliberative dimension and its relation to sympathetic judgment. The Athenians' extralegal judgments about punishment and distribution were sympathetic precisely because these judgments were informed by long-range deliberations about the common advantage of the city and the flourishing of its citizens. Preserving the common advantage and the possibility of individual human flourishing demands flexible compromise rather than inflexible harshness (or inflexible mildness); equitable citizens grasp this fact. In this way the *Ath. Pol.* presents equity as a democratic possibility—and indeed as a virtue that graces democratic citizenship at its best.

### **Equity's Deliberative Dimension**

In *NE* 5.10, Aristotle argues that equity is a distinctive and superior type of justice (*NE* 5.10.1137a35-1137b12). He also identifies the good legislator as a living standard of equity (*Pol.* 4.1.1288b27, *NE* 5.10.1137b23-5). By theorizing equity as an ethical virtue in its own right, and by revealing its political significance, Aristotle distinguishes his approach to equity from the tradition of thought and discourse on equity that had preceded him. For example, Plato's Athenian Stranger had disparaged 'equity and forgiveness . . . [as] enfeeblements of the perfection and exactness that belong to strict justice'.<sup>10</sup> Similarly, Herodotus and Gorgias had associated equity with extralegal judgment and forgiveness; unlike the Athenian Stranger, however, they had presented

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<sup>10</sup> See Plato, *Laws* 757e. The quote is drawn from T. Pangle, trans., *The Laws of Plato* (Chicago: University of Chicago Press, 1980), p. 144.

equity in a favorable light, contrasting the mildness of equity with the severity of the law.<sup>11</sup> Another usage of equity occurs in the speeches of Isocrates and Demosthenes: the equitable person fulfills his contracts in an evenhanded and respectable way.<sup>12</sup> Although scholars have not neglected these historical antecedents of Aristotelian equity, they have not recognized the originality, unity, and political significance of Aristotle's own account—features that appear in *NE* 5.10.

Aristotle opens *NE* 5.10 by raising a perplexity (*aporia*): is equity the same as justice or is it different? According to Aristotle, everyone recognizes that equity and justice are homologous, if not identical, characteristics (*NE* 5.10.1137a33-4). Recall that Aristotle had argued, at the beginning of his treatment of justice, that justice understood as lawfulness—justice 'in general' (*katholou*; *NE* 5.6.1134a15)—is 'complete virtue in relation to another' (*NE* 5.1.1129b26-7). Likewise, in the first paragraph of *NE* 5.10, Aristotle points out that 'we' often use 'the term *equitable* (*to epieikes*) in place of the term *good*' (*anti tou agathou*; *NE* 5.10.1137a35-1137b2).<sup>13</sup> Having established the

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<sup>11</sup> Herodotus 3.53 and Gorgias, *Epitaphios*, fragment Diels-Kranz 82b6. Cited in Nussbaum, 'Equity and Mercy', p. 86.

<sup>12</sup> For example, Isocrates 7.33; Demosthenes 34.30. For an account of *epieikeia* in the context of the Athenian law courts, see E. Harris, 'How Strictly Did the Athenian Courts Apply the Law? The Role of *epieikeia*', *Bulletin of the Institute of Classical Studies*, 56 (2013), pp. 27-48.

<sup>13</sup> Throughout the paper I have modified Irwin's translations of *epieikeia* and *epieikēs*: where he gives 'decency' and 'decent', I give 'equity' and 'equitable'. The argument in

similarity of equity to the justice of the lawful person, however, Aristotle goes on to distinguish the two virtues: ‘the equitable is better than one way of being just, but it is still just, and not better than the just by being a different kind of thing’ (*NE* 5.10.1137b9-10). As magnificence (*megaloprepia*) surpasses liberality (*eleutheriotēs*), and greatness of soul (*megalopsuchia*) surpasses love of honor (*philotimia*; *NE* 4.4.1125b1-5), so equity can be considered ‘superior’ to justice (*kreitton to epieikes*; *NE* 5.10.1137b11), even though it remains a kind of justice. In this way Aristotle introduces equity as the peak of justice, which is itself the peak of the other-directed ethical virtues.

In the second part of *NE* 5.10, Aristotle begins to explain why equity can be considered justice’s peak. The key point is that ‘equity is just, but it is not the legally just, but a rectification of it’ (*epanorthōma nomimou dikaiou*; *NE* 5.10.1137b12-14). Justice codified in law demands ‘rectification’, according to Aristotle, ‘because all law is general, but concerning some matters it is not possible to speak correctly in a general way’ (*NE* 5.10.1137b13-14).<sup>14</sup> The various problems with legal justice are familiar. On the one hand, gaps in the law arise because the law cannot fully foresee the particularities of action. On the other hand, because the law takes the form of inflexible propositions,

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favor of rendering *epieikeia* as ‘equity’ is that this translation preserves and highlights the orientation of *epieikeia* toward the law. Yet Irwin’s translation correctly suggests that *epieikeia* goes beyond ordinary lawfulness and may comprise the whole of other-directed ethical virtue. Also note that the root of *epieikeia* is *eikos*: *epieikeia* is the virtue that corrects the law in view of what is ‘likely’, ‘fitting’, or ‘appropriate’.

<sup>14</sup> Trans. Bartlett and Collins.

complex circumstances may require the correction or reformulation of the law altogether (see *Pol.* 3.11.1282b2-6, 3.15.1286a22-5; *Ath. Pol.* 9.2-4).<sup>15</sup> In Aristotle's own words: 'The source of the error is not the law or the legislator, but the nature of the object itself, since that is what the subject matter (*hulē*) of actions (*tōn praktōn*) is bound to be like' (*NE* 5.10.1137b1-2). Hans Georg Gadamer comments: 'Aristotle shows that every law is in a necessary tension with concrete action, in that it is general and hence cannot contain practical reality in its full concreteness.'<sup>16</sup> No matter how comprehensive or exact the laws may be, justice in the sense of lawfulness must sometimes yield to equity.

The foregoing argument proceeds at a high level of abstraction. One wonders what Aristotle means, more concretely, when he says that equity entails a 'rectification of law' (*NE* 5.10.1137b28). Until recently, scholars had agreed on the answer to this question. The work of Jacques Brunschwig is representative. Brunschwig contends that 'the context' of Aristotle's analysis of equity, in *NE* 5.10, 'is clearly that of the law, as revealed by a comparison to parallel texts of the *Rhetoric*, and more precisely that of the penal law'.<sup>17</sup> In Brunschwig's view, equity is the virtue of 'the judge', who attends to the particulars of the case, and, on this basis, eschews 'a mechanical or blind application [of the penal law, especially when such an application] would result in a verdict that would be too severe according to the moral intuitions of the judge and the society in which he

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<sup>15</sup> See Nussbaum, 'Equity and Mercy', p. 93.

<sup>16</sup> H.G. Gadamer, *Truth and Method*, 2<sup>nd</sup> rev. ed., trans. J. Weinsheimer and D.G. Marshall (London: Continuum, 2004), p. 316. See also *NE* 2.2.1104a1-12.

<sup>17</sup> Brunschwig, 'Rule and Exception', p. 136.

works'.<sup>18</sup> Brunschwig, Martha Nussbaum, and many others confine equity to the sphere of the law courts, identify the equitable individual as the good judge, and describe his work as the appropriate suspension of the law or at least the mitigation of punishment in accordance with the facts of the case.<sup>19</sup>

However, there is no indication in *NE* 5.10 that equity is exclusively associated with corrective justice. Would it not be surprising to find that Aristotle relegates equity to the courts in light of the opening passage of *NE* 5.10? In that passage, as we have seen, Aristotle holds up equity as a superior and distinctive type of justice that appears to comprise the totality of the other-directed ethical virtues. In fact, Aristotle uses the word 'equitable' in the sense of 'wholly virtuous' throughout the *Nicomachean Ethics* (e.g., *NE* 4.9.1128b23-6, 9.8.1168a32-5, 10.9.1180a10-14).<sup>20</sup> Equity cannot possibly boil down to a flexible and particularized mode of judicial decision-making.

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<sup>18</sup> Brunschwig, 'Rule and Exception', p. 139.

<sup>19</sup> Nussbaum, 'Equity and Mercy', pp. 95-7; R. Kraut, *Aristotle: Political Philosophy* (Oxford: Oxford University Press, 2002), pp. 109-10, 166-8; B. Yack, *The Problems of a Political Animal: Community Justice, and Conflict in Aristotelian Political Thought* (Berkeley: University of California Press, 1993), pp. 193-4; R. Sorabji, *Necessity, Cause, and Blame: Perspectives on Aristotle's Theory* (Chicago: University of Chicago Press, 1980), pp. 261-4; A. Hewitt, 'Universal Justice and *Epieikeia* in Aristotle', *Polis*, 25 (2008), pp. 116-17.

<sup>20</sup> See T. Smith, *Revaluing Ethics: Aristotle's Dialectical Pedagogy* (Albany: SUNY Press, 2001), pp. 153-5.

On the contrary, whereas scholars often present equity as the modular skill of a judge who departs from the law (after its initial application) in meting out punishments for past instances of wrongdoing, Aristotle himself emphasizes, at least in the first place, equity's deliberative orientation toward future-oriented questions of legislation or political action. In a central passage of *NE* 5.10, Aristotle argues that the equitable person corrects the law for the same reason that the law sometimes proves an inadequate guide to political action and demands correction in the form of a decree (*psēphisma*; *NE* 5.10.1137b28-32). According to Richard Kraut, 'a decree is a legal enactment addressed solely to present circumstances, and sets no precedent that applies to similar cases in the future'.<sup>21</sup> Kraut rightly notes that the juxtaposition of flexible, particularized decrees to rigid, general laws was commonplace in Greek political thought.<sup>22</sup> Aristotle's simile of the Lesbian ruler sharpens this contrast: 'for the standard applied to the indefinite is itself indefinite (*aoristos*), as the lead standard is in Lesbian building, where it is not fixed, but adapts itself to the shape of the stone; similarly, a decree is adapted to fit its objects' (*NE* 5.10.1137b30-2). Why was it necessary, in certain circumstances, for laws to yield to decrees? In this passage, Aristotle says only that 'on some matters legislation is impossible' (*adunaton*; *NE* 5.10.1137b29). Elsewhere he speaks more directly: 'to legislate concerning matters of deliberation (*bouleuontai*) is impossible' (*Pol.*

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<sup>21</sup> Kraut, *Aristotle*, p. 106.

<sup>22</sup> See D. MacDowell, *The Law in Classical Athens* (Ithaca: Cornell University Press, 1978), pp. 43-6, 49. Cf. M. Schwartzberg, 'Athenian Democracy and Legal Change', *American Political Science Review*, 98 (2004), pp. 312, 319-20.

3.16.1287b20). While laws are general, inflexible, and, consequently, only ‘accidentally’ just (*kata sumbebēkos*; *NE* 5.9.1137a13), deliberation involves particularized and flexible investigation of how best to act ‘where the outcome is unclear and the right way to act is undefined’ (*NE* 3.3.1113b9-10). The implication is that the equitable person corrects the law on the basis of deliberation.<sup>23</sup>

That lawfulness is insufficient for virtuous action, and deliberation is essential to it, is a leitmotif of the *Nicomachean Ethics*. Aristotle maintains throughout the work ‘that questions about actions and expediency, like questions about health, have no fixed answers’ (*NE* 2.2.1104a2-3). Consequently, he denies that it would be possible to provide law-like definitions of the virtues. The virtues can only be explained ‘in outline (*tupō*), not exactly’ (*NE* 2.2.1104a1-2; see also *NE* 1.3.1094b13-27) because virtuous individuals ‘themselves must consider in each case what the opportune moment is (*pros ton kairon skopein*), as doctors and navigators do’ (*NE* 2.2.1104a9-10). This argument suggests that the law, in contradistinction to the virtuous individual, cannot grasp the opportune moment. Inescapably, nonetheless misleadingly, the law offers general and fixed prescriptions for action, even though the true measure of virtuous action resides in the flexible and particularized deliberation and choice of the virtuous person (*NE* 2.6.1107a2). Thus Aristotle calls such a person ‘a law unto himself’ (*NE* 4.7.1128a34).

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<sup>23</sup> Aristotle is not arguing that rule by decree is superior to the rule of law. Rather, ‘the law should rule in all matters, while the office-holders and the citizen body should decide in particular cases’ (*Pol.* 4.4.1292a34-5). Certainly rule by decree can be inequitable—as in the execution of the Arginusae generals (*Ath. Pol.* 34.1).

In addition, Aristotle directly addresses the limits of the law as a guide to action in the concluding passage of *NE* 5.9, which directly precedes his exposition of equity. According to Aristotle, many people think that they are just, because they know what the laws demand of them; however, they do not actually know how or when to act on these ideas (*NE* 5.9.1137a5-26). What these people lack is the deliberative excellence that would allow them to act in the right way and at the right time. Justice in the general sense of lawfulness demands correction by a deliberative excellence that attends to the opportune moment and thus arrives at flexible, particularized decisions about just action—of the kind embodied in decrees, for example. The flexibility and fastidiousness that scholars uniformly ascribe to Aristotelian equity reflects, in the first place, the deliberative aspect of this virtue and its corresponding focus on the opportune moment.<sup>24</sup>

That Aristotle connects equity to deliberation, decrees, and the idea of the opportune moment is significant for consideration of who the equitable person is and what he does. For Aristotle, deliberating well about action belongs to the person of practical wisdom (*ho phronimos*), and especially to the *phronimos* insofar as he acts politically (*NE* 6.5.1140a25-31); his case-in-point is Pericles (*NE* 6.5.1140b9-12).<sup>25</sup>

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<sup>24</sup> Neither deliberation nor its cognates appears in Shanske's 'Revitalizing Aristotelian Equity'. Similarly, Frank casts equity as a critical excellence that looks backward toward putative acts of wrongdoing. E.g., Frank, *Democracy of Distinction*, pp. 51, 105.

<sup>25</sup> But cf. Salkever, who argues, persuasively, that Aristotle is at the same time a critic of the excessive bellicosity of Periclean Athens (and, *a fortiori*, of Sparta). S. Salkever,

Moreover, Aristotle defines statesmanship (*politikē*) itself with reference to deliberation, seizing the opportune moment, and issuing decrees. Statesmanship ‘is concerned with action and deliberation, since [it is concerned with decrees and] and the decree is to be acted on as the last thing [reached in deliberation]’ (*NE* 6.8.1141b27-8). The virtuous statesman deliberates well, and the result of his deliberation can be embodied in a decree. Furthermore, Aristotle shows in the *Politics* that the statesman grasps the opportune moment to intervene in unfolding political events (*Pol.* 4.1.1289a1-12, 5.8.1308a33-4). Since Aristotle defines both statesmanship and equity as excellence in the kind of deliberation that corrects the law in light of the opportune moment, equity and statesmanship emerge as closely related characteristics. Aristotle contends that ‘statesmanship and practical wisdom (*phronēsis*) are the same state (*hexis*)’ (*NE* 6.8.1141b24), and that practical wisdom and equity are co-present in the same persons (*NE* 6.11.1143a20-8, 6.13.1144b32). Equity, practical wisdom, and statesmanship coincide in the virtuous political actor.

But who, exactly, is this person? In another central passage of *NE* 5.10, Aristotle identifies the equitable person as ‘the legislator’ (*ho nomothetēs*; *NE* 5.10.1137b22-4). Many interpreters suppose that Aristotle’s point in this passage is that ‘legislative intent’ provides an interpretative standard for the application of the law to particular cases.<sup>26</sup>

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*Finding the Mean: Theory and Practice in Aristotelian Political Philosophy* (Princeton: Princeton University Press, 1990), pp. 170-4.

<sup>26</sup> See Brunschwig, ‘Rule and Exception’, pp. 150-1; Kraut, *Aristotle*, pp. 109-110; Shanske, ‘Revitalizing Aristotelian Equity’, p. 356.

However, Aristotle does not contend that the law demands correction in light of the legislator's intention, his original plan for the regime's practices and institutions. A political founder cannot anticipate every political contingency that the regime will face in the future (*NE* 5.10.1137b16-9). Aristotle argues instead that the law demands correction in the manner that the legislator himself originally exercised his practical intelligence when he founded the regime. Irrespective of whether one is a legislator oneself, equitable correction of the law means inhabiting the perspective of the legislator, decreeing 'what the legislator would have said if he had been present there' (*NE* 5.10.1137b23-4). In other words, 'the good legislator and the true statesman' (*ho agathos nomothetēs kai ho hōs alēthōs politikos*), to whom Aristotle addresses his 'science of the regime' in the *Politics*, might be considered living standards of equity (*Pol.* 4.1.1.1288b21-7).

Why Aristotle appeals to the good legislator as a living embodiment of equity can be explained, in the first place, by the affinities between practical wisdom, statesmanship, and equity that I have already explored. 'The good legislator and the true statesman' are political experts who possess the kind of practical wisdom that locates the opportune moment for just action. As Aristotle writes in the *Politics*: 'to recognize an ill as it arises in the beginning belongs not to any chance person, but rather to a statesman' (*politikou andros*; *Pol.* 5.8.1308a33-4). The statesman knows how to intervene in unfolding political events and to correct the law. Although the legislator does not typically correct the law, but rather composes it, his own sense of the opportune moment manifests itself in his ability to shape the political 'matter' available to him at the time of his founding (*Pol.* 7.4.1325b41-1326a4).

Second, Aristotle may portray the good legislator as a living standard of equity because the legislator's practical wisdom aims to realize the common advantage (*to koinon sumpheron*) of the regime. Aristotle defines general justice not only as lawfulness, but also, and more importantly, as lawfulness for the sake of the common advantage (*NE* 5.1.1129b15-19, 5.2.1130b25-7). Equity improves upon general justice in this sense by correcting the law in light of the end at which the law aims. Thus Aristotle argues in *Politics* 4.1 that the good legislator should lay down laws that bring about the best regime or the nearest possible approximation to that regime; for it is with 'the same *phronēsis* that one should try to see both what laws are best and what are fitting for each of the regimes' (*Pol.* 4.1.1289a12). The end of the best regime, and of any 'correct' regime (*Pol.* 3.7.1279a28-31), is the common advantage: 'for the same things are best for men both privately and in common, and the legislator should implant (*empoiein*) these in the souls of human beings' (*Pol.* 7.14.1333b37-9; see also 3.12.1282b14-17, 7.8.1328b13-15, and *NE* 8.9.1160a13-14). Ideally, then, the legislator exemplifies equity when he frames the laws of his regime in order to realize the common advantage to the greatest extent possible within the circumstances of his founding. Correcting the law in the manner of the good legislator would mean exercising a similarly synoptic yet nuanced care for the common advantage of the regime.

Thus far Aristotle might seem to have reserved the virtue of equity for the most extraordinary political actors—legislators and statesmen. Yet Aristotle also indicates that equity has a role to play in citizenship and particularly in the activity of deliberation. Although Aristotle does not outline practices of equitable deliberation along the lines of his summative theory of the wisdom of the multitude (see *Pol.* 3.11.1281b1-22), he does

comment on the appropriate occasions for and the goals of deliberation among equitable citizens.<sup>27</sup> Consider, on this point, Aristotle's treatment of 'likemindedness' (*homonoiā*) in *NE* 9.6. Having asserted that likemindedness is a type of 'political friendship' (*politikē philia*) that 'is found in equitable people' (*en tois epieikesin*; *NE* 9.6.1167b3-5), he offers three examples of occasions for equitable deliberation: 'cities are likeminded whenever it is resolved by all to make the political offices elective, or to conclude an alliance with the Lacedaemonians, or to have Pittacus rule when he too was willing to do so' (*NE* 9.6.1167a30-3). Each of these examples refers to a context-specific, potentially divisive, and future-oriented problem of legislation or political action that cannot be settled through a straightforward application of the law. For this reason, and as Wilson has noted in his work on deliberation in Aristotle's political thought, the rule of law must be supplemented by the rule of men; and the rule of men involves, at its best, 'equitable deliberation'.<sup>28</sup>

Yet equitable deliberation does not refer to any and every decision made by men beyond the guidance of the law; to be genuinely equitable, citizens must deliberate in a certain way and in view of certain ends. According to Aristotle, equitable citizens realize likemindedness precisely because they aim to make 'the same decision concerning what is advantageous, choose the same things, and do what has been resolved in common' (*NE*

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<sup>27</sup> See D. Cammack, 'Aristotle on the Virtue of the Multitude', *Political Theory*, 41 (2013), pp. 175-202.

<sup>28</sup> J.L. Wilson, 'Deliberation, Democracy, and the Rule of Reason in Aristotle's *Politics*', *American Political Science Review*, 105 (2011), p. 272.

9.6.1167a27-8). Ideally, at least, equitable citizens will identify an opportune course of action that also brings citizens into accord and thereby conduces to the common advantage of the regime. In this way equitable citizens approach the practical intelligence of the legislator. Even though equitable citizens do not compose a whole framework of laws, they sustain and renew his vision when they adjust and correct his laws in time. Arguably, at least, the legislator depends upon the deliberative excellence of equitable citizens no less than equitable citizens depend upon the founding vision of the legislator.

In sum, equity primarily refers to the deliberative excellence of legislators, statesmen, and citizens who apply the laws with imagination and foresight to the concrete circumstances of political life. While Aristotle maintains that justice in its general sense simply *is* lawfulness (*NE* 5.1.1129b13-27), he also recognizes the impossibility of formulating unqualified rules of justice—and hence the need for equity.<sup>29</sup> For this very reason, and as scholars have long recognized, equity may also inform judgments about the past, especially judgments about wrongdoing and punishment.

### **Equity and the Problem of Sympathetic Judgment**

The deliberative excellence of the equitable person does not exhaust Aristotle's definition of equity. In fact, by examining equity's well-known critical aspect, it may be possible to

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<sup>29</sup> See D. Wiggins, 'Deliberation and Practical Reason', in *Essays on Aristotle's Ethics*, ed. A.O. Rorty (Berkeley: University of California Press, 1980), pp. 221-40; Salkever, *Finding the Mean*, pp. 135-42; L. Strauss, *Natural Right and History* (Chicago: University of Chicago Press, 1953), p. 159.

explain why equitable citizens aim to realize likemindedness and civic friendship through deliberation. For it is in the context of his treatment of equitable corrective judgment that Aristotle emphasizes the connection between equity and sympathy.

According to Allen, ‘Aristotle has a word for the ability to be good at . . . acts of equity. It is *suggnōmē*’.<sup>30</sup> *Suggnōmē* is a compound word that affixes the preposition ‘with’ (*sun*) to ‘judgment’ (*gnōmē*); common translations include ‘forgiveness’, ‘consideration’, ‘sympathy’, and ‘sympathetic judgment’.<sup>31</sup> That Aristotle indeed associates *suggnōmē* with *epieikeia* becomes clear in *NE* 6.11: ‘*suggnōmē* consists in being skilled in deciding the matters with which the prudent person is concerned. For the equitable things are common to all good human beings in relation to one another. . . and all matters of action fall among things particular and ultimate’ (*peri ta prakta tauta d’ eschata*; *NE* 6.11.1143a29-36). This difficult passage—to which I will return—points up the complexity of the conceptual relation between equity and sympathetic judgment. What, then, does Aristotle mean by *suggnōmē*, and what is its relation to equity?

*Rhetoric* 1.13 could shed light on these problems, since Aristotle devotes this passage to examination of the sympathetic judgment of the equitable person in meting out

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<sup>30</sup> Allen, *Talking to Strangers*, p. 154.

<sup>31</sup> On the etymology of *suggnōmē*, see Beiner, *Political Judgment*, p. 76-9; Nussbaum, ‘Equity and Mercy’, p. 94. Again I depart from Irwin, who renders *suggnōmē* as ‘consideration’, which obscures the fact that *suggnōmē* is a type of judgment, i.e., the obvious and important relation of *suggnōmē* to *gnōmē*. Also apposite is the modern Greek, *signomi*, which means both ‘sorry’ and ‘excuse me’.

punishment. Just as equity improves upon ‘general justice’ understood as lawfulness, so too it improves upon particular justice—namely, the virtue of distributing or exchanging goods or issuing corrective judgments with regard to the relevant type of equality, whether geometric or arithmetic (*NE* 5.2.1130b30-1131a9, 5.4.1131b25-1132a5). Thus in *Rhetoric* 1.13 Aristotle argues that wrongdoing precipitated by error (*hamartēma*) or misfortune (*atuchēma*) as opposed to outright injustice (*adikia*) elicits the sympathetic judgment of equitable jurors (or arbitrators), even and especially when the law recommends harsh punishment (*Rhet.* 1.13.1374b1-4). Sympathetic judgment is also the right response to cases in which the strict application of the letter of the law would undermine the purpose for which the legislator wrote that law in the first place (*Rhet.* 1.13.1374b10-12). For example, Aristotle imagines a law that prescribes harsh punishment for assault with a metallic weapon: the equitable juror would correct this law—he would be sympathetic in his judgment of the accused—in the case of a man facing this charge on the grounds that he committed assault while wearing a ring (*Rhet.* 1.13.1374a26-36). As Brunschwig, Nussbaum, Kraut and others have persuasively argued, sympathetic judgment tends toward pardon or mitigation; the equitable person will correct or go beyond the law rather than recommend an excessively harsh, albeit legal, punishment.<sup>32</sup>

However, these commentators have been less persuasive in their attempts to explain why equitable corrective judgment entails sympathy. To say that the judge

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<sup>32</sup> Brunschwig, ‘Rule and Exception’, pp. 136-40; Nussbaum, ‘Equity and Mercy’, pp. 94-7; Kraut, *Aristotle*, p. 109.

eschews a ‘mechanical’ application of the law does not yet explain why a more flexible application of the law should tend in a forgiving direction.<sup>33</sup> Shanske recognizes this problem; his response is to say that the equitable judge evinces sympathy for the accused as a matter of ethos or habit. In his own words, ‘ethos in the broadest sense is central to adjudication’ as Aristotle understands it.<sup>34</sup> Likewise, for Frank, equity is itself a kind of ‘good habit’ that goes beyond the law in doing justice to the ‘habits and actions’ of the accused, that is, to his character as opposed to his putatively unjust act.<sup>35</sup> For these critics, a legal culture of equity habituates judges to be sympathetic.

Yet, if equitable judgment is defined by its flexibility, then is it not possible that equitable judges would deliver severer verdicts in some cases than those recommended by the law? As Aristotle himself writes in the *Rhetoric*: ‘Wrong acts are greater in proportion to the injustice from which they spring. For this reason the most trifling are sometimes the greatest, as in the charge brought by Callistratus against Melanopus that he had fraudulently kept back three consecrated half-obols from the temple builders’ (*Rhet.* 1.14.1374b22-5). No doubt, Aristotle exhorts the judge to examine the character of the accused; but the result of this particularized attention will not always be a lenient

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<sup>33</sup> Brunschwig, ‘Rule and Exception’, pp. 136; Kraut, *Aristotle*, pp. 109-10, 166-7.

<sup>34</sup> Shanske, ‘Revitalizing Aristotelian Equity’, p. 362.

<sup>35</sup> Frank, *Democracy of Distinction*, p. 111. See also Allen’s ubiquitous emphasis on ‘habits of citizenship’ in *Talking to Strangers*, pp. 4, 6, 18-19, 85, 172; and Nussbaum, ‘Equity and Mercy’, pp. 90-1.

decision. Upon examination in court, a wrongdoer may appear to be even more unjust than his crime originally indicated.

A further dimension is added to this problem by an important line that appears near the conclusion of *NE* 5.10: ‘he who is disposed to choose and to do these sorts of things and is not exacting to a fault about justice (*ho mē akribodikaios epi to cheiron*), but is instead disposed to take less for himself (*all’ elattōtikos*) even though he has the law on his side, is equitable’ (*NE* 5.10.1138a1-3).<sup>36</sup> This line suggests that sympathetic judgment manifests itself in the equitable person’s distributive judgments as well. The distributive judgments of the equitable person reveal his sympathy for his fellows; rather than risk inflicting an unjust loss upon them, he would prefer to inflict a loss upon himself. But why exactly should the equitable person sometimes choose to accept a loss for himself? Does not Aristotle’s initial presentation of distributive justice recommend precise judgment regarding proportionally equal distributions (*NE* 5.5.1134a1-7)?

In matters of both distribution and punishment, the relation of equity to sympathetic judgment is more complex and ambiguous than one might have thought. Recall, on this point, the passage with which I began this section: ‘*suggnōmē* consists in being skilled in deciding the matters with which the prudent person is concerned. For the equitable things are common to all good human beings in relation to one another . . . and all matters of action fall among things particular and ultimate’ (*NE* 6.11.1143a29-36). What this difficult passage indicates is that sympathetic judgment evaluates, retrospectively, the same questions about action that equitable deliberation takes up in

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<sup>36</sup> Trans. Bartlett and Collins.

advance. Sympathetic judgment does not tend blindly toward selflessness or mildness for the same reason that selflessness or mildness do not constitute inflexible laws for action. For Aristotle, anger and punishment can be contextually-appropriate responses to wrongdoing (*NE* 4.5.1125b31-5). The idea that the equitable person has a character that simply disposes him toward sympathy cannot fully explain the link between equity and sympathy.

To be sure, Aristotle himself has not fully explained the connection between equity and sympathy in either the *Nicomachean Ethics* or the *Rhetoric*. While he has illuminated certain features of sympathetic judgment, Aristotle offers few concrete examples that show when and why an equitable person would choose to be sympathetic. At the same time, Aristotle makes clear that when the equitable person evinces sympathy even beyond the requirements of the law, he has reasons for doing so; indeed, sympathetic judgment is a central part of the architectonic political intelligence that Aristotle ascribes to the legislator. For the sake of understanding more exactly the role of sympathetic judgment in equity, it would be helpful to look at a rich picture of equitable citizens exhibiting the full scope of this virtue—both its deliberative and critical aspects. Should such an example feature *democratic* citizens, moreover, then it might be possible to determine whether the contemporary commentators are correct in asserting a special affinity between equity and democracy. Such an example exists; in the subsequent section, I turn to the Aristotelian *Ath. Pol.*, in which equity comes to life.

## Aristotelian Equity and Athenian Democracy

On the basis of his remarks on equity and democracy in the *Nicomachean Ethics* and the *Politics*, it is tempting to conclude that Aristotle doubts the possibility of equitable democratic citizenship. Consider that Aristotle distinguishes ‘the equitable persons’ (*hoi epieikeis*) from the democratic ‘many’ (*hoi polloi*) in both the *Nicomachean Ethics* and in the *Politics*. For example, in his discussion of law at the end of the *Ethics*, Aristotle says that ‘the many (*hoi polloi*) yield more to compulsion than to argument’, whereas ‘the equitable person (*ton epieikē*) . . . will attend to reason because his life aims at the fine’ (*NE* 10.9.1180a4-11). A similar distinction is found in Aristotle’s critique of Phaleas in the *Politics*: ‘To rule [the many], then, [requires] not so much leveling property as providing that those who are equitable by nature (*tous epieikeis tē phusei*) will be the sort who have no wish to aggrandize themselves, while the mean (*tous phaulous*) will not be able to, which will be the case if they are kept inferior (*hētous*) but are done no injustice’ (*Pol.* 2.7.1267b5-8).<sup>37</sup> Perhaps Aristotle distinguishes ‘the equitable persons’ from ‘the many’ because equity lies beyond the natural capacities of ordinary people to achieve. After all, for Aristotle, virtue ‘is not easy, nor can everyone do it’ (*NE* 2.9.1109a29).

In fact, Aristotle’s doubt that the democratic multitude is capable of virtue gives rise to his critique of Athenian-style democracy, which he presents as democracy’s ‘final’ and most extreme form (*Pol.* 4.4.1292a1-33, 4.6.1292b40-12193a10).<sup>38</sup> In his own

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<sup>37</sup> Plato’s Athenian Stranger makes a similar argument at *Laws* 736d-737a.

<sup>38</sup> On Aristotle’s critique of Athenian democracy, see Ober, *Political Dissent*, pp. 293-310.

words: ‘their way of life is a mean one (*ho bios phaulos*), with no task involving virtue among the things that occupy the multitude of human beings who are vulgar persons and merchants or the multitude of laborers’ (*Pol.* 6.4.1319a26-9). A democratic regime ruled by these people, Aristotle worries, will degenerate into the lawless tyranny of the many. In order to satisfy their greed for power and material wealth, the many will seek to rule directly in the assembly and the law courts, and they will use their rule to dominate and plunder the rich. Aristotle is blunt: ‘if the majority decides on the basis of number, they will act unjustly by confiscating the property of the rich few’ (*Pol.* 6.3.1318a24-6). Initially, the prospects for equitable democratic citizenship look dim from the Aristotelian perspective.<sup>39</sup>

Even so, and without effacing these tensions and ambiguities, Aristotle’s thought actually supports the possibility of equitable democratic citizenship in the final analysis. The Aristotelian presentation of a critical episode in the history of democratic Athens suggests that the Athenian demos exhibited Aristotelian equity. I have in mind the Aristotelian *Ath. Pol.* and its treatment of the reconciliation and the amnesty of 404-403, which ended the armed conflict between the democratic and oligarchic factions at Athens and reconstituted the democracy after the rule of the Thirty and the Ten. Martin Ostwald remarks that the reconciliation ‘constitutes one of the most inspiring episodes in Athenian history, if not even in human history’; unsurprisingly, a vast scholarly literature attends to

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<sup>39</sup> Aristotle’s harsh assessment of Athenian-style final democracy in the *Politics* contrasts with his more approbatory remarks on lawful agrarian democracy. On this point, see Salkever, *Finding the Mean*, 223-6.

it.<sup>40</sup> Yet, with the possible exceptions of Shanske, Frank, and Monoson, scholars have not recognized that the Aristotelian account points to equity as the virtue that animated the demos in 403.<sup>41</sup> By exploring the role of equity in this episode, I provide a case study that supports and deepens the recent work in political theory on equitable democratic citizenship. More importantly, my reading of the *Ath. Pol.* illuminates Aristotle's more

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<sup>40</sup> Ostwald, *Popular Sovereignty*, p. 497. Book-length treatments include E. Carawan, *The Athenian Amnesty and Reconstructing the Law* (Oxford: Oxford University Press, 2013); T. Loening, *The Reconciliation Agreement of 403/402 B.C. in Athens* (Stuttgart: Franz Steiner, 1987); J. Shear, *Polis and Revolution: Responding to Oligarchy in Classical Athens* (Cambridge: Cambridge University Press, 2011); A. Wolpert, *Remembering Defeat: Civil War and Civic Memory in Ancient Athens* (Baltimore: Johns Hopkins University Press, 2002).

<sup>41</sup> D. Shanske, 'Thucydides and the Law: A Response to Leiter', *Legal Theory*, 19 (2013), pp. 302-6; Frank and Monoson, 'Lived Excellence', pp. 264-5. These excellent essays point toward the conclusion that the amnesty and the reconciliation were equitable. That said, Shanske's examination of *epieikeia* at Athens focuses on Thucydides; he does not mention the *Ath. Pol.* While the substance of Monoson and Frank's brief account of the amnesty broadly anticipates my own, they do not mention equity or *epieikeia*. Cf. Allen's early work on equity and Athenian democracy, in which she suggests that Aristotle criticized equitable democratic judgment at Athens; in her view, he preferred the rule of law. D. Allen, *The World of Prometheus: The Politics of Punishing in Democratic Athens* (Princeton: Princeton University Press, 2000), p. 187.

abstract elaborations of the virtue of equity, including equity's deliberative dimension and its relation to sympathetic judgment.

According to the Aristotelian author of the *Ath. Pol.*, with the defeat of the Athenian navy at Aegospotami in 405, the Spartan 'Lysander became master of [Athens] and established the Thirty' as an oligarchic puppet-regime (*Ath. Pol.* 34.2). The Thirty 'at first behaved with self-restraint' (*metrioi*; *Ath. Pol.* 35.2); however, 'when the Thirty had tightened their grip on the city, there was no type of citizen they did not attack' (*Ath. Pol.* 35.4). Greed and violence defined the rule of the Thirty: 'they killed those remarkable for wealth, family, or reputation, aiming to remove any potential threat and to lay their hands on their property' (*Ath. Pol.* 35.2).<sup>42</sup> The Thirty also harassed the demos, evicting all but three thousand citizens from the city itself.<sup>43</sup> When the exiles massed in the Piraeus and fought back, seizing Phyle under the leadership of Thrasybulus, the Thirty sent a military expedition against them. Yet, the exiles were victorious, first at Phyle, and then, in a second and more significant engagement, at Munychia. During the autumn of 403, 'the group which held the Piraeus and Munychia gradually gained the upper hand in the war and the whole people went over to their side' (*Ath. Pol.* 38.3). The Thirty were then deposed, and, with the aid of the Spartans, especially King Pausanias, the Athenians achieved 'peace and reconciliation' (*hē eirēnē kai hē dialusis*; *Ath. Pol.* 38.4).

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<sup>42</sup> See R. Balot, *Greed and Injustice in Classical Athens* (Princeton: Princeton University Press, 2001), p. 220.

<sup>43</sup> Xenophon, *Hellenika* 2.4.1.

The Aristotelian author records the terms of the reconciliation agreement at great length—though Julia Shear has argued that even he presents an abridged version of the actual agreement.<sup>44</sup> To summarize the summary, the Athenian democrats would return from the Piraeus to the town (*astu*); at that time, both the democrats and the oligarchs would swear ‘reconciliation oaths’ (*horkoi*; *Ath. Pol.* 39.4). Paraphrasing these oaths, the author writes that an ‘amnesty’ (*mē mnēsikakein*, i.e., ‘don’t recall evils’; *Ath. Pol.* 39.6) would apply to all citizens except the rulers and hangmen of the oligarchic regime (i.e., the Thirty, the Eleven, and the Ten of the Piraeus); and ‘even they were to be immune from prosecution once they had submitted to the audit’ (*euthuna*) performed upon all outgoing office-holders (*Ath. Pol.* 39.6). In addition, former supporters of the Thirty who were afraid could register to live outside Athens in an oligarchic enclave at Eleusis (*Ath. Pol.* 39.1-5). Although the agreement was not explicit on this point, the restored regime would be a democracy; indeed, the democratic commitment to *isonomia*, to equality before the law, arguably informed the amnesty itself.<sup>45</sup>

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<sup>44</sup> Shear, *Polis and Revolution*, p. 201.

<sup>45</sup> Shear, *Polis and Revolution*, p. 201. On *isonomia* at Athens, see Herodotus 3.80.6; K. Raaflaub, ‘Equalities and Inequalities in Athenian Democracy’, in *Dēmokratia: A Conversation on Democracies Ancient and Modern*, ed. J. Ober and C. Hedrick (Princeton: Princeton University Press, 1996), pp. 139-74; G. Vlastos, ‘Isonomia’, *The American Journal of Philology*, 74 (1953), pp. 337-366.

After a brief digression on the enactment and enforcement of the reconciliation agreement (*Ath. Pol.* 40.1-2), the Aristotelian author affirms its success, which he attributes above all to the demos:

The Athenians appear to have reacted to their previous misfortunes, both private (*idia*) and public (*koinē*), in the most noble and statesmanlike way of all (*kallista dē kai politikōtata apantōn*). They not only refused to entertain any charges based on previous events, but they repaid out of common funds the money which the Thirty had borrowed from the Spartans for the war, although the agreement had specified that the men of the city and those of the Piraeus should repay their debts separately; they felt that this ought to be the first step in restoring likemindedness (*homonoia*) in the city. In other cities the democrats, far from making contributions themselves in similar circumstances, redistribute the land. (*Ath. Pol.* 40.3-4)<sup>46</sup>

Seeking to explain the success of the reconciliation, many scholars point to the ‘moderation’ and ‘self-restraint’ of the Athenian demos; Carawan even invokes ‘a virtue of accuracy and integrity’.<sup>47</sup> In my view, however, equity is the virtue displayed by the

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<sup>46</sup> Translation modified in light of J. Ober, ‘Social Science History, Cultural History, and the Amnesty of 403’, *Transactions of the American Philological Association*, 132.1 (2002), p. 128.

<sup>47</sup> For the ‘moderation’ and ‘self-restraint’ readings see, Balot, *Greed and Injustice*, p. 225; Ostwald, *Popular Sovereignty*, p. 497; Frank and Monoson, ‘Lived Excellence’, pp.

demos during this episode. In his characterization of the Athenian people, the author flags four features of equity that we have previously encountered. First, and most obviously, the Athenians exercised sympathetic judgment, amnestying former supporters of the Thirty and the Ten and paying the debt to the Spartans. Their selflessness in matters of both punishment and distribution went far beyond what was legally required or expected of them. Like the equitable person of *NE* 5.10, the demos was not ‘exacting to a fault about justice’, but was instead ‘disposed to take less, even though [it had] the law on [its] side’ (*NE* 5.10.1138a1-3). Second, like the ‘equitable people’ discussed in *NE* 9.6, the Athenians aimed to achieve ‘likemindedness’ through deliberation about the fundamental arrangements of the regime in the face of divisive political circumstances that threatened to tear them apart (*NE*.9.6.1167a28-9.6.1167b5). Third, scholars such as Shear and Nicole Loraux have argued that a formula introducing the reconciliation agreement indicates that the agreement took the form of a decree. As we have seen, a decree is an archetypal vehicle for equitable correction of the law; thus Aristotle mentions decrees in his initial explanation of equity in *NE* 5.10 (*NE* 5.10.1137b28-9).<sup>48</sup> Fourth and last, that the demos acted ‘in the noblest and most statesmanlike (*politikōtata*) way of all’ reminds one of Aristotle’s living standards of equity, ‘the good legislator and the true statesman’.

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264-5; and M.I. Finley, *Democracy Ancient and Modern*, rev. ed. (New Brunswick: Rutgers University Press, 1985), pp. 29-30. See also Carawan, *Athenian Amnesty*, p. 277.

<sup>48</sup> Shear, *Polis and Revolution*, p. 199; N. Loraux, *The Divided City: On Memory and Forgetting in Ancient Athens*, trans. C. Pache and J. Fort (New York: Zone Books, 2002), pp. 141, 149.

True, the Aristotelian author does not explicitly call the demos equitable in the above passage or anywhere else in the *Ath. Pol.* Note, however, that the same problem applies to the influential readings that ascribe ‘moderation’ or ‘self-restraint’ to the people. The terms ‘moderation’ and ‘self-restraint’ do not appear in the text; rather, scholars have adduced these Aristotelian virtues as explanations of both the demos’ actions and the approbation of the author. Yet, for Aristotle, moderation and self-restraint refer to the correct ethical orientations toward pleasure (see *NE* 3.10.1118a25-6, 7.4.1148a5-15). By contrast, equity is the virtue that disposes individuals toward statesmanlike deliberation and sympathetic judgment beyond the law. The clear advantage of the equity reading is that the language and the logic of the passage inescapably raise issues related to equity. When Frank and Monoson write, reasonably, that ‘the Athenian demos acted lawfully and moderately’ by issuing the amnesty, it would be more precise, in my view, to say that the demos acted equitably.<sup>49</sup>

Strikingly, in fact, the absence of *epieikeia* from the *Ath. Pol.* contrasts with its presence in the remarks on the Athenian amnesty found in the Platonic *Seventh Letter* and in Isocrates’ *Areopagiticus*. The *Seventh Letter* contains the following line: ‘it was not surprising that in the course of a revolution excessive vengeance should be meted out to political enemies; and yet the returned democrats did show considerable equity’

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<sup>49</sup> Frank and Monoson, ‘Lived Excellence’, p. 265.

(*epieikeia*; 325b).<sup>50</sup> And here is Isocrates' *Areopagiticus*: 'But the finest and greatest testimony of all to the equity of the people (*tēs epieikeias tou dēmou*) is that those who remained in the city had borrowed a hundred talents from the Spartans. . . . Yet the people decided to use common funds for the repayment' (7.68).<sup>51</sup> That both Plato (or one of his students) and Isocrates attributed equity to the Athenian people independently confirms that the Aristotelian author of the *Ath. Pol.* likely held this view. The Aristotelian author's implicit ascription of equity to the Athenian democrats aligns with the explicit views of Aristotle's closest philosophical contemporaries.<sup>52</sup>

Indeed, on my reading of the *Ath. Pol.*, the depiction and the analysis of the Athenian people constitutes a case study of equitable democratic citizenship and the role of sympathetic judgment within it. The sympathetic judgment of the demos served the common advantage and responded, in opportune and contextually-appropriate ways, to the past injustices of the oligarchs. The demos set itself up as a foil to the so-called Thirty Tyrants by being sympathetic. While the Thirty went beyond the law for the sake of

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<sup>50</sup> R.S. Buck, trans., *Plato's Life and Thought: With a Translation of The Seventh Letter* (London: Routledge, 1949), p. 153. As in the case of the *Ath. Pol.*, I am agnostic on the question of the authorship of the *Seventh Letter*.

<sup>51</sup> Y.L. Too, trans., *Isocrates I* (Austin: University of Texas Press, 2000), p. 198.

<sup>52</sup> On Aristotle's affinity with Plato and Isocrates, see Ober, *Political Dissent*, p. 291. The amnesty was a contested issue in Attic oratory. See B. Garsten, 'Deliberating and acting together', in *The Cambridge Companion to Aristotle's Politics*, ed. M. Deslauriers and P. Destrée (Cambridge: Cambridge University Press, 2013), p. 325.

domination and greed, the demos went beyond the law for the sake of the end of the law, namely, the common advantage. Rather than punish, *en masse*, former supporters of the oligarchy, the demos refused even to prosecute them; rather than confiscate their property, the demos settled their debt to the Spartans; rather than exile or disenfranchise them, the demos invited them to participate as citizens in the regime. The demos' sympathetic judgment legitimated the reconstituted democracy. In the words of the Aristotelian author: 'it was just that the people should rule (*dikaiōs tou dēmou labein tēn politeian*) because they had accomplished their return by their own efforts' (*Ath. Pol.* 41.1). The demos' sympathetic judgment invested their re-founding with a 'moral authority' that the prior oligarchic regime had sorely lacked.<sup>53</sup>

Generalizing from this case, equitable citizens exercise sympathetic judgment when they apply the deliberative rationality of the good legislator to issues of particular justice. Eschewing exactingness in matters of distribution or punishment, equitable citizens put on display their care for the common advantage, inviting their fellows to participate as equals in the regime. In this way sympathetic judgment can promote the common advantage in a regime reckoning with past injustices and factional conflict; the equitable citizen grasps this fact. His sympathetic judgment is soundly reasoned and politically astute. Sympathetic judgment is a part of equitable citizenship because it itself arises out deliberation about and care for the regime's common advantage.

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<sup>53</sup> J. Ober, *Athenian Legacies: Essays on the Politics of Going on Together* (Princeton: Princeton University Press, 2005), p. 61. See also Xenophon, *Hellenika* 2.4.39-42.

On my account, then, the actions of the Athenian demos in 403 were paradigmatically equitable. However, many scholars recommend a more pragmatic and less encomiastic approach to this episode. To be sure, Josiah Ober has praised the Athenians for having chosen to ‘go on together, [for having chosen] it as something of value, in the face of experienced difference and periodic conflict’.<sup>54</sup> Yet he has also argued that the amnesty derogated from ‘absolute morality’, since it demanded that the Athenian demos ‘forget’ the crimes of the Thirty and the Ten.<sup>55</sup> For Andrew Wolpert and Edwin Carawan, the reconciliation should be understood as an instance of ‘coming-to-terms’ or contentious ‘dialogue’ between Athenian democrats and oligarchs.<sup>56</sup> And Nicole Loraux argues that the amnesty was a shortsighted rapprochement with oligarchy that undermined Athenian democracy altogether: ‘the restored democracy sought to distance itself from *kratos* to such a degree that, putting the common interest first, it was on the verge of asking the citizens to forget that the oligarchy ever existed.’<sup>57</sup> For these interpreters, the actions of the Athenian demos in 403 were less sympathetic than strategic, for better or worse.

To this objection I respond that equity and strategy are not necessarily at odds. The amnesty and the restitution of the money to the Spartans were indeed strategic moves

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<sup>54</sup> Ober, *Athenian Legacies*, p. 3.

<sup>55</sup> Ober, *Athenian Legacies*, p. 61.

<sup>56</sup> Carawan, *Athenian Amnesty*, pp. 42, 90; Wolpert, *Remembering Defeat*, pp. 138-40.

<sup>57</sup> Loraux, *Divided City*, p. 257. One problem with Loraux’s analysis is that she envisions democratic rule as the unfettered expression of a democratic id or will-to-power.

that suited both the opportune moment and the common advantage. The Athenians chose sympathetic judgment for the sake of ending *stasis* in the present and reconciling the oligarchs to the common advantage of the democracy going forward. Had the Athenians gone the Machiavellian route, purging the oligarchs, then Athens may have degenerated into civil war of Corcyrean severity.<sup>58</sup> Instead, through deliberation, the Athenians discovered and enacted Aristotle's own advice on the preservation of regimes—'to assign equality or precedence to those who participate least in the regime' (*Pol.* 5.8.1309a27).

In fact, precisely because their behavior in 403 was truly equitable, the Athenian democrats counterbalanced their sympathy for the oligarchs with one action of efficacious harshness. The Aristotelian author of the *Ath. Pol.* lauds the Athenian demos, led by the statesman Archinus, for voting to execute the first oligarch to flout the terms of the amnesty (*Ath. Pol.* 40.2). Frank and Monoson rightly comment: 'while technically illegal, Archinus' actions demonstrate the lawfulness and moderation Aristotle takes to be necessary to preserve Athens' (at that time) fragile constitution.'<sup>59</sup> Even though the execution contravened strict legal justice in the direction of harshness, its effect was to preserve the mild amnesty and the reconciliation. While equitable citizens will tend to be lenient, their leniency is not inflexible. The execution was equitable insofar as it arose out of flexible deliberation about the common advantage amid unforeseen and divisive circumstances. Statesmanlike deliberation and flexible compromise in view of the

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<sup>58</sup> See Thucydides 3.82-3. Had the demos purged the oligarchs, or redistributed their property, or canceled debts, no one would have blinked. *Stasis* was ubiquitous.

<sup>59</sup> Frank and Monoson, 'Lived Excellence', p. 264; and Rhodes, *Commentary*, p. 477.

common advantage are essential to equity, while sympathy is equitable on balance—but not always.

At an even deeper level, moreover, considerations of strategy are not at odds with those of equity insofar as the equitable person grasps that equity and therewith sympathetic judgment are good for him, all things considered. According to Aristotle, virtue is itself useful; one's long term 'strategy' is to cultivate the virtues for the sake of one's own flourishing (see *NE* 1.7.1097b1-7, 1098a16-18).<sup>60</sup> Truly equitable citizenship therefore involves sympathetic judgment rather than destructive retributivism because equitable citizens characteristically eschew wrongdoing and cultivate the virtues, including equity, out of care for their own souls. Irrespective of whether ordinary democratic citizens possess a fully worked-out account of the soul and its flourishing activity, if they are equitable, they must possess rough-and-ready thoughts on these heady issues, which will lead them to go beyond the law, as necessary, for the sake of the common advantage and their own flourishing.<sup>61</sup>

## **Conclusion**

This article seeks to lay bare the deliberative dimension of Aristotelian equity. A proper appreciation of equity's deliberative dimension, which manifests itself above all in

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<sup>60</sup> On this point, see J. Cooper, *Knowledge, Nature, and the Good: Essays on Ancient Philosophy* (Princeton: Princeton University Press, 2005), pp. 270-308.

<sup>61</sup> For example, Thucydides' Pericles articulates a distinctly Athenian-democratic perspective on both the virtues and human flourishing. See Thucydides 2.37-41.

political life, also helps to explain why the equitable person's retrospective judgments about wrongdoing tend to be sympathetic. Whereas contemporary commentators have reduced sympathetic judgment to habitual goodwill inculcated by a legal or political culture of friendship, I have argued that sympathetic judgment is contingent on the deliberative rationality of the equitable citizen, which must attend to both the opportune moment and the common advantage, even beyond the bounds of the law. Whether he makes decisions as a political leader, deliberates in the assembly, metes out punishments in the courts, or distributes goods among friends, the equitable citizen exhibits the capacious yet particularized political intelligence of the statesman or legislator.

At the same time, I have joined the contemporary commentators in supposing that Aristotelian equity could be a signal virtue of a democratic citizen in particular. My reading of the *Ath. Pol.* offers a more detailed picture of equitable democratic citizenship from an authentically Aristotelian perspective. In 403, without a Solon at the helm, the Athenian demos accomplished the Solonian feat of healing the democracy's wounds and re-founding the regime altogether (cf. *Ath. Pol.* 5-13). That the Aristotelian *Ath. Pol.* casts the people as a Solonian re-founder in 403 suggests that this text has a rhetorical and pedagogical function—that it is a 'poetic history' in the apt formulation of Frank and Monoson.<sup>62</sup> The account of the reconciliation and the amnesty teaches by example the kind of statesmanlike or legislative deliberation that attends to both the common

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<sup>62</sup> Frank and Monoson, 'Lived Excellence', pp. 260, 268.

advantage and the opportune moment. In the *Ath. Pol.*, therefore, equitable democratic citizenship comes to light as both a challenge and a possibility.<sup>63</sup>

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<sup>63</sup> I would like to thank many teachers, colleagues, and friends for their conversation about and comments on this article: Ed Andrew, Rob Ballingal, Ryan Balot, Ronnie Beiner, Daniela Cammack, Joe Carens, Nate Gilmore, Seth Jaffe, Rebecca Kingston, Clifford Orwin, David Polansky, Joel Schlosser, and Ella Street. Thanks also to the two anonymous reviewers for *Polis*.