Epieikeia: Equitable Lawmaking in the Construction of Statutes

Raymond B. Marcin
The Catholic University of America, Columbus School of Law

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EPIEIKEIA; EQUITABLE LAWMAKING IN THE CONSTRUCTION OF STATUTES

by Raymond B. Marcin*

There is a gremlin in the law. An amicable but troublesome imp which, from all evidence, has lived for as long as there has been law and which, in all reckoning, is very probably immortal. Aristotle gave the gremlin a name. He called it Epieikeia.

Epieikeia rises every now and again to expose the fallacy in the sometimes-voiced truism that legislatures legislate and judges judge. Judges do sometimes legislate, i.e., make law, when under the influence of epieikeia they carve a humane but legislatively unprovided-for exception out of an otherwise applicable statute, or when for humane reasons they extend the application of a statute to a situation which it does not by its terms cover. Yet judges, when they do this, almost never give the credit to epieikeia; indeed they seem curiously hostile to the idea that such a gremlin even exists.

ORIGINS

Long before remembered time, when humankind was first beginning to survive in consistency and order, there arose a problem which, with perplexing durability, has unsettled every legal tradition from that early day to this.¹ It was the enigma of the socially directed rule and the individuated set of facts. The socially directed rule is almost always an abstraction. But every set of facts to which that rule can be applied is a concrete entity. And there is no necessary identity

* A.B., St. John’s Seminary (1959); A.B., Fairfield University (1961); J.D. Fordham Law School (1964); Associate Professor of Law, The Catholic University of America School of Law.

¹ Before that early dawn, folkways, customs, religious taboos, and the direct commands given by a leader to those who followed probably determined the content of what we would call “law.” R. WORMSER, THE STORY OF THE LAW 3-5 (1952). There must have come a time when there were too many followers for the leader to control conveniently with individually directed commands. “In any large group general rules, standards, and principles must be the main instrument of social control, and not particular directions given to each individual separately.” H. HART, THE CONCEPT OF LAW 121 (1961).
between the two. Therein lies the difficulty. Often a gap is left between the rule and the set of facts. A judge will be faced with the decision whether to fill the gap by making law equitably. A well-conceived and well-expressed socially directed rule will at best fit almost all the sets of facts that it ought to fit and almost none of the sets of facts that it ought not to fit. Of course, the perfectly conceived and perfectly expressed socially directed rule will fit every set of facts that it ought to fit and no set of facts that it ought not to fit. But it must be admitted that the perfectly conceived and expressed rule has thus far escaped, and without specific Divine intervention is likely to continue to escape, human artisanry. Phrased in this way, the perennial problem of the socially directed rule and the individuated set of facts is one of human fallibility. The same characteristic quickens the gremlin of which we speak.

In Western legal tradition the origin of the problem of the socially directed rule may be traced to the Mesopotamian civilizations of the third millenium B.C. and their view of natural law as "abstract, universally applicable commands of God to all mankind." That Mesopotamian view diffused into the legal philosophies of Greece, especially the philosophy of the Stoics, and those philosophies in turn came to influence the legal thinking of Rome. In Rome, however, the socially directed rule encountered a local Latin tradition which conceived of law in terms of legal precedent rather than abstract, preordained natural law. This Latin tradition looked not so much on the socially directed rule as on the decision of the individual judge in the individual case as constituting "law." Thus early local Roman

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3. "Men's Actions are so diverse and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances." Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (Ch. 1615). See also Ehrenzweig's discussion of human fallibility in the face of questions concerning the meaning of justice. A. Ehrenzweig, Psychoanalytic Jurisprudence 34 (1971).
5. Id. (citing M. Cicero, De Legibus, (C. Keyes trans. 1928) and J. Needham, Science and Civilization in China 534 (1956)).
6. L. Pospisil, supra note 4, passim.
7. Although Roman law rested on an archaic codification of abstract rules called Lex Duodecim Tabularum (Law of the Twelve Tables) in theory as well as in practice these rules did not automatically bind the Roman judges and lawyers. They were guides, a framework to be interpreted and adjusted to the issues arising from actual disputes . . . .
Id. at 8.
tradition contemplated lawmaking by judges. The Mesopotamian-Stoic idea that the abstract socially directed rule was the "law" conflicted with the Roman positivist-realist tradition of judicial lawmaking. The Mesopotamian view eventually prevailed. Judicial lawmaking in the interpreting of socially directed rules was formally prohibited by the Code of Justinian.\(^8\)

The Roman experience is of interest because it shaped the problem in practical terms and drew the philosophic battle lines between the positivists and the naturalists.\(^9\) The Romans, of course, did not solve the problem of the socially directed rule and the individuated set of facts. Indeed, the Code's attempt to end equitable lawmaking by judges very soon broke down, as it had to, and echoes of the Roman jurists' arguments over "legislative intent" are with us today.

It is the thesis of this article that we are repeating that Roman experience today. We too have had our era of judicial lawmaking. We too have developed the conventional wisdom that judges cannot make law. And we too have seen the clash of these two attitudes in the hard case. Our answer to date has been to deify that ethereal and often nonexistent sprite called legislative intent: even as we make equitable law in the hard case, we eschew the credit and ascribe the deed to the lawmakers' foresight, which we presume to have discovered somewhere in the rule itself or in its trappings.

The problem inherent in the socially directed rule and the individuated set of facts has generated many differing accommodations, if not solutions. Pre-Justinian Rome sought a solution in the *interpretatio* of commentating jurists.\(^10\) Christian canonists institutionalized the Roman *interpretatio* and refined it into a hierarchy of types.\(^11\) Others sought a solution in the legal fiction.\(^12\) For some reformers, the solution lay in legislation itself.\(^13\) For many the accommodation lay in a separate judicial system.\(^14\) But to many, at least

\(^8\) Id. at 8-9.
\(^12\) See generally L. FULLER, LEGAL FICTIONS (1957); H. MAINE, ANCIENT LAW 25-28 (London 1861).
\(^13\) E.g., Justinian. See also J. BENTHAM, THE THEORY OF LEGISLATION (C. Ogden ed. 1931); H. MAINE, *supra* note 12, at 29-30.
since the days of Aristotle and perhaps ever since that early unremembered dawn, the problem of the socially directed rule and the individuated set of facts has been accommodated through the device of equitable lawmaking by judges.

This is by no means a universally accepted approach to the problem. Many have challenged equitable lawmaking in the construction of statutes. Some have doubted its very existence. And where its existence has been acknowledged, its death has been sought with frequency and vigor. Henry Campbell Black wrote its epitaph a century ago. It has been held to be in violation of our various state and federal constitutional separation-of-powers provisions. Court after court has paid lip service to its demise. And yet this phoenix rises. Why?

THE GREEKS

Eugene O'Neill once wrote: "There is no present or future—only the past happening over and over again—now." Perhaps no civilization has given witness to the accuracy of that observation to such a degree as has that of the Golden Age of Greece. Inevitably we strike out on new philosophic, psychological, or political pathways only to find that that uniquely prescient civilization has trodden those paths before us. And so it is with the concept of equitable lawmaking in the construing of statutes. The Greeks not only thought about it, but divided into intellectual camps over it—one camp representing a quite modern positivist approach to the phenomenon, the other a quite modern natural-law approach.

15. "The right to apply an equitable construction to the written laws was often adverted to as one to be exercised with caution, on account of the danger of turning the courts into legislatures, and in modern times it has been disavowed by them, and its principle distinctly repudiated." H. Black, Handbook on the Construction and Interpretation of the Laws 62 (2d ed. 1911).

16. Id. at 57-66. See also J. Lewis, Sutherland: Statutes and Statutory Construction 1077 (2d ed. 1904).

17. Sagacious legal scholars of high repute, such as, for instance, John Chipman Gray, Wigmore, Allen and Radin, have said that courts, in discharging their duty of carrying out the express will of the legislature as faithfully as they can, are frequently unable to escape the responsibility of engaging in supplemental legislation. Guiseppi v. Walling, 144 F.2d 608, 621 (2d Cir. 1944) (Frank, J.). See also Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).


19. As an example, perhaps the newest and most original approach to legal philosophy is that of the Freudian, or more accurately, psychoanalytic school. Seg, e.g., A. Ehrenzweig, supra note 3. Ehrenzweig unhesitatingly acknowledged the debt of the school to classical Greek jurisprudence.
We are told that the Athenians were an inordinately litigious people, and the dilemma of the statute applicable on its face but unjust in its application must have been known to them. Indeed, Plutarch said that Solon deliberately worded his laws obscurely so as to increase the power of the Athenian judges. Accordingly, the Greek advocates, "[i]n arguing from statutory enactments [made] much play . . . with the supposed intention of Solon as the most revered lawgiver of Athens." Paying lip service to legislative intent, a phenomenon solidly engrafted on to our own jurisprudence, thus characterized the Athenian approach to statutory application by judges.

Plato had no difficulty in recognizing the problem, although he did little to solve it. It was, in fact, a necessary part of his theory of ideas. In his view, only the idea of law or justice was truly real. Positive law as written by mortal men was merely a pale and often imperfect representation of that idea. Consequently positive law and justice sometimes conflicted. That conflict, in Plato's view, was caused by legislators' imperfect interpretation of the idea of justice. Perhaps the clearest statement by Plato concerning the problem of the socially directed rule and the individuated set of facts appeared in The Statesman:

[T]he law does not perfectly comprehend what is noblest and most just for all and therefore cannot enforce what is best. The differences of men and actions, and the endless

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20. See ARISTOPHANES, THE BIRDS, in which the character Euripides quips: "Grasshoppers chirp upon their boughs a month or two, but our Athenians chirp over their lawsuits their whole life long." Quoted in R. Bonner, LAWYERS AND LITIGANTS IN ANCIENT ATHENS 96 (1927).
22. Id. at 302.
24. PLATO, THE REPUBLIC, bk. VII.
25. Carl Joachim Friedrich noted the similarity of Plato's view to the approach of the natural-law jurists, but also perceived the difference. In Plato's view, positive law participates in the idea of justice; the natural-law jurists, according to Friedrich, see positive law merely as the lesser of two norms, with justice as the greater.

It follows that [according to Plato] positive law is a phenomenon, exposed to becoming and passing away, which participates only incompletely in the time-less world of ideas, a notion very different from that of natural law in modern idealism, where the ideal of justice as the more perfect norm is confronted with the positive law.

irregular movements of human things do not admit of any universal and simple rule. And no art whatsoever can lay down a rule which will last for all time.\textsuperscript{26}

Plato's resolution of the problem—some would call it "pessimistic" and others "realistic"—is presaged, perhaps, in Socrates' decision in \textit{The Crito} to obey an unjust "law" and drink the poison. Strangely, Plato recognized the possibility by hypothesis of solving the problem by the use of equitable lawmaking. In \textit{The Statesman}, Socrates was seen as agreeing with the proposition that government officials who acted contrary to the written laws "with a view to something better, would be acting . . . like the true Statesman."\textsuperscript{27} But Plato went on to portray Socrates as agreeing that, because no great number of men are able to acquire a good enough knowledge of the art of lawmaking, the best approach "is to do nothing contrary to . . . written laws. . . ."\textsuperscript{28} Indeed, Plato seemed to foresee the propensity of some governmental systems to entrust the problem to judges, and he recognized a further, perhaps more serious problem in that course of action: not every guardian of the law acts out of pure motives.

But what if, while compelling all these operations to be regulated by written law, we were to appoint as the guardian of the laws someone elected by a show of hands or by lot, and he, caring nothing about the written text, should proceed to act contrary to it from motives of interest or favour, and without any claim to knowledge, would not this be a still worse evil than the former?\textsuperscript{29}

Thus Plato's final position leaves us ill at ease. He insisted, in natural-law fashion, that laws which do not serve the general good of the community are not true laws,\textsuperscript{30} but he did not take the bait and create a theoretical approach for equitable lawmaking by judges.

Aristotle did advocate equitable lawmaking in the construing of statutes. It was he who gave a name to that missing ingredient in some applications of statute law, the ingredient which judges must supply: \textit{epieikeia}, a word which, thanks to the predilection of me-

\begin{footnotes}
\item[27.] Id. at 516.
\item[28.] Id. at 517.
\item[29.] Id. at 516.
\item[30.] C. FRIEDRICH, \textit{supra} note 25, at 19.
\end{footnotes}
dieval translators for transliterating instead of translating, has entered Anglo-American jurisprudence. Aristotle summarized his solution to the problem in an oft-quoted passage from his *Nichomachean Ethics*:

[A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms. Now in situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark. The law itself is none the less correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case. For such is the material of which actions are made. So in a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of the statement. Such a rectification corresponds to what the lawgiver himself would have said if he were present, and what he would have enacted if he had known [of this particular case].

Thus Aristotle was in accord with Plato in recognizing that human fallibility lay at the core of the problem. His solution, however, went far beyond Plato's reticence and well into what it would not be inaccurate to call the conventional wisdom of today. Courts, when faced with the hard case, i.e., the case in which the law covers a particular set of facts but in justice ought not to do so, or in which the law does not cover a particular set of facts but in justice ought to, should place themselves in the shoes of the legislator and do what the legislator would have done had he or she known of the present case. In other words, courts should legislate equitably.

Despite its advocacy of equitable lawmaking, Aristotle's position is not the radical departure from Plato's that it appears on its face to be. Aristotle connected judicial lawmaking with legislative intent. For Aristotle, the equitable view of a case should in no way contradict legislative intent. This would accord with Plato's approach of giving

32. See J. JONES, supra note 21, at 66.
33. Id. at 65. In the RHETORIC, bk. 1, ch. 13, Aristotle observed that equity is intended by the legislator whenever the legislator is aware of the necessity to draft a law
legislative intent its due in the final analysis. But Aristotle recognized elsewhere that an equitable view cannot be presumed to have been intended by the legislator when the legislator has neglected to notice a defect in the law. It is therefore open to conjecture how closely the judge must observe some presumed legislative intent under Aristotle's approach.

The question was similarly left open in Athenian practice. On the one hand, even in the "hard case" the words of the statute were supposed to control the judges' decision. But at the same time the oath of Athenian judges permitted them to decide according to their own best judgment whenever there was no applicable statutory law. That power came to be used in quite modern fashion not merely in the absence of statutory law but in the presence of an applicable but unjust or inequitable statute.

Recognizing the propriety of equitable lawmaking by judges leads, of course, to practical difficulties. The sense of equity of some judges may not be in accord with the true legislative intent, or may be ruled by irrelevant passions or inexcusable biases. Noel Dermot O'Donoghue found a solution to that dilemma elsewhere in Aristotle's Nichomachean Ethics. In this modified view of Aristotle, legal technique alone does not suffice. Moral virtue must at some point enter into the judge's approach. We may credit O'Donoghue with seeing that necessary connection in his joining of Aristotle's gnomé with Aristotle's epikeia: "gnomé belongs to the head and Epikeia [sic] to the heart, and ... together they describe the type of judge who is at once shrewd and humane, who knows the law but also knows how to apply the law to the case in hand." Gnomé has been translated as "good sense," and may be equated both with the good judgment and sound understanding of the intellect and also with the forgiveness and sympathetic understanding of the heart. The conclusion seems inexorable that equitable construction as a legal technique is an insufficient solution to the problem of the generalized rule of law and the individuated set of facts. A rigid set of absolute rules, absolutely interpreted, invites individual injustices. But un-

34. ARISTOTLE, RHETORIC, supra note 23, at 80.
35. J. JONES, supra note 21, at 135.
37. Id. at 154.
38. ARISTOTLE, NICHOMACHEAN ETHICS, supra note 31, at 165 n.47.
checked *epieikeia* reduces all law to an unwieldy and paralyzing form of situationism. *Gnomé* is Aristotle's restraint on *epieikeia*.

If Aristotle expressed the modern-day candor in acknowledging the existence and even advocating the use of equitable lawmaking by judges, Epicurus expressed the modern-day discomfort with the notion. If one accepts the premise that natural-law jurisprudence views a law as valid only insofar as it is in conformity with principles flowing from the nature of human beings, then Epicurus can properly be described as a natural-law jurist. But the main thrust of Epicurus' legal philosophy is best described as utilitarian. The ambivalence, while a curiosity, is not inexplicable. In Epicurus' view, law originates from human nature, but human nature itself is dynamic, even evolutionary. Consequently "usefulness" to the developing human condition is a "natural principle" and the criterion for judging the justness of laws. It is in the context of this "natural-law utilitarianism" that Epicurus and the Epicureans confronted the question of equitable lawmaking by judges. Let us suppose a particular statute does not serve, and in fact runs counter to, this natural principle of usefulness to human kind. Must it be obeyed? Both Epicurus and his followers answered the question, surprisingly, in the affirmative. Indeed, one Epicurean's answer to the problem posed by the state which demands that we obey an unjust law was, in essence, "love it or leave it."

The ancient Greeks thus presaged most aspects of our modern approach to the problem of the socially directed rule and the indi-

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Only to the extent to which they serve the "natural principle" of usefulness may the laws or the acknowledged rights and duties be called "just." Any law that fails to live up to this basic criterion is contrary to the dictates of nature and reason. . . . [B]y confronting the "positive laws" with the "natural principle" of usefulness and expediency, Epicurus and the Epicureans, in their own particular fashion, raise the old and apparently never to be settled confrontation of natural law and positive law, or to be more exact, touch upon the age-old problem dealing with the validation and justification of the positive law through natural law.

*Id.* at 58-59.

40. *Id.* at 66-67.

41. Philodemus is also fully aware of the fact that the . . . "statutory laws" . . . are not always in complete accord with the "natural laws" . . . or with the "laws common to all civilized peoples" . . . and commonly observed by all civilized nations. Nevertheless, he insists, we must abide by these "particular laws," although we may not always consider them to be just and fair, or else simply leave the country.

*Id.* at 80.
viduated set of facts. Plato framed the question in terms of the human fallibility of the legislator.\textsuperscript{42} Aristotle both recognized the phenomenon and advocated the use of equitable lawmaking by judges as a response to the problem.\textsuperscript{43} Epicurus and his followers saw the potential problem in any jurisdiction which accepts a natural-law approach to jurisprudence, and dismissed it by adopting a positivist’s respect for the statutory language.\textsuperscript{44}

\textbf{THE ROMAN WAY}

All these views roiled and jostled in the busy jurisprudence of late classical Rome.\textsuperscript{45} But there was one peculiarly Roman ingredient which flavored the stew of equitable lawmaking, the recipe for which is in use today: \textit{interpretatio}.

Many writers have been tempted to treat the Code of Justinian as a starting point but it was, in truth, the crowning achievement of a system of jurisprudence which was, at its writing, centuries older than the common-law system is today. It is in the pre-Justinian era, “[t]he period in which Roman private law reached its highest development,” and it was in “the so-called classical period of Rome,”\textsuperscript{47} that we find evidences of a widespread use of the techniques of equitable lawmaking.

The fountainhead of all Roman law prior to the Code of Justinian was the Twelve Tables, a codification which preceded Justinian’s by a millenium. Between 150 B.C. and A.D. 235 there existed a difficult-to-define yet nonetheless influential group of persons, the Roman Jurists. They held no office and possessed no delegated governmental power, but they were responsible for most of the sophisticated Roman law in their era.\textsuperscript{48} Building upon Plato’s recognition of the problem of the hard case, \textit{i.e.}, the \textit{casus omissus}, and upon Aristotle’s advocacy of equitable lawmaking as a solution, the Roman Jurists institutionalized the practice into a process of lawmaking by analogy. A. Arthur Schiller described it thus: “Simply stated, from a given rule of law the major premise which it presupposed was ascertained; as a

\textsuperscript{42} See text accompanying note 26 supra.
\textsuperscript{43} See text accompanying notes 31-34 supra.
\textsuperscript{44} See text accompanying notes 39-41 supra.
\textsuperscript{46} See, e.g., Usatorre v. The Victoria, 172 F.2d 434, 439-40, 441 n.16 (2d Cir. 1949).
\textsuperscript{47} Schiller, supra note 45, at 734 & n.7.
\textsuperscript{48} Id. at 734-35.
logical consequence a series of other rules was derived, *not directly contained within the source from which the proposition stemmed*.”

The residue of this form of equitable construction, i.e., lawmaking by analogy, permeates modern civil law jurisprudence, and is far from unknown in contemporary Anglo-American cases. It of course runs counter to the conventional Anglo-American wisdom embodied in the maxim *expressio unius est exclusio alterius* (as it no doubt did in the Roman era whence the maxim is derived). Roman *interpretatio* and its modern descendants in the civil law did, and still do, involve true law *making* by judges, not merely the passive effectuation of legislative intent.

Perhaps no person before or since has framed the issue facing natural-law jurists concerned with statutory construction as lucidly as the eclectic rhetor Cicero:

True law is right reason conformable to nature, universal, unchangeable, eternal, whose commands urge us to duty, and whose prohibitions restrain us from evil. Whether it enjoins or forbids, the good respect its injunctions, and the wicked treat them with indifference. *This law cannot be*

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49. *Id.* at 738 (emphasis added). See also Kiss, *Equity and Law*, in *Science of Legal Method* 146, 149 (1917).


51. [T]here is a difference between the extensive interpretation which attempts to discern the intent of the legislator as it can be derived from the scope of the law, and the analogy of a statute which establishes new law because of the similarity of the reason without regard to the intent of the legislator. . . . [T]here seems to be a determined effort in recent times to accord to the courts the same power of analogical reasoning from statute that has always been employed with regard to cases.

Schiller, *Roman Interpretatio*, *supra* note 45, at 740 (citing *Statutes and The Sources of Law*, in *Harvard Legal Essays* 229-33 (1934)).

[T]he older art paid little attention to the meaning of the words of the statutes . . . and used them primarily as pegs upon which to hang a new development in the law . . . .

. . . Aristotle . . . says “it is equitable to look not to the law but to the legislator, not to the letter of the law but to the intention of the legislator.” The Latin rhetors not only adopt *aequitas* as the basic principle of their method of interpretation, but seem to go beyond the Greeks in stressing the existence of *aequitas* as a body of law alongside of *ius*.

*Id.* at 749, 757. See also Kiss, *supra* note 49, at 149.
contradicted by any other law, and is not liable to either
derogation or abrogation. Neither the senate nor the people
can give us any dispensation for not obeying this universal
law of justice. It needs no other expositor and interpreter
than our own conscience. It is not one thing at Rome, and an-
other at Athens; one thing today, and another tomorrow; but
in all times and nations this universal law must for ever [sic]
reign, eternal and imperishable. It is the sovereign master
and emperor of all beings. God himself is its author, its
promulgator, its enforcer. And he who does not obey it flies
from himself, and does violence to the very nature of man.52
Cicero, of course, was speaking in the context of one's individual
moral obligation to obey or disobey the unjust law. But what if the
same dilemma were posed to the interpreter or applier of the unjust
statute—the judge? Would the judge give effect to the statute or to
the higher, unwritten law? We saw that Epicurus, reverencing both,
opted for the statute.53 But what would a Roman judge or interpreter
have done? Schiller has separated Cicero and his fellow rhetors from
the jurists,54 implying that the concept of a higher law, or aequitas,
espoused by the rhetors never did enter the nuts-and-bolts judging of
cases by jurists. It may be that the Roman jurists did confine them-
selves to the simpler "hard-case" concept of equitable lawmaking, and
did not recognize Cicero's concept of the higher law. But Cicero's
concept did develop a place in Roman jurisprudence in the preroga-
tive of the emperor himself to mediate between law and equity, a
prerogative which came to be known among canonists and civilians as
"authentic interpretation": "By a constitution of Constantine, interpretatio,
now spoken of as the mediator between law (ius) and equity
(aequitas), is reserved to the emperor alone; the jurists have passed
out of the picture."55
The interpretative function of the jurists thus died out, super-
seded by the imperial prerogative, and indeed was specifically pro-
hibited by Justinian on publication of the Corpus Juris Civilis.56 But

52. M. CICERO, On the Commonwealth, bk. III, ch. 22, reprinted in The
Natural Law Reader, supra note 9, at 54-55 (emphasis added).
53. See text accompanying note 41 supra. Socrates would have been in accord, bas-
ing the obligation to obey the statute on a natural-law principle of social preservation.
54. Schiller, Roman Interpretatio, supra note 45, at 753 et seq.
55. Id. at 744.
56. J. MERRYMAN, supra note 50, at 8.
the classical jurists did succeed, before the demise of their influence, in building upon and institutionalizing within Roman law earlier Greek thought concerning equitable lawmaking in the construing of statutes.

AQUINAS

Try as he might, Justinian could not stamp out the flickers of equitable construction by judges. By the eleventh century it was flourishing again as a legal concept among the great writers of the law school at Bologna. We are told that the school's founder, Irnerius, in his Summa Codicis “clearly lays it down that laws which are contrary to equity are not to be enforced by the judge.” The intensity of the medieval jurists' advocacy of equitable construction (indeed it goes beyond mere advocacy; it is a mandate to judges) can easily be understood in light of their definition of equity, or aequitas. “Aequitas” to the writers of the law school at Bologna, and doubtless to those legal scholars who preceded and influenced them, is God Himself. Bulgarus, a successor to Irnerius at the school in Bologna, started with this assumption when he urged that jurists “must always consider carefully whether any particular law (jus statutum) is equitable, if

57. See Schiller, Jurists' Law, supra note 10, at 1228 n.6.
58. 2 R. CARLYLE & A. CARLYLE, A HISTORY OF MEDIEVAL POLITICAL THEORY IN THE WEST 15 (1950). Irnerius had written:

Conditae leges intelligendae sunt benignius ut mens earum servetur et ne ab equitate discrepent: legitima enim praeeptaa tunc demum a judice admittuntur, cum ad equitatis rationem accommodantur. Item in legibus intelligendis ne qua fraud adhibatur, vitandum est....

Written laws are more richly understood when one pays heed to the insight they possess, and not when they are read out of harmony and equity. For it is only when the written laws are adjusted to the principle of equity that the true legal rules can be gleaned from them by the judge. And so it is that in interpreting laws one must avoid whatever might lead to error.

SUMMA CODICIS, bk. 1, ch. 14, quoted in id. at 15 n.1 [translation by author].
59. 2 R. CARLYLE & A. CARLYLE, supra note 58, at 7-8.

Aequitas est rerum convenientia quae in paribus causis paria jura desiderat. Item Deus, qui secundum hoc quod desiderat aequitas dicitur: nihil aliud est aequitas quam Deus....

Equity is a harmony of nature which demands that similar cases be adjudged by similar legal principles. In like manner, God who is the source of this demand, has been called equity. Equity is nothing other than God Himself.

FRAGMENTUM PRAEGENSE (anonymous), bk. IV, ch. 2, quoted in id. at 8 n.1 [translation by author]. This view, in content and possibly in source, is Augustinian. Saint Augustine acknowledged that human law must give way to the lex aeterna which he identified with the Divine Intellect and Will of God. See Chroust, The Fundamental Ideas in St. Augustine's Philosophy of Law, 18 AM. J. JURIS. 57, 61-62 (1973).
not it must be abolished. The judge must prefer equity to strict law.

Not all the Bolognese civilians were as dogmatic as Imerius and Bulgarus, however, on the mandate to judges to use equitable construction. Some, no doubt writing with knowledge of the constitution of Constantine referred to above, would reserve all cases involving a divergence between law and equity to the authentic interpretation of the emperor. One might surmise that the difference in positions could be ascribed to whether one identified equity with God or one had a more technical, more human definition of the term.

Despite their lack of unanimity, the early medieval civilians did, much more clearly than the Greeks and Romans, find the source of equitable construction in God. It was left to the later Scholiastics, most notably Saint Thomas Aquinas, to weave the inconsistent approaches of the jurists, the rhetors, the imperial prerogative, and the various Bolognese civilians into a blended tapestry, which stood for five centuries as natural-law jurisprudence, the dominant legal theory of the West. The fundamental problem of natural-law jurisprudence is to draw a connection between God, equitable construction, and moral virtue. If equitable construction is merely a technique for ascertaining true legislative intent in the necessary generality of statutory rules, how was it then that Aristotle saw a connection between equitable construction and moral virtue? How was it that the early medieval civilians drew a connection between equitable construction and God Himself? What do God and moral virtue have to do with the equitable construction of statutes?

It has been said that Saint Thomas Aquinas’ explanation of the nature of equitable construction was “radically identical” with that of Aristotle. Aquinas clearly saw epieikeia, even in the civil law setting, as an outgrowth of the necessary generality of statutory rules:

60. 2 R. CARLYLE & A. CARLYLE, supra note 58, at 15.
61. See text accompanying note 55 supra.
62. 2 R. CARLYLE & A. CARLYLE, supra note 58, at 16.
63. Id. at 16-17.
64. Other Scholastic philosophers addressed the problem of equitable construction. Summaries of the thoughts of St. Albert the Great, John Gerson, St. Antoninus, Cajetan, Soto, Covarruvias, Medina, Navarrus, Vasquez, and Francisco Suarez on epieikeia can be found in L. RILEY, THE HISTORY, NATURE AND USE OF EPIKEIA IN MORAL THEOLOGY 19-102 (1948).
65. See text accompanying note 37 supra.
66. See note 59 supra and accompanying text.
67. L. RILEY, supra note 64, at 28.
Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.  

Although he recognized the primacy of legislative intent over legislative language, Aquinas did not, like Aristotle, view the search for a speculative legislative intent as the proper technique of equitable construction: “In these and like cases it is bad to follow the law, and it is good to set aside the letter of the law and to follow the dictates of justice and the common good.” Aquinas' brand of equitable construction would thus seem to involve the judge in a larger measure of law making than Aristotle’s. This is certainly true in practice. But in Aquinas’ legal theory, the process is more one of discovering the law than making the law. For in the Thomistic, as in the Augustinian scheme of things, a human law which is unjust is no law at all. It is a perversion of law. What, then, is the judge's job? When the judge is faced with a human law which is unjust in its application to the particular set of facts, he or she must ignore the human law and apply the law of nature, which is “the light of natural reason.” Drawing on Sacred Scripture, Aquinas defined the light of natural reason as “nothing else than an imprint on us of the Divine light.”

68. ST. THOMAS AQUINAS, TREATISE ON LAW 103 (Gateway ed. 1977).
69. “He who follows the intention of the lawgiver, does not interpret the law simply; but in a case in which it is evident, by reason of the manifest harm, that the lawgiver intended otherwise.” Id. at 104.
71. As Augustine says . . . , that which is not just seems to be no law at all; wherefore the force of a law depends on the extent of its justice. . . . [I]f at any point it deflects from the law of nature, it is no longer a law but a perversion of law.
72. “[I]n human affairs a thing is said to be just, from being right, according to the rule of reason. But the first rule of reason is the law of nature . . . .” Id.
73. Id. at 15.
74. Id. at 15-16. “It is therefore evident that the natural law is nothing else than the rational creature’s participation of the eternal law.” Id. at 16.
Thus Aquinas assimilated equitable construction into his natural-law jurisprudence, raising it from a troublesome but necessary technique for handling the hard case to a principle of higher justice, a law beyond the law. Noel Dermot O'Donoghue wrote of Aquinas' treatment of equitable construction:

What we are glimpsing here, it seems to me, is some kind of ultimate order of right and wrong which can only be apprehended by a kind of intellectual intuition. ... Essentially it is an intuition of the human, of man's needs, possibilities, and fragility. There is a sense in which the law is inhuman, but the law beyond the law is entirely human, and the judge who takes account of it is simply thinking in human terms as well as legal terms. This does not mean that he becomes a moralist, for he cannot judge the human heart ... But he can judge the human situation as a human situation, and here his intuition of what it is to be human is uniquely important. The law beyond the law is simply the law of his own humanness, an intuition of the human in himself which demands great lucidity and humility.75

Modern legal realists, such as Holmes and Frank, would no doubt be surprised to learn the extent of coincidence between their views of judicial lawmaking and those of Aquinas.76

**EQUITY IN ENGLISH JURISPRUDENCE**

Perhaps Aquinas best articulated the real significance and true import of equity in statutory construction. Equity was needed in any scheme of statutory construction not only to relieve the difficulty of the hard, unforeseen case, but also to provide a means of recognizing higher law concepts which, if justice is to rule, must at times control over literal language. This elevated concept of equitable lawmaking in the construing of statutes found its way to English shores in the work of Christopher St. Germain.77

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75. O'Donoghue, supra note 36, at 163-64.
76. See, e.g., Jerome Frank's description of the role of a judge: "A judge with an imaginative personality supplies 'an increment of vitality that is . . . desirable . . . and truly necessary in order to put' the legislative 'message across,' for only such a judge can read a statute 'with an insight which transcends its literal meaning.'" J. FRANK, COURTS ON TRIAL 300 (1949).
77. Called "St. German" by Plucknett & Barton in the Selden Society edition of Doctor and Student, but "St. Germain" generally elsewhere.
In 1523 St. Germain began publishing his set of dialogues which eventually became the very influential work *Doctor and Student*.\(^7^8\) In part, *Doctor and Student* was an apology for the application of English law in opposition to Church decrees. St. Germain set out to demonstrate that the common law rather than Church decrees should govern the consciences of Englishmen,\(^7^9\) a heady idea in pre-Reformation England. What if English law conflicted with the law of God or the law of nature? How could it ever be considered the superior binding force on English consciences? The Aristotelian-Thomist view of *epieikeia*\(^8^0\) provided an answer. There is, or ought to be, thought St. Germain, a measure of the law of God and the law of nature in every human law, and human laws which seem to conflict with those higher laws ought to be interpreted in such a way as to respect the higher law. The usual method of resolving any such conflict was, according to St. Germain, the Aristotelian method of construing into the law a dispensation or exception for the hard case.\(^8^1\)

*Epieikeia*, in St. Germain's view, resides in every statute, and can be found there by proper interpretative techniques:

> Equity is a righteousness that considereth all the particular circumstances of the deed [and that] also is tempered with the sweetness of mercy. And such an equity must always be observed in every law of man and in every general rule thereof, and that knew he well who said thus. Laws covet to be ruled by equity. . . . [Equity's exception] is secretly understood in every general rule of every positive law.\(^8^2\)

Equity resides in every statute because the law of reason and the law of God is the soul of every statute:

> The law of man which sometimes is called law positive is derived by reason as a thing which is necessarily and probably flowing of the law of reason and the law of God, for the due end of human nature. . . . In every law positive well made is somewhat of the law of reason and of the law of God.\(^8^3\)

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79. Id. at xlvi.
80. Or as St. Germain transliterated Aristotle: *epicaia*. Id. at 97.
81. Id. at 95 et seq.
82. Id. at 95, 97 (spelling modernized).
83. Id. at 27 (spelling modernized).
If equity and the higher law concepts were understood as residing dormant in every human law, then the proposition that human laws bind human consciences would be intellectually defensible. The hard case and the law whose application works an outrage on the human conscience would still be manageable because courts could relieve the harshness or injustice by plucking the *epieikeia* from the law and applying it in place of the literal language.

St. Germain's view of equitable construction, or at least the Aristotelian hard-case-exception part of his view, took hold in English jurisprudence in the commentaries accompanying Edmund Plowden's case reports. Plowden seemed to see equity as both resident in the statute itself and as a virtue (Aristotle's *gnomé*) apart from it:

> [T]he law may be resembled to a nut, which has a shell and a kernel within, the letter of the law represents the shell, and the sense of it the kernel. . . . And experience shows us that no lawmakers can foresee all things which may happen, and therefore it is fit that if there is any defect in the law, it should be reformed by equity, which is no part of the law, but a moral virtue which corrects the law.84

St. Germain's view, with one small refinement added by Edward Hake, survived as the dominant approach in Anglo-American jurisprudence. But we have already seen that modern Anglo-American theorists eschew equitable construction, because they are too aware of the dangers of equitable lawmaking by judges. Plato alerted us to this problem.85 It is, after all, human beings and not the Ultimate Sovereign who must delve for equity in a statute, and men are fallible. It is the human inability to draft perfect laws86 which makes *epieikeia* necessary. Is the end result a vicious circle?

If Edward Hake did not resolve the dilemma, he at least provided a theoretical justification for our contemporary approach. Hake wrote his dialogue, called *Epieikeia*, in the late 1580's or early 1590's.87 He not only saw the dangers of partiality and error that

84. Eyston v. Studd, 75 Eng. Rep. [2 Plowden] 688, 695, 698 (1574) (citing, *inter alia*, C. St. Germain, Doctor and Student). Plowden likened resident equity to the soul of a statute, its words being likened to its body, and went on to observe that "this correction of the general words is much used in the law of England." *Id.* at 695-96.

85. *See* text accompanying note 29 *supra*.

86. *See* note 3 *supra* and accompanying text.

Plato had pointed out but tried to create an approach which would obviate those dangers. Hake's idea was to build an approach to statutory construction on St. Germain's notion that equity resided in every statute: [W]hereas Equity is said to be . . . that saying is not so to be understood as though Equity were a thing out of the law or beside the law, or as if it were the Equity of the judge, and not of the law, but that the Equity thereby meant is to be taken (as it is indeed) to be within the law, and that it being there found is to be applied by the judge of the law according as the particularity of the case that is before him, not aided by the letter of the law, shall require. Whereas St. Germain identified the equity that resided in a statute with the law of nature and the law of God, and that identification seemed to give judges the license to surmise what the law of nature or the law of God might be in the particular situation, Hake, building on Plowden, identified his own concept of resident equity with the intent of the law: [I]f [it] should happen that there were a case which being brought to the words of the law were likely to receive rule or judgment contrary to the law of God, against the law of Reason, what else could the judge conceive in such a case but that, while he should stick in the letter of the law, he should but insist in the very husk and skin of the law, and

88. [I]t is a thing most dangerous that judges should be left to the liberty of their own exposition of the law.

. . . . [W]here the law is any way left to the discretion of the judge it is either for that the judge has authority above the law (as to alter the law at his discretion) or else that in the exposition of the law he has power to use or not to use Equity according to his discretion.

E. HAKE, supra note 87, at 25, 43 (spelling modernized).

89. Samuel E. Thorne, who wrote the preface to the D.E.C. rare edition of Hake's Epieikeia is of the view that St. Germain, along with Plowden, did not recognize epieikeia as residing in the law itself, and he credits Hake with departing from St. Germain in finding epieikeia in the law. Thorne, Preface to E. HAKE, supra note 87, at viii, x.

90. E. HAKE, supra note 87, at 46 (emphasis and parentheses in original; spelling modernized).

91. "[E]picata . . . is no other thing but an exception of the law of god, or of the law of reason, from the general rules of the law of man [spelling modernized]." C. ST. GERMAN, supra note 78, at 97.
were therefore to turn himself by and by to investigate the intent and hidden meaning of the law?\footnote{92}

Thus, in Hake's view it is neither the objective law of God or law of reason nor the judge's own conception of the law of God or law of reason that controls in statutory interpretation. The controlling principle is the result of the judge's investigation into the intent and hidden meaning of the law itself—the purpose behind the law. When we recall that both Plato and Aristotle advocated giving legislative intent its due in equitable construction,\footnote{93} we see that Hake has taken us full circle. But Aristotle took us one step beyond a quest-for-legislative-intent approach when he recognized that an equitable view cannot always be presumed to have been intended by the legislator.\footnote{94} Did Hake take that step as well?

What is a judge to do when neither the law itself nor its equity (\textit{i.e.}, the evidences of its purposes, intent, or spirit) resolves the ambiguity? What is a judge to do when neither the law nor its equity removes the perceived injustice? Both questions face judges today. Hake's solution was for the judge to refer the matter to the legislature for authentic interpretation or a new law:

\begin{quote}
If the letter of the law at any time does happen to fail in the deciding of a particularity, the judge or expositor of the law is thereupon by and by to investigate the hidden sense or Equity thereof . . . . Again, if as well the letter as the interpretation thereof (whereby I understand the law in his fullness) shall also happen to fail or be defective, then the only way is to fly unto the supreme authority for the supply of a new law.\footnote{95}
\end{quote}

Hake's approach thus closed the door on the idea of \textit{judicial} lawmaking in the construing of statutes. The theoretical basis which he provided for his approach, a "purpose" approach which let itself be guided by the spirit and reason behind the rule, was receiving contemporaneous practical attention in the courts with the rule in \textit{Heydon's Case}.\footnote{96} Thus it was that Anglo-American jurisprudence

\footnote{92. \textit{E. Hake}, \textit{supra} note 87, at 16 (emphasis added; spelling modernized). Hake's identification of equity with legislative intent found its way into practical jurisprudence. See, \textit{e.g.}, \textit{R. v. Williams}, 96 Eng. Rep. 51, 52 (1758) (Lord Mansfield).}
\footnote{93. \textit{See} note 33 \textit{supra} and accompanying text.}
\footnote{94. \textit{See} note 34 \textit{supra} and accompanying text.}
\footnote{95. \textit{E. Hake}, \textit{supra} note 87, at 23 (emphasis in original; spelling modernized).}
\footnote{96. 76 Eng. Rep. 637 (Ex. 1584).}
reached its present accommodation with the dilemma of the general rule of law and the particular set of facts, an accommodation tolerable but in truth no less fleeting than that reached by the Greeks.

It cannot be doubted that Hake's emphasis on legislative intent has emerged today as the dominant characteristic of Anglo-American statutory interpretation. Similarly the introjection of legislative intent into the old process of equitably construing statutes is what led to the ostensible demise of that process and the rise of the spirit-and-reason or purpose approach. The distinction between equitable construction and construing in accord with the spirit and reason of a law is a delicate one, but one which saves the latter approach from charges of abuse of judicial discretion and usurpation of legislative power. When a judge applies his or her own sense of equity or his or her own sense of natural or divine justice, the judge is making law, or so say the critics of equitable construction. But the spirit and reason approach evades their criticism, for "the intention of the legislature constitutes the law of its enactments."98

The Phoenix Rises

The accomplishment of Edward Hake in bringing about the metamorphosis of equitable construction into the spirit-and-reason rule had a settling effect on Anglo-American jurisprudence—for a time. The troublesome little gremlin of equitable lawmaking by judges had been at last imprisoned. Judges, of course, went right on equitably making law in their construing of statutes,99 happily insulating themselves from charges of usurpation by giving the credit to what must have been extremely prescient legislatures.

Someone had to blow the whistle on what was, in more and more instances, a pure fiction. As we have seen, the need for equitable lawmaking by judges rested, at least partially,100 on the fact that legislatures neglect to have any intent whatsoever with respect to this

97. See, e.g., C. Sands, 2A SUTHERLAND: STATUTES AND STATUTORY CONSTRUCTION § 54.02 at 353 & n.3 (1973).
99. See C. Sands, supra note 97, at § 54.03. "It is easily seen that the courts still follow the same process in the interpretation of statutes, although they may generally disapprove the doctrine of equitable construction. . . . Even though by name the doctrine may be refused application, actually it is still used." E. Crawford, supra note 98, § 179 at 298.
100. I.e., in the Aristotelian hard-case view. In other parts it rested on the natural-law approach. See text accompanying notes 67-83 supra.
or that then unforeseen particularity. Aristotle had, of course, blown the whistle millenia ago.\textsuperscript{101} But it was left to the American realists, as the natural-law jurists had done in an earlier age, to once again release the gremlin of equitable lawmaking by judges:

Interpretation is generally spoken of as if its chief function was to discover what the meaning of the Legislature really was. But when a Legislature has had a real intention, one way or another, on a point, it is not once in a hundred times that any doubt arises as to what its intention was. If that were all that a judge had to do with the statute, interpretation of statutes, instead of being one of the most difficult of a judge’s duties, would be extremely easy. The fact is that the difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present.\textsuperscript{102}

That echo of Aristotle, written in 1909 by John Chipman Gray, was reechoed with varied volume by, among others, Oliver Wendell Holmes,\textsuperscript{103} Jerome Frank,\textsuperscript{104} Learned Hand,\textsuperscript{105} and William O. Douglas.\textsuperscript{106}

With the rise of equitable lawmaking by judges has also come,

\begin{itemize}
\item \textsuperscript{101} See text accompanying note 31 supra.
\item \textsuperscript{102} J. GRAY, THE NATURE AND SOURCES OF THE LAW 172-73 (2d ed. 1921).
\item \textsuperscript{103} Southern Pac. Co. v. Jensen, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting).
\item \textsuperscript{104} J. FRANK, LAW AND THE MODERN MIND 190 (1930); COURTS ON TRIAL, supra note 76, at 292, et seq. (1949): Usatorre v. The Victoria, 172 F.2d 434, 439 n.12 (2d Cir. 1949); Guiseppi v. Walling, 144 F.2d 608, 620-22 (2d Cir. 1944).
\item \textsuperscript{105} United States v. Klinger, 199 F.2d 645, 648 (2d Cir. 1952):
\begin{itemize}
\item When we ask what Congress “intended,” usually there can be no answer, if what we mean is what any person or group of persons actually had in mind. Flinch as we may, what we do, and must do, is to project ourselves, as best we can, into the position of those who uttered the words, and to impute to them how they would have dealt with the concrete occasion.
\end{itemize}
\item Archibald Cox, writing about Learned Hand’s approach to legislative interpretation, acknowledged: “There is truth . . . in the words of those who say that in applying a statute a court cannot interpret only but must make new law to supplement the legislation.” Cox, Judge Learned Hand and the Interpretation of Statutes, 60 HARV. L. REV. 370, 374 (1947).
\item \textsuperscript{106} Bradley v. United States, 410 U.S. 605, 612-13 (1973) (Douglas, J., dissenting).
\end{itemize}
predictably and necessarily, the quite valid caution that lawmaking by judges must not go too far: "Some have said it would be better if judges here made law openly rather than behind the mask of purpose interpretation. But it seems to the writer that—unlike plain meaning—legislative “purpose” is helpful in providing a standard which expressly refers to something independent of the judge."\(^{107}\)

What is to save us from unrepresentative, antidemocratic lawmaking by judges? And yet what is to save us from the injustice of a legislatively unprovided-for contingency?\(^{108}\) On the one hand, we have Bishop Hoadly’s oft-quoted epigram: “Nay, whoever hath an absolute authority to interpret any written or spoken laws, it is He who is truly the Law Giver to all intents and purposes, and not the Person who first wrote and spoke them.”\(^{109}\) On the other hand, we have a collective discontent and even outrage at the notion of scrupulously applying a statute whose words inadvertently mandate an injustice.\(^{110}\)

It may be that the solution to the dilemma is the simple observation that if courts begin to go their own way in making new law as they equitably construe statutes, legislatures can check them by legislating anew. That, perhaps, is the ultimate American accommodation—checks and balances. To the pragmatists among us, that working-relationship-type solution may seem best. To the romantics among us, however, that solution may seem too cold, and even inadequate, for it imprisons the gremlin without ever taking its measure, without coming to understand its true character. One longs for a fuller exploration of the simpler solution of the Bolognese civilians, who identified the gremlin with the Divine essence, or of the Renaissance nat-

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\(^{108}\) Archibald Cox felt the weight of the dilemma and called it insoluble. Cox, supra note 105, at 375.

\(^{109}\) Eighteenth century epigram, *quoted in J. Frank, Courts on Trial*, supra note 76, at 294. Frank also quoted Thomas Hobbes’ 17th century remark: “[T]he Law may be made to bear a sense, contrary to that of the Sovereign; by which means the Interpreter becomes the legislator.” Id. at 294 n.5.

\(^{110}\) Charles P. Curtis has attempted to resolve the dilemma by advocating a process whereby courts would resolve these hard cases by placing themselves in the shoes of the present or a future legislature:

Let the courts deliberate on what the present or a future legislature would do after it had read the court’s opinion, after the situation has been explained, after the court has exhibited the whole fabric of the law into which this particular bit of legislation had had to be adjusted. The legislature would then be acting, if it did act, in the light of the tradition of the whole of the law, which is what the courts expound and still stand for.

ural-law jurists, who found and came to know the gremlin as the light of natural human reason, itself a reflection of the Divine light. One wonders whether, if Aristotle’s joinder of *epieikeia* with *gnomé* was more fully developed in today’s jurisprudence, we might at last get the true measure of that elusive gremlin.\(^{111}\)

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111. Roscoe Pound hinted at that joinder when he discussed a famous colloquy in *Langbridge’s Case*, [cited by Pound as Y.B. 19 Ed. III, 375] in which one of the judges of the court of common pleas suggested that “the law” was the will of the justices. “Nay,” corrected the chief justice, “law is reason.” Pound’s conclusory observation was that “[m]ere will, as such, has never been able to maintain itself as law.” Pound, *Courts and Legislation*, in *Science of Legal Method* 202, 227 (1917). That is, law *is* in the will of judges when they invoke *epieikeia*, but it will not be maintainable law unless the judges are guided by the *gnomé* of reason.