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The Virtue of Equity and the Contemporary World

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THE WORD EQUITY, WHEN IT appears in contemporary theological discussions, can carry a variety of meanings. Most commonly, it is used as a synonym for a commitment to fairness and typically referred to along with justice.[1] Secondly, it can be used in a more legal, technical sense—a reference to the traditional power, derived from the British courts of the Chancellery, by which judges may craft a special remedy to correct a deficiency of the common or civil law.[2] Third, it may also be used in a technical legal sense in canon law. In this sense, equity is often understood as an expression of divine mercy to soften the strictness of the law.[3] While each of these meanings has its own rich significance, not one of them extends to the understanding of equity developed in the Aristotelian/Thomistic tradition. In this tradition, equity (*epieikeia* or *epikeia*) is understood as not only an action but also a virtue. Individuals who possess the virtue of equity have the stable disposition to "set aside" (*praetermissis*) the letter of the law in order "to follow the dictates of justice and the common good" (ST II-II 120, a. 1). Equity for Aquinas, therefore, is an expression of the natural law, a "higher rule of human action" than legal justice, which justifies temporarily setting aside the authority of the civil law (ST II-II 120, a. 2, ad 1).

Equity, therefore, considers laws which are not comprehensively unjust, but rather would be unjust or harmful to the common good if applied in specific situations. After Aquinas, this description of the virtue of equity appeared as an important topic for many moral theologians, including Suárez, Cajetan, Soto, Alphonsus Liguori, and many of the manualists. For each of these theologians, the virtue of equity was important because it provided an explanation for the way

[1] See, for example, James F. Keenan: "mindful of God's call for a new earth, a new sense of justice and equity." *A History of Catholic Moral Theology in the 20th Century* (London: Continuum International Publishing Group, 2010), 200.
[2] *Black's Law Dictionary*, 10th ed. (Toronto: Thompson West, 2014), s.v. "Equity."
[3] John J. Coughlin, *Law, Person, and Community* (Oxford: Oxford University Press, 2012), 124.

in which Christians could disobey the law and yet still act in accordance with the virtue of justice.

However, in the last century, equity's significance in moral theology has gradually faded. In fact, the most recent full length treatise in English on the virtue of equity, still considered the standard study, was completed in 1948.[4] The topic of equity was revived in a series of essays in the 1970s, in which Joseph Fuchs, Bernard Häring, and several others argued, against much of the traditional understanding, that equity should be understood as applicable to natural law as well as civil, at least in certain senses.[5] Since this innovative presentation of equity, there has been little constructive discussion of the virtue of equity. Although brief discussions of equity have appeared in recent works on the connected virtues of justice and political virtues in general, equity still remains largely neglected as a topic for contemporary theological reflection.[6] In 1996, Romanus Cessario highlighted this absence in an essay which presented an outline of the "historical-doctrinal study of the notion" in order to provide the historical grounding for the retrieval of the virtue.[7] In this essay, Cessario notes this absence, writing "with only some few exceptions, *epieikeia* no longer figures prominently on the list of topics that engage the interest of moral theologians. Given the influence that the concept once exercised on Christian moral reasoning, such inattention should signal a certain alarm."[8] From being an important and vibrant component of analysis of Christian resistance of unjust laws, the virtue of equity has become only a tool of theoretical theological critique.

I share Cessario's concern about the disappearance of the virtue of equity because I believe that understanding the virtue of equity is important for Christians living in a conflicted society to determine how to engage with civil law. However, in order to reclaim the virtue of equity as a compelling tool of critique of civil law, its dependence

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[4] See Lawrence Riley, *The History, Nature, and Use of Epikeia in Moral Theology* (Lexington, KY: Christ the King Library, 2017). For a slightly more recent study in French see Edouard Hamel, "L'usage de l'epikie," *Studia Moralia* 3 (1965): 48-81.

[5] See Josef Fuchs, "*Epikeia* Applied to Natural Law?" in *Personal Responsibility and Christian Morality* (Washington, DC: Georgetown University Press, 1983), 185-199; Roger A. Couture, "The Use of *Epikeia* in Natural Law: Its Early Developments," *Église et Théologie* 4 (1973): 71-103; N.D. O'Donoghue, "Towards a Theory of Exceptions," *Irish Theological Quarterly* 35, no. 3 (1968): 217-232; and Bernard Häring, "Dynamism and Continuity in a Personalistic Approach to Natural Law," in *Norm and Context in Christian Ethics*, ed. Gene Outka and Paul Ramsey (New York: Scribners, 1968), 199-218. Fuchs's essays will be discussed in more detail in section III.

[6] See Thomas Bushlack, *Politics for a Pilgrim Church: A Thomistic Theory of Civic Virtue* (Grand Rapids: William B. Eerdmans, 2015), 93 -97.

[7] Romanus Cessario, "*Epieikeia* and the Accomplishment of the Just," in *Aquinas and Empowerment,* ed. G. Simon Harak (Washington, DC: Georgetown University Press, 1996), 170.

[8] Cessario, "*Epieikeia* and the Accomplishment of the Just," 170.

upon natural law must be retrieved, contrary to the innovations made by Fuchs and Häring. In making this retrieval, I draw specifically upon Servais Pinckaers's description of natural law as a tool of discernment developed from natural instincts. I argue that Pinckaers provides a natural law theory which justifies the claim that the discernment of an individual citizen according to the virtue of equity might, in specific situations, justifiably stand against the authority of civil law. In addition, equity, as a virtue which may be cultivated by Christians, must be understood not only as an acquired virtue but also as a virtue infused with charity.

To make this argument, I first provide a basic overview of equity, understood as a virtue foundationally informed by natural law, by considering a brief overview of Aquinas's description of the virtue of equity. In the following section, I consider the innovative view of equity as a correction to natural law developed by Fuchs and Häring. In this section, I argue that a robust understanding of equity as informed by natural law is crucial for contemporary retrieval of the virtue. I also argue that Pinckaers's theory of natural law provides both sufficient grounding for the expansive claims made of the virtue and answers the concerns regarding natural law which led Fuchs and Häring to believe that it could be modified by equity. Finally, as the positive part of this retrieval, I consider how equity would appear as an infused virtue by considering the implicit presentation of a form of infused equity in the pastoral letters of St. Oscar Romero.

EQUITY IN AQUINAS

Aquinas mentions the virtue of equity in the *Scriptum super Sententiis*, the *Sententia Libri Ethicorum,* and the *Summa*. In this article, I focus primarily on the *Summa*, his most mature work. In addition, although Aquinas appears to differentiate between the Greek term *epieikeia* and the Latin *equitas* in some of his earlier work, he presents them as synonyms in the *Summa* (ST II-II q. 120, a. 1).[9] Therefore, for the purposes of this article, I consider *epieikeia* and *equitas* as interchangeable terms, for which "equity" stands as an adequate English translation. In the *Summa,* Aquinas identifies the virtue of equity as connected to the virtue of justice. Equity is the last of the virtues connected to justice to be listed in the *Summa*. It shares many of justice's structural characteristics, and, like justice, its basic act is to grant to each their due. Aquinas's discussion of equity therefore depends upon much of his prior analysis of the virtue of justice, especially its relationship to civil and natural law.

[9] Aquinas equates *epikeia* and *equitas* for the purposes of this question in the *Summa*: "…the object of *epikeia* which we call equity (*equitas*)." For a further discussion of the differentiation of *epikeia* and *equitas* in the *Sententia Libri Ethicorum*, see Bushlack, *Politics for a Pilgrim Church*, 95-97.

Aquinas identifies two types of justice—justice enacted between individuals and justice which is owed to the community from individuals, "as parts to a whole" (ST II-II q. 58, a. 5). Since individual or particular justice directs actions in personal relationships between individuals, it exists in each individual (ST II-II q. 58, a.1, ad 1). The justice owed to the community is called legal justice, since it "belongs to the law to direct to the common good" (ST II-II q. 58, a. 5). Legal justice is general "in so far as it regards the common good as its proper object" (ST II-II q. 58, a. 6). The object of both types of justice is the just, "which is the same as the right" (ST II-II q. 57, a.1). In other virtues, apart from justice, the right is determined "in relation to the agent only," whereas the right in a work of justice "besides its relation to the agent, is set up by its relation to others" (ST II-II q. 57, a.1). The relation to others is just if "it is adjusted to another person according to some kind of equality," thus creating some type of objective standard for the virtue of justice (ST II-II q. 57, a.2). Thomas identifies this standard as the precepts expressed in the Decalogue, which comprise the "first principles of the Law" and are accessible by natural reason (ST I-II q. 100, a. 3; II-II q. 122, a. 1).[10]

Because the common good is its object, legal justice exists primarily in the one who has the care and responsibility for the common good. Thus, it exists "in the sovereign principally and by way of a mastercraft [*architectonice*], while it is secondarily and administratively in his subjects" (ST II-II q. 58, a. 6). The virtue of legal justice is most often exercised by the ruler in the formulation and promulgation of law in order to advance the common good. In exercising this virtue, the ruler must discern both the natural right, which civil laws cannot contradict if they are to be just, and what positive right must be established to advance the common good in a particular community.

This discernment of what positive right advances the common good is necessary because, since human nature is changeable and sinful, "that which is natural may sometimes fail" (ST II-II q. 57, a. 2, ad. 1). Therefore, there may be occasions upon which the normal and natural standards of justice should be disregarded, due to the effects stemming from human sinfulness. For example, although the natural law requires that deposits always be returned, the intervention of human sin may change the context so that the natural law no longer applies. It would normally be just to return a sword placed upon deposit, but the natural law does not mandate that a sword needs to be returned to somebody who would harm the common good by possessing it. In addition, the changeableness of human nature requires that positive laws

[10] For further discussion of the relationships between the precepts of justice and the virtue, see Jean Porter, *Justice as a Virtue: A Thomistic Perspective* (Grand Rapids: William B. Eerdmans, 2016), 171-227. I am indebted to Porter's discussion of justice as a virtue for clarifying this important connection.

must vary in response to different cultures and contexts, in order to more appropriately perfect the virtue of the citizens of each community (ST I-II q. 97, a. 1). For example, the citizens of some countries, due to their discipline and prudence, might need fewer laws to restrain them than the citizens of other countries, who lack stable civic norms and customs. It is due to these defects and differences in human needs for governance that Aristotle describes political justice as "partly natural and partly legal" (ST II-II q. 57, a. 2).

The positive (or legal) element of human law is created when the will of the prince or the decision of the people "make a thing to be just provided it be not, of itself, contrary to natural justice... for instance by decreeing that it is lawful to steal or to commit adultery" (ST II-II q. 57, a. 2, ad. 2). Determining how the natural law applies in a specific context, and what further positive laws are required to promote the common good, means that the ruler must exercise the virtue of justice through an act of judgment (ST II-II q. 60, a. 1). This requires a special type of judgment, going beyond the normal virtuous judgment regarding interpersonal interactions or self-regulation. In formulating positive law, "there is further need for the judgment of a superior, who is 'able to reprove both, and to put his hand between both'" (ST II-II q. 60, a. 1, ad 3).

While judgment is an act of justice, and therefore perfects the will, it also requires the virtue of prudence: "because it belongs to the reason to pronounce or define" (ST II-II q. 60, a.1, ad 1). Specifically, the ruler's act of judgment requires the virtue of *synesis*, which is connected to prudence and defined as the disposition to judge rightly according to "particular practical matters" (ST II-II q. 51, a. 3). However, the ruler, no matter how superior his or her access to reason, is always limited in the laws he or she can frame. Because laws are framed for the community, not for individual instances or situations, those framing the law can only frame these laws to fit "the majority of situations" likely to arise in that community (ST I-II q. 96, a. 1). Human laws, issued by limited human lawgivers to address situations specific to one particular context, can never hope to address all of the existing possible situations which might arise in relation to a law (ST I-II q. 96, a. 6). This means that some laws which are generally just (and therefore normally binding in conscience) may not be just in some limited and unexpected situations (ST I-II q. 96, a. 4).

In these instances, what is the proper response of the people? At first, it seems that Aquinas has laid down a very clear delineation between legal justice, the justice of the ruler functioning in his office or of the people as an entire community, and individual justice, the justice which applies to individual relationships. In his discussion of the act of judgment necessary for legal justice, Thomas claims that "in matters of justice, there is further need for the judgment of a superior." This goes beyond the need for judgment only of a virtuous man in

relationship to the other virtues which regulate a human in himself or herself, rather than in interpersonal relationships (ST II-II q. 60, a. 1, ad 2). In addition, since legal justice in fact directs all citizens and all virtues towards the common good, how can there be a virtue which overrides this master ("general") virtue? (ST II-II 58, a. 6, ad 4) Wouldn't claiming that citizens can judge against the law, contrary to the citizen's own authority, be a judgment of "usurpation" and therefore contrary to the virtue of justice? (ST II-II q. 62, a.2)

To respond to this potential objection, Aquinas draws upon Aristotle to describe a specific virtue which allows an ordinary citizen to virtuously act against the letter of a generally just law to secure the outcome which promotes the common good. Just as the content of a just act might change in exceptional circumstances due to human sinfulness, civil laws that are rightly established may fail to be just in specific cases. "Therefore, in such cases judgment should be delivered, not according to the letter of the law, but according to equity which the lawgiver has in view" (ST II-II q. 60, a. 5, ad 2).

Understanding what is meant by the "equity which the lawmaker has in view" requires several levels of distinction. First, it is important to differentiate between the type of situation which Aquinas is considering in his discussion of equity and one which is generally unjust. Like Augustine, Aquinas believes that a law which is completely unjust, whether by usurpation or its total failure to promote the common good, is no law at all and not binding. In analyzing the virtue of equity, he is considering why a generally just law, rightfully issued by the proper authority, can in specific situations be disobeyed by individual citizens on their own judgment. Aquinas provides two examples of situations in which this may obtain. In one example, he considers a situation in which the exercise of equity is only against positive law. In the second, he considers a situation in which the exercise of equity is (presumably) against positive law (this is not specified but seems to be assumed based on its placement in the discussion of equity) and also, apparently, against natural law. In the consideration of whether a person can act against the letter of the positive law, he provides the example of citizens of a besieged city who, despite the law forbidding the gates of the city to be opened, open the gates to admit defenders whose arrival is necessary to the city's defense (ST I-II q. 96, a. 6). Secondly, as discussed above, he provides the example of a person who refuses to return an item placed on deposit because the man requesting its return is "in a state of madness" or planning to use the sword to commit treason and fight against his country (ST II-II q. 120, a. 1). In considering this exact same instance in another article, Aquinas makes the point that this situation occurs not because natural right (which would always require that the sword be returned) fails, but rather because human nature itself is changeable, and may fall into error. "Since it happens sometimes that man's will is unrighteous, there are

cases in which a deposit should not be restored, lest a man of unrighteous will make evil use of the thing deposited: as when a madman or an enemy of the common weal demands the return of his weapons" (ST II-II q. 57, a. 2, ad 1). In both instances, the virtuous citizen is the one who acts according to equity and disobeys the letter of the law. The key for Aquinas's justification of the existence of the virtue of equity is that, when acting according to the doctrine of equity, the citizen is not acting contrary to justice, even though she is acting contrary to the letter of the law. Her actions contradict legal justice, when justice is narrowly understood as actions in accordance with the letter of the law.[11] However, to follow the letter of the law when this action would promote injustice would be in itself sinful. In this situation, equity is the justice which "exceeds" legal justice, and in fact directs it (ST II-II q. 180, a. 2). The object of equity, just like the object of legal justice, is to "follow the dictates of justice and the common good" (ST II-II q. 120, a. 1). Therefore, in Aquinas, equity describes both a virtue and a standard of justice. Equity is the standard of a justice higher than legal justice, to which each law must conform to be truly just, and therefore to be valid and authoritative. Equity as a virtue enables a citizen to judge according to this standard of justice that in one specific circumstance the generally just law should not apply (ST II-II q. 120, a. 1, ad. 2).

However, the virtue of equity is strictly limited. The application of equity to the law does not mean that the law, considered generally, is definitely unjust. Nor is a claim of equity a denial that, at times, a strict application of the letter of the law might be necessary for the common good—so long as this strictness does not run contrary to justice (ST II-II q. 120, a. 1, ad. 1). In addition, possessing the virtue of equity is not equivalent to a license to unqualifiedly disregard the letter of the law. Rather, according to Thomas, equitable action is only appropriate in specific types of situations: "sudden peril" or "immediate necessity" where it would be impossible to refer the matter to an authority for further confirmation or guidance (ST I-II q. 96, a. 6; II-II q. 120, a, 1, ad 3).

The proper action of the virtue of equity actually requires the engagement of the virtues of prudence and justice, as do all exercises of judgment regarding the law. As discussed above, judgment according to common law, the judgment of a judge or legislator, for example,

[11] The later tradition on equity focused on how much equity can be exercised for the benefit of an individual as opposed to the common good generally conceived. For the purposes of this article, I will not focus specifically on these questions of the relationship between the individual and common good. See, for example, Francisco Suárez, *De Legibus*, ed. Luciano Pereña Vicente (Madrid: Consejo Superior de Investigaciones Científicas, Instituto Francisco de Vitoria, 1971), VI.vii.

requires the virtue connected to prudence called s*ynesis*. Equity requires different capacities, and therefore depends upon the connected virtue to prudence known as *gnome.* Both *gnome* and *synesis* are virtues which perfect the **"**cognitive power apprehending a thing just as it is in reality" (ST II q. 51, a. 3, ad 1). However, they apprehend different things. *Gnome*, "a higher virtue of judgment," is a virtue of the intellect which allows a person, when confronted with situations outside of the common course of action, to "judge of such matters according to higher principles than the common laws" (ST II-II q. 51, a. 4). *Gnome* therefore is the disposition which determines when the positive law contradicts the natural law. It also is the virtue by which a person possesses the ability to discern when the natural law itself does not apply in a specific situation (ST II-II q. 122, a. 1). However, because the ordinary citizen does not have access to all the information available to the ruler, this discernment is only justified when the law runs afoul of natural right or the common good. Also, implicit in this limitation is that, in rendering each person his or her due, equity is also directed by the objective precepts which regulate justice and all connected virtues and are expressed in the Decalogue (ST II-II q. 122, a. 1).

Since judgment is an act of the virtue of justice, equity requires more than simply acknowledging the precepts of justice and the directions of prudence. In addition, equity requires the perfection of the appetitive power of the will so that a person "renders to each one his due by a constant and perpetual will" according to the apprehension and direction of reason (ST II-II q. 58, a. 1 and 4). Thus, the person possessing the virtue will not only make the correct judgment but possess the actual desire to act according to the judgment. This desire will be translated into actions of both restoration and protection of what is due to others. Therefore, the virtue of equity depends upon both right understanding and right desire.

THE RELATIONSHIP BETWEEN EQUITY AND NATURAL LAW

In a series of essays in the 1960s and 1970s, Joseph Fuchs and Bernard Häring, and several others, engaged in a retrieval of the virtue of equity.[12] In these essays, the authors argue that the virtue of equity, in one way or another, should be understood as capable of creating an exemption to natural law as well as civil law. The contemporary interpreters intentionally ground their own understanding of equity as some form of "escape valve" from natural law in a line of argument developed from some early scholastics, such as Richard of Middleton and

[12] See Josef Fuchs, "*Epikeia* Applied to Natural Law?" 185-199; Roger A. Couture, "The Use of *Epikeia* in Natural Law," 71-103; N.D. O'Donoghue, "Towards a Theory of Exceptions," 217-232. Bernard Häring, "Dynamism and Continuity," 199-218.

Ockham, through Cajetan to Alphonsus Liguori.[13] For example, although Cajetan believes certain precepts of the natural law are inviolable, such as those related to adultery or lying, equity might be applied to create an exemption from natural law in other situations where it could cause "unnecessary harm."[14]

According to Fuchs and Häring, these theologians turned to equity to modify their understanding of natural law as a strict code of rules, either articulated by God or based upon biological determinism. As Häring points out, the result of viewing the natural law only as strict norms imposed from without resulted in these theologians using *epieikeia* for "reducing the all too great number of absolutes; practically, they admitted the use of *epieikeia* only with regard to those 'natural law' principles which contained a historical element that was no longer fully in tune with new insights and new realities."[15] Fuchs and Häring seek to critically appropriate this claim—that natural law can be modified by equity—and innovate upon it in order to present an understanding of natural law which they believe accords better with modern insights.

In the interest of space, I briefly consider only Fuchs's appropriation of equity as a critical tool in order to develop a new theory of natural law. First, Fuchs argues that any understanding of the norms of natural law as "imposed from above" seems to have disappeared from the discourse. "Today, we are hardly as optimistic as the learned men of other times, for we think that divine natural law itself (neither written nor otherwise formulated) is not always sufficiently expressed in norms which are formally redacted by us men and not God. In other words, we have difficulty in calling these norms (other than the imprinted natural law) 'divine' precepts with absolute certainty."[16] This leaves the only possible understanding of natural law as a set of precepts "'imprinted' on the creature to the extent that the creature, in understanding itself, posits such a law actively as well as passively."[17] This leaves natural law, for Fuchs, as, at most, a set of rigid norms grounded in biological realities.

However, Fuchs argues that even this limited understanding of natural law is too rigid. There are, he acknowledges, "transcendental" norms of natural law, which are tautological in their content, such as "the adage that good must be done or evil avoided, or—and this is the same thing—that man ought to act in a rational or genuinely human

[13] See Couture, "The Use of *Epikeia* in Natural Law," 73-100. See Lawrence Riley, *The History, Nature and Use of Epikeia in Moral Theology* (St Pius X Press, 2012), 258-275.
[14] Couture, "The Use of *Epikeia,*" 97.
[15] Häring, "Dynamism and Continuity," 213.
[16] Fuchs, "*Epikeia* Applied to Natural Law?" 191.
[17] Fuchs, "*Epikeia* Applied to Natural Law?" 187.

manner."[18] However, it is not possible to go beyond these tautologies and the analogical claims which can be deduced from them ("be chaste," "be just") to make any universal claims regarding "those practical and operative norms which determine what actually pertains to chastity, justice…."[19] Assuming that there is some sort of universally-posited set of operative norms ignores the fact that the content of these norms must always be understood as "deficient" and "general" and hence any individual's "conception and redaction of norms may be very inadequate."[20] The insight of the early modern theologians regarding equity's ability to modify natural law, he argues, is really a statement that, because of these deficiencies, all of these "natural law" norms should be understood as correctable or changeable given the developments in human history and understanding.[21] Through using equity analogically, Fuchs believes we can see that even these corrections are inevitably subject to misapplication since they are always translated through "the positions and judgments made and formulated by man himself, and therefore such norms per se can be deficient and consequently are general rather than strictly universal."[22] Thus, for Fuchs, the virtue of equity functions as the analogical articulation of the understanding that there should always exist a severe limitation on any claims of normative judgment that go beyond the particular.

> The norm must be corrected or at least interpreted according to the totality of the concrete reality. This means that a moral judgment must ultimately be made about what is concrete, since norms are meant to help only insofar as they have value. For when concrete reality is sacrificed for the sake of humanly formulated abstract norms, or when norms which seem to be only general are taken to be universal, there is some danger that natural law in a strict sense—and therefore man himself—may be sacrificed.[23]

Through this presentation of a thoroughly "transcendental" theory of natural law, Fuchs believes he has preserved human freedom for everyday moral judgments.

Fuchs (and Häring) are correct in their claim that any view of natural law as only a rigid series of biologically imprinted precepts does not provide a compelling natural law theory. Moreover, for those interested in the retrieval of equity as a virtue, this view of natural law is so rigid and its precepts so firm that there is no room for the sensitivity to cultural differences and contextual realities required both of

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[18] Fuchs, "*Epikeia* Applied to Natural Law?" 188.
[19] Fuchs, "*Epikeia* Applied to Natural Law?" 188.
[20] Fuchs, "*Epikeia* Applied to Natural Law?" 188.
[21] Fuchs, "*Epikeia* Applied to Natural Law?" 193.
[22] Fuchs, "*Epikeia* Applied to Natural Law?" 188.
[23] Fuchs, "*Epikeia* Applied to Natural Law?" 197-198.

the lawmaker in shaping positive law and the possessor of the virtue of equity in acting against the letter of the law. However, there are also two negative results of their retrieval of equity as an analogical tool to critique natural law theories. First, they completely abandon any understanding of equity as a virtue which may be developed by an individual and inform her actions towards excellence. Secondly, their thoroughly transcendental theory of natural law has little actual content to inform the "higher principles" which justify the claims of equity, making it difficult to view equity as any type of virtue which actually enables people to challenge problematic laws or justifiably interact in the political arena. Thus, equity becomes only an analogy, no longer either a virtue or a standard.

Any retrieval of the virtue of equity must depend on a different understanding of natural law. I believe that Pinckaers's presentation avoids the rigid legalism which concerns Fuchs and Häring, while still preserving natural law as a true source of discernment for individual citizens in highly varied and specific situations. Pinckaers describes natural law as grounded in natural inclinations, which orient us to the good, "a primitive élan and attraction that carries us toward the good and empowers us to choose among lesser and greater goods."[24] Pinckaers is not, however, arguing for a simple biological determinism of natural inclinations. Rather, the instincts are guided by what "St. Thomas occasionally referred to as the *instinctus rationis*, the rational instinct which, with Aristotle, he likened to the higher instinct, inspired genius."[25] These instincts inform the desires of the will, "which was ruled by its perception of the good, which was its end…. [T]his was the foundational principle of natural law, at the base of all other laws. The latter would determine and spell out the specific human good, according to the intrinsic qualities of human nature and the inclinations they engendered."[26] Thus, contrary to Fuchs's fear that natural law is understood simply as a mechanistically applied universal code, Pinckaers's view of natural law integrates a second order of reflexivity which is sensitive to context and particularity. In addition, rather than destroying human individuality, these instincts which inform natural law, when perfected, develop into virtues, stable dispositions to act rightly in any circumstance or context. In addition, rather than ignoring natural law's theological origin as an instantiation of divine direction, Pinckaers also argues that "in St. Thomas's view, inclinations, like the natural law, were God's most precious work in the

[24] Servais Pinckaers, *Sources of Christian Ethics*, 3rd ed., trans. Mary Thomas Noble (Washington, DC: The Catholic University of America Press, 1995), 402.
[25] Pinckaers, *Sources*, 404.
[26] Pinckaers, *Sources*, 407.

human person, a direct, unique participation in his own wisdom, goodness, and freedom and the emanation of the eternal law."[27] This connection between natural law, inclinations, and virtues will only be strengthened when the theological virtues infuse the acquired virtues and transform them.

According to Pinckaers, a robust theory of the natural law and the development of virtues leads to a greater understanding and appreciation of human freedom, rather than a restriction, since it is one of the tools by which God sets us free to rightly pursue the good, the true, and the beautiful. Fuchs, on the other hand, shares what Pinckaers describes as the "modern view," which posits an implicit disjunction between freedom and law. Pinckaers believes that this disjunction, which separates natural law from God's care for his creation, mistakenly views law as only a force imposed unilaterally from above. In contrast, true natural law

> is not the work of a will external and foreign to us. Precisely because it is the expression of our natural inclinations, especially the spiritual ones, this law penetrates to the heart of our freedom and personality to show us the demands of truth and goodness. These guide us in the development of freedom through actions of excellence. Thus, natural law is the inner law. It is the direct work of the One, who has created us to image him in our spiritual nature and our free, rational will. The exigencies of natural law have their source both in God and in our human nature.[28]

According to Pinckaers, it is obvious that natural law can be understood both as accessible, through our will and our reason, and as substantive enough to provide the substance for discernment which might contradict the authority of the civil law. Equity displays the connection he draws between the natural law and virtues especially well since here we have a virtue which is specifically about discerning the natural law. Equity is not required in order to make exceptions to the natural law but rather grows spontaneously out of the natural law and therefore has the authority to correct civil law. In fact, although Pinckaers does not explicitly describe this, it is a logical extension of the freedom which the natural law brings to understand it as grounding equitable engagement with civil law. While positive law is important, it is not an authority which commands a slavish devotion. Rather, insofar as it reflects the common good, it points us towards greater good and freedom in Christ, to which our natural inclinations bear witness. However, insofar as it limits this, it is not the last word. In equity, the natural law's role of truly freeing impinges upon our corporate reality.

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[27] Pinckaers, *Sources*, 405.
[28] Pinckaers, *Sources,* 452.

However, the freedom which comes from holding the natural law over the civil law is not that of chaos. Rather, it is an emphasis on the freedom which comes with the law. Because the natural law is grounded in the instincts which we all share and communally expressed, it become a source of freedom as a bond, not a source of divisions. Equity, which requires us to act for the common good according to the natural law, means that rather than "man defin[ing] himself by insisting on his own freedom against the same freedom of others,"[29] our freedom to act outside the civil law results in greater freedom for others as well.

Along with the "modern" view's association of natural law with repression and diminished freedom, Pinckaers also critiques this approach's lack of a connection between natural law and theological content. Specifically, he distinguishes his view of natural law from Fuchs by arguing that Fuchs's "distinction [between transcendent and categorical] as commonly understood, precludes the possibility of showing how what is specifically Christian penetrates and operates in concrete actions, in areas regulated by virtues and particular norms, and how faith and charity, notably, are practical virtues, capable of assuming and transforming both virtues and human values."[30]

EQUITY AS AN INFUSED VIRTUE

There is a further question that must be asked: are there specific ways that this virtue should be practiced by Christians? Repeatedly in his writings, Pinckaers points us beyond simply thinking about acquired virtues to remind us that those in a state of grace are animated by theological virtues, which "inspire, animate, and direct [the acquired virtues] from within, transforming them also by giving them greater intensity and new strength."[31] The infused virtues arise from "the grace of the Holy Spirit, [as] it penetrated to the interior of the human person and became the very source of the virtues."[32] The result of this encounter with the grace of the Holy Spirit is a radical re-orientation of the end of all our human actions. "The center and goal of life—to which desires tend and the heart stretches forward—moves beyond visible horizons, beyond suffering and death, to where the

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[29] Pinckaers, *Sources*, 434.
[30] Pinckaers, *Sources,* 202.
[31] Pinckaers, *Sources,* 453. Whether Christians maintain the acquired virtues after receiving the infusion of the Holy Spirit has been the topic of some recent contemporary debate. See, for example, Michael Sherwin, O.P., "Infused Virtue and the Effects of Acquired Vice," *The Thomist* 73 (2009): 29-52; Angela McKay Knobel, "Can Aquinas' Infused and Acquired Virtues Coexist in the Christian Life?" *Studies in Christian Ethics* 23, no. 4 (2010): 381-96; and William Mattison, "Can Christians Possess the Acquired Moral Virtues?" *The Thomist* 72 (2011): 558-85. Because I am drawing upon Pinckaers's discussion of the infused cardinal virtues, I am by default assuming that Christians possess these in place of the acquired.
[32] Pinckaers, *Sources*, 183.

risen Christ is seated with the Father….This hope, even now, creates a new dimension, even a new world within the human heart, where the moral life unfolds."[33]

In addition to creating a new end of our actions, this infusion of the Holy Spirit provides a new law, which neither contradicts the natural law and the old law nor subsumes them, but rather completes them fully. The law of the Spirit does not do away with the guidance of natural instincts which direct us to the good. Rather, through the law these natural instincts are fully elevated and perfected, and thus the person is able to act with full and perfect freedom. As Pinckaers writes, "This spiritual spontaneity, perfected by the virtues, characterizes the evangelical Law and causes it to be called the law of freedom."[34] The infused theological virtues of faith, hope, and love are given to us by God's grace and orient us to God as our supernatural end, "God himself immediately" (ST I-II q. 63, a. 3, ad. 2). They also perfect the soul "in regard to other things, yet in relation to God" (ST I-II q. 63, a. 3, ad. 2). This means all of our habits relating to inner-worldly actions are also transformed. At times, the actions stemming from these transformed virtues may be the same as those to which the acquired virtues might direct us. However, at other times, the actions stemming from the acquired virtues and the infused virtues will appear radically different, due to their different objects, and the ability of the infused virtues to "perfect beyond the capacity of nature" (ST I-II q. 63, a. 3, ad. 3). Thus, to use one of Thomas's examples, it is the infused moral virtues which determine "how men behave well in respect of their being 'fellow-citizens with the saints, and of the household of God,'" whereas it is by the acquired virtues that "man behaves well in respect to human affairs" (ST I-II 63, a. 4). At times, behaving well towards the household of God may appear very much like behaving as a good citizen according to the acquired virtue. The good citizen, for example, would extend towards other citizens the respect owed to their human nature, and a care and concern for the common good. However, as we will see later, at other times the actions of the Christian, living as one who is a "fellow citizen with the saints," might be characterized by radical actions of self-sacrificial love which far exceed the mean which the acquired virtues might establish.

This example is especially pertinent for considering how the infusion of the theological virtues specifically affects the virtue of equity. Equity, as a connected virtue to justice, is infused by charity. Charity orients the end of justice, understood generally, towards friendship, and especially friendship with God and, by extension, friendship with our neighbor. Relations with other people, under the new law, become "an extension and a participation in the supernatural ties that unite us

[33] Pinckaers, *Sources,* 116.
[34] Pinckaers, *Sources,* 186.

to God at the source of our nature and being, through creative wisdom and love."[35] Thus, the difference lies in the fact that our infused friendships are based on the "fellowship of happiness, which consists essentially in God, as the First Principle, whence it flows to all who are capable of happiness" (ST II-II q. 26, a. 2). In addition, through loving with God's love, we come to love best "those who are nearer to God" (ST II- II q. 26, a. 8). Aquinas does not define precisely who these people are, but I will return to this point later in discussing Romero's theory of the preferential option.

The result of our loving our neighbor within a fellowship of happiness and through the love of God is that our love is transformed. We now care for our neighbor's good in the same way we care for our own (ST II-II q. 44, a. 7). In fact, at times of urgency and severe peril, the holder of more perfect charity may feel impelled to put herself at risk for her neighbor's good (ST II-II q. 25, a. 5, ad. 3). In addition to establishing a higher possible standard of sacrificial love, charity also directs justice to consider a broader notion of what loving our neighbor requires. Rather than simply considering the good of those to whom we would naturally owe duties, charity impels us to recognize that "the common good of many is more Godlike than the good of an individual. Wherefore it is a virtuous action for a man to endanger even his own life, either for the spiritual or for the temporal common good of his country" (ST II-II q. 31, a. 3, ad. 2). Thus, when justice is reoriented towards friendship by charity, Christians may find themselves called to actually sacrifice their own wellbeing, their own due, either by a neighbor's urgent need or for the common good.

How does equity, therefore, appear as an infused virtue? Can disobeying the letter of the law be an action of infused justice which is oriented to supernatural friendship? It is clear that Aquinas is also considering equity's function as an infused virtue, since he explicitly connects the discernment required for obeying the law to the guidance of the Holy Spirit (ST I-II q. 95, a. 5, ad. 2). Natural equity actually functions as a paradigmatic virtue for showing how the natural virtue of justice can be transformed by charity. According to Aquinas, the goal of natural legal justice, and therefore civil law, "is the formation of friendship among citizens."[36] However, generally, according to justice, this civil friendship is focused on chiefly the ruler of the state, on whom the entire common good of the state depends; hence to him before all, the citizens owe fidelity and obedience" (ST II-II q. 26, a. 2). The virtue of equity expands this friendship to a mutual love between all citizens, since any individual citizen might be directed by the virtue of equity to act against the letter of the law for the common good. Therefore, in the transition from equity to justice, we see the same type

[35] Pinckaers, *Sources,* 435-436.
[36] Pinckaers, *Sources,* 434.

of expansion of friendship which results when justice is infused by charity.

Considered as an infused virtue, equity therefore can also serve as a paradigm. This is because the exercise of equity can carry with it both the broader regard for the common good and the greater risk of sacrifice which characterize the transformation of justice occasioned by the infused virtues. In practicing equity, Christians are promoting not only equality, but doing it out of love: first for God, the source of justice, and then for others. The citizen who makes the choice to engage in equitable action for the common good demonstrates how friendship can motivate care for justice. This claim that equity can function as an infused virtue does not mean that justice requires an orientation of civil law to ends of supernatural perfections. Rather, as Thomas says, "The purpose of human law is to lead men to virtue, not suddenly, but gradually…that if 'new wine', i.e. precepts of a perfect life, 'is to be put into old bottles,' i.e. into imperfect men, 'the bottles break, and the wine runneth out; i.e. the precepts are despised and those men, from contempt, break into evils worse still" (ST I-II q. 96, a. 2, ad 2).

Additionally, in engaging in equity, as an infused virtue, the Christian takes on the risk of reappraisal from a governing authority. There is no guarantee that the citizen's grace-informed judgment will accord with the judgment of the ruler or that the ruler will not decide to apply the full penalty of the law to the citizen engaged in the equitable actions. In deciding to engage in an equitable action, the Christian therefore may be called to make that sacrifice of self for the care of others which Aquinas describes as representing the perfection of charity (ST II-II q. 26, a. 5). However, although Aquinas includes the possibility of self-sacrifice in his discussion of charity, he does not consider it in much depth, and not at all in the context of equity. In the next section, I consider a discussion of infused equity in a contemporary environment while also taking into full consideration the sacrifices that might be involved.

Saint Oscar Romero and Infused Equity in Action

In Oscar Romero's pastoral letters, he makes no explicit mention of the cultivation of the virtue of equity. However, his directions to his parishioners regarding their approach to civil laws parallel Aquinas's discussion of equity, while placing it in a contemporary context. The specific situation which Romero claims constitutes a serious injustice is the oppressive limitation on the formation of popular political organizations in El Salvador, specifically, and Latin America, generally. Romero refers to the Puebla Statement to describe how governments "look askance at the organizing efforts of laborers, peasants, and the common people; and they adopt repressive measures to prevent such organizing. But this type of control over, or limitation on, activity is

not applied to employer organizations, which can exercise their full power to protect their interests."[37]

Romero does point out that some limitations on formation of popular political groups are not inherently unjust. Acting to organize is not an absolute right; rather:

> In regard to the right to organize, we uphold the national Constitution when it recalls the limits imposed by morality and rejects anarchical theories of the use of rights. Our intention, in demanding that the right of association be enjoyed by all Salvadorans, with particular emphasis on the rural population, is certainly not to defend terrorist groups or support anarchist movements and irrational, subversive ideologies.[38]

This limitation means that the law itself may not be instantly dismissible as fully unjust and rather invalid. Rather, the danger seems to be in specific unjust applications of these laws in El Salvador, rather than the laws generally understood as unjust. In El Salvador, the laws were being enforced to limit any formation of political organizations opposing the government or seeking to give voice to the poor and disenfranchised, not to protect the common good by opposing the organization of criminal groups.[39] Rather, the limitation was both unjust and causing severe damage to the common good in El Salvador. Romero diagnoses the damage by writing that this limitation "infringes upon [the] dignity [of many El Salvadorians], their freedom, and their equal right to participate in politics and it leaves without protection those who need it most."[40] Through these infringements, the purpose of laws governing political organizations—"to protect the weakest"—is being suborned.[41] The result of this enforcement of the limitation on political organizing is that the rural poor in particular are unable to advocate for the conditions which would ensure at a minimum the "simple basic need to survive, to exercise their right to make their conditions of life at least tolerable."[42] In differentiating between the abuse of the letter of the law and abusive enforcement, Romero describes a situation in which actions against the letter of the law, in accordance with the virtue of equity, might be necessary to promote the common good and end injustice. Because equity is not mandated, Romero also captures

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[37] Oscar Romero, "Fourth Pastoral Letter: The Church's Mission Amid the National Crisis" in *Voice of the Voiceless,* trans. Michael J. Walsh (Maryknoll: Orbis Books, 1985), 120. Citing "Puebla, Final Document" in *Puebla and Beyond*, ed. John Eagleson and Philip Scharper (Maryknoll: Orbis Books, 1979), no. 44.
[38] Romero, "Third Pastoral Letter: The Church and Popular Political Organizations," in *Voice of the Voiceless,* 93.
[39] Romero, "Third Pastoral Letter," 92-93.
[40] Romero, "Third Pastoral Letter," 91.
[41] Romero, "Third Pastoral Letter," 91.
[42] Romero, "Third Pastoral Letter," 91.

the voluntary nature of equitable engagement with the law by acknowledging that joining a political organization in defiance of the law is not something all Christians are called to do.[43]

Having presented a scenario in which equity might be applied, Romero then distinguishes between the response in accordance with the natural acquired virtues and actions by those possessing the infused theological virtues. Romero acknowledges that, up to a certain point, both groups share common practices and may engage in similar actions in acting against the letter of the law. Similar reasoning may also direct these actions. The common equitable practices are based upon a recognition that the letter of the law may be disobeyed if it conflicts with the higher principle of respect for the "human and social value of the individual."[44] In other words, "The criterion for organizing, whether at the political, cultural, or trade union level, is the defense of legitimate interests, whether or not they are contained in a specific piece of legislation or an interpretation of it."[45] The discernment of the crucial relationship between forming popular political organizations and these higher principles may result in a sincere and committed citizen, especially one from among the rural poor, putting this discernment into action and maintaining her engagement by a consistent will.[46] On the other hand, Romero specifically warns against absolutizing the object of equity, specifically, those activists who "make their own organization the supreme value, and subordinate everything else to it…. In practice they become so fanatical that the interests of the people are no longer their chief concern, but the interests of the group or organization."[47] This new "idolatry," as Romero names it, confuses the object of equity with the actual good it is supposed to achieve: the common good.

Although Romero at first focuses on similar actions of equitable disobedience, he is most concerned with how Christians should engage in equitable law-breaking. In discerning whether to break the civil law, Christians must discern not only these natural law principles of human dignity but also the principles expressed in sacred teachings. Although they may disobey the civil law, they must always remember that their actions are still under the authority of "the law of [God's] justice and his commandment of love."[48] While Christians should care about protecting and building up the natural common good, this higher teaching directs the Christian to always remember that their ultimate end is supernatural: the reign of the kingdom of God. This priority of

[43] Romero, "Third Pastoral Letter," 102-103.
[44] Romero, "Third Pastoral Letter," 101.
[45] Romero, "Third Pastoral Letter," 92-93.
[46] Romero, "Third Pastoral Letter," 93.
[47] Romero, "Fourth Pastoral Letter," 135.
[48] Romero, "Third Pastoral Letter," 92-93.

the supernatural ends is best expressed through continued "loyal solidarity with the Church and openness to the transcendence of God through the sacramental signs of his grace, through prayer and meditation on the Word of God." [49] As Christians grow towards deeper relationship with God and commitment to the church, they should find that their commitment to this-worldly justice, and their willingness to make sacrifices in pursuit of it, grows as well. "This mutual interaction between an explicit faith and dedication to justice will be the guarantee that one's faith is not vain, but is accompanied by works, and at the same time that the justice one is seeking is indeed the justice of the kingdom of God." [50]

Reminding Christians that their actions should be oriented to supernatural ends in accordance with divine teaching does not mean that they need to either be blind to the pernicious effects of unjustly applied civil laws or naïve about how the structures which lead to these enforcements remain in place. Romero writes that "Quite truthfully, the church is interested only in offering the country the light of the gospel for the full salvation and betterment of men and women, a salvation that also involves the structures within which Salvadorans live, so that, rather than get in their way, the structures can help them live out their lives as children of God."[51] Directed by the laws of God's justice and love, Christians who partake in political organizations pursuant to the direction of equity will discern how to demolish structure of injustice without compromising or minimizing the challenges due to structural sin or the great hope for change even in this world, in preparation for the next.

The possession of the infused virtue of equity also imposes a higher duty of care for others impacted by our equitable actions. Romero, like Aquinas, sees that the definition of "who is my neighbor?" expands dramatically when justice, and equity, the connected virtue, are infused with charity. Now, rather than simply taking natural duty into account, actions of infused equity should be carried out in accordance with the order of charity. Acts of equity are most pressing when carried out for those in urgent need and those who are closest to God, rather than simply for the ones to whom we owe a duty according to acquired justice. Romero writes to all Christians with an invitation to act in accordance with this order, "We invite all, regardless of class, to accept and take up the cause of the poor as if they were accepting and taking up their own cause, the cause of Christ himself: 'I assure you, as often as you did it for one of my least brothers, you did it for

[49] Romero, "Third Pastoral Letter," 102.
[50] Romero, "Third Pastoral Letter," 102.
[51] Romero, "Fourth Pastoral Letter," 128.

me.'"[52] In describing this preferential option, he makes explicit the connection between those who are closer to God, referenced by Aquinas, and the description of the union of the poor with the person of Christ from the Gospel (e.g. Matthew 25:40-45).

Finally, Romero not only calls upon Christians to practice equity for a greater number of people but also, if necessary, at great personal cost and sacrifice. Those who act on behalf of the poor and oppressed should be aware that they will be confronted with the opposition of "those who will look without seeing and listen without hearing or understanding (Matthew 13:14) … [and] those, too, who prefer the darkness to the light because their actions are evil (John 3:19)."[53] This opposition to their power may require Christians to, very literally, "cooperate in the birth pains of a new creation (Rom. 8:22)."[54] Many of those who acted against the letter of the law were "arrested, tortured, murdered."[55] The practice of equity in the face of such oppression and suffering truly did require the perfection of both discernment and the desire for justice.

CONCLUSION

In conclusion, I believe that the virtue of equity is retrievable and appropriate for use in today's political climate. This retrieval depends first upon an understanding of equity as a virtue dependent upon natural law and potentially infused by the theological virtues. As Aquinas and Pinckaers both stressed, in different ways, acting according to the virtue of equity requires acceptance of limitations and cultivation of disciplines of both mind and will. First, it requires the acceptance and acknowledgement of some higher principle which can provide some form of objective guidance for the practice of equity, and one which has general accessibility. Secondly, for Christians, it requires a willingness to be changed by the infusion of charity. Infused equity requires the Christian to both take account of supernatural ends as well as natural, and neighbors in the spirit instead of simply neighbors in the flesh. Finally, this broad expansion of the virtue requires that Christians who seek to cultivate the virtue of equity are willing to truly sacrifice for the common good. Many of those who acted against the letter of the law were, like Romero himself, arrested or murdered. Retrieving the virtue of equity provides one additional way in which Christians can continue in the same redemptive work within the world. M

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[52] Romero, "Fourth Pastoral Letter," 125. Citing "Puebla, Message to the People of Latin America" in *Puebla and Beyond*, no. 3.
[53] Romero, "Third Pastoral Letter," 87.
[54] Romero, "Third Pastoral Letter," 87.
[55] Romero, "Fourth Pastoral Letter," 71.