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LEARNING TO LIVE MORE EQUITABLY

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Abstract: Although seventeenth-century societies fell far short of contemporary standards of justice, early modern philosophers thought deeply about what social justice consists in. At a theoretical level, they aimed to articulate distributive principles. At a practical level, they asked what qualities we need to possess in order to make just judgments. In the first part of this article, I discuss two interpretations of the conception of equity on which justice was held to rest. On either interpretation, I suggest, treating people equitably was held to be compatible with treating them in ways that we would consider radically unjust. This raises the practical question: What qualities was an equitable or just judge thought to need? The middle section of the article sketches a reply, drawing on a genre of early modern works about how to reason. As this section reveals, early modern thinkers were alive to the many ways in which we can fall short of justice and possessed many techniques for self-improvement. Greater justice was not beyond the bounds of their imaginations; so, what prevented them from defending it? In the final section of the article, I propose a partial answer, as relevant to us as to our early modern forebears.

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Seventeenth century European societies were in many ways radically unjust. While there is now a broad consensus that the members of a state are entitled to equal political rights, early modern theorists lived in a world where most people—all women and many men, together with members of non-Christian religions and some Christian sects—were excluded from voting and political office. Where there is now a consensus that spouses should have the same basic rights regardless of their gender, early modern marriage laws subjected women to the power of their husbands. While slavery is nowadays held to be an appalling abuse, this was the era in which the European slave trade was established. These are troubling reflections. They distance us from our philosophical forebears whose sense of justice must, it seems, have been vastly different from and even inferior to our own. They may even prompt us to wonder why we should study them. What is to be gained from trying to understand the attitudes of people whose ways of life were shockingly unjust?

Seductive as these doubts may be, I aim to show that they are not decisive. The early modern philosophers whose work I shall discuss thought deeply about what justice is and about the virtues that enable us to live justly. For them, understanding justice was not only a theoretical project—a matter of articulating distributive norms that could in principle be implemented. They were equally concerned with practical questions about the qualities we need to cultivate if we are to be capable of making just judgments. How can we become more just? The answers they give, as I argue in the concluding section of this article, are a source of inspiration and at the same time contain a warning. Inspiringly, they offer sophisticated insights into habits and dispositions that hold back our understanding and block our ability to act justly. Here are ideas from which we can learn. By way of warning, they show how taxing it is to act on these insights and how easily we fall short of them. While identifying limitations within early modern conceptions of justice may be relatively straightforward, identifying comparable shortcomings in our own attitudes is arguably less so. Early modern philosophical culture offers us a mirror in which to examine our own failures to practice justice.

In Section 1, I examine what was regarded as the highest standard of justice; the standard of equity against which civil laws were assessed. I distinguish two influential and overlapping conceptions of equity, one organized around the idea of natural equality, the other around proportional distributions of harms and benefits. I show that both interpretations were applicable to social as well as legal arrangements, and that each was used to license significant forms of inequality. Because it is often difficult to

judge whether a distribution is equitable, the arbitrators who made such decisions needed to have appropriate skills and virtues, and in Section 2, I consider what these were held to be, and how would-be judges were meant to acquire them; partly, I suggest in Section 3, by drawing on a popular genre of works about reasoning. Texts such as Locke's *On the Conduct of the Understanding* contain thought-provoking and sometimes profound advice about how to become sufficiently open-minded to appreciate the limitations of entrenched interpretations of equity. Section 4 draws attention to a number of unsuccessful challenges to the inegalitarian conceptions of equity that dominated early modern life. In Section 5, I turn to ask what we can learn from them.

1. CONCEPTUALIZING JUSTICE

When early modern writers discuss distributive justice—the just distribution of burdens and benefits among individuals and social groups—they begin from the classical adage that justice consists in giving each their due. Writing in 1531, Thomas Elyot seconds the view of the ancient civilians,[1] that "justice is a will perpetual and constant, which gives to every man his due."[2] For the jurist Jean Bodin, writing in the 1570s, it is "the right division of . . . that which of right unto every man belongeth."[3] According to Thomas Hobbes's *Leviathan* of 1651, "justice is the constant will of giving every man his own."[4] At one level, this adage is a claim about civil law. A system of civil law is just when, judged by its own standards, it gives each their due. At another level, it is a claim about social mores, which are held to be just or equitable when they conform to shared expectations about what is due to whom. At a third level, however, these legal and social distributions of powers derive their legitimacy from an independent rational principle of equity, against which they can be assessed. Equity in this sense specifies whether a distribution is fair or reasonable—whether it gives people what is "really" due to them. As Hobbes explains, giving each man what in reason belongs to him "is called equity or distributive justice," and as other

[1] That is, the Roman lawyers.

[2] Sir Thomas Elyot, *The Governor* (1531), ed. S. E. Lehmberg (London: Dent, 1962), III.1, p. 159. Hereafter *G.*

[3] Jean Bodin, *The Six Bookes of a Commonweale* (1606), ed. Kenneth Douglas McRae (Cambridge, MA: Harvard University Press, 1962), 6.vi, p. 755. Hereafter *SBC.*

[4] Thomas Hobbes, *Leviathan* (1651), ed. Edwin Curley (Hackett: Indianapolis, 1994), XV.3. Hereafter *L.*

writers sometimes add, law without equity is like a body without a soul.[5] There is thus a distinction between civil justice and this sense of equity.[6] Civil laws determine what is just and unjust within a particular jurisdiction, but whether these laws are equitable is a further question.

If the principle of equity is to be useful in philosophical, legal, or social arguments, it needs to be filled out. What *is* really due to whom? One enduring answer aligns equity or distributive justice with the Golden Rule. To cite Elyot again, a person "receives and honours justice" when they "do the same thynge to an other, that [they] woldest have done to them."[7] A century later, Hobbes reiterates this view: people should be contented with as much liberty against others as they would allow others against themselves.[8] However, whilst the Golden Rule is widely invoked, its interpretation is also controversial. Two dominant understandings of it run through early modern discourse: the view that equitable distributions must respect our common humanity and the view that they must be proportionate.

According to the first view, equity consists in respecting the law of nature, which requires us to treat one another as natural equals. This is the principle of equity to which civil law should answer. To illustrate this outlook, we can turn again to one of its most interesting and influential defenders, Thomas Hobbes, for whom the nature and extent of our natural equality is rooted in our shared vulnerabilities and dispositions. On the one hand, we have common needs; human beings can only "live and live well" if they have the right "to govern their bodies, to enjoy air, water, motion and ways to go from place to place."[9] On the other hand, human beings care so deeply about certain things that they will not agree to live without them. "Of things held in propriety," Hobbes explains, "those that are dearest to a man are his own life and limbs; and in the next degree (in most men) those that concern conjugal affection; and after them riches and means of living."[10] To escape the turmoil and violence of the state of nature we need to recognize that, because these needs and desires are such fundamental aspects of human life, no one can be expected to give up their claim to them. If we are to transition to a more secure existence within the state, we must be willing to treat other people as our natural equals and abide by

[5] Hobbes, *L* 15.24; see also Bodin, *SBC* 6.vi, p. 764.

[6] Compare Bradin Cormack, *A Power to do Justice* (Chicago: University of Chicago Press, 2007), 103.

[7] Elyot, *G*, III. iii, p. 164.

[8] Hobbes, *L* XIV.5.

[9] Hobbes, *L* XV.22.

[10] Hobbes, *L* XXX.12.

laws that reflect our shared humanity.[11] Civil law must guarantee our basic needs and protect each of us from violence to our persons, violation of conjugal honor, forcible rapine, and fraudulent surreption of our goods.[12]

Hobbes spells out this conception of equity as an aspect of the laws of nature. According to the ninth law, each person must "acknowledge other for his equal by nature."[13] Rather than proudly standing apart or arrogantly trying to reserve extra power or privileges for themselves, people must treat others as their equals in all their dealings.[14] Respecting the foundation of civil justice, they must "perform their covenants made,"[15] and as the eleventh law reminds us, judges must deal equally with those who come before them.[16] In Hobbes's view, conforming to these natural laws, which "specify what is good and evil in the conversation of mankind," is a demand on our rationality.[17] If we want to live peacefully and securely, we need to treat one another equitably by devising civil laws that respect our natural equality, a truth summarized and made accessible in the Golden Rule. "Yet to leave all men inexcusable, [the laws of nature] have been contracted into one easy sum, intelligible even to the meanest capacity, and that is Do not that to another which thou wouldst not have done to thyself."[18]

The same conception of equity is defended by theorists who lay greater stress on the divine authority of the Law of Nature. To cite a familiar case, John Locke argues in the *Second Treatise* that, by giving us natural rights to life, liberty, and property, God has made us fundamentally equal. Furthermore, the law of nature demands that we acknowledge this equality by respecting the rights of others just as they respect ours, and by punishing violations proportionately. This, Locke explains, is the rule of "reason and common equity, which is that measure God hath set to the actions of men, for their mutual security."[19] When the rule is implemented within the state, it gives rise to civil laws and penalties that

[11] On Hobbes's conception of equality see Kinch Hoekstra, "Hobbesian Equality," in *Hobbes Today: Insights for the 21st Century*, ed. S. A. Lloyd (Cambridge, Cambridge University Press, 2013), 76–112.

[12] Hobbes, *L* XXX.12.

[13] Hobbes, *L* XV.21. See J. Olsthoorn, "Hobbes's Account of Distributive Justice as Equity," *British Journal for the History of Philosophy* 21, no. 1 (2013): 13–33.

[14] Hobbes, *L* XV.21–22.

[15] Hobbes, *L* XV.1.

[16] Hobbes, *L* XV.23.

[17] Hobbes, *L* XV.38.

[18] Hobbes, *L* XV.35.

[19] John Locke, "Second Treatise of Government" (1689), in *Two Treatises of Government*, ed. Peter Laslett (Cambridge: Cambridge University Press, 1998), II. 8. Hereafter *ST*.

answer to our natural equality and, by doing so, "tend to the preservation of the whole."[20]

A second strand of theorizing takes a different approach, grounding the notion of equity on Aristotle's claim that benefits and burdens are distributed justly when they are distributed proportionately. In cases of commutative justice, Aristotle argues, the ratio to which a distribution conforms should be arithmetical, so that like is exchanged for like; but in cases of distributive justice the ratio should be geometrical, so that what a person gives or receives is proportional to something about them such as their social status, honor, or need. This view serves many early modern authors as a point of reference and is often criticized[21]; but some writers, including Bodin, make it central to their own analyses of equity. In Bodin's view, Aristotle was right to hold that justice must be proportionate; a rule is equitable when it protects and enhances the common good of a community by treating everyone proportionately or appropriately. He was wrong, however, to think that either arithmetical or geometrical proportion can capture what is equitable, since neither of these relationships, when translated into civil law, can adequately uphold the common good. Linking each of Aristotle's forms of proportion to a particular type of constitution, Bodin spells out their shortcomings.[22] Strict arithmetical justice, which treats everyone in the same way and is mainly practiced in democracies, favors the interests of the multitude by subjecting them to the same laws as the nobility, but simultaneously removes the legal privileges of the aristocracy and undermines their status. Feeling slighted and diminished, they are liable to resist the law, thus endangering the common good. A comparable problem afflicts geometrical justice. Civil laws answering to this form of proportionality are usually found in aristocracies, where they favor the nobility over the multitude by treating people in proportion to their status or rank. However, while such laws will tend to satisfy aristocrats, they will disadvantage the multitude who are liable to oppose them. Like its arithmetical counterpart, a geometrically proportionate law tends to conflict.

Holding to a broadly Aristotelian outlook, Bodin advocates a third, harmonical form of proportion, designed to overcome these deficiencies. Its success purportedly lies in acknowledging both equality (between the

[20] Locke, *ST* XV.171.

[21] See for example Hobbes, *L* XV.14; Henry More, *An Account of Virtue or Henry More's Abridgment of Morals put into English* (London, 1640). II.6.v–vii, p. 125–27. Hereafter *AV*.

[22] Bodin, *SBC* 6.vi, pp. 755–60.

members of a rank or class) and difference (between ranks or classes) and distributing burdens and benefits in a fashion that acknowledges the claims of each. Bodin envisages a harmonically proportionate monarchy where the law harnesses the strengths of one group to offset the weaknesses of another, treating each differently but at the same time binding them together for their mutual good.[23] Some implications of this scheme emerge in his discussions of marriage laws and proportionate punishment. Marriage laws, he argues, should not threaten differences of rank by allowing anyone to marry anyone, nor should they consolidate these differences by only permitting marriage within a single rank. Instead, men and women of different ranks should be allowed to marry when their union will benefit each group, and by implication benefit society as a whole. "And indeed, it best agreeth with harmonical proportion if a rich base woman marry with a poor gentleman, or a poor gentleman with a rich common person. . . ."[24] Turning to punishment, Bodin firmly rejects the view that people should be treated alike, "for there is nothing more unjust than the perpetual equality of fines and punishments." Instead, magistrates should be sensitive to social differences and punish proportionately. They should fine the rich more than the poor,[25] punish men more harshly than women,[26] reward captains more than ordinary soldiers,[27] and let virtuous people off lightly when this will encourage future obedience.[28] Summing up his view in an extended metaphor that obscures the differences he is recommending, Bodin portrays an equitable community as a feast, where the host encourages the development of new friendships between his guests by placing a rich person next to a poor one, a reserved person next to someone confident and outgoing, and so on. Taken as a whole, this strategy generates "a beautifulnesse of harmonicall order" and the profit of sweetness and love.[29] Equitable laws, as Bodin conceives of them, therefore need not prescribe equal treatment. On the contrary, they mete out radically divergent rights to the members of different social ranks.

This legal outlook merges with a broader conception of equity that applies to the social practices of everyday life. The question of what is due

[23] Bodin, *SBC* 6.vi, p. 760.
[24] Bodin, *SBC* 6.vi, p. 758.
[25] Bodin, *SBC* 6.vi, pp. 770, 775.
[26] Bodin, *SBC* 6.vi, p. 776.
[27] Bodin, *SBC* 6.vi, p. 760.
[28] Bodin, *SBC* 6.vi, p. 772–73.
[29] Bodin, *SBC*, 6.vi. p. 759.

to whom looms large, for example, in the work of Antoine de Courtin, whose *Nouveau traité de la civilité* of 1671 was an immediate bestseller in English translation.[30] Appealing to a range of Ciceronian virtues, Courtin defines civility as "the modesty and decorum to be observed by everyone according to his condition."[31] Civility requires individuals to behave according to their age and rank, to respect the quality of the people they encounter, to take account of what is customary, and to be suited to time and place.[32] There are admittedly customs that apply to everyone: "if a man does not re-salute a person which hath saluted him with his hat, though his condition be never so mean, he will be looked upon as uncivil and ill-bred, let his extraction be never so great."[33] But even these are finely attuned to social difference. To count as modest, and thus civil, a man must be able to gauge whether the people he meets are his inferiors or superiors and must know how to treat them with the right degree of familiarity or respect.[34]

Of the two conceptions of equity we have considered—one grounded on natural law, the other on proportion—the first may seem more compelling than the second. While theorists such as Bodin designedly embrace a view of equity inflected by local custom, natural law theorists appeal to a universal standard. This is certainly the view of Hobbes, who disparages appeals to convention. "Ignorance of the causes and original constitution of right, equity, law and justice disposeth a man to make custom and example the rule of his actions . . . like little children, that hath no other rule for good and evil manners but the correction they receive from their parents and masters."[35] Among adults, decisions about what constitutes an equitable distribution should not be based on local habits and expectations, but on a rational grasp of the rights and duties that delineate our natural humanity. To some extent, this position goes with a commitment to equality. As Hobbes also argues, a rational understanding of equity implies that justice should "be equally administered to all degrees of people, that as well the rich and mighty as poor and obscure persons may be righted of the injuries done to them."[36] But this commit-

[30] Antoine de Courtin, *Nouveau traité de la civilité qui se practique en France parmi les honnêtes gens* (1671), trans. *The Rules of Civility or, Certain Ways of Deportment Observed Amongst All Persons of Quality upon Several Occasions* (1671). Repr. 1673, 1675, 1678, 1685. Hereafter *RC*.

[31] Courtin, *RC*, ch. 1, p. 4.

[32] Courtin, *RC*, ch. 2, p. 6.

[33] Courtin, *RC*, ch. 3, p. 17. See also Teresa Bejam, "Hobbes and Hats," *American Political Science Review* (2023), pp. 1–14.

[34] Courtin, *RC*, ch. 3, p. 17.

[35] Hobbes, *L* XI.21.

[36] Hobbes, *L* XXX.15. See also Locke, *ST* XI.142.

ment is limited. Authors who ground equity in the law of nature do not by any means rule out the legitimacy of legislation that upholds customary differences of rank and status. In their eyes, there is, for example, nothing inequitable about denying women the property rights awarded to men, or using the law to exclude poorer classes from participation in political life. The law of nature does not specify that we have an equal right to property or political inclusion, and equity does not demand it.

Efforts to show that our natural equality can be reconciled with respect for social differences are also common in extralegal debate. In his *Enchyridion Ethicum*, translated as *An Account of Virtue*, Henry More contends that probity, or giving each person their due, requires us to act modestly or decorously by not displeasing others.[37] We must respect our common humanity by being affable, courteous, and considerate to all our neighbors; but "besides general decorum," we must also observe those "special acts, suited to every rank, age and condition of life." As More summarizes, it is part of natural justice or equity to pay everyone what by custom they may expect.[38]

A commitment to our natural equality is therefore compatible with laws and customs that give people radically differing powers and privileges. To give each their due, in early modern terms, is in practice to uphold and reproduce a range of stark social inequalities between rich and poor, aristocrats and commoners, women and men, masters and servants, the enfranchised and disenfranchised, the free and the enslaved. Locke is particularly concerned to underline this point. "Though I have said that all men by nature are equal, I cannot be supposed to understand all sorts of equality: age or virtue my give man a just precedency: excellency of parts and merit may place others above the common level: birth may subject some, and alliance or benefits others, to pay an observance to those to whom nature, gratitude or other respects may have made it due; and yet all this consists with the equality in which all men are in. . . ."[39] Beyond respecting everyone's rights to life, liberty, and property (which now emerge as relatively limited entitlements), an equitable commonwealth is free to decide how to distribute burdens and benefits among its members in the name of upholding the common good.[40] A question therefore arises. Who is going to make these decisions, and what qualifications fit them to do so?

[37] More, *AV* II. 8.xi, p. 137. For full reference see n. 21.
[38] More, *AV* II. 8.xi, p. 138.
[39] Locke, *ST* VI.54.
[40] Locke, *ST* XI.131.

2. THE BURDEN OF ARBITRATION

The task of deciding whether a distribution is equitable rests on the shoulders of an arbitrator. As Hobbes puts the point, distributive justice, or equity as it is more properly called, is the justice of an arbitrator who is trusted to distribute to every man his own.[41] Arbitration is not, however, a ubiquitous feature of the legal process; for the most part, existing civil laws are taken to be equitable and go unquestioned, though it is of course possible for the principle of equity and the civil law to drift apart, as when laws imposed by a tyrant terrorize a people. Hobbes draws attention to this problem. While the tyrant's laws may be just in the sense that they have been properly enacted by a sovereign whose decrees, in Hobbes's view, determine the parameters of justice,[42] they may nevertheless be iniquitous.[43] Judged against the conception of equity embodied in the law of nature, they are a failure.[44] To restore equity in these circumstances one would need to overhaul the law and introduce major reforms; but in most societies, it is assumed, the aim of equitable arbitration is simply to tidy up the law and ensure that it is fit for use.[45]

Since no legislation, however careful, can anticipate all the questions to which a law may give rise or foresee all the circumstances in which penalties for violating it will have to be awarded, puzzling cases are bound to emerge. To resolve them, arbitrators must have discretion to augment or correct the law when equity demands it, steering between the danger of applying the law too rigidly and the risk of taking it too much into their own hands. Locke stresses this discretionary aspect of law. Where legislation is equitable, a magistrate's duty is to apply it; but since the point of law is to "protect us from bogs and precipices,"[46] there is also a place for arbitrators whose job is to consider whether the law as it stands is in fact equitable. Does it, for example, ask people to do things that are not in their power?[47] If so, a legal authority may remit it. Are the penalties attached to it unduly burdensome? If so, an authority may mitigate its severity or pardon offenders.[48] Does equity even

[41] Hobbes, *L* xv.15.
[42] Hobbes, *L* xxvi.11.
[43] Hobbes, *L* xviii.6.
[44] Hobbes, *L*, xv.23.
[45] See Cormack, *The Power to do Justice*, 110–11; Bodin, *SBC* 3.v, p. 333.
[46] Locke, *ST* VI. 57.
[47] Locke emphasizes, for example, that "conscience is tenderly to be dealt with." See John Locke, "First Tract on Government," in *Political Essays*, ed. Mark Goldie (Cambridge: Cambridge University Press, 1997), 22.
[48] Locke, *ST* XIV.160.

dictate that an established law should be overridden? If so, it may be set aside. It may be equitable, for example, to pull down someone's house to stop a fire, change electoral boundaries,[49] or, as Locke argues, prorogue a law in cases of national emergency.[50] The same idea extends to social relations, where, for example, an equitable shopkeeper may override her strictly contractual obligations and give her poorer customers a bit extra. In using these powers, arbitrators exercise what is usually called discretion or prerogative. In Locke's words, "this power to act according to discretion for the public good, without the prescription of the law, and sometimes even against it, is that which is called prerogative."[51] It "can be nothing but the people's permitting their rulers to do several things of their own free choice, where the law was silent, or sometimes too against the letter of the law, for the public good."[52]

As Locke implies, the ultimate arbiters of equity within the state are sovereigns. (In the English equity court of Star Chamber, the king-in-council acted as judge.) But the people who mainly did the work of adjusting laws and penalties were legal officials, whose powers varied with their experience and rank. An ordinary justice of the peace might exercise limited discretion by reducing a sentence in a specific case, but explicit pleas for equity were considered by more senior magistrates in specialized courts. In practice, the authority of these judges derived from their position, however it had been attained; but in both legal and philosophical writings, the capacity to reach equitable judgments is treated as a complex skill. For Bodin, acquiring it is a continuing aspect of a magistrate's training. To cultivate and pass down a shared sense of what is equitable or harmonically proportionate, judges should become members of associations or colleges. By eating together, getting to know one another, and discussing problematic cases, they will be exposed to a wider range of arguments and gain opportunities to revise the opinions on which their judgments are based.[53]

Learning to be equitable, as Bodin presents it here, is primarily a matter of exploring the limits and possibilities of the law; but there is clearly a danger that judges will be blind to the benefits of legal reform or adjust legislation to achieve particular outcomes. Rather than the law bending to the principle of equity, equity will bend to the law.[54] Margaret Cavendish

[49] Locke, *ST* XIII.157–58.

[50] Locke, *ST*, IX.159, IX.160.

[51] Locke, *ST* XIV.160.

[52] Locke, *ST* XIV.164. On discretion in sentencing see Cynthia Herrup, "Law and Morality in Seventeenth-century England," *Past and Present* 106 (1985): 102–23.

[53] Bodin, *SBC* 4.iv, p. 487.

[54] Cormack points out that this problem is raised in Thomas More's *Utopia* by the figure of Hythloday. See Cormack, *A Power to do Justice*, 111–12.

gives a sense of the kind of stalemate that may arise in one of her unresolved legal orations, "A Widow's Cause Pleaded before Judges in the Court of Equity," where a widow whose rich husband has left her only a pittance pleads for redress. "It is against conscience and equity that the mother that bred and bore her children . . . should be left poorer than the children that were born from her." Not at all, responds the Defendant. "There is no reason, equity, nor conscience that the widow should carry away so great a part of her husband's estate as to impoverish his children and ruin his family."[55]

Theorists of equity are aware of these risks and seek to minimize them by adding that good arbitrators must have certain character traits. Magistrates, Bodin contends, should excel in integrity and wisdom and comport themselves with gravity and severity.[56] Judges, according to Hobbes, should be upright and impartial, equipped with strong powers of natural reasoning and the capacity to meditate on a problem. They should be contemptuous of riches and preferment, able to step back from their passions, and should possess "patience to hear, diligent attention in hearing, and memory to retain, digest and apply what [they have] heard."[57] These qualities are clearly valuable in courts of law. They conjure a portrait of an intelligent, impartial, steadfast, and attentive judge, capable of looking beyond the letter of legislation, sensitive to the exigencies of particular cases, and beyond corruption. But as well as playing a vital role in images of equitable legal arbitration, these qualities also evoke a broader sense of the virtues on which all just or equitable judgments, legal or otherwise, depend. By endowing arbitrators with this range of virtues, theorists draw attention to the continuity between a good judge in the legal sense and someone who is equipped to understand and apply the principle of equity wherever just distribution is at issue. A bent for reasoning and meditation, good concentration, upright resistance to corruption, and the power to control one's passions are, after all, integral to early modern images of wisdom, so that the virtues of an arbitrator blend smoothly into those of a wise philosopher who is skilled at putting their theoretical knowledge into practice. Making equitable judgments is not a matter of following rules. It rests on the exercise of a complex range of abilities, which in turn flow from certain virtues.

[55] Margaret Cavendish, "Orations of Divers Sorts Accommodated to Divers Places," in *Political Writings*, ed. Susan James (Cambridge: Cambridge University Press, 2003), Oration 50, pp. 180–81. Henceforth *ODS*.

[56] Bodin, *SBC* 3.v, p. 340–41.

[57] Hobbes, *L* xxvi.28. See also *L* xv.24.

3. TRAINING ARBITRATORS

Where, though, are wise judges to be found? Rather than trusting to luck and hoping that equitable arbitrators will emerge, early modern authors put their minds to the question of how they should be trained. How is a dedication to justice to be inculcated? How is discretion to be taught? Their attempts to answer these questions are embedded in a wider literature about the process of learning to be a good thinker in both a theoretical and a practical sense. While these writings are not specifically concerned with the cultivation of the capacity to be an equitable judge, they nevertheless provide rich accounts of the intellectual and psychological habits that were held to distort our understanding of equity and explain how to set about correcting them. Alongside an exemplary image of a virtuous arbitrator, early modern audiences therefore had access to sophisticated accounts of the processes of critical thinking and epistemic training that equitable judges needed to undergo.

To indicate how this literature is relevant to the training of arbitrators, I shall concentrate on a text by Locke: *On the Conduct of the Understanding*.[58] This is one of many seventeenth-century discussions of the limitations of our understanding and focuses on three defects in the way we reason: some of us rarely reason at all; we mistakenly construe our passions as reasons; and we take too narrow a view of the questions we are dealing with.[59] Abstract as this may sound, Locke construes reasoning broadly, as a means to good judgment as well as knowledge. To learn to reason is to cultivate a mixture of theoretical and practical skills, including deduction but also discretion. It is to learn to pay attention to logical relations, but also to social ones. However, since none of these skills come naturally, we must be willing to train ourselves in all aspects of reasoning, just as we train ourselves to become doctors or dancers.[60] To illustrate the many problems standing in our way, Locke sketches the figure of a local magistrate—a country gentleman who, after failing to learn anything at university, retires to the shires where he does nothing but drink and hunt with a group of dissolute companions. In due course, helped by "the strength of his purse and party," he becomes a magistrate and dispenses notable decisions from the bench.[61] This vignette epitomizes the vices that reasoning is supposed to extirpate—the magistrate is ignorant, insular, stubborn,

[58] John Locke, *On the Conduct of the Understanding*, ed. John Yolton (Bristol: Thoemmes Press, 1993). Hereafter *CU*.
[59] Locke, *CU* §3, p. 7.
[60] Locke, *CU* §4, pp. 16–17.
[61] Locke, *CU* §3, p. 13.

complacent, partial, presumptuous, prejudiced, and hasty. At the same time, it implicitly draws attention to the virtues that a more equitable judge would possess.

Locke's analysis of the hindrances to understanding revolves around the master vice of prejudice.[62] Prejudice is partly the result of lack of experience, so that people who spend their time out and about in the world are usually less afflicted by it than those whose existence is narrowly circumscribed. City porters tend to be more knowledgeable and open minded than village laborers, and compared to the local magistrate, "an urban coffee-house gleaner is an errant statesman."[63] Prejudice is dispelled by wide-ranging reading and conversation, so that those who "discuss with but one sort of men and read but one sort of books" are not only prone to poor judgment but are liable to overestimate their own understanding.[64] They risk becoming like the inhabitants of the remote Marian islands "who thought themselves the only people of the world."[65]

Superficially straightforward measures such as these are among Locke's main remedies for insularity and complacency. Learning to regard one's beliefs as provisional judgments, subject to revision in the light of experience, is an essential antidote to prejudice.[66] But maintaining this attitude is not easy. We are attached to our convictions, and our tendency to hold on to them is encouraged by social practices in which doubt or hesitation are regarded as failings. Locke focuses on the case of religion, but his warning is a general one. The prejudiced country magistrate who will not hear his opinions gainsaid suffers from the same pathology as a zealot, so "muffled up in the zeal and infallibility of his own sect" that he refuses to "enter into debate with a person that will question any of those things that to him are sacred."[67] For the zealot, the least show of doubt is a sign of lukewarmness and apostasy, but other social practices are equally opposed to hesitation. In a legal trial, for example, where the pressure to reach a verdict is almost overwhelming, judges and juries may be expected to set aside their doubts. In happier circumstances, Locke implies, the process of reaching rational judgments is untrammeled by timetables or dogmas. Reasoners are able to go at their own pace as they question their more stubborn beliefs and open themselves to

[62] Locke, *CU* §10, p. 42.
[63] Locke, *CU* §3, p. 13.
[64] Locke, *CU*, §3, p. 9.
[65] Locke, *CU*, §3, p. 10.
[66] Locke, *CU*, §6, pp. 21–22; §7, p. 31.
[67] Locke, *CU*, §2, pp. 13–14.

other opinions and attitudes. In fact, since misjudgment thrives on our precipitancy—our tendency to jump to conclusions—it is important to learn to reason at a manageable speed.[68]

By cultivating good intellectual habits, Locke argues, we can develop more open and inquiring outlooks, designed to mitigate our epistemological weaknesses. To become a more equitable arbitrator, one must keep finding out how different kinds of people see the world and reflecting on their viewpoints. One must keep questioning and testing one's convictions and must make time for these forms of self-education. There is, however, a further danger to be avoided. As we develop a facility for particular kinds of reasoning, whether mathematical or empirical, deductive or probabilistic, we are liable to become too attached to them and apply them too widely. For example, Locke claims, philosophers mistakenly tend to introduce "lines and diagrams into the study of divinity" or to treat religion and morality "in the terms of the laboratory."[69] They underrate the range of methods and approaches that are needed to understand different kinds of subject matter. Viewing many aspects of the world through a single investigative lens can itself be a form of partiality or prejudice, made more dangerous by the fact that it tends to conceal itself. The "reasonings, interpretation and language" of a form of inquiry that we trust will "make all chime that way," so that its findings appear persuasive.[70] It will determine which variables we regard as relevant, shape what we see or hear and make certain kinds of evidence compelling, simultaneously blinding us to alternatives.

When the standards and procedures in which arbitrators are trained exercise such a hold over them as to "make all chime that way," this will block their ability to see beyond their confines. To appreciate what a failure this would be, we need only remind ourselves that the point of equity in legal contexts is to surpass existing laws and correct their limitations. Questions about equity arise at the boundary between a legal mode of reasoning and a conception of natural justice with its own investigative and epistemological norms. Rather than allowing one to dominate the other, an equitable arbiter must be sensitive to the claims of each approach and find a way to bring them into conversation. The same applies when issues of equity arise in moral or political contexts. Arbitrators who have trained themselves to avoid prejudicial judgments aim to balance the demands of natural justice against those of custom. To judge impartially or uprightly

[68] Locke, *CU*, §24, p. 77.
[69] Locke, *CU* §18, p. 58.
[70] Locke, *CU* §33, p. 107.

in the fullest sense, one must be alert to different ways of addressing a question.

A rational temperament, as Locke portrays it, is in many ways an open one. Becoming a better reasoner is in large part a matter of broadening one's knowledge and learning to handle it more flexibly. If *On the Conduct of the Understanding* is, among other things, a training manual for equitable judges, it urges them to cultivate these skills. But is there any evidence that this program was successful? Where, in seventeenth-century society, is the equity of existing social or political arrangements called into question?

4. CONTESTATIONS

As we have seen, many theorists take it for granted that the demands of equity are satisfied by highly unequal distributions; but their conclusions do not go unchallenged. The question of what is due to whom is debated within political and religious movements, in philosophy and in fiction, so that early modern societies, like our own, are haunted by conflicting images of equity. While some appeals to it uphold the status quo, others underwrite demands for radical change.

Critics of existing mores sometimes appeal to equity to draw attention to the gap between legal principles and practice. Despite the fact that theorists such as Hobbes regard equality before the law as a fundamental aspect of equitable treatment, litigants continue to complain about inequitable discrimination against the poor. Here, for example, is the Quaker Daniel Baker, writing in 1650: "Is it not the honour of a good magistrate wisely, and with a good understanding, to make diligent enquiry and search into the nature or ground of a matter or controversy between a man and his neighbour, that no true and sound judgment may be ministered without respect for persons, and that the cause of the poor may be heard as well as the rich; and so judgment or sentence to be passed according to equity and mercy."[71] To resolve a case equitably, a judge must take the trouble to investigate the context of the disagreement, without favoring the claims of the rich.

More consequentially, perhaps, the equity of the law is challenged in constitutional contexts, notably in the struggles between king and

[71] Daniel Baker, "Letter to the Major and Aldermen of the City of Worcester," in *The Guiltless Cries and Warnings of the Innocent Against Injustice, Oppression and Cruelty* (London, 1670). See also *The Call of the Harmless and Oppressed for Justice and Equity . . . from the People of God Who Are Called Quakers* (London, 1665).

Parliament at the time of the English civil war. According to the Leveller John Lilburne, "the Law taken abstract from its original reason and end, is made a shell without a kernel, a shadow without a substance, and a body without a soul: It is the execution of Laws according to their equity and reason, which (as I may say) is the spirit that giveth life to Authority, the letter kills."[72] When legislation becomes detached from the standard of equity it loses legitimacy. Richard Overton, another Leveller, also appeals to equity when he condemns the House of Lords for violating the rights of members of the House of Commons and asks the Commons for redress. "To every Individual in nature, is given an individual property by nature, not to be invaded or usurped by any: for every one as he is himselfe so he hath a self propriety, else could he not be himself, and on this no second may presume to deprive any of, without manifest violation and affront to the very principles of nature, and of the Rules of equity and justice between man and man."[73] Just as the Lords can equitably oppose the tyrannies and oppressions of the king, Overton argues, so the Commons has a duty to oppose the Lords when they fail to protect natural justice. "And therefore Sir, in reason, equity and justice, we deserve no less at your hands. . . . For by nature we are but the sons of Adam, and from him have derived a natural propriety, right and freedom, which [is all] we require. And how in equity you can deny us we cannot see."[74]

For Overton, responsibility for restoring equity lies with the representatives of the people. For other Levellers, however, equity prescribes a shift of power to the people themselves. Take, for example, the moment in the Putney Debates when two officers of the New Model army, Colonel Thomas Rainborough and the Commisar General Henry Ireton, discuss the proper extent of male suffrage. To Ireton, it is obvious that the franchise should be restricted to men with property or "a stake in the kingdom." Rainborough disagrees. "And therefore I say that it must be either the law of God or the law of man that must prohibit the meanest man in the kingdom to have this benefit as well as the greatest. I do not find anything in the law of God that a lord shall choose twenty burgesses and a gentleman but two, or a poor

[72] John Lilburne, "The Legal Fundamental Liberties of the People of England Revived, Asserted and Vindicated" (London, 1648). See also Lilburne, "On the 150th page" (1645), in *The English Levellers*, ed. Andrew Sharp (Cambridge: Cambridge University Press, 1998), 3–8.

[73] Richard Overton, "An Arrow Against All Tyrants" (1646), in Sharp, *The English Levellers*, 55.

[74] Overton, "An Arrow Against All Tyrants," 57.

man shall choose none. I find no such thing in the law of nature."[75] An equitable polity will defend universal male suffrage.

Alongside these overtly political challenges, voices were raised against other entrenched inequalities. As recent research has repeatedly shown, seventeenth-century women writers offered a slew of arguments for the natural equality of women and men and the inequity of women's subordination. In the designedly hyperbolical words of one of Cavendish's female orators, women are treated like animals. "We live and die as if we were produced by beasts rather than by men . . . ; the truth is we live like bats and owls, labour like beasts and die like worms."[76] Or in Judith Drake's more sober account, nothing makes one party slavishly depress another except their fear that the latter may dominate them. "This is our case. For men, being sensible as well of the abilities of mind in our sex, as of the strength of body in their own, begin to grow jealous that we, who in the infancy of the world were their equals and partners in dominion, might in process of time . . . become their superiors; . . . and therefore began in good time to compel us to a subjection nature never meant . . . and to take the benefit of her kindness from us."[77]

These attempts to delegitimize certain aspects of patriarchal institutions on the grounds that they inequitably fail to respect the natural equality of men and women are echoed in the emerging tradition of opposition to colonial slavery. Here too we find writers who protest against violations of the humanity of slaves that amount to treating them as beasts. For people living in England, a jolting source of information about the sheer horror of Caribbean slavery was a short text, *The Complaints of the Negro Slaves against the Hard Usage and Barbarous Cruelties Inflicted upon Them*, published in 1684 by Thomas Tryon, who had lived during the 1660s in Barbados.[78] One of the many abuses itemized in the slave's authorial voice is extreme overwork. "Whereas a good man is merciful even to his beast, they extend no compassion to us who are of the same species as themselves, but slave us on in continual drudgery till our heart-strings crack and our nerves are enfeebled and our marrow is

[75] "Extract from the Debates at Putney," in Sharp, *The English Levellers*, 106. As Sharp points out, none of the Levellers contemplated the possibility of female suffrage; but they did believe that male consent was the only basis of legitimate government, and some advocated universal male suffrage. See Sharp, *The English Levellers*, xv–xvi. See also Teresa Bejam, "What Was the Point of Equality?" *American Journal of Political Science* 66, no. 3 (2022): 604–16.

[76] Cavendish, *ODS*, Oration 129, p. 248.

[77] Judith Drake, *An Essay in Defence of the Female Sex* (London, 1696), 20–21.

[78] On Tryon, see Philippe Rosenberg, "Thomas Tryon and the Seventeenth-Century Dimensions of Antislavery," *The William and Mary Quarterly* 61, no. 4 (2004): 609–42.

exhausted and our bones fall under their burdens and our spirits are consumed and our souls, in weariness and anguish, wish for death rather than life."[79] Another is the inequity of masters who punish slaves for disobeying a system of laws that they themselves do not take seriously, as, for example, when a half-starved slave who stole food was whipped by his master, not for stealing but for getting caught. "Is not this rare Christian equity, to beat us unmercifully for that which they themselves do but laugh at and make a jest of."[80] Equity is incompatible with arbitrary punishment. A third appeal to equity is directed toward slave owners. Treating their slaves more equitably would relieve their consciences; at the same time, it would be financially beneficial, because slaves would be able to labor for longer. "Which might teach all our masters to . . . use pity, goodwill and equity in their dealings with us, whereby they would not only preserve a good conscience void of offence . . . but also might increase their outward wealth."[81] Here we find a distorted invocation of equity as conducive to the common good—in this case the purportedly common good of masters and slaves.

5. LEARNING FROM THE EARLY MODERN CASE

The redistributions of power envisaged in these various pleas for equity were clearly not beyond the bounds of seventeenth-century imagination. Nor were such appeals completely isolated—they were, after all, eloquently voiced in print. None of them, however, proved sufficiently persuasive to gain traction and generate reform. It would be generations before slavery was made illegal, husbands lost the legal power to dominate their wives, and the vote was extended to all male citizens, let alone all female ones. In practice, these inequalities continued to be regarded as equitable and were largely resistant to change.

Their resilience contains an obvious moral lesson, as relevant to us as to our early modern forebears: it is extremely difficult to interrogate our existing conceptions of equity, and even more difficult to put the fruits of this kind of self-examination into practice. Locke and his contemporaries offer profound insights into the problems we face, anticipating some of the most widely discussed claims of recent social epistemology. The

[79] Thomas Tryon, "The Complaints of the Negro Slaves against the Hard Usage and Barbarous Cruelties Inflicted upon Them," in *Friendly Advice to the Gentlemen Planters of the East and West Indes* (London, 1684), 88. Hereafter Tryon.

[80] Tryon, 102.

[81] Tryon, 141.

insistence that we need to learn to reason at the right pace could not be more relevant in an era when ideas, like capital, circulate ever more rapidly, and prefigures recent discussions about thinking fast and slow.[82] Locke's contrast between a country gentleman and a coffee house gleaner aligns an inquiring outlook with experience rather than social class, and reminds us, with Charles Mills and others, that privilege can block knowledge and dull our perceptions of inequity.[83] The same insight is still more forcefully voiced by Locke's critic, Mary Astell, in her discussion of the effects of women's subordination. "The mean and inconsiderable" she argues, "often stumble on truth when they seek not after her, but she is commonly kept out of the way and industriously concealed from the Great and mighty." In fact, because Truth does not treat the great and mighty "with so much ceremony and complaisance as their flatterers do" they tend to be "impatient when they meet with her."[84] Social privilege reinforces prejudice and undermines the impartiality on which equitable judgment rests.

Locke knows these dangers. Yet, with the benefit of hindsight, we can observe him letting opportunities to confront them slip by. Like the country magistrate he pillories, he does not always live up to the standards he recommends. The sign of this is not so much that he does not share our standards of equity as that he makes assumptions about what is equitable without pausing to consider them. They are so unproblematic, so taken for granted, as to be invisible. For example, to justify the right of a husband as opposed to a wife to make decisions about the common interests of a married couple, Locke simply asserts that men are naturally abler and stronger than women.[85] Can he find this claim unproblematic? Can he not envisage the possibility that a natural equality between men and women might govern arrangements within marriage? Can he really hold that this possibility does not merit discussion? To take a different case, can Locke be unaware that his commitment to natural justice is vitiated by the inclusion of chattel slavery in the constitution he helped to write

[82] See for example Teresa Brennan, *Exhausting Modernity: Grounds for a New Economy* (London: Routledge, 2000); Daniel Kahneman, *Thinking Fast and Slow* (London: Penguin, 2012).

[83] Charles W. Mills, "White Ignorance," in *Black Rights/White Wrongs: The Critique of Racial Liberalism* (Oxford: Oxford University Press, 2017), 49–71.

[84] Mary Astell, *A Serious Proposal to the Ladies* (London, 1694), Part II. ch. 3. iii. See also Ann Jessie Van Sant, "'Tis Better That I Endure': Mary Astell's Exclusion of Equity," in *Mary Astell: Reason, Gender and Faith*, ed. William Kolbrener and Michal Michelson (Aldershot: Ashgate, 2016).

[85] Locke, *ST* VII.82.

for the Carolinas?[86] Can he really think that it is equitable for colonists to own slaves? In both these instances, open-mindedness is overridden by an interpretation of equity enshrined in everyday life.

These limitations are not of course confined to Locke, and are no doubt paralleled by our own unquestioned commitments to inequities of various kinds. However, Locke does offer a further important insight into the habits of thought that prevent us from recognizing potentially equitable alterations in our ways of life. One of the satisfactions of reasoning, as he sees it, lies in imposing order. In place of the chaos of perceptions, memories, and affects that form the raw materials of thinking, we reason our way to a grasp of the world and ourselves that is relatively coherent and makes our lives more or less manageable. "Bright enough for our purposes," the order we find in natural processes and normative standards provides a sense of relief and comfort, but also an excited enjoyment in our own rational power to articulate and apply it.

In relation to these aspects of reasoning, the radical or indeed reactionary possibilities that haunt established conceptions of equity are both a challenge and a threat. In some cases, they can be accommodated within established legal or moral frameworks, but in others they remain recalcitrant, hovering around the edges of familiar patterns of reasoning and flickering in and out of social consciousness. We may not be completely unaware of them, any more than Locke is likely to have been completely unaware of Leveller demands for more inclusive political rights. But there is a gap between possessing this kind of awareness and knowing how to give transgressive possibilities due consideration. The social disruption they presage and the affective confusion they arouse often prompt us to shy away from them and, even when we register them, to resist the uncertainties they introduce. Attending to them may seem too nebulous and open ended a project to undertake, too alarming a departure from things we know how to handle. Orderly thinking, as Locke portrays it, takes account of relevant possibilities, organizing them into compelling arguments and manageable courses of action. But it is not attuned to the disorderly hauntings that unsettle established conceptions of equity and defy our habitual expectations. To acknowledge these, we need to be open to a kind of disorder—to the fractured understanding, glimpsed opportunities, and divided loyalties that go with greater insight into natural equality.

[86] *The Fundamental Constitutions of Carolina* (1669), Article 110, "Every Freeman of Carolina shall have absolute power and authority over his Negro slaves, of what opinion or religion soever."

Locke worries that making space for disorder would be regressive—a reversion to a childish form of thought, focused on streams of ideas that "draw the mind forward to take notice of the new."[87] There is something right about this anxiety. A person with an exceptional sensitivity to inequity would presumably be struck by things that others overlook, whether the appalling brutality with which slaves are treated or the resourcefulness of purportedly weak women. Like a child who has not yet been fully acculturated, they would "take notice of the new." Locke fears that a preoccupation with novel or surprising things smacks of immaturity and gets in the way of reasoning. But his argument suppresses the possibility that a fresh and open eye may be as revealing in social as in natural investigations. To perceive existing inequities, we arguably need to be willing to abandon custom and expectation and be capable of living with the disorder this entails. As well as being open-minded, we need to be open to changed institutions and different practices.

Again, these implications are not absent from early modern thinking. Hobbes gestures toward them when he identifies equitable or just action with the virtue of courage. "That which gives to human actions the relish of justice," he writes, "is a certain nobleness or gallantness of courage (rarely found) by which a man scorns to be beholden for the contentment of his life to fraud or breach of promise."[88] A courageous person will consistently acknowledge others as their natural equals by keeping their covenants, however difficult it may be to do so. To put it another way, they will not deviate from the demands of equity. Extending Hobbes's conception, we could perhaps say that the relish of justice in its fullest form is expressed in the courage to explore natural equality to its limits. Passing beyond the realms of social or political convention, truly equitable arbitrators must find the courage to go on reconsidering what equity asks of us and struggling to give each their due.

[87] John Locke, *An Essay Concerning Human Understanding*, ed. Peter N. Nidditch (Oxford: Oxford University Press, 1975), II.i.8.

[88] Hobbes, *L* XV.10.