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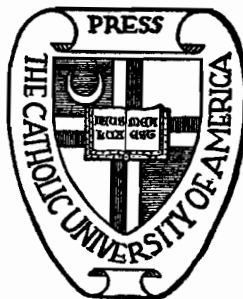
The History, Nature and Use of EPIKEIA in Moral Theology

by the

REV. LAWRENCE JOSEPH RILEY, A.B., S.T.L.

A DISSERTATION

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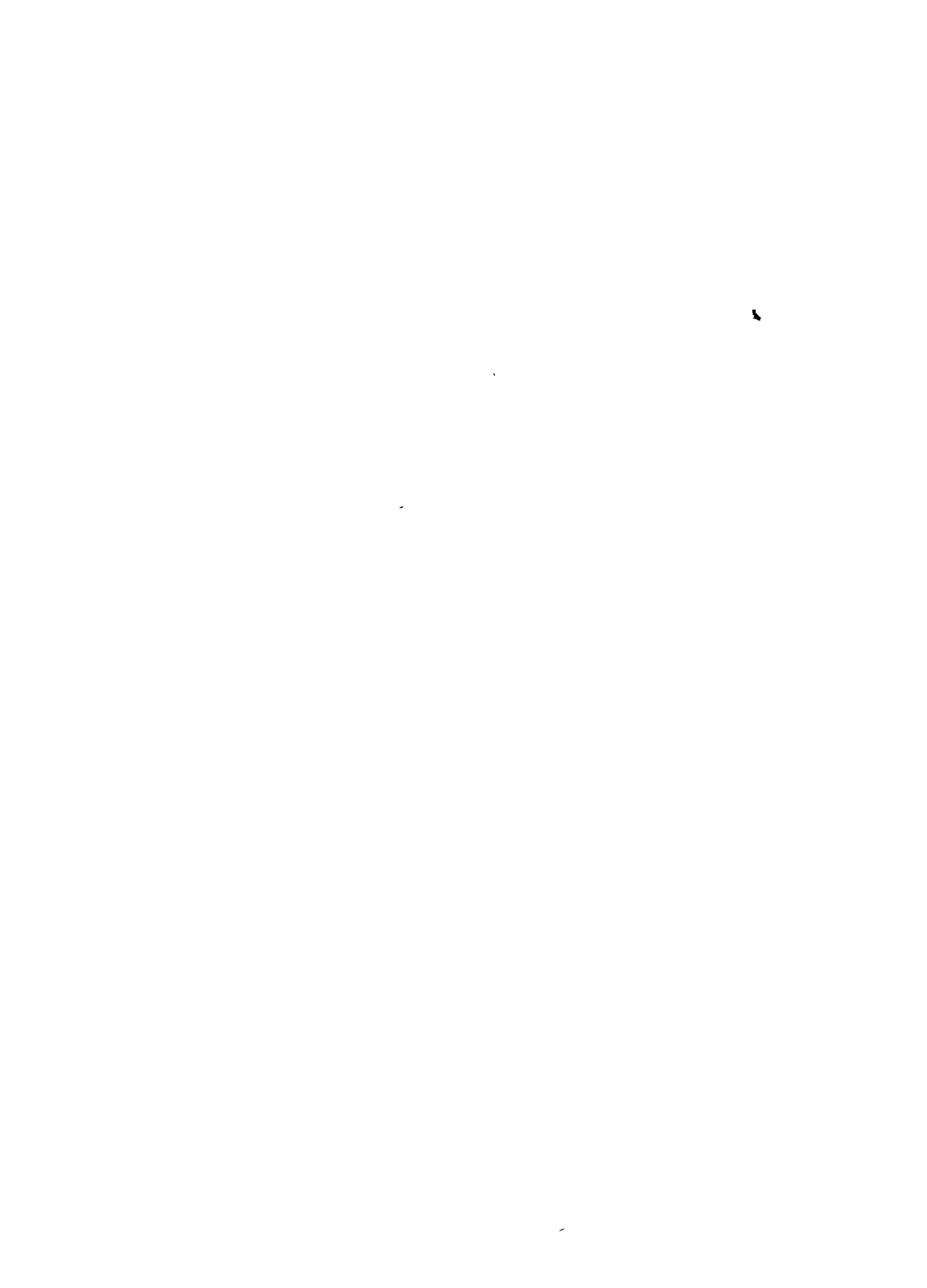
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FOREWORD

IN the various manuals of Moral Theology only a very limited discussion is accorded to the treatment of *epikeia*. Moreover, the concept of its very nature is not a little elusive. It is in the interest of clarification, from the points of view of the history, nature and use of *epikeia* in Moral Theology, that this work is humbly presented.

The author wishes to express his sincere gratitude to His Excellency, the Most Rev. Richard J. Cushing, D.D., Archbishop of Boston, for the opportunity afforded him to pursue graduate studies in Sacred Theology. Thanks are also due to the Faculty of the School of Sacred Theology of Catholic University, especially to the Very Rev. Francis J. Connell, C.S.S.R., S.T.D., for his expert guidance and kind advice in directing the writing of this dissertation; to the Rev. Joseph B. Collins, S.S., S.T.D., and the Rev. Thomas O. Martin, S.T.D., J.C.D., Ph.D., LL.B., for their many helpful suggestions—and to all others, too numerous to mention specifically, who so graciously and unsparingly assisted the writer.



PART I

HISTORICAL DEVELOPMENT OF THE THEORY OF EPIKEIA IN MORAL THEOLOGY

CHAPTER I

INTRODUCTION

ARTICLE 1. THE PROBLEM OF *Epikēia*

Two centuries ago the theologian Concina¹ made reference to the vagueness which surrounds the term *epikeia*. While some authors understand by it a correction of law, others, he pointed out, consider it to be interpretation of law. Nor are there lacking theologians who identify it with dispensation. This uncertainty as to the nature of *epikeia*—not to mention its extent, as well as the conditions which must be fulfilled in order that it be employed licitly—has persisted to our own day,² and is increased by the frequent allusions of writers

¹ D. Concina, *Theologia Christiana Dogmatico-Moralis* (Neapoli, 1772-1775), Vol. VI, Dissert. II, Cap. XIV, Quaest. V, n. 31.

² Chelodi states: "Epicheiae notio non apud omnes eadem est, et modo latius, modo arctius circumscribitur, imo sunt qui eam in iure admitti posse negent."—J. Chelodi, *Ius de Personis iuxta Codicem Iuris Canonici*, recognitum et auctum ab E. Bertagnolli (ed. 2; Tridenti: Libr. Edit. Tridentum, 1927), n. 69. Thus, Noldin-Schmitt, e.g., call *epikeia* "a restrictive interpretation of law."—H. Noldin, *Summa Theologiae Moralis*, recognitum et emendatum ab A. Schmitt (ed. 25; Oeniponte: Rauch, 1937-1938), I, n. 160. Merkelbach terms it "a certain *quasi* restrictive interpretation."—B. Merkelbach, *Summa Theologiae Moralis* (ed. 3; Parisiis: Desclée, De Brouwer et Soc., 1938-1939), I, n. 296. Coronata refers to it as "ideal justice," and again as "practical doctrinal interpretation."—M. Conte a Coronata, *Institutiones Iuris Canonici* (Vols. I, II, ed. 2, 1939; Vol. III, ed. 2, 1941; Vol. IV, ed. 2, 1945; Vol. V, 1936; Taurini-Romae: Marietti), I, n. 29; *Compendium Iuris Canonici* (Taurini: Marietti, 1937-1938), I, n. 272. For Rodrigo it is "a benign mitigation of law."—L. Rodrigo, *Praelectiones Theologico-Morales Comillenses*, Series I,

to the kindred concept of *aequitas*, a term which, as Vermeersch³ notes, men constantly use, without the ability to explain its significance and essence. Michiels⁴ calls attention to the fact that authorities are not in agreement as to the specific elements which distinguish *aequitas* from other virtues, and more particularly from *epikeia*. Indeed, on the point of what most theologians and canonists⁵ consider to be the most fundamental element in *epikeia* itself—the interpretation, not of the words of the law, but of the intention of the legislator—Michiels does not find himself in agreement. For him *epikeia* is based ultimately not on the will of the legislator, but rather “on the superior principles of natural justice.”⁶ In point of fact, he considers it “superfluous”⁷ to devote a special title or section of his work to the study of *epikeia*, inasmuch as, in his view, it is merely a cause excusing from the obligation of law.

Theologia Moralis Fundamentalis, Vol. II, *Tractatus de Legibus* (Santander: Editorial Sal Terrae, 1944), n. 390. Cicognani-Staffa consider it “a prudent subjective judgment.”—H. Cicognani, *Commentarium ad Librum Primum Codicis Iuris Canonici*, recognitum et auctum a Dino Staffa (Romae: “Buona Stampa,” 1939-1942), I, p. 304.

³ A. Vermeersch, *Quaestiones de Iustitia* (ed. 2; Brugis, 1904), n. 478.

⁴ G. Michiels, *Normae Generales Iuris Canonici* (Lublin: Universitas Catholica, 1929), I, p. 436.

⁵ “. . . omnes unanimiter docent agi de investiganda mente legislatoris.”—S. D’Angelo, “De Aequitate in Codice Iuris Canonici,” *Periodica*, XVI (1927), 222*-223*. Molina states that *epikeia* occurs in regard to events “qui eventus non censeantur eis [legibus] comprehensi, eo quod si de illis in particulari interrogaretur legislator quando legem condebat, respondisset, suam mentem non esse ut comprehenderentur.”—L. Molina, *De Iustitia et Jure* (Moguntiae, 1659), Vol. VI, Tract. II, Disp. 259. Writes an anonymous author: “Dans l’*epikeia*, on interprète toujours la *volonté* du législateur . . .”—“Etude de Théologie Morale sur L’Obligation en Conscience des Lois Civiles,” *NRTh*, XVI (1884), 45. Cf. also J. D’Annibale, *Summula Theologiae Moralis* (ed. 5; Romae, 1908), I, n. 187; P. Maroto, *Institutiones Iuris Canonici ad Normam Novi Codicis* (Romae, 1919), I, n. 241; V. Del Giudice, “Privilegio, Dispensa ed *Epicheia* nel Diritto Canonico,” *Scritti in Memoria del Prof. Francesco Innamorati* (Perugia: Tip. G. Guerro, 1932), p. 277.

⁶ *Op. cit.*, I, p. 441.

⁷ *Ibid.*, p. 371. He does, however, call it “a special mode of excuse from law.”—*Ibid.*, p. 442.

No little confusion is added to this very complicated matter,⁸ first by the fact that the notions both of *epikeia* and of *aequitas* have varied to some extent from one age to another, and secondly by the fact that, although these two terms are considered by some⁹ to possess the same etymological signification, even a cursory study will reveal that they are not today employed in the same sense—and in some degree this is true of past history as well.

Amid the wide disagreement among theologians on so many points connected with *epikeia*, authors generally agree in stating—and this, in spite of the traditional doctrine that *epikeia* is a virtue, even superior to the virtue of justice, though in a sense a part of it¹⁰—that its use is fraught with peril,¹¹ and demands on the part of him who resorts to it, “exquisite judgment, mature prudence . . . candor of spirit, and love of justice.”¹²

In civil law there is scarcely less obscurity in regard to these matters.¹³ If *epikeia* is mentioned at all, reference is made to the

⁸ The description is that of Van Hove. Cf. A. Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, Vol. I, Tom. II, *De Legibus Ecclesiasticis* (Mechliniae-Romae: Dessain, 1930), p. 274.

⁹ Van Hove, e.g., states: “. . . aequitas et epikeia etymologicè idem significant. . . .”—*Loc. cit.* But Giannini disagrees. Cf. note 31 of this chapter. *Harper's Latin Dictionary* asserts that Pott connects *aequum* not with *ἕοικα* from which *ἐπιείκεια* is derived, but with the Sanscrit *eka* = *one*, as if *properly, one and uniform*; while others consider it akin to *aemulor*.—E. Andrews, editor, C. Lewis and C. Short, revisers, *Harper's Latin Dictionary: A New Latin Dictionary, Founded on Translation of Freund's Latin-German Lexicon* (New York, 1907), p. 58, s. v. *aequus*.

¹⁰ Cf. St. Thomas, *Sum. Theol. (Opera Omnia* [ed. Vivès; Parisiis, 1871-1880], I-VI), II-II, q. 120, a. 2, ad 1.

¹¹ Cf., e.g., S. Loiano, *Institutiones Theologiae Moralís ad Normam Iuris Canonici* (Taurini: Marietti, 1934-1942), I, n. 140; Maroto, *op. cit.*, I, n. 242; J. McHugh-C. Callan, *Moral Theology, A Complete Course* (New York: Jos. F. Wagner, Inc., 1929-1930), I, n. 413.

¹² D. Prümmer, *Manuale Theologiae Moralís* (Vol. I, ed. 8; Vol. II, ed. 4 and 5; Vol. III, ed. 6 and 7; Friburgi Brisgoviae: Herder, 1933-1935), I, n. 231. Cf. also U. Beste, *Introductio in Codicem* (ed. 2; Collegetville, Minn.: St. John's Abbey Press, 1944), p. 82.

¹³ The lack of precision is not confined to present day jurists. Two centuries ago Thomasius observed: “De aequitate multa disserere solent Scriptores juris civilis, sed non ubique ea cura, quae satisfaciat gustui hodierno.”

fact that the Scholastics used the term synonymously with *aequitas*. As to the latter, "few words have had so varied and strange a fortune . . . no idea is less definite."¹⁴ "The word 'equity' represents a rather uncertain and equivocal notion."¹⁵ One author terms equity mere "sentimentalism";¹⁶ another maintains that it "embraces a moral ideal" in contradistinction to positive law, which is "inevitably subject to many imperfections and inconsistencies."¹⁷ Another states that it consists of "such of the principles of received morality as are applicable to legal questions and commend themselves to the judges."¹⁸ Still another writer views it merely as a *deus ex machina* which intervenes in the solution of embarrassing problems.¹⁹

In view of the foregoing considerations, it would seem that an inquiry into the history of *epikeia*, its nature, its lawfulness, its place in Moral Theology, and its extent is appropriate, especially since such a study "generally has been far too little developed in our manuals."²⁰ This dissertation is undertaken with a keen realization, on the one hand, that, where the authority of laws is wont to be neglected or scorned, a general state of private and public confusion ensues,²¹ but on the other, that there is, and must be, a recognition that slavish adherence to the letter of the law in every case without exception is no less an evil to be avoided.

Inasmuch as the main purpose of this dissertation is to inquire, from a historical and a theological point of view, as to whether *epikeia* is a reputable and justifiable institute of Moral Theology,

—C. Thomasius, *Tractatio Juridica de Aequitate Cerebrina*, L. 2, *Cod. de Rescindenda Venditione Ejusque Usu Practico* (Halaë Salicae, 1749), Cap. I, § 1.

¹⁴ A. Giannini, "L'Equità," *Archiv. Giurid.*, Quarta Serie, XXI (1931), 177.

¹⁵ F. Geny, *Méthode d'Interprétation et Sources en Droit Privé Positif* (ed. 2; Paris, 1919), I, p. 109.

¹⁶ M. Ricca-Barberis, *Sul Diritto della Guerra e del Dopoguerra* (Torino, 1926), p. 336.

¹⁷ C. Allen, *Law in the Making* (Oxford: Clarendon Press, 1927), p. 233.

¹⁸ T. Holland, *The Elements of Jurisprudence* (Oxford, 1880), p. 50.

¹⁹ Herbart, quoted in Giannini, *art. cit.*, *Archiv. Giurid.*, XXI, 177.

²⁰ "L'Epikie," *L'Ami du Clergé*, XXV (1903), 162.

²¹ Cf. Allocution "Quandoquidem," Benedict XV, 4 Dec. 1916, *AAS*, VIII (1916), 467-468.

whether it enjoys a definite place, and fulfills an important function in that science, or whether it is merely a loophole by which one may exempt himself from the distasteful obligation of law, a casuistical treatment is not to be expected. Any examples offered are introduced only insofar as they serve to illustrate the more general and abstract principles under discussion. Moreover, attention should be called at the very beginning to the fact that this study aims to consider the historical development, nature, lawfulness and extent of *epikeia* from the viewpoint of Moral Theology. Special care has been taken to disassociate the inquiry from Canon Law, not only because this restriction has been imposed from the outset, but likewise because a discussion of the canonical ramifications of *epikeia* and *aequitas* could well constitute a separate dissertation. This is especially true insofar as the influence of the older canonists²² on the development of the concept of *aequitas* is concerned, a point to which only the briefest reference can be made in this dissertation.

The main concern of such a study in Moral Theology will center about the forum of conscience.²³ It will have reference to the imputability, or lack of it, before God, which follows upon deliberate deviation from the words of a law, when such deviation is based upon the presumed intention of the legislator to exclude from his law the case at hand. The standing in the external forum, ecclesiastical or civil, of such an act, performed under such circumstances, is of secondary consequence in our investigation. Indeed, we may agree with Rodrigo who, treating of the approach of the moralist to the tract *De Legibus*, observes:

The formal aspect under which the moral theologian considers laws cannot be the same as that of the moral or political philoso-

²² Mention may be made of the scattered references to the idea of benignity and equity in Gratian's *Decretum*. Cf., e.g., *Decretum Gratiani Emendatum et Notationibus illustratum una cum glossis* (Venetiis, 1605), c. 7 D. 1; cc. 9, 10, 14, 15 D. 45. For later canonists cf., e.g., A. Barbosa, *De Axiomatibus Iuris Usus frequentioribus* (*Tractatus Varii* [Lugduni, 1651]), Axioma XV; H. Bonacossa, *De Aequitate Canonica Tractatus* (Venetiis, 1575).

²³ "Ad theologiam moralem pertinet determinare quandonam et quomodo possit quis, tuta conscientia, pronuntiare quod per *epikeiam* non sit applicanda in casu particulari lex in se certa et manifesta."—C. Berutti, *Institutiones Iuris Canonici* (Taurini-Romae: Marietti, 1936-1938), I, p. 90.

opher, or of the lawyer, whether civil or canon, but far different and higher.²⁴

Nevertheless, occasional allusions to Canon Law and to the work of canonists in this field of *epikeia* will be necessary in this dissertation, first for the sake of completeness, secondly because of the difficulty, and at times impossibility, of distinguishing adequately between the moral and canonical aspects of some problems pertaining to law, and thirdly because not infrequently canonists, while treating ostensibly of the canonical elements involved in a question, actually are equally, or even more concerned with the purely moral issues at stake.²⁵

The first part of this dissertation will be devoted to an inquiry into the historical development of the theory of *epikeia* in Moral Theology. It will take the form both of an exposition of the teaching of the most prominent theologians who have discussed *epikeia*, and of a commentary on the doctrines which they have proposed. It has been deemed advisable to offer this evaluation of the views of the authors in question, simultaneously with the explanation of their opinions, rather than to postpone it to a subsequent section, and thus create the necessity of constant reference to previous pages. Moreover, it is hoped that this method of procedure will serve to give a clearer picture of the gradual development of the concept of *epikeia* in Moral Theology.

It should further be noted that in the section dealing with the historical development of the concept, only the inner nature of *epikeia* as explained by the various moralists will be considered. What they taught of the relation of *epikeia* to other virtues and to other concepts in Moral Theology, as well as of its use in special

²⁴ "Respectus formalis sub quo leges considerat theologus moralis nequit esse idem ac est respectus pro philosopho morali vel politico, aut pro iurisconsulto seu civili seu canonico, sed longe diversus et altior."—Rodrigo, *op. cit.*, n. 1.

²⁵ D'Angelo endeavors to show that practically all modern canonists consider *epikeia* to be a purely moral or ethical institute, having validity only in the internal forum. Cf. S. D'Angelo, "De Aequitate in Codice Iuris Canonici," *Apollinaris*, I (1928), 379-383. If this opinion of the nature of *epikeia* be true, any discussion of *epikeia* by a canonist would seem to be an incursion into the field of Moral Theology.

cases, will be studied in Part II of the dissertation. Finally, it may be remarked that it is fully realized that there exist differences of opinion as to the meaning of some of the passages which will be considered. The interpretations here suggested seem, after careful study, to be preferable. But they are not offered as the only possible explanations, nor are they put forward in any controversial way.

In the historical section of the dissertation, after a brief study of the teaching of St. Albert the Great, our interest will center mainly about St. Thomas and subsequent theologians. Inasmuch as among ecclesiastical writers prior to these saintly scholars, no formal discussion of *epikeia* appears, to a consideration of these writers only a brief reference will be accorded. However, there is required a more searching study of the doctrine of the pagan philosopher Aristotle, in whose *Nicomachean Ethics* ²⁶ is found the first detailed explanation of *epikeia*, an explanation which, it may safely be said, has influenced either directly or indirectly practically every subsequent author who has treated this matter. Furthermore, no effort will be made to mention all the theologians following St. Thomas who have treated of *epikeia*, not only because practically every moralist who has written on the tract *De Legibus* has made some reference to this subject, but particularly because it seems more appropriate to confine our study to those theologians who have made some special observations on *epikeia* worthy of note, or contributed in some outstanding way to the development of this concept in Moral Theology.

The second part of this dissertation will investigate the nature, lawfulness and extent of *epikeia* in Moral Theology. It will consider the elements essential to *epikeia*, its lawfulness as an institute in Moral Theology, and its relation to certain other virtues and concepts in that science. Finally, an inquiry will be undertaken as to the permissibility of *epikeia* in cases involving the natural law, divine positive law and human invalidating laws.

²⁶ V, 10. All references to Aristotle's works hereinafter made, refer to Greek text: *Aristotelis Opera* (ed. Bekker; Oxonii, 1837); to English translation: R. McKeon, editor, *The Basic Works of Aristotle* (New York: Random House, 1941).

ARTICLE 2. PRELIMINARY NOTIONS

I. *The Meaning of "Jus"*

As a background for the proper discernment of the meaning of *epikeia*, there is required of necessity an understanding of several terms which will constantly appear throughout this dissertation.

First is the term *Jus*. Taken both objectively and subjectively, this term is thus defined by Gury:

By the term *jus* precisely taken . . . is understood either that which is due to another, and it is wont to be called *justum* or *aequale*—and thus is the object at which justice aims and which it accords to each; or it is taken for the title which justice regards on the part of the other, or on account of which it desires to accord to each what is his own—and thus is the power to obtain or possess something.²⁷

A right, then, which exists in a person by reason of some objective title, is "a moral power . . . owing to which the holder of the power may claim something as due to him, or as already belonging to him, or demand of others that they shall perform some acts or abstain from them."²⁸ It is conceded by some law, natural or positive, or it exists in conformity with the law and dependent upon a just title.²⁹

The term *justum*, to which *jus* has reference, possesses a two-fold meaning, the distinction being based upon the source of the right which one legitimately possesses. Suarez points out:

Justum is two-fold: *justum naturale* which is right according to natural reason, and is never defective if reason does not err;

²⁷ "Nomine *iuris*, presse sumpti . . . intelligitur vel id quod alteri debetur, *iustumque* dici solet aut *aequale*, et sic est objectum quod iustitia intendit, quodque ipsa cuique tribuit; vel accipitur pro titulo, quem iustitia respicit ex parte alterius, seu propter quem vult suum cuique tribuere, et sic est *potestas ad aliquid* obtinendum, aut possidendum."—J. Gury, *Compendium Theologiae Moralis*, adnotationibus locupletatum A. Ballerini, textu emendato a D. Palmieri (ed. 13; Prati, 1898), I, n. 519.

²⁸ R. Holand, *Natural Law and Legal Practice* (New York, 1899), p. 268.

²⁹ Cf. J. Bouvier, *Institutiones Theologicae* (ed. 6; Parisiis, 1846), VI, p. 3.

the other is *justum legale*, that is, what is constituted by human law, and this, though it be just *in universalis*, may be defective in a particular case.³⁰

II. A Conspectus of the Meaning of "Epikeia" and "Aequitas" in History

Etymologically *epikeia* (or *epicheia*, *epichia*, *epikeja*, *epikia*, *epikiia*, *epieikeia*, *epiqueia*, *epieicia*, etc.)—ἐπιείκεια—signifies something "fitting, moderate, *aequum et bonum*."³¹ Nevertheless, "*epikeia* . . . has not only one proper signification."³² In the Aristotelian sense,³³ it is a correction of the law where the law "sins" by reason of its universality. Among theologians it is frequently used to indicate a benign interpretation of law.

³⁰ "Duplex est enim justum: unum naturale, quod est rectum secundum naturalem rationem, quod nunquam deficit, si ratio non erret; aliud est justum legale, id est, quod lege humana constituitur, et hoc, licet in universalis justum sit, solet in particulari deficere."—F. Suarez, *De Legibus et Legislatore Deo* (*Opera Omnia* [ed. Vivès; Parisiis, 1856-1878], V-VI), Lib. I, Cap. II, n. 9. (Hereinafter cited as *De Legibus*.)

³¹ Cicognani-Staffa, *op. cit.*, I, p. 297. Cf. Van Hove, *De Legibus Ecc.*, n. 267. As to the derivation of the word, ἐπιείκεια is derived from εἰκός (neut. part. of ἔοικα), *likely, probable, reasonable*. Cf. H. Liddell-R. Scott, *Greek-English Lexicon*, revised and augmented by H. Jones and R. McKenzie (Oxford: Clarendon Press, 1925-1940), I, pp. 632, 484, s. v. ἐπιείκεια, εἰκός. Cf. also J. Murray, et al., editors, *A New English Dictionary on Historical Principles* (Oxford: Clarendon Press, 1888-1928), III, p. 242. Grant believes: "Ἐπιεικῆς (from εἰκός) first means 'customary' as in Homer; then 'seemly,' then 'good' in general; afterwards it is probable that an association of εἰκω 'to yield' became connected with the word, and hence the notion of moderation and of waiving one's rights arose, and τὸ ἐπιεικές was constantly contrasted with τὸ δίκαιον. Out of this contrast the idea of equity was developed."—A. Grant, *The Ethics of Aristotle* (ed. 4; London, 1885), II, p. 139. Giannini maintains that the confusing of the Latin *aequitas* with the Aristotelian ἐπιείκεια has favored the tendency to consider both terms as having a common root. Such a common origin Giannini denies, believing that in its original signification ἐπιείκεια meant "decenza, convenienza," whereas *aequitas* meant "eguaglianza, unità." "I significati originari come le radici sono distinti e diversi," he concludes.—*Art. cit.*, *Archiv. Giurid.*, XXI, 179.

³² Cicognani-Staffa, *op. cit.*, I, p. 297.

³³ Aristotle, *Nicomachean Ethics*, V, 10.

Even a most cursory examination will lead to the conclusion that the term *aequitas* has not been restricted historically to any one meaning. As D'Angelo³⁴ notes, it has sometimes been employed to signify *iustitia naturalis*, at other times *ius ideale*, occasionally *congrua moderatio*, and frequently—especially among the Scholastics—*epikeia*. With an etymological root meaning flatness or evenness or levelness, and hence equality, *aequitas* later acquired a secondary signification of fairness or moderation or even liberality.³⁵ But basically, insofar as the term had any reference to law, by reason of its original meaning it signified unity, equality and hence justice.³⁶ This connotation “gives us the ancient concept of justice, the content of which is equality, absolute identity of treatment, prescinding from the quality of the terms in relation.”³⁷

The equality which is signified by *aequitas* is two-fold. First it refers to that which is demanded by the natural law (*aequum naturale*), and in this sense *aequum naturale* is identified with *justum naturale*. Thus, it is said, for example, that natural equity demands that no one be condemned before due hearing be given his case,³⁸ or

³⁴ D'Angelo, *art. cit.*, *Periodica*, XVI, 211*. Heylen observes: “Aequitas etiam ad justitiam refertur, at diversimode: vel (1) significat, sensu latiore, justitiam naturalem . . . vel (2) designat, sensu strictiore, observationem legis quae sequitur mentem habitualement legislatoris potiusquam litteram legis . . . vel (3) dicitur de habitu quae inclinatur ad usum juris humanum juxta regulas naturalis convenientiae, humanitatis et christianae misericordiae moderatum. . . .”—V. Heylen, *De Jure et Justitia* (ed. 4; Mechliniae: Dessain, 1943), I, p. 42. Cf. also Cicognani-Staffa, *op. cit.*, I, p. 297.

³⁵ Cf. J. Faccioli, A. Forcellini, J. Furlanetti, *Lexicon Totius Latinitatis* (Patavii, 1864-1887), I, p. 124, s. v. *aequitas*.

³⁶ Cf. A. Bolognetus, *De Lege, Jure, et Aequitate Disputationes* (Romae, 1570), Cap. XXXI, n. 1; Van Hove, *De Legibus Ecc.*, n. 267.

³⁷ Giannini, *art. cit.*, *Archiv. Giurid.*, XXI, 182. It is the opinion of this author that *aequitas* was not limited to ἐπιείκεια, and when translated into Greek was rendered rather by ἰσότης. However, with the coming of Christianity, *aequitas* more clearly took on the idea of benignity, humaneness and clemency, as noted in the description attributed to St. Cyprian: “Justitia dulcore misericordiae temperata.” In later years it came to be used synonymously with *epikeia*.—*Ibid.*, p. 183.

³⁸ “. . . neque enim inaudita causa quemquam damnari aequitatis ratio patitur.”—*Corpus Iuris Civilis* (Vol. I, *Institutiones* recognovit Paulus Krueger, *Digesta* recognovit Theodorus Mommsen, retractavit Paulus Krueger, ed. 15;

that natural equity requires that no one be enriched by inflicting harm upon his neighbor or by doing damage to his goods.³⁹ In such cases it is readily seen that natural equity is identical with natural justice, and that what is called *aequum naturale* is actually *justum naturale*. Secondly it refers to that equality which is aimed at by human law, and which in this sense is known as *aequum legale* or *aequum civile*.⁴⁰

In each of the foregoing cases, *aequitas* is identified with equality and justice. But by reason of its secondary signification of moderation and liberality, *aequitas* historically assumed the meaning of a benign application of law by public authority—"justice tempered by the sweetness of mercy."⁴¹ It is in this connection that Suarez describes it as follows: ". . . *aequitas* is taken for the prudent moderation of the written law against the rigorousness of its words . . ." ⁴²

Thus understood, this virtue of *aequitas* is found primarily in him who authoritatively renders judgment or applies the law in a given case. A judge may overlook the rigid letter of the law and issue sentence on more *equitable* grounds. It is to be noted, of course, that such mitigation may well be called for by natural equity or jus-

Vol. II, *Codex Iustinianus* recognovit et retractavit Paulus Kreuger, ed. 10; Vol. III, *Novellae* recognovit Rudolphus Schoell, absolvit Gulielmus Kroll, ed. 5; Berolini: apud Weidmannos, 1928-1929), D (48.17) 1.

³⁹ "Nam hoc natura aequum est neminem cum alterius nocumento fieri locupletioem."—*Ibid.*, D (12.6) 14.

⁴⁰ Cf. Van Hove, *De Legibus Ecc.*, n. 267.

⁴¹ "Justitia dulcore misericordiae temperata." Abbas Panormitanus states that Joannes Andreas thus defines *aequitas* "secundum Beatum Cyprianum." Cf. Abbas Panormitanus (Nicolaus de Tudeschis), *Commentaria in Quinque Libros Decretalium* (n. p., 1542), *In Prima super Primo Decretalium de Transactionibus Rubrica*, Cap. XI, Vol. I, fol. 137, n. 6. Frequently authors allude to this description and refer it to St. Cyprian without further comment. Cf., e.g., L. Ferraris, *Prompta Bibliotheca Canonica, Juridica, Moralis, Theologica necnon Ascetica, Polemica, Rubristica, Historica* (Lutetiae Parisiorum, 1858), Vol. V, s.v. *Lex*, Art. V, n. 34; Vermeersch, *Quaest. de Iust.*, n. 486; Heylen, *op. cit.*, I, p. 42. However, to quote Giannini: "Non ho trovato la definizione in un rapido esame delle op. di San Cipriano, nè l'Hartel cita l'aequitas nel copiosissimo indice che segue alla sua nota ed. delle opere del Santo."—*Art. cit.*, *Archiv. Giurid.*, XXI, 203.

⁴² *De Legibus*, Lib. I, Cap. II, n. 10.

tice itself. But beyond that, a court may well give a benign decision even in instances where rigorous adherence to the letter of the law would by no means be strictly unjust. As will be seen, this distinction between *jus* and *aequitas* was known in the juridical theory of the Greeks and Romans. Thus, Aristotle states: “. . . an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity.”⁴³ Cicero writes: “. . . to turn aside from the words and to use *aequitas*.”⁴⁴ “It is fitting that a matter be judged *ex aequo et bono*, not from cunning and crafty law.”⁴⁵ “. . . and to say many things in accordance with *aequitas* and against *jus*.”⁴⁶

A kindred *aequitas* may exist not only in a public authority but also in any private individual, insofar as this term is taken to signify a certain fitting mitigation of a strict right, that is,

. . . a congruous moderation of a strict right, which means a certain remission of it, and [*aequitas* is] the virtue disposing one toward such; as if a creditor grants a delay to his debtor, which is of little harm to himself but of advantage to the other; or if an employer from the labors of his employees makes an extraordinary profit and therefore rewards them beyond their wages.⁴⁷

Thus understood, *aequitas* inclines an individual to use his rights in a humane way.⁴⁸

⁴³ *Rhetoric*, I, 13.

⁴⁴ “. . . a verbis recedere et aequitate uti.”—M. Tullius Cicero, *Pro Caecina* (*Opera Omnia* [ed. Ernesti; Boston, 1815-1817], VI), 13, 37.

⁴⁵ “Ex aequo et bono, non ex callido versutoque jure rem judicari oportere.”—*Ibid.*, 23, 65.

⁴⁶ “. . . multaque pro aequitate contra jus dicere.”—*De Oratore* (*Opera Omnia*, II), I, 56, 240.

⁴⁷ “. . . congrua moderatio iuris proprie dicti, quae dicit quamdam iuris remissionem, atque virtus ad id disponens; ut si creditor moram concedit debitori, dum sibi non multum nocet, illi vero prodest, aut si dominus ex operariorum laboribus lucrum extraordinarium percipit et ideo ultra mercedem ipsis largitur.”—Merkelbach, *Summa Theol. Mor.*, II, n. 890.

⁴⁸ “. . . flectit animum ad humanum iuris usum.”—A. Vermersch, *Theologiae Moralis Principia, Responsa, Consilia* (ed. 3; Romae: Pont. Universitatis Gregoriana, 1933-1937), II, n. 637.

Aequitas is often considered to exist in any private person who is a subject of a law, insofar as he interprets, broadly speaking,⁴⁹ the law in a benign fashion favorable to himself, not according to its words but rather according to the presumed intention of the legislator. Thus, a private individual may correct the written law in its application to a concrete case. In a strict sense, this is *epikeia*, and with this concept our dissertation is concerned. St. Alphonsus defines it as "a presumption, at least probable, that the legislator in a certain set of circumstances did [or, would] not wish to bind [the subject]." ⁵⁰

As will be explained in considerable detail below, Aristotle ⁵¹ considers *epikeia*, first insofar as it refers to law, and secondly insofar as it refers to a person.⁵² In the former sense, *epikeia* is the correction of a law which is deficient by reason of its universality.⁵³ In the latter sense,⁵⁴ *epikeia* denotes a certain humaneness and benignity, found in him who is wont to make concessions in matters involving his own strict rights,⁵⁵ who is not a stickler for his own rights, even

⁴⁹ Cf. p. 19 et sqq., *infra*.

⁵⁰ ". . . est praesumptio saltem probabilis, quod legislator in aliqua rerum circumstantia noluerit obligare."—S. Alphonsus M. de Liguorio, *Homo Apostolicus* (Augustae Taurinorum, 1876), Tract. II, n. 77. Cf. also A. Lehmkuhl, *Theologia Moralis* (ed. 12; Friburgi Brigoviae, 1914), I, n. 243; H. Davis, *Moral and Pastoral Theology* (ed. 4; New York: Sheed and Ward, 1943), I, p. 187.

⁵¹ The idea of the defectiveness of human law because of its universality is found even before Aristotle. Plato, e.g., states: ". . . law could never, by determining exactly what is noblest and most just for one and all, enjoin upon them that which is best, for the differences of men and of actions and the fact that nothing, I may say, in human life is ever at rest, forbid any science whatsoever to promulgate any simple rule for everything and for all time. . . . But we see that law aims at pretty nearly this very thing . . ."—Plato (H. Fowler, trans.), *The Statesman* (London, 1925), n. 294.

⁵² *Nicomachean Ethics*, V, 10.

⁵³ On this point Vinogradoff remarks: ". . . it [i.e., *epikeia*] forms a link between the general νόμος and the single case in its complicated surroundings."—P. Vinogradoff, *Outlines of Historical Jurisprudence* (Oxford, 1920—), II, p. 64.

⁵⁴ As will be seen, many modern moralists following Vermeersch, consider this latter *epikeia* to be a separate virtue called *aequitas*, standing between justice and charity, and a potential part of the former. Cf. Vermeersch, *Quaest. de Iust.*, nn. 481 et sqq.

⁵⁵ Aristotle, *Nicomachean Ethics*, V, 9.

though he has the law on his side,⁵⁶ who is "merciful to the weakness of human nature," who thinks "less about the laws than about the man who framed them, and less about what he said than about what he meant," who does not "consider the actions of the accused so much as his intentions, nor this or that detail so much as the whole story."⁵⁷

In Roman Law⁵⁸ *aequitas*⁵⁹ is used in a two-fold sense.⁶⁰ First it is taken to signify a quality in a human law, in virtue of which that law is in conformity with the natural law and with natural reason. A law lacks this quality, either when it is opposed to the natural law,⁶¹ or when it is so rigorous and severe as to deviate more or less from the natural law or from its spirit.⁶² In the Roman legal system it was the function of the praetor's edict to constitute a

⁵⁶ *Ibid.*, V, 10.

⁵⁷ Aristotle, *Rhetoric*, I, 13.

⁵⁸ The best treatment of this point is found in M. Voigt, *Das Ius Naturale, Aequum et Bonum und Ius Gentium der Römer* (Leipzig, 1856-1875). Viazzi says that this work is the "fonte alla quale direttamente od indirettamente attingono tutti gli autori posteriori."—P. Viazzi, "Equità," *Enciclopedia Giuridica Italiana*, Vol. V, Parte II, p. 268.

⁵⁹ Giannini finds that the word *aequitas* itself occurs about one hundred times, not to mention such expressions as *aequum arbitrari*, *aequum videri*, *aequum putare*, etc. But in spite of this abundant use of the term, he notes "la mancanza di una diretta definizione dell'equità." He adds a long list of references wherein allusion is made to *aequitas* or to *aequum et bonum* by Latin authors such as Plautus, Terence, Cato, Livy, Cicero and Sallust.—*Art. cit.*, *Archiv. Giurid.*, XXI, 195 et sqq. Allen remarks: ". . . it is not a little surprising to find, in a system so absolute, comprehensive, and explicit as the Roman, especially as codified by the authority of the supreme lawgiver, the conception of *aequitas* or *aequum et bonum* so firmly embedded . . ."—*Op. cit.*, pp. 206-207.

⁶⁰ Cf. Van Hove, *De Legibus Ecc.*, n. 269.

⁶¹ Thus, Wohlhaupter notes that originally *aequitas* for the Romans coincided with the Greek ἰσότης, and only later come to signify the opposite of *jus strictum*.—E. Wohlhaupter, *Aequitas Canonica*, Görres-Gesellschaft zur Pflege der Wissenschaft im Katholischen Deutschland, No. 56 (Paderborn: Ferdinand Schöningh, 1931), p. 24.

⁶² Giannini believes that to Roman jurists *aequitas* appears "come la sostanza e l'ideale del diritto." When *jus* does not attain this ideal, it is *rigor juris*, *jus durum*, *asperum*, *summum*, etc.—*Art. cit.*, *Archiv. Giurid.*, XXI, 201.

jus aequum by mitigating the harshness of the civil law, not so much because mitigation was strictly demanded by natural equity, but rather because it was considered more fitting, due to the presence of extenuating circumstances which arose in particular cases.

In respect to all things not regulated by law or usage, that is to say, in most cases, the Roman magistrates [i. e., praetors] had, within the limits of their jurisdiction, a discretionary power. In order to avoid arbitrary action, they were required to make known by an edict, before taking office, the principles which they proposed to follow, and a Cornelian law (67 B. C.) prohibited them from disregarding this edict in their decisions. The larger part of what we should call the administrative law of Rome had no other basis than these edicts of the praetors. In them were inserted a multitude of rules of civil law, formulas of actions adapted to this or that contract; in their edicts the praetors pledged themselves to intervene in certain cases to relieve from forfeitures or to grant privileges, to impose stipulations, to authorize legal possession, etc.⁶³

It is this general spirit which underlies Courts of Equity in Anglo-American Law.⁶⁴ However, by virtue of the doctrine of *stare*

⁶³ V. Duruy, *History of Rome and of the Roman People*, M. Ripley, trans., J. Mahaffey, ed. (Boston, 1883-1886), Vol. IV, Sect. II, pp. 341-342. Cf. also A. Van Hove, *Commentarium Lovaniense in Codicem Iuris Canonici*, Vol. I, Tom. I, *Prolegomena* (Mechliniae-Romae: Dessain, 1928), n. 417; J. Bryce, *Studies in History and Jurisprudence* (New York, 1901), Vol. II, Essay XIV; C. Ferrini, *Storia delle Fonti del Diritto Romano e della Giurisprudenza Romana* (Napoli, 1885), pp. 16 et sqq.

⁶⁴ "In the system of the Common Law . . . it [i.e., equity] denotes certain remedial processes by which relief can be afforded in cases whose peculiar circumstances place them beyond the reach of the ordinary courts. The *courts of common law*, adhering to their ancient customs and refusing to take jurisdiction over causes for which no precedent existed, left five classes of private legal controversies entirely without redress. . . . In these cases the sole resort of the suitor was to the king in person, who by his chancellor investigated and decided the controversy; thus gradually establishing a *new tribunal* side by side with the courts of common law, but with practically unlimited jurisdiction and able to apply its remedies to every species of private injury. Until the reign of Richard II (A. D. 1377-99) the authority of this tribunal was chiefly spiritual; but at that time it began to issue *writs of subpoena*, summoning the parties into

decisis,⁶⁵ there has gradually been constructed an entire system of equity-law.⁶⁶ A similar occurrence took place in the Roman judicial system, in that a distinct *jus praetorium* arose.⁶⁷

In the second place, *aequitas* in Roman Law is taken to mean a benign interpretation of law.⁶⁸ The prominence of *aequitas* in this latter sense is to a considerable extent traceable to the influence of Christianity.⁶⁹ In reference to this point, one must take due note

court as witnesses, and then detaining them until they complied with its decrees. By this means it obtained control over the persons of the parties, and became able to enforce its orders under penalty of perpetual imprisonment. During the next two centuries the growing power of this tribunal aroused the apprehensions of the courts of common law, and its authority was often called in question; but in the reign of James I (A. D. 1616) the king himself set these matters at rest by deciding that the chancellor could grant relief even against the judgment of a court of common law. Since that date equity jurisdiction has rapidly expanded. In this country it is sometimes vested in the courts of common law, sometimes in distinct judicial bodies."—W. Robinson, *Elementary Law* (new rev. ed.; Boston, 1910), § 348. Cf. also H. Taylor, *The Science of Jurisprudence* (New York, 1908), pp. 296 et sqq.; E. Jenks, *A Short History of English Law* (ed. 4; London: Methuen & Co., Ltd., 1928), pp. 210 et sqq.; F. Pollock, *A First Book of Jurisprudence* (ed. 5; London, 1923), pp. 258 et sqq.; C. Keigwin, "The Origin of Equity," *GLJ*, XVIII (1929-1930), 15-35, 92-119, 215-240, 299-326; XIX (1930-1931), 48-65, 165-184.

⁶⁵ ". . . obliges equal and inferior courts to follow the rulings of preceding and superior tribunals unless they appear to be erroneous, compels a similar decision affirming the custom and adds to its authority; and thus is gradually built up a rule of law which binds all courts within that jurisdiction until it is reversed or modified by statute or by the judgment of a higher court."—W. Robinson, *op. cit.*, § 9.

⁶⁶ Cf. J. Salmond, *Jurisprudence* (ed. 7; London, 1924), § 22.

⁶⁷ ". . . in the course of time the praetor gradually came more and more to carry over almost entirely the edict of his predecessor, until finally the form became fixed soon after 125 A.D., when the edict as formulated by Julian under directions from Hadrian was given statutory force by a *senatus consultum*. The edict thus ceased directly to be a source of new equity law."—W. Cook, "Equity," *Encyclopaedia of the Social Sciences*, V, 587.

⁶⁸ Thus, e.g.: "Placuit in omnibus rebus praecipuam esse iustitiae aequitatisque quam stricti iuris rationem."—*Corpus Iuris Civilis*, C (3.1) 8. There was a later prohibition to substitute *aequitas* for strict law: "Inter aequitatem iusque interpositam interpretationem nobis solis et oportet et licet inspicere."—*Ibid.*, C (1.14) 1.

⁶⁹ Cf. Cicognani-Staffa, *op. cit.*, I, p. 298.

of the Scriptural emphasis on kindness and clemency,⁷⁰ and of the constant exhortations to the practice of these and kindred virtues, as found in Patristic literature.⁷¹ As Pope Benedict XV points out:

The Church not only took care that the laws of the barbarian nations be abrogated and their fierce customs reduced to humane-ness, but also, relying on divine aid, it tempered, and, once corrected, perfected in a Christian way, the law itself of the Romans, that signal monument of ancient wisdom which has rightly been called *ratio scripta* . . .⁷²

Riccobono well expresses the same idea:

Aequitas had assumed a most wide content, and was now extended to embrace all the new ideals and sentiments of Christian life. The contrast between classical equity and Justinian equity is therefore most perceptible. . . . Classical equity is retributive. . . . The conception of equity in the law of Justinian is far different . . . it is often called *humanitas*, *pietas*, *benignitas*.⁷³

⁷⁰ Cf., e.g., Coloss. 4, 1; Rom. 13, 10.

⁷¹ Cf., e.g., Clement of Alexandria, *Stromata*, 3, 2, 6, 1 (*GCS Clem. Alex.* 2, 197-8 Stählin); Lactantius, *Divinae Institutiones* 5, 14, 9-11 (*CSEL* 19, 445-6 Brandt), St. Hilary, *Commentarius in Matthaeum*, XXIV (*MPL*, IX, 1050); St. Ambrose, *De Officiis Ministrorum*, III, 3, 16 (*MPL*, XVI, 149); St. Augustine, *Ennaratio in Psalmum LXII* (*MPL*, XXXVI, 755). For the identification of *aequitas* with justice, cf. St. Augustine, *De Quantitate Animae* (*MPL*, XXXII, 1043); St. Isidore, *Etymologiarum Libri XX*, X, 7 (*MPL*, LXXXII, 368), *Differentiarum sive de Proprietate Sermonum Libri Duo*, I, 68 (*MPL*, LXXXIII, 17).

⁷² "Neque enim solum barbararum gentium leges curavit Ecclesia abrogandas ferosque earum mores ad humanitatem informandos, sed ipsum quoque Romanorum ius, insigne veteris sapientiae monumentum, quod *ratio scripta* merito nuncupatum, divini luminis auxilio freta, temperavit correctumque christiane perfecit . . ."—Constitutio Apostolica "*Providentissima*," Benedict XV, 27 May 1917, *AAS*, IX, Pars II (1917), 5.

⁷³ "L'*aequitas* aveva assunto un contenuto latissimo e si distende ora ad abbracciare tutti i nuovi ideali e sentimenti della vita cristiana. Il contrasto tra l'equità classica e quello giustiniana è quindi sensibilissimo. . . . L'equità classica è retributiva. . . . La concezione dell'equità nel diritto di Giustiniano è ben diversa . . . spesso si denomina *humanitas*, *pietas*, *benignitas*."—S. Riccobono, "Cristianesimo e Diritto Privato," *RDC*, III (1911), 47. On the same point cf. B. Brugi, "L'Equità e il Diritto Positivo," *RIFD*, III (1923), 450-451; D'Angelo, *art. cit.*, *Periodica*, XVI, 221*.

Moreover, in the ecclesiastical legal system itself, a benign interpretation and application of law, as opposed to excessive rigor and severity, are frequently in evidence. Van Hove⁷⁴ points out that up to the end of the twelfth century this benignity or *aequitas* is designated by various terms, such as *dispensatio*, *indulgentia*, *relaxatio a summo iure*, *temperamentum salubri moderatione factum*, *miseri-cordia*, *humanitas*, *liberatio*, *venia*, *sapiens condescensio*.⁷⁵ Moreover, underlying all such concessions on the part of ecclesiastical authority is the motive of Christian charity,⁷⁶ although, as is evident, these concessions could not infringe upon divine law.⁷⁷ From the twelfth century on, many of the Popes in their decretals mention *aequitas*, as opposed to the rigor of law.⁷⁸ On the theological side, in the discussions by the Scholastics⁷⁹ the terms *aequitas* and *epikeia* become definitely identified.

⁷⁴ *De Legibus Ecc.*, n. 270.

⁷⁵ Brys offers several historical illustrations. Cf. J. Brys, *De Dispensatione in Iure Canonico* (Brugis, 1925), pp. 14 et sqq.

⁷⁶ “. . . *caritas est ipsius fundamentum* quo nititur potestas dispensandi auctoritatis ecclesiasticae. Superiores enim ecclesiastici ex praecepto caritatis tenentur meliori modo prospicere gloriae Dei et bono animarum, interdum rigore legem urgendo, interdum eam misericorditer relaxando.”—Brys, *ibid.*, p. 52.

⁷⁷ Thus, St. Ivo of Chartres concedes the lawfulness and wisdom of a dispensation, “si tamen nihil contra Evangelium, nihil contra apostolos usurpaverit.”—*Prologus in Decretum a se Concinnatum* (MPL, CLXI, 58-59).

⁷⁸ On this point cf. Van Hove, *De Legibus Ecc.*, nn. 270 et sqq.; E. Reilly, *The General Norms of Dispensation*, The Catholic University of America Canon Law Studies, No. 119 (Washington, D. C.: The Catholic University of America Press, 1939), pp. 20 et sqq.

⁷⁹ Cf., e.g., St. Thomas, *Sum. Theol.*, II-II, q. 120, a. 1; Suarez, *De Legibus*, Lib. VI, Cap. VI, n. 5.

CHAPTER II

TRADITIONAL EXPLANATION OF THE NATURE AND SCOPE OF *EPIKEIA*: ANALYSIS AND COMMENTARY

ARTICLE I. PRE-SUAREZIAN DEVELOPMENT

I. *Authors Before St. Thomas*

Aristotle (d. 322 B. C.). Inasmuch as practically all writers, civil as well as ecclesiastical, have based their explanations of *epikeia* and *aequitas* on Aristotle, for a thorough comprehension of the development of these concepts, it is necessary to investigate the Philosopher's treatment of ἐπιείκεια, as found in his *Nicomachean Ethics*¹ and in his *Rhetoric*.²

After dealing in the *Nicomachean Ethics* with the nature, sphere and function of justice, Aristotle enters into a discussion of a corrective of legal justice which he calls ἐπιείκεια.³ He points out that the basic reason for the existence of such a concept is to be found in the fact that laws are, of their very nature, universal. Lawmakers legislate for the general run of cases, and not for any particular concrete instance. But particular details and circumstances are almost limitless in number and nature; it is clear that no legislator in the act of framing a law, can foresee all the variable circumstances which may arise. Taking into account what usually

¹ *Nicomachean Ethics*, V, 10. Maggiore believes that Aristotle's discussion here "rimane insuperato per profondità e finezza speculativa."—G. Maggiore, "L'Equità e il Suo Valore nel Diritto," *RIFD*, III (1923), 261.

² *Rhetoric*, I, 13. In the fifteenth chapter also, Aristotle refers to *epikeia*, stating that "the principles of equity are permanent and changeless. . . ." The fact that laws because of their universality cannot easily be applied in some particular cases is mentioned also in his *Politics*: "As in other sciences, so in politics, it is impossible that all things should be precisely set down in writing; for enactments must be universal, but actions are concerned with particulars."—*Politics*, II, 8.

³ *Nicomachean Ethics*, V, 10.

and ordinarily happens, he enacts his law. He is not, however, ignorant of the possibility that his law, though just and good in general, may be deficient in particular cases. On the other hand, an individual may find himself confronted with a case which, although it is included in the law insofar as the words are concerned, nevertheless is not comprehended in the general law, if the intention of the legislator, and not merely the verbal formula, be scrutinized. And so, he *emends* or *corrects* the law; he prudently judges that if the lawmaker had foreseen this particular case, he would not have wished to bind his subject; and so the subject does not observe the law as it is written. In other words, *epikeia* is used. Moreover, as Aristotle is careful to point out, the error is not in the law, for the law in general may be just and ordained to the common good. "All law is universal, but about some things it is not possible to make a universal statement which shall be correct."⁴ Neither is the lawmaker to be criticized. For, as St. Thomas remarks in commenting upon this passage of Aristotle:

... about some things our intellect can make a universal statement which is true—as in the case of the necessary, in regard to which a defect cannot occur. But of other things it is impossible that anything be said which is true universally—as in the case of the contingent.⁵

Rather, the defect is to be found in the very nature of things, that is, in the variability of contingent facts.

This, then, is the nature of *epikeia*—"a correction of law where it is defective owing to its universality."⁶ For it is reasonable that there exist some means of emending a law in a particular case where it errs because its terminology is universal, even though in general the law may be ordained to the common good. An individual, then, in

⁴ *Loc. cit.*

⁵ "... de quibusdam intellectus noster potest aliquid verum dicere in universali, sicut in necessariis in quibus non potest defectus accidere. Sed de quibusdam non est possibile quod dicatur aliquid verum in universali, sicut de contingentibus."—*In X Libros Ethicorum ad Nicomachum Commentarius (Opera Omnia, XXV), V Eth., Lect. XVI.* (Hereinafter cited as *In Ethica.*)

⁶ *Nicomachean Ethics*, V, 10,

using *epikeia*, has in mind, not the rigid and inflexible words of the written law, but rather the intention of him who made the law. From a consideration of the circumstances he prudently judges that, if the legislator were now present and conversant with all the details at hand, he would not impose the obligation to observe the law according to its letter. Indeed, it seems to be Aristotle's opinion that if the lawmaker could have foreseen the case, he would have made specific provision for it in his law; for he states that *epikeia* has reference to "what the legislator himself would have said had he been present, and would have put into his law if he had known."⁷ And yet, in his *Rhetoric* Aristotle writes that the existence of *epikeia*

partly is and partly is not intended by legislators; not intended, where they have noticed no defect in the law; intended, where they find themselves unable to define things exactly, and are obliged to legislate as if that held good always which in fact only holds good usually; or where it is not easy to be complete owing to the endless possible cases presented. . . .⁸

It is because of the deficiency of law, arising out of its universality, that

all things are not determined by law, viz., that about some things it is impossible to lay down a law, so that a decree is needed. For when the thing is indefinite the rule also is indefinite, like the leaden rule used in making the Lesbian moulding; the rule adapts itself to the shape of the stone and is not rigid, and so too the decree is adapted to the facts.⁹

⁷ *Loc. cit.*

⁸ *Rhetoric*, I, 13.

⁹ *Nicomachean Ethics*, V, 10. With regard to the decree here mentioned, Aristotle later explains it by stating that "a decree is a thing to be carried out in the form of an individual act."—*Nicomachean Ethics*, VI, 8. In comment, Grant observes that a decree "constitutes the application of a general principle" and "like the exercise of equity, was a remedy to make up for the insufficiency of laws."—*Op. cit.*, II, pp. 168, 140. Relative to the Lesbian moulding, Grant explains that it "appears to have been a kind of Cyclopaean masonry, which may have remained in Lesbos from the early Pelasgian occupiers of the island. Polygon stones were used in it, which could not be measured by a straight rule."—*Ibid.*, p. 141. More specifically Burnet believes that: "This is said to refer to

Having determined the object of *epikeia*, Aristotle proceeds to a discussion of its subject. Very simply, it is the individual who thus corrects the law. "It is evident also from this who the equitable man is; the man who chooses and does such acts."¹⁰ Continuing, however, the Philosopher points out that he also is an equitable man, who "is no stickler for his rights in a bad sense, but tends to take less than his share though he has the law on his side."¹¹ In other words, both the man who uses *epikeia* as an emendation of law, and the man who, in favor of his neighbor, acts leniently in demanding his due from that neighbor—both are motivated by the same virtue.¹²

Moreover, attention should be called to the fact that the voluntary mitigation of an individual's strict right is not an act which he is bound to perform. In point of fact, such a man is worthy of praise precisely because his action is in no way due in justice. It is difficult to understand Giannini's view to the contrary: "This passing over is only the practice of justice, since it is precisely in view of the injustice that he would commit, that the equitable man yields his right."¹³

the 'Cyclopiian' building, e.g. at Tiryns where polygonal stones were used and a μολίβδινος κανών would doubtless be of service. But why should it be called 'Lesbian'? Stewart asks whether the reference is not to the Lesbian κῦμα 'moulding.' . . . The Lesbian κῦμα was undulation, not a simple hollow like the Dorian. Surely this must be right."—J. Burnet, *The Ethics of Aristotle* (London, 1900), p. 244. Stewart concludes: "Where the stones are irregularly shaped the builder must use a flexible rule."—J. Stewart, *Notes on the Nicomachean Ethics of Aristotle* (Oxford, 1892), I, pp. 525-526.

¹⁰ *Nicomachean Ethics*, V, 10.

¹¹ *Loc. cit.* In commenting on this passage Maurus seems to restrict very much the concept of the equitable man: "Patet . . . quid sit homo aequus: est enim qui corrigit justum legale per aequitatem naturalem . . . et non exequitur exacte legem in partem deteriozem, sed aliquid remittit de rigore legis, etiamsi verba legis faveant tali rigori."—S. Maurus, *In Ethica (Aristotelis Opera Omnia Quae Extant Brevis Paraphrasi et Litterae Perpetuo Inhaerente Expositione* [Parisii, 1885-1886], II), V, 10.

¹² Cf. St. Thomas *In Ethica*, V, Lect. XVI.

¹³ "Ma questo passar su non è che la pratica della giustizia giacchè è appunto in vista dell' ingiustizia che commetterebbe che l'uomo equo cede il suo diritto."—Giannini, *art. cit.*, *Archiv. Giurid.*, XXI, 193.

With regard to the extent of *epikeia*, Aristotle speaks in a very general way. One is justified in concluding that *epikeia* may be used in any case where the law fails by reason of its universal scope. "It is right where the legislator fails us and has erred by oversimplicity, to correct the omission—to say what the legislator himself would have said had he been present . . ." ¹⁴ It is obvious that this leaves a broad range for the use of *epikeia*, for there are numerous cases in which the universality of a law makes it defective. Yet, it is very important to note that *epikeia* may not be used to correct every defect that may arise in the law—but only the defect which arises by reason of the law's universality. ¹⁵

From a consideration of the treatment of *epikeia* by Aristotle we may draw still another conclusion. He does not limit the use of *epikeia* to those cases in which observance of the law as written would result in a public detriment. That it can be utilized in favor of a private individual, without any reference to the common good at all (not, of course, if deviation from the law as written would result in harming the general welfare), is a valid inference from his general principle: ". . . it is right, where the legislator fails us and has erred by over-simplicity to correct the omission . . ." ¹⁶

Nowhere does Aristotle make any reference to the necessity of endeavoring to recur to someone in authority before *epikeia* is used. Nor does he in any way indicate that *epikeia* is licit only in cases

¹⁴ *Nicomachean Ethics*, V, 10.

¹⁵ This point is very emphatically stressed by Cajetan. Cf. Cajetan (Card. Thomas de Vio), *Angelici Doctoris S. Thomae Aquinatis Summa Theologica cum Commentariis Thomae de Vio Card. Cajetani et Elucidationibus Litteralibus P. Seraphini Capponi a Porrecla* (Romae, 1773), in II-II, q. 120, a. 1. In considering equity from a modern point of view only, and hence criticizing Aristotle because he failed to take into account defects in the law other than universality which equity might be used to correct, Holland seems to be guilty of an anachronism. "Since the generality of a law," he writes, "is not the only hardship in its application which is redressed by Equity, Aristotle's definition . . . is hardly adequate."—Holland, *op. cit.*, p. 50, footnote. The opinion of Keigwin appears to be far nearer the truth: ". . . the function of Equity is to correct the deficiencies of the law which are due to the universality of legal principles, or (in other words) to rectify the rigidity of legal rules."—*Art. cit.*, *GLJ*, XIX, 170.

¹⁶ *Nicomachean Ethics*, V, 10.

of emergency. In point of fact, the tenor of his treatment of the matter seems to imply the opposite, namely, that an individual on his own authority in all cases may correct the law which has become defective owing to its universality. Of course, actually the law must be thus defective; this Aristotle supposes, for he enters into no discussion of cases where this condition is not certainly verified.

In his treatment of *epikeia* in the *Nicomachean Ethics* the Philosopher insinuates that there is question only of human law. This is evidenced by his statement that the legislator would have made provision for the case at hand had he foreseen it. And even if it be true, as Aristotle states in his *Rhetoric*, that a legislator may foresee the case and yet not mention it as an exception to his law, still the use of *epikeia* is restricted to human law, for the failure to make provision for special cases is attributed by Aristotle to the fact that legislators "find themselves unable to define things exactly."¹⁷

It must be admitted, however, that Aristotle's treatment of *epikeia* leaves many questions unanswered.¹⁸ Prescinding for the moment from the very knotty problem as to the exact relation existing between *epikeia* and justice,¹⁹ we must consider as being not a little vague, Aristotle's explanation of the very nature of *epikeia*. In the *Nicomachean Ethics*, for example, he describes at length the process of correcting a law when it is deficient because of its universality, and logically concludes that the virtue exists in him who executes the task of emending the statute. Yet, immediately he adds that that man is equitable who does not insist too rigorously

¹⁷ *Rhetoric*, I, 13.

¹⁸ "Chi cerca tutti i vari passi e li raccoglie, non può non notare che taluni particolari male aderiscono, e si sgretolano nell' insieme."—Giannini, *art. cit.*, *Archiv. Giurid.*, XXI, 193.

¹⁹ ". . . for the equitable though it is better than one kind of justice, yet is just, and it is not as being a different class of thing that it is better than the just. The same thing, then, is just and equitable, and while both are good, the equitable is superior. What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice. . . . Hence the equitable is just, and better than one kind of justice—not better than absolute justice but better than the error that arises from the absoluteness of the statement. . . . It is plain, then, what the equitable is, and that it is just and is better than one kind of justice."—*Nicomachean Ethics*, V, 10.

upon his rights. Obviously two different ideas are here present and two different acts are concerned. The first has reference entirely to law and involves a correction of it which will result in benefit to the subject of the law. The second seems to have no necessary connection with law at all; it has reference only to a right, and exists as a virtue, not in him who is the subject of the obligation, but rather in him to whom that subject is obligated. For a proper understanding of Aristotle's teaching this distinction must be kept in mind.²⁰ Failure to appreciate that there are here involved two separate concepts is responsible for much of the confusion which characterizes subsequent comment as to the doctrine of Aristotle on *epikeia*.

Despite Aristotle's discussion of the subject of *epikeia* both in his *Nicomachean Ethics* and in his *Rhetoric*, it must be said that there is no unequivocal indication as to who precisely may correct the law. May *epikeia* be used by a subject of the law on his own initiative, or is its use restricted to a judge or other official whose function it is to apply the law to individual cases? In his *Rhetoric* Aristotle seems to leave the impression that *epikeia* may be used only by an authority, for he states: ". . . an arbitrator goes by the equity of a case, a judge by the strict law, and arbitration was invented with the express purpose of securing full power for equity."²¹ In the *Nicomachean Ethics* Aristotle's expression is rather indefinite: ". . . it is right, where the legislator fails us and has erred by oversimplicity, to correct the omission . . ."²² But the very fact that the statement is made without qualification would seem to justify the conclusion that any individual—even the subject of the law himself—may use *epikeia*.²³ On the other hand, in the supposition of

²⁰ "Hinc duplex innuitur respectus: alter quoad legem, prout est emendanda, alter quoad ius strictum, prout est mitigandum."—E. Hugon, "De Epikēia et Aequitate," *Angelicum*, V (1928), 359. It should be noted, however, that there is a possibility of interpreting in a somewhat different and narrower sense Aristotle's description in the *Nicomachean Ethics* of the equitable man. Cf. the observation by Maurus, note 11 *supra*.

²¹ *Rhetoric*, I, 13.

²² *Nicomachean Ethics*, V, 10.

²³ Medina, however, draws a different conclusion as to the meaning of Aristotle. Commenting on I-II, q. 96, a. 6 of the *Summa Theologica* of St.

the truth of this view, it is difficult to explain why no mention is made of any necessity of recourse to a Superior by the subject of the law—even in cases where to reach an authority is convenient.

To conclude this discussion of the doctrine of Aristotle regarding *epikeia*, it may be said: (1) *Epikeia* is a correction of the law, where the law is deficient by reason of its universality. (2) Not only he who corrects the law is an equitable man, but likewise he who is “no stickler for his rights.” In other words, at least in relation to the subject, there appears to be an identification of *correctio legis* with *mitigatio juris*. (3) *Epikeia* may be used to effect a good not only for the community, but even for the advantage of a private individual. (4) No mention is made of the necessity of recourse to a Superior. (5) *Epikeia*, it would seem, is concerned only with human law.

St. Albert the Great (+1280). The first²⁴ of the Scholastics to devote himself to a formal treatment of *epikeia* is St. Albert the Great.²⁵ The main points of his teaching may be outlined as follows.

First, it sometimes happens that, due to the variability of the circumstances of time and place, legal precepts are unable to subserve the purpose of the lawgiver. In such instances the equitable man (“*superjustus*”) resorts to *epikeia* strictly understood and, turning aside from the words of the law, acts in conformity with the intention of the legislator on the basis of the principle: “What has

Thomas, he states that the problem there to be solved is whether or not a subject may deviate from the words of the law—for that the ruler may do so no one doubts, in view of the teaching of Aristotle. Cf. B. Medina, *Expositio in Primam Secundae Angelici Doctoris* (Venetiis, 1602), q. 96, a. 6.

²⁴ Although no formal discussion of *epikeia* is found in the works of Cardinal Laborans (+ c. 1189), mention should be made of his description of *aequitas*, insofar as it may be exercised by the Roman Pontiff. “Est tamen in manu romani pontificis, digitus et in digito discretio, rigiditas et flexura, quo pro discretivo libramine suae sanctae deliberationis et providentiae, valeat canonum moderari censuris, ut et rigescant mitia, et rigida mitescant, lenitati succedat asperitas, et asperitati prout expedit, si tamen expediat quae nondum forte contingit, dispensatoria lenitas.”—*Fragmenta Laborantis* (MPL, CCIV, 912).

²⁵ St. Albert the Great, *Ethica (Opera Omnia* [ed. Borgnet; Parisiis, 1890-1899], VII), Lib. V, Tract. IV, Cap. I; Lib. VI, Tract. III, Cap. IV.

been established for a certain purpose must not be observed contrary to that purpose.”²⁶

Secondly, St. Albert offers three examples to illustrate his teaching. In the first case, there exists a law which forbids under pain of death any *peregrinus* to ascend the walls of the city. Seeing an enemy mounting the walls, a *peregrinus* pursues him and puts him to flight. Obviously there is a transgression of the words of the law by the *peregrinus*, but the purpose of the law is served. In the second case, an individual deviates from the literal observance of the law which requires that a *depositum* be restored, doing so in order not to return a sword to its owner who is insane. In the third case, a man violates a precept which forbids any citizen of a city to associate with an alien, his purpose being the obtaining from the wife of an enemy certain information regarding the enemy’s plans against the city.

Thirdly, *epikeia* and justice are not convertible terms. Yet *epikeia* belongs to the same genus as does justice, and pertains to legal justice. The equitable is better than the legally just (*justum legale*), but it is not better than the naturally just (*justum naturale*), which is the object of the natural law. In point of fact, the equitable is considered to be nobler than the *justum legale*, precisely because it approaches more closely to the *justum naturale*. In short, *epikeia* is “a directing of the *justum legale* to the purpose of a law.”²⁷

Fourthly, the equitable man is not an “*acerbodiaeos*,”²⁸ but is indulgent with regard to the punishment of an offender, even when the law would warrant a more rigorous attitude.

Finally, *epikeia* executes an action which an individual, inspired by the virtue of “*gnome*,”²⁹ judges must be performed.

²⁶ “Quod ad finem aliquem institutum est, contra finem illum observari non debet.”—*Ibid.*, Lib. V, Tract. IV, Cap. I.

²⁷ “. . . directio justi legalis ad finem legis.”—*Loc. cit.*

²⁸ St. Albert thus defines an *acerbodiaeos*: “. . . dicitur acerbodiaeos tam certus in justitia legis et praesumens, quod justum legis etiam in detrimentum vergens observare contendit, et ideo nititur semper ad deterius, et poenas legis intendit.”—*Loc. cit.*

²⁹ *Gnome* is defined as: “judicium rectam justi qui Graece ἐπιείκεια vocatur.”—*Ibid.*, Lib. VI, Tract. III, Cap. IV.

II. *St. Thomas*

St. Thomas (+1274). For purposes of clarity the doctrine of *St. Thomas* on *epikeia* may be considered under the following headings: 1. Nature and lawfulness of *epikeia*; 2. Relation of *epikeia* to the common good; 3. Extent of *epikeia*; 4. Necessity of recourse to a superior; 5. Modern controversies regarding the meaning of certain points in *St. Thomas*' teaching on *epikeia*; 6. Summary.

1. *Nature and lawfulness of epikeia.*

As to the nature of *epikeia* or *aequitas*,³⁰ *St. Thomas*' explanation is radically identical with that of Aristotle. He stresses the point that the lawmaker cannot foresee all possible cases; and so, with the common good as his aim, he frames the law in accordance with what happens in most instances. Obviously there may arise cases in which strict adherence to the letter of the law will prove harmful to the general welfare. In such instances the written law is not to be observed, because the law itself, as it stands, has deviated from the intention of the legislator, and is contrary to the common good. It is not to be observed, for the very efficacy and force of law are dependent entirely upon the ordination of law to the common good. Hence, any aberration of law from that direction will result in a nullification of that power to obligate which it formerly enjoyed.³¹

And so, *St. Thomas* and Aristotle are in agreement that the basic foundation underlying *epikeia* is the fact that law is sometimes deficient by reason of the universality of its expression. *St. Thomas* states:

. . . no man has wisdom so great that he can take into consideration all individual cases; and therefore he cannot adequately express in words all those things that are fitting for the end which he has in mind. And if the legislator were able to consider all

³⁰ *St. Thomas* uses *aequitas* as a synonym for *epikeia*. Cf. *Sum. Theol.*, II-II, q. 120, a. 1. Although there can be no doubt about the nominal identification of the two terms by *St. Thomas*, it is disputed as to whether he believes that in essence *epikeia* and *aequitas* are identical. Cf. pp. 47 et sqq. *infra*.

³¹ *Ibid.*, I-II, q. 96, a. 6.

cases, it would not be fitting that he mention all, in order to avoid confusion; but he should formulate the law according to what is of most usual occurrence.³²

To the objection that the power of interpreting the law belongs exclusively to him who has the power of enacting the law, St. Thomas answers that an individual who follows the intention of the legislator cannot be said to interpret the law.³³ He readily admits the teaching of St. Augustine: "In regard to temporal laws, although men judge about them when they are establishing them, nevertheless, once they are instituted and established, it shall not be licit to judge about them, but according to them."³⁴ However, maintains St. Thomas, when a subject in an emergency case acts *praeter verba legis*, actually there is no judgment made about the law itself, but rather about the individual case in which the words of the law are not to be observed.³⁵ This is a fine and all-important distinction. It represents the individual subject of the law hard-pressed by circumstances which probably the lawmaker did not foresee, or at least did not desire to mention in his law. He must make an immediate decision. He knows what the law states. He is keenly aware of the instant nature of the case at hand. Now, he does not debate as to the merits or expediency of the law itself—he accepts as true that the law exists, that it is good, that it binds in general: "He makes no judgment about the law itself."³⁶

³² ". . . nullius hominis sapientia tanta est ut possit omnes singulares casus excogitare; et ideo non potest sufficienter per verba sua exprimere ea quae conveniunt ad finem intentum. Et si posset legislator omnes casus considerare, non oporteret ut omnes exprimeret propter confusionem vitandam; sed legem ferre deberet secundum ea quae in pluribus accidunt."—*Ibid.*, I-II, q. 96, a. 6, ad 3. It is interesting to compare this final note with certain other statements made elsewhere by St. Thomas, to the effect that if the legislator had foreseen the case at hand he would have made provision for it as an exception in his law. Cf. *In Ethica*, Lib. V, Lect. XVI; *Sum. Theol.*, II-II, q. 60, a. 5, ad 2.

³³ *Sum. Theol.*, I-II, q. 96, a. 6, ad 2.

³⁴ ". . . in istis temporalibus legibus, quanquam de his homines judicent cum eas instituunt, tamen cum fuerint institutae atque firmatae, non licebit de ipsis judicare, sed secundum ipsas."—St. Augustine, *De Vera Religione*, XXXI (*MPL*, XXXIV, 148).

³⁵ *Sum. Theol.*, I-II, q. 96, a. 6, ad 1.

³⁶ *Loc. cit.*

But his attention is centered upon the case which confronts him. Obviously it falls under the words of the law. Does it, however, fall under the law itself—the law being essentially what the lawmaker intended, and not necessarily and in every case what the words state; for it is not to be supposed that human language always accurately and infallibly expresses what the legislator actually had in mind, or would have had in mind if he had been aware of the case now confronting the individual. This, then, is the problem to be solved—what action to take in this particular case: “He makes a judgment about the individual case.”³⁷ Observance of the law will be injurious to the general welfare; immediate action is necessary; there is no time to consult an authority who can dispense from the law.³⁸ And so, the subject settles the problem by deciding that in this case the words of the law are not to be observed.³⁹

In an earlier work⁴⁰ St. Thomas insists with even greater emphasis on the importance of the legislator’s intention, as distinguished from the words of the law. The intention of the lawmaker is so much more essential than the words of the law, that actually it would be a greater transgression to observe the words and not the intention, than to act in the contrary way. The same idea is repeated in the *Summa Theologica*:

³⁷ *Loc. cit.*

³⁸ All these elements are specifically expressed by St. Thomas. And so, his explanation must be understood in the light of the factors which he himself has introduced. Thus: “. . . si emergat casus in quo observatio talis legis sit damnosa communi saluti . . .” “Si observatio legis secundum verba non habet subitum periculum . . . non pertinet ad quemlibet ut interpretetur quid sit utile et quid inutile civitati.” “Si vero sit subitum periculum, non patiens tantam moram ut ad superiorem recurri possit, ipsa necessitas dispensationem habet annexam.”—*Ibid.*, a. 6.

³⁹ Substantially the same reply is given in the *Summa Theologica*, II-II, q. 120, a. 1, ad 2. It should be noted that St. Thomas speaks of the deviation from the letter of the law by a subject of the law. Whereas there may be doubt in Aristotle’s teaching as to who may use *epikeia*, there can be none so far as St. Thomas’ doctrine is concerned.

⁴⁰ Cf. *Commentum in Quattuor Libros Sententiarum Magistri Petri Lombardi (Opera Omnia, VII-XI)*, IV, dist. 15, q. 3, a. 1, sol. 4, ad 3. (Hereinafter cited as *Sent.*)

. . . commands which are given under the form of a general precept do not bind all persons in the same way, but according to the requirements of the end purposed by the legislator; if anyone through contempt of his authority should disobey a precept, or violate it in such wise as to frustrate the end intended by him, such a one sins mortally; if, however, one fails to observe a precept for some reasonable cause, especially if the legislator, were he present, would not insist upon the observance of the law in the case, such a transgression is not a mortal sin.⁴¹

St. Thomas acknowledges that *aequitas* may be understood in more than one sense. In his *Commentum in Quattuor Libros Sententiarum Magistri Petri Lombardi* he alludes to *aequitas* insofar as it is identified with justice, and *aequitas* insofar as it signifies *epikeia*.⁴² Thus, for St. Thomas *aequitas* and *epikeia* are not always necessarily identical; that is, *aequitas* is broader in meaning than *epikeia*. It is important to note, however, that St. Thomas distinguishes *epikeia*, not from *aequitas* in the sense of *mitigatio juris*, but rather from *aequitas* in the sense of equality. Understood in this latter sense, *aequitas* is really justice, for justice involves the rendering to another what is his due *secundum aequalitatem*.⁴³ Actually, then, in this passage St. Thomas refers to *aequitas naturalis* which, as has been explained above,⁴⁴ is identical with justice.

A study of the teaching of St. Thomas will not reveal very clearly just what distinction, if any, he believes to exist between *aequitas* as

⁴¹ “. . . praecepta quae per modum communis statuti proponuntur, non eodem modo obligant omnes, sed secundum quod requiritur ad finem quem legislator intendit: cuius auctoritatem si aliquis transgrediendo statutum contemnat, vel hoc modo transgrediatur ut impediatur finis quem intendit, peccat mortaliter talis transgressor; si autem ex aliqua rationabili causa quis statutum non servet, praecipue in casu in quo etiamsi legislator adesset, non decerneret esse servandum, talis transgressio non constituit peccatum mortale.”—*Sum. Theol.*, II-II, q. 147, a. 3, ad 2. It is not to be thought that St. Thomas implies that *venial* sin is committed in the case in question. Mention is made of *mortal* sin only because the objection under consideration is: “. . . quicumque transgreditur praeceptum, peccat mortaliter.”

⁴² Cf. *Sent.* III, dist. 33, q. 3, a. 4, sol. 3, ad 2.

⁴³ Cf. *Sum. Theol.*, II-II, q. 80, a. unic.; II-II, q. 57, a. 1, ad 3; II-II, q. 58, a. 2.

⁴⁴ Cf. pp. 10-11 *supra*.

mitigatio juris and *aequitas* as *correctio legis* (that is, *epikeia*). In commenting on Aristotle, he notes with the Philosopher that in a man who corrects the law by using *epikeia*, there is a certain characteristic virtue by force of which such an individual is equitable, and is distinguished from one who is not. The passage is important and calls for quotation in full:

And he [i.e., Aristotle] posits a certain quality as belonging to such a virtuous individual: he says that such a man is not an *acribodikaïos*, that is, one who diligently executes justice in a bad sense, that is, for the sake of inflicting punishment, as those who are rigorous in exacting a penalty; but they [i.e., men who are equitable] lessen the penalty even though the law would support them if they meted out severe punishment. For penalties were not intended by the legislator for their own sake, but as a sort of medicine for sin. Wherefore, an equitable man does not impose greater punishment than suffices for preventing sin.⁴⁵

Apparently St. Thomas interprets Aristotle to refer here not to any individual who, as a creditor, may treat his debtor benignly, even possibly canceling part of the debt due him in strict justice, but rather to a judge or to some other public authority, who acts leniently toward one who has transgressed the law.⁴⁶ To the virtue exercised by those individuals who are equitable in the sense that they do not insist with rigor on their strict rights,⁴⁷ St. Thomas may possibly refer very briefly and in a passing way in the *Summa Theologica*.⁴⁸

⁴⁵ "Et ponit quamdam proprietatem talis virtuosi: et dicit quod talis non est acribodikaïos, id est diligenter exequens justitiam ad deterius, id est ad puniendum, sicut illi qui sunt rigidi in puniendo, sed diminuunt poenas quamvis habeant legem adjvantem ad puniendum. Non enim poenae sunt per se intentae a legislatore, sed quasi medicina quaedam peccatorum. Et ideo epiches non plus apponit de poena quam sufficiat ad cohibenda peccata."—*In Ethica*, Lib. V, Lect. XVI.

⁴⁶ Cf. notes 11 and 20 of this chapter. This concept is not to be confused with the *aequitas* which is resorted to by a judge in ruling whether or not a subject actually is guilty of the violation of the law when he transgressed its words. Cf. *Sum. Theol.*, II-II, q. 60, a. 5, and the discussion of it on pp. 46 et sqq. *infra*.

⁴⁷ Cf. Aristotle, *Rhetoric*, I, 13.

⁴⁸ ". . . aequitas vero [potest contineri] sub epikeja vel amicitia."—*Sum. Theol.*, II-II, q. 80, a. unic., ad 3. Speaking of *aequitas* as a "congrua moderatio

2. Relation of epikeia to the common good.

St. Thomas seems to be quite clear in maintaining that *epikeia* may be used only when the common good is involved. "The letter of the law must always be observed by the subject unless there be danger to the public good."⁴⁹ Nor are there lacking other statements of like tenor. Several times in the course of the same article and in other passages as well, the Angelic Doctor implies that the common good must always enter into the case before *epikeia* may licitly be used. Thus: "If there should arise a case in which such observance of the law would be harmful to the common safety, it is not to be obeyed."⁵⁰ In discussing the example adduced to illustrate his teaching, he says that it is permissible to act "contrary to the words of the law in order that the general good which the legislator intends may be subserved."⁵¹ Nor is he less clear when he discusses

juris proprie dicti," Merkelbach states: "Ita saepius intelligunt moderni, et sensus non erat veteribus ignotus, uti constat ex S. Thoma, q. 80, ad 3."—*Summa Theol. Mor.*, II, n. 890. But it must be confessed that the indication in the *Summa Theologica* is vague. In this connection Vermeersch states that St. Thomas "dum nostram aequitatis rationem refert ad amicitiam, simul addit eam 'parum habere de ratione debiti.'"—*Quaest. de Iust.*, n. 487. His reference is to the *Summa Theologica*, II-II, q. 80, a. unic.

⁴⁹ "Semper ei qui legi subditur, verba legis servanda sunt, nisi adsit periculum publici boni."—*Sum. Theol.*, I-II, q. 96, a. 6.

⁵⁰ "Si emergat casus in quo observatio talis legis sit damnosa communi saluti, non est observanda."—*Loc. cit.*

⁵¹ ". . . contra verba legis ut servaretur utilitas communis quam legislator intendit."—*Loc. cit.* As illustrations of the use of *epikeia*, St. Thomas offers the following examples. In a besieged city there is a law to the effect that the gates of the city must remain closed; certain defenders of the city outside the gates are being pursued by the enemy; in such a case the gates should be opened to allow them to enter.—*Sum. Theol.*, I-II, q. 96, a. 6. The law demands that deposits be returned; however, a sword should not be returned to its owner who is insane, nor to its owner who would make use of it against his country.—*Ibid.*, II-II, q. 120, a. 1. One who has a reasonable cause for considering himself exempt from the ecclesiastical precept of fasting, does not sin when he transgresses the letter of the law.—*Ibid.*, II-II, q. 147, a. 3, ad 2; also a. 4. As to whether *epikeia* is involved in this example concerning fasting, there is some controversy. Cf. pp. 49 et sqq. *infra*.

whether or not *epikeia* is a virtue: "Since *epikeia* directs laws in accordance with the requirements of justice and the common good . . ." ⁵²

It may be objected that the doctrine that *epikeia* may be used for the advantage of a private citizen is at least implied in St. Thomas' choice of one illustration to exemplify his teaching:

. . . the law requires that deposits be restored, because such in most instances is just; however, it sometimes happens to be harmful; for example, if a person bereft of his senses should deposit a sword and then demand its return while he is insane . . . ⁵³

This objection has some weight, if it be true that in the example alleged, St. Thomas has in mind only the welfare of him who owns the sword or of him who is about to return it. But the whole context seems to imply that the Angelic Doctor is more concerned with the danger which will accrue to the community at large if the sword is returned. In fact, the case is adduced to illustrate this very point: ". . . in some cases to observe the law is contrary to justice and to the common good which the law intends; as, the law requires that deposits . . ." ⁵⁴

And yet, that *epikeia* may be used even for the good of a private individual in instances where the public utility is not involved, might seem to be a logical inference from certain other passages in St. Thomas' works. Thus, for example, in discussing the precept of fasting, he states: "A precept imposed by a legislator does not bind when its observance would nullify or frustrate the intention of the legislator to incline men to virtue . . ." ⁵⁵

⁵² "Cum epicheia sit legum directiva secundum quod iustitiae ratio et communis utilitas poscit . . ."—*Sum Theol.*, II-II, q. 120, a. 1.

⁵³ ". . . lex instituit quod deposita reddantur, quia hoc ut in pluribus iustum est; contingit tamen aliquando esse nocivum, puta si furiosus deposuit gladium, et eum repositat dum est in furia . . ."—*Loc. cit.*

⁵⁴ ". . . quam [legem] tamen in aliquibus casibus servare est contra aequalitatem iustitiae, et contra commune bonum, quod lex intendit; sicut lex instituit quod deposita . . ."—*Loc. cit.*

⁵⁵ "Praeceptum a legislatore positum, tunc solum ad observandum non

Moreover, let it be supposed that a case arises in which it is perfectly clear that observance of the words of the law would be contrary to the legislator's intention. The case in point involves no danger or harm to the common welfare. Would it not seem that to disregard the written law would be more in accord with St. Thomas' teaching on the extreme importance of the intention of the lawmaker, as distinguished from the words of the law?

The problem is a perplexing one. Soto⁵⁶ admits that there is doubt as to St. Thomas' opinion. He contends, however, that St. Thomas does not deny that *epikeia* may be used for the advantage of a private individual. Suarez interprets the words of St. Thomas by asserting: "Although in the aforesaid article six, he speaks of a detriment to the common good, under that heading he includes a detriment to individual citizens; for such redounds to the harm of the state. . . ." ⁵⁷ The Salmanticenses⁵⁸ consider that in the example concerning the law which forbids the opening of the gates of the city, St. Thomas has in mind a detriment to the common good. But in the example involving the return of the sword to its owner who is insane, the Angelic Doctor, they believe, envisages peril to a private individual only. Consequently, the use of *epikeia* is at times permissible, even when the common good is not concerned.

It would seem that, in St. Thomas' opinion, for the lawful use of *epikeia* the public good must in some way be involved, either directly or—what the words of Suarez seem to mean—indirectly. And quite possibly it is in the light of this indirect relation to the common good that the doctrine of St. Thomas, illustrated by the example concerning fasting, can be reconciled with the apparently different teaching in other sections of his works.

obligat quando observatio intentionem legislatoris evacuat vel impediat, qua intendit homines inducere ad virtutem . . ."—*Sent.* IV, dist. 15, q. 3, a. 2, sol. 2.

⁵⁶ D. Sotus, *De Justitia et Jure* (Salmanticae, 1556), Lib. I, q. VI, a. 8.

⁵⁷ "Nam licet, in dicto artic. 6, loquatur de detrimento communis boni sub illo comprehendit detrimentum particularium civium; nam in damnum civitatis redundat. . . ."—*De Legibus*, Lib. VI, Cap. VII, n. 13.

⁵⁸ Salmanticenses, *Cursus Theologiae Moralīs* (Venetiis, 1728), Vol. III, Tract. XI, Cap. IV, Punct. III, n. 44.

3. *Extent of epikeia.*

It is quite evident that St. Thomas looks upon *epikeia* as licit when strict observance of the law would produce a harmful result, and hence would be evil. Thus, in commenting on Aristotle, he says:

... when a law prescribes something in a general way, and in a particular case it is not useful for it to be observed, it stands to reason that the law should be corrected insofar as it is defective; where, namely, the legislator left undetermined a particular case in regard to which the law was defective and sinned . . .⁵⁹

His teaching in the *Summa Theologica* is even clearer. Thus, for example, he states that in some cases to observe the letter of the law would be "contrary to the equality of justice."⁶⁰ Again, he says that in some instances "the essence of justice" demands that *epikeia* be used.⁶¹

That the use of *epikeia* is not restricted to this type of case, however, seems to be the meaning of St. Thomas, in a passage found in his *Commentum in Quattuor Libros Sententiarum*:

⁵⁹ ". . . cum lex proponit aliquid in universali, et in aliquo casu non sit utile observari, ratio recte se habet quod aliquis dirigat illud quod deficit legi, ubi scilicet legislator reliquit casum particularem in quo lex deficit non determinatum et peccavit . . ."—*In Ethica*, Lib. V, Lect. XVI. It cannot be apodictically stated that this passage, taken by itself, refers to cases where observance of the law would be sinful or evil. For by the word "*peccavit*" St. Thomas could mean that the law sinned, in the sense that it imposed an excessively difficult obligation. Yet, the former interpretation seems more compatible with other passages of the Angelic Doctor.

⁶⁰ *Sum. Theol.*, II-II, q. 120, a. 1. It is to be noted, of course, that it is wrong not only for the subject to obey the law, but also for the legislator to demand its observance. However, St. Thomas in discussing *epikeia*, has in mind especially the evil result which would ensue from the literal following of the law—it would be wrong, e.g., to return a sword to its owner who is now insane. Consequently, the matter is principally treated from the aspect of the subject of the law. It should be noted, however, that while in some cases it would be unjust for the subject to obey the letter of the law, in others it would be unjust to oblige the subject to obey the letter of the law, although literal observance of the precept would effect no detriment, other than the injustice done to the subject. It would seem to be a logical deduction from St. Thomas' opinion that *epikeia* is permissible in either case; for in each, to demand observance of the law exceeds the power of the legislator.

⁶¹ *Loc. cit.*

If, however, one does not observe [a precept] in some case in which it can be believed with probability that, if the legislator were present, he would not be willing to bind him, such a one is not to be deemed a transgressor of the precept.⁶²

This is a broad statement, and from it one might infer that it is the opinion of St. Thomas that the use of *epikeia* is not restricted to cases where observance of the law would be harmful to the common good, but may possibly be resorted to in cases where to obey the law would be very difficult—even perhaps in cases where, owing to circumstances, although to follow the words of the law would be neither sinful nor excessively difficult, the subject prudently judges that, if the lawmaker were at hand, he would not be willing to impose the obligation. From a study of this passage alone, that inference would seem to be justified. Yet, in view of the stringent restrictions set down by St. Thomas in the *Summa Theologica*,⁶³ it is doubtful that the final opinion of the Angelic Doctor would leave a field so broad for the use of *epikeia*.

Cajetan⁶⁴ not only adheres to the stricter view—that *epikeia* may be used only when observance of the letter of the law would be evil—but he maintains that such is the opinion of St. Thomas. Catalanus⁶⁵ likewise interprets St. Thomas in this way. So too, among many modern writers Van Hove⁶⁶ and Cicognani-Staffa⁶⁷ may be mentioned as believing that St. Thomas is thus to be understood. Suarez,⁶⁸ however, contends that such a doctrine is entirely too rigorous. The observation of the theologian Castropalao on this point is

⁶² “Si autem in aliquo casu non servat in quo probabiliter credi potest, si legislator adesset, eum obligare non velle, talis non est reputandus praecepti transgressor.”—*Sent.* IV, dist. 15, q. 3, a. 1, sol. 4, ad 3.

⁶³ Thus, in the *Summa Theologica*, I-II, q. 96, a. 6, *epikeia* is discussed only in connection with cases in which observance of the law would be “damnosa communi saluti,” and in II-II, q. 120, a. 1, in connection with cases in which observance of the law would be “contra aequalitatem iustitiae.”

⁶⁴ *Op. cit.*, in II-II, q. 120, a. 1.

⁶⁵ P. Catalanus, *Universi Juris Theologico-Moralis Corpus Integrum* (ed. 2; Barcino, 1743), Vol. I, Pars I, Quaest. II, Cap. XIV, n. 9.

⁶⁶ *De Legibus Ecc.*, n. 272.

⁶⁷ *Op. cit.*, I, p. 300.

⁶⁸ *De Legibus*, Lib. VI, Cap. VII, n. 9.

interesting. He acknowledges that St. Thomas' opinion on the matter is obscure, but he endeavors to clarify the apparent indefiniteness:

Some believe that it is not licit to deviate from the words of the law except when its observance would be evil; this seems to be the opinion of St. Thomas in II-II, q. 120, a. 1. . . . The reason is because *epikeia* is an emendation of the law in that case in which the law sins—but the law does not sin except if it obligate one to do something sinful. . . . Nonetheless, the common opinion should be held, with which St. Thomas does not disagree, that it is licit to use *epikeia* not only in the case in which obedience to the law would be evil, but also in the case in which it would be too burdensome and difficult, because of grave harm therefrom resulting . . .⁶⁹

4. *Necessity of recourse to a Superior.*

Perhaps the most vexing problem which arises in connection with the teaching of St. Thomas on *epikeia* revolves about the question of the necessity of recourse to authority. That the Angelic Doctor is very strict on this point is evidenced by the conditions which he outlines, the fulfillment of which is required for the licit use of *epikeia*. If there be no sudden or urgent danger, then no private individual, says St. Thomas, can interpret what is useful or not useful to the common welfare—such pertains to the ruler alone, who may dispense from the law if he sees fit to do so. If, on the other hand, a sudden danger should arise, and action so immediate is demanded that there is no time to recur to higher authority, “the necessity has the dispensation attached to it, for necessity knows no law.”⁷⁰

From this statement alone, one might perhaps conclude that St. Thomas does not allow the use of *epikeia*—even when observance of

⁶⁹ Aliquibus videtur non esse licitum a verbis legis deviare, nisi quando esset iniqua illius observatio; sic videtur tenere D. Thomas 2.2. quaest. 120, art. 1. . . . Ratio est quia epikieia est emendatio legis in eo casu in quo lex peccat. . . . Sed lex non peccat, cum non obligat ad aliquid iniquum. . . . Nihilominus tenenda est communis sententia, a qua nec D. Thomas dissentit, non solum licitum esse uti epikieia in casu quo obedire legi esset iniquum, sed in casu quo esset nimis grave et difficile, propter aliquod grave damnum inde resultans . . .”—F. Castropalaus, *Opus Morale* (Lugduni, 1682), Vol. I, Tract. III, Disp. V, Punct. III, § II, nn. 2-3.

⁷⁰ *Sum. Theol.*, I-II, q. 96, a. 6.

the law would be evil, and even when the general welfare is involved—except in cases where recourse to authority is impossible, and immediate action is essential. Yet, one must keep in mind other passages of St. Thomas, touching on the point. In discussing whether or not all are bound to observe the laws of fasting, for example, he makes the following statement:

. . . general precepts are formulated according to the needs of the many. And therefore, the legislator in enacting them has in mind what happens generally and for the most part. If for some special cause there should be found something in an individual which is incompatible with the observance of a precept, such a person the legislator does not intend to bind to compliance with the law. However, discretion must be used in the matter. For if the reason be evident, it is lawful for a man on his own initiative to omit the fulfillment of the precept, especially if custom intervenes [in his favor], or if it be difficult for him to recur to a Superior. If, however, the reason be doubtful, one should have recourse to the Superior who has power to grant dispensations in such cases. And this must be done with regard to the fasts designated by the Church, to which all are bound in general, unless there be some special obstacle.⁷¹

Now, while it is true that St. Thomas here mentions recourse to a Superior, nevertheless, by no means is the same insistence placed on it as in the former passage. Nor should we lose sight of the implication that the necessity of recourse is restricted to cases of doubt.⁷²

⁷¹ “. . . statuta communia proponuntur, secundum quod multitudini conveniunt. Et ideo legislator in eis statuendis attendit id quod communiter et in pluribus accidit. Si quid autem ex speciali causa in aliquo inveniat quod observantiae statuti repugnet, non intendit talem legislator ad statuti observantiam obligare. In quo tamen est discretio adhibenda. Nam si causa sit evidens, per seipsum licite potest homo statuti observantiam praeterire, praesertim consuetudine interveniente, vel si non posset de facili recursus ad superiorem haberi. Si vero causa sit dubia, debet aliquis ad superiorem recurrere, qui habet potestatem in talibus dispensandi. Et hoc observandum est in jejuniis ab Ecclesia institutis, ad quae omnes communiter obligantur, nisi in eis fuerit aliquod speciale impedimentum.”—*Ibid.*, II-II, q. 147, a. 4.

⁷² For an interpretation of the meaning of the terms “certainty,” “doubt,” and “probability,” cf. Chap. IV, art. 9 *infra*.

In the same article in which he seems to insist so emphatically on the necessity of recourse to a Superior, St. Thomas thus replies to an objection:

. . . he who follows the intention of the legislator does not interpret the law simply; but in a case in which it is evident, by reason of the manifest harm, that the legislator intended otherwise. For if it be a matter of doubt, he must either act according to the words of the law or recur to Superiors.⁷³

It would seem from a consideration of this last sentence that recourse to authority is necessary only in cases of doubt.

But if it be maintained that St. Thomas does not intend to restrict his doctrine on the necessity of consulting a Superior to cases of doubt, there is still to be explained this more direct statement:

. . . there is place for interpretation in doubtful cases where it is not allowed to deviate from the words of the law without the decision of the ruler. But when the case is manifest there is need not of interpretation, but of execution.⁷⁴

The problem becomes more involved if one resorts to other works of St. Thomas. Thus, for example, in the passage quoted above⁷⁵ from the *Commentum in Quattuor Libros Sententiarum*, no need of consulting an authority is mentioned.

Any attempt to solve the problem must be prefaced by a realization that there are three possible types of cases involved. *Case 1.* There is certainty that the lawmaker would not impose obligation in this case if he were present. Now, either the case is one of emergency where an authority with power to dispense cannot be reached on

⁷³ “. . . ille qui sequitur intentionem legislatoris non interpretatur legem simpliciter, sed in casu in quo manifestum est per evidentiam nocimenti legislatorum aliud intendisse. Si enim dubium sit, debet vel secundum verba legis agere, vel superiores consulere.”—*Sum. Theol.*, I-II, q. 96, a. 6, ad 2.

⁷⁴ “. . . interpretatio locum habet in dubiis, in quibus non licet absque determinatione principis a verbis legis recedere; sed in manifestis non est opus interpretatione sed executione.”—*Ibid.*, II-II, q. 120, a. 1, ad 3. Commentators explain that St. Thomas here refers to execution of the act to be performed *praeter verba legis*.

⁷⁵ *Sent.* IV, dist. 15, q. 3, a. 1, sol. 4, ad 3. Cf. note 62 *supra*.

time, or it is not one of emergency. *Case 2.* There is a doubt whether or not the observance of the law could be presumed to be opposed to the intention of the legislator. Again, either the case is one of emergency where an authority cannot be reached on time, or it is not one of emergency. *Case 3.* There is a sound probability that the lawmaker would not impose obligation in this case, if he were present. Either the case is one of emergency where recourse to an authority is impossible, or it is not a case of emergency.

Concerning the first case, it is clear that St. Thomas teaches that, if the matter is so urgent that there is no possibility of recourse, one may licitly use *epikeia*. But what of cases where this urgency is not present, where to recur is possible? As has been indicated above, St. Thomas' general discussion of the matter⁷⁶ appears to point to the necessity of consulting an authority. On the other hand, in other passages⁷⁷ he seems to imply that recourse is unnecessary. How are these statements to be reconciled? Cajetan⁷⁸ in commenting on the *Summa Theologica*, states that *epikeia* may be used (that is, recourse is not necessary) in cases of certainty, even when recourse is possible. Vasquez⁷⁹ teaches the same as more probable, and cites the one hundred and twentieth question⁸⁰ to corroborate his statement. Suarez, the Salmanticenses and Billuart make no allusion to the problem engendered by the ninety-sixth question, but cite a response from St. Thomas to show that recourse is unnecessary.⁸¹ Sylvius teaches:

For since it [i.e., the case] is evident, it is licit to act contrary to the words of the law even without consulting the Legislator—

⁷⁶ *Sum. Theol.*, I-II, q. 96, a. 6, in *corp.*

⁷⁷ Cf. *ibid.*, II-II, q. 147, a. 4; I-II, q. 96, a. 6, ad 2; II-II, q. 120, a. 1, ad 3; *Sent.* IV, dist. 15, q. 3, a. 1, sol. 4, ad 3.

⁷⁸ *Op. cit.*, in I-II, q. 96, a. 6.

⁷⁹ G. Vasquez, *Commentarii ac Disputationes in Summam S. Thomae* (Lugduni, 1630-1631), in I-II, Disp. 176, Cap. III, n. 13.

⁸⁰ St. Thomas, *Sum. Theol.*, II-II, q. 120, a. 1.

⁸¹ Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 1; Salmanticenses, *op. cit.*, Vol. III, Tract. XI, Cap. IV, Punct. III, n. 41; C. Billuart, *Tractatus de Legibus (Summa Sancti Thomae* [ed. 9, Palmé; Parisiis, n. d.], II), Dissert. V, Art. IV. The reference to St. Thomas is found in *Summa Theologica*, II-II, q. 120, a. 1, ad 3.

and this, whether the matter admits of delay or not: because "when the case is manifest there is no need of interpretation," says St. Thomas.⁸²

Farrell in his modern commentary on St. Thomas has the following:

. . . it is not surprising to find St. Thomas agreeing that when the letter of the law here and now would militate against the common good, the law is not to be followed, for that would be to act against the intention of the legislator. However, unless the emergency has arisen so suddenly and must be settled so quickly that recourse is impossible, the interpretation or absolution from the law in this particular case must be made by the legislator himself.⁸³

Few theologians have made any attempt to explain the statements in the sixth article of the ninety-sixth question, wherein St. Thomas appears to demand recourse to authority in all cases save those of emergency. Perhaps the most noteworthy endeavors to clarify this point have been made by Cajetan and Soto.

Cajetan⁸⁴ readily admits the apparent inconsistency. But he offers the following solution. When St. Thomas states in the *corpus* of the article that it is the function of no private individual to interpret what is useful or what is not useful to the state, he has in mind a *casus dubius* and not a *casus certus*. That this is so is proved by the fact that for the Angelic Doctor, when the case is manifest there is no need of interpretation. Hence, by using the term "*interpretatio*" in the *corpus*, St. Thomas indicates that he is not discussing a *casus certus seu manifestus*.

⁸² "Cum enim sit evidens, etiam non consulto Legislatore licet agere contra verba legis, idque sive res patiat moram sive non: quia *In manifestis non est opus interpretatione*, ait B. Thomas."—F. Sylvius, *Commentaria in Summam S. Thomae* (Antverpiae, 1667), in I-II, q. 96, a. 6.

⁸³ W. Farrell, *A Companion to the Summa* (New York: Sheed and Ward, 1938-1942), II, p. 403. The passage mentions recourse to the legislator. It is to be assumed that the same teaching would hold when there is question of the possibility of recurring to an authority who, though he is not the legislator, has the power to declare the meaning of the law or to dispense from it.

⁸⁴ *Op. cit.*, in I-II, q. 96, a. 6.

However, another difficulty now arises. In the *corpus* of the article St. Thomas allows *epikeia* to be used in cases of sudden emergency, for "the necessity has the dispensation attached to it." Yet, in his reply to the second objection he states that in cases of doubt the words of the law must be followed if a Superior cannot be consulted. If, as Cajetan maintains, St. Thomas refers in the *corpus* of the article to a *casus dubius*, how can his position be reconciled with that taken in the reply to the second objection? In cases of necessity where recourse is impossible, does he not seem to allow deviation from the law in one place, and forbid it in another?

Cajetan puts forward this solution: *In ambiguis datur latitudo*. That is, some cases are so doubtful that they remain such in spite of every endeavor to remove the doubt. Other cases are doubtful, but in such wise that one can reasonably judge what the lawmaker would wish were he now present. In the *corpus* of the article, contends Cajetan, St. Thomas speaks of the latter type of ambiguity, and thus allows the use of *epikeia* in cases of emergency. In his reply to the second objection, he deals with the former type of ambiguity and does not permit *epikeia* even in cases where there is no possibility of recourse.

In brief, Soto's solution is as follows.⁸⁵ In cases where the subject has certainty that it was not the intention of the legislator to impose obligation, there is absolutely no need of recourse to an authority, whether there exists an emergency or not. Moreover, this opinion, he asserts, is clearly reconcilable with the teaching of St. Thomas. For in the sixth article, when the Angelic Doctor states that recourse must be had in cases where the observance of the law involves no sudden peril, actually he is speaking of cases of probability, and not of cases of certainty at all.

It is unfortunate that no further explanation is given either by Cajetan or by Soto. Neither makes any attempt to prove his opinion, and so the value of the reasons underlying it cannot be weighed. In favor of the explanations of these theologians this much must be said—that in the light of them the apparent inconsistencies in the teaching of St. Thomas in this article seem to vanish.

⁸⁵ *Op. cit.*, Lib. I, q. VI, a. 8.

Concerning the second case,⁸⁶ the doctrine of St. Thomas is clear. Where there is a doubt (that is, to the opinion that the law does not bind in the case, the subject is unable to give any assent—even an assent which is accompanied by the fear that the opposite is true) as to whether the legislator would impose obligation in the case were he present, the subject must either act according to the words of the law or consult a Superior.⁸⁷

Commenting on St. Thomas, Cajetan,⁸⁸ Soto,⁸⁹ Sanchez,⁹⁰ Sylvius,⁹¹ the Salmanticenses,⁹² and Billuart⁹³ all enunciate the same teaching. In general, Suarez⁹⁴ agrees, but he discusses the matter in greater detail and makes certain reservations.

Concerning the third case,⁹⁵ the doctrine of St. Thomas to a great extent depends upon the meaning of the passage found in his *Commentum in Quattuor Libros Sententiarum*:

If, however, one does not observe [a precept] in some case in which it can be believed with probability that, if the legislator were present, he would not be willing to bind him, such a one is not to be deemed a transgressor of the precept.⁹⁶

⁸⁶ Cf. p. 41 *supra*.

⁸⁷ “. . . interpretatio locum habet in dubiis, in quibus non licet absque determinatione principis a verbis legis recedere . . .”—*Sum. Theol.*, II-II, q. 120, a. 1, ad 3. From the context it is evident that St. Thomas refers to interpretation of the lawmaker's intention, not to interpretation of the words of the law. For the objection to which he replies is this: “Sed interpretari intentionem legislatoris ad solum principem pertinet . . .” Cf. also *ibid.*, I-II, q. 96, a. 6, ad 2.

⁸⁸ *Op. cit.*, in I-II, q. 96, a. 6.

⁸⁹ *Op. cit.*, Lib. I, q. VI, a. 8. Strangely, Vasquez (*op. cit.*, in I-II, Disp. 176, Cap. II, n. 8) indicates that Soto allows any subject “to interpret the law” (i.e., to deviate from the words, apparently), even in cases of doubt, provided that there be an emergency.

⁹⁰ T. Sanchez, *Disputationes de Sancto Matrimonii Sacramento* (Lugduni, 1739), Lib. II, Disp. 41, n. 37.

⁹¹ *Op. cit.*, in I-II, q. 96, a. 6.

⁹² *Op. cit.*, Vol. III, Tract. XI, Cap. IV, Punct. III, n. 41.

⁹³ Tract. *De Legibus*, Dissert. V, Art. IV.

⁹⁴ *De Legibus*, Lib. VI, Cap. VIII, nn. 10 et sqq.

⁹⁵ Cf. p. 41 *supra*.

⁹⁶ *Sent.* IV, dist. 15, q. 3, a. 1, sol. 4, ad 3. Cf. note 62 *supra*.

This statement is general and inclusive. There are no reservations (other than that the author indicates immediately before this passage that he is discussing positive laws only). One may licitly deviate from the words of the law in a case of probability. But what if recourse is possible? On this point St. Thomas is not clear. Nor is the matter further elaborated in those passages of the *Summa Theologica* where *epikeia* is explicitly treated.

Theologians are not in agreement on this point. Many contend that in cases where there is sound probability that the lawmaker would not oblige the subject to obey the law as written were he now present, an individual may deviate from the words of the law—but only when there is at hand an emergency which prevents recourse to authority. If there is no such emergency, a Superior must be resorted to. This seems to be the opinion of Cajetan,⁹⁷ Soto,⁹⁸ and Sylvius.⁹⁹ They all assert that they follow the teaching of St. Thomas on the point. Vasquez,¹⁰⁰ however, denies that St. Thomas can correctly be interpreted to favor Cajetan's doctrine. Suarez¹⁰¹ agrees with Cajetan and Soto, at least as regards the doctrine to be held in practice. Billuart,¹⁰² citing St. Thomas, believes that *epikeia* may be used if the opinion in its favor is more probable, but mere probability is not sufficient to allow one to deviate from the words of the law.

In the face of the discordant opinions of theologians, most of whom assert that they base their teaching in this matter on the words of St. Thomas, it is extremely difficult to come to a definitive decision as to the real meaning of the Angelic Doctor. On the one hand, the passage quoted above seems clear—sound probability is always sufficient to warrant the use of *epikeia*. But if this be taken to mean that recourse to a Superior is not necessary even when it is possible, there are few theologians who teach so liberal a doctrine. St. Thomas himself in the *Summa Theologica* appears to be far more strict. Perhaps the solution to this problem, as well as to some of the others

⁹⁷ *Op. cit.*, in I-II, q. 96, a. 6.

⁹⁸ *Op. cit.*, Lib. I, q. VI, a. 8.

⁹⁹ *Op. cit.*, in I-II, q. 96, a. 6.

¹⁰⁰ *Op. cit.*, in I-II, Disp. 176, Cap. II, nn. 15 et sqq.

¹⁰¹ *De Legibus*, Lib. VI, Cap. VIII, nn. 3 et sqq.

¹⁰² Tract. *De Legibus*, Dissert. V, Art. IV.

discussed in this section, will be found only when one acknowledges as a fact, that all the words of St. Thomas do not manifest the considered and crystallized opinion of the Angelic Doctor in his later years, but that there was a development in his thought—in this instance from a liberal to a strict point of view. Such seems to be the opinion of Cajetan¹⁰³ expressed in connection with another point, and it may well be that this explanation will help to solve other difficulties as well.

5. *Modern controversies regarding the meaning of certain points in St. Thomas' teaching on epikeia.*

There are several passages in the *Summa Theologica* of St. Thomas, some of them already briefly alluded to, which require special consideration, by reason of controversies regarding them which have arisen in modern times. The first of these passages reads as follows:

... as unjust laws in themselves are, either always or for the most part, contrary to the natural law, so too, laws that are rightly enacted are defective in some cases: in such cases if they were observed they would be contrary to the natural law. And therefore, in such cases judgment must not be given according to the letter of the law, but recourse must be had to *aequitas* which the legislator intended. Hence the Jurist says: "No reason of law or favor of *aequitas* permits that useful enactments introduced for the advantage of men, should be harshly and rigorously interpreted by us so as to render them burdensome for men." And in such cases, even the legislator would judge otherwise; and if he had taken them into account, he would have made provision for them in the law.¹⁰⁴

¹⁰³ *Op. cit.*, in II-II, q. 80, a. unic.

¹⁰⁴ "... sicut leges iniquae secundum se contrariantur juri naturali vel semper vel ut in pluribus; ita etiam leges quae sunt recte positae, in aliquibus casibus deficient; in quibus si servarentur essent contra jus naturale. Et ideo in talibus non est secundum litteram legis judicandum sed recurrendum ad aequitatem, quam intendit legislator. Unde Jurisperitus dicit: 'Nulla ratio juris aut aequitatis benignitas patitur, ut quae salubriter pro utilitate hominum introducuntur ea nos duriore interpretatione contra ipsorum commodum producamus ad severitatem.' Et in talibus etiam legislator aliter judicaret, et si considerasset, lege determinasset."—*Sum. Theol.*, II-II, q. 60, a. 5, ad 2.

With regard to the standing of *epikeia* in the external forum when used by an individual subject of the law, St. Thomas makes no explicit statement. It is the opinion of Van Hove,¹⁰⁵ however, that the Angelic Doctor in the above passage openly admits the use of *epikeia* in the external forum by a judge, insofar as he passes sentence to the effect that, in reference to the individual case being adjudicated, it was beyond the power of the legislator to impose obligation, inasmuch as observance of the law would be harmful and evil. Both Cappello¹⁰⁶ and Del Giudice¹⁰⁷ agree that in the passage in question *epikeia* is involved.

To this view D'Angelo¹⁰⁸ is very definitely opposed. Contending that St. Thomas looks upon *epikeia* as a private, moral element, he maintains that *aequitas* as discussed by the Angelic Doctor in the above reply, is juridic *aequitas*, which differs specifically from *epikeia* as treated by him in II-II, q. 120, a. 1 and in II-II, q. 147, a. 3, ad 2 of the *Summa Theologica*. While granting nominal identity between the two concepts insofar as the word *aequitas* is used to express both the juridic concept and the ethical concept, he believes that in substance *epikeia* is a species of *aequitas*, that the two notions are not identical, and moreover are not considered to be such by St. Thomas.

D'Angelo points out that in II-II, q. 147, a. 3, ad 2, there is question, not of any juridic matter, but of something which concerns the internal forum, namely, sin. The logical process by which an individual subject of the law deems himself exempt from the obligation of the law in the particular case there under consideration, is identical with that by which the judge resorts to *aequitas* in II-II, q. 60, a. 5, ad 2. But although the process is the same, the essence of the act is different.¹⁰⁹ In one passage (II-II, q. 147, a. 3, ad 2) it is the subject who, examining the intention of the legislator, considers himself exempt from the letter of the law on the presumption that if the legislator were present he would not demand observance

¹⁰⁵ *De Legibus Ecc.*, n. 275.

¹⁰⁶ F. Cappello, *Summa Iuris Canonici* (Vols. I and II, ed. 3; Vol. III, ed. 2; Romae: Pont. Universitas Gregoriana, 1936-1939), I, n. 89.

¹⁰⁷ *Art. cit.*, p. 275.

¹⁰⁸ *Art. cit.*, *Apollinaris*, I, 377 et sqq.

¹⁰⁹ "Si *processus* vero idem est, non eadem tamen est *ratio*."—*Ibid.*, 378.

of his law in the case at hand. In the other passage (II-II, q. 60, a. 5, ad 2) it is the judge who officially interprets the law by recurring to the mind of the legislator.¹¹⁰ In each instance, D'Angelo continues, there is invoked the principle that, if the legislator were present, he would not bind the subject in the case. However, in the second instance there is interpretation, a juridic and public act which seeks to ascertain the intention of the legislator as contained in the law. In the first instance there is an ethical and private act which seeks to ascertain the intention of the legislator existing outside the law.

It would seem that the position of D'Angelo on the matter is more logical. The entire context of the sixtieth question revolves about the authoritative judgments of official magistrates. The thesis of the fifth article is that "every judgment must always be given according to the written law . . . otherwise the judgment would be defective, as deviating either from the *justum naturale* or the *justum positivum*."¹¹¹ Now, it would appear that in view of the teaching of St. Thomas in the *corpus* of the fifth article, the *aequitas* referred to in the reply to the second objection must be a norm contained in the law itself—otherwise there would be a contradiction in the doctrine of the Angelic Doctor. *Epikcia*, on the other hand, always involves the invoking of the intention of the legislator, not as contained in the formula of the law, but as presumed to exist outside it.

Moreover, in the following article of the same question St. Thomas expresses the belief that, since judgments must be rendered according to the written law, a judge in some way interprets the formula of the law by applying it to a particular case.¹¹² This fact obviously pertains to the case under consideration, for in both the fifth and sixth articles there is question of authoritative judgments by official magistrates. Now, St. Thomas points out that just as a law can-

¹¹⁰ D'Angelo believes that in modern terminology this would represent the invoking of Canon 18, and the recurring to the mind of the legislator as therein mentioned.

¹¹¹ "Necessarium est, quodvis iudicium semper secundum legis scripturam fieri . . . alioquin iudicium deficeret, vel a justo naturali vel a justo positivo."—*Sum. Theol.*, II-II, q. 60, a. 5.

¹¹² ". . . cum iudicium sit ferendum secundum leges scriptas . . . ille qui iudicium fert, legis dictum quodammodo interpretatur, applicando ipsum ad particulare negotium."—*Ibid.*, a. 6.

not be enacted except by public authority, so too a judgment cannot be given except by public authority.¹¹³ The judgment, then, under consideration here, can, in St. Thomas' own words, be rendered only by public authority. It would seem to follow that it must differ, in his opinion, from that judgment which he describes a subject of the law as making, to the effect that he need not follow the words of the law in the case at hand.¹¹⁴

Finally, in regard to all the judgments under discussion in the sixtieth question, "he who renders the judgment, in some way interprets the formula of the law . . ." ¹¹⁵ Yet, where there is question of *epikeia*, "he who acts outside the words of the law in a case of necessity makes no judgment about the law itself . . ." ¹¹⁶ It would appear that there is question, then, of two acts which are different in nature.

Turning aside from this point, we may consider two other passages of St. Thomas, concerning which there is a controversy involving some modern writers. The passages in question are as follows:

. . . commands which are given under the form of a general precept do not bind all persons in the same way, but according to the requirements of the end purposed by the legislator: if anyone through contempt of his authority should disobey a precept, or violate it in such wise as to frustrate the end intended by him, such a one sins mortally; if, however, one fails to observe a precept for some reasonable cause, especially if the legislator, were he present, would not insist upon the observance of the law in the case, such a transgression is not a mortal sin.¹¹⁷

. . . general precepts are formulated according to the needs of the many. And therefore, the legislator in enacting them has in mind what happens generally and for the most part. If for some special cause there should be found something in an individual

¹¹³ *Loc. cit.*

¹¹⁴ Cf., e.g., *Sum. Theol.*, I-II, q. 96, a. 6; II-II, q. 120, a. 1.

¹¹⁵ ". . . ille qui iudicium fert, legis dictum quodammodo interpretatur . . ." —*Ibid.*, II-II, q. 60, a. 6.

¹¹⁶ ". . . ille qui in casu necessitatis agit praeter verba legis, non iudicat de ipsa lege . . ." —*Ibid.*, I-II, q. 96, a. 6, ad 1.

¹¹⁷ *Ibid.*, II-II, q. 147, a. 3, ad 2. Cf. note 41 *supra*.

which is incompatible with the observance of a precept, such a person the legislator does not intend to bind to compliance with the law. However, discretion must be used in the matter. For if the reason be evident, it is lawful for a man on his own initiative to omit the fulfillment of the precept especially if custom intervenes [in his favor], or if it be difficult for him to recur to a Superior. If, however, the reason be doubtful, one should have recourse to the Superior who has power to grant dispensations in such cases. And this must be done with regard to the fasts designated by the Church, to which all are bound in general, unless there be some special obstacle.¹¹⁸

Van Hove¹¹⁹ expresses the belief that in these passages there is no question of *epikeia* at all, because the "reasonable cause" mentioned in the first, is "very different from the causes which he [i.e., St. Thomas] requires in *epikeia*." The author considers it to be the opinion of the Angelic Doctor that there are several causes which excuse a subject from obeying a law, that *epikeia* is one of these causes, and that in the passage in question the cause exempting the subject from the obligation of the precept of fasting is not *epikeia*.

On the other hand, most of the authors who refer to the passage—Voit,¹²⁰ D'Annibale,¹²¹ Cappello,¹²² D'Angelo,¹²³ Del Giudice,¹²⁴ for example—consider that *epikeia* is involved. There would seem to be no sound reason to dispute their opinion. Van Hove assumes that the "reasonable cause" alluded to is different from those required in order that there be place for the use of *epikeia*,

¹¹⁸ *Ibid.*, a. 4. Cf. note 71 *supra*.

¹¹⁹ *De Legibus Ecc.*, n. 274. He also mentions in support of his view *Summa Theologica*, II-II, q. 147, a. 4, ad 3 and ad 4.

¹²⁰ E. Voit, *Theologia Moralis* (Anconae, 1841), I, n. 172.

¹²¹ *Op. cit.*, I, n. 187, note 43.

¹²² *Summa Iuris Canon.*, I, n. 89.

¹²³ *Art. cit.*, *Apollinaris*, I, 378 et sqq.

¹²⁴ *Art. cit.*, p. 275. Among the older authors, cf. Navarrus (M. Azpilcueta), *Commentarius Utilis in Rubricam de Judiciis (Opera Omnia* [Venetiis, 1597-1618], IV), n. 74; Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 3; P. Laymann, *Theologia Moralis* (Venetiis, 1719), Lib. I, Tract IV, Cap. XIX, n. 3; J. Patuzzi, *Ethica Christiana seu Theologia Moralis* (Mediolani, 1781-1782), Vol. I, Tract. I, Dissert. IV, Cap. V, n. 4.

merely because he considers that it is not found among the reasons previously treated by St. Thomas. Even in the supposition that the "reasonable cause" here mentioned differs from those discussed in prior articles by St. Thomas, there seems to be no basis for assuming that those reasons considered in other passages are the only reasons which will justify the use of *epikeia*. It is not at all impossible that the Angelic Doctor, who admittedly devotes three articles to *epikeia*,¹²⁵ is here also, in a fourth, alluding to the same concept. It would seem to be a rather unsound argument to state that St. Thomas does not here refer to *epikeia*—because the discussion of *epikeia* and of the reasons justifying its use is restricted to other passages. Indeed as has been seen above,¹²⁶ Van Hove does not hesitate to maintain that in II-II, q. 60, a. 5 of the *Summa Theologica* *epikeia* is involved, even though there is there introduced a factor—judgment by a magistrate and not by a subject—entirely missing in I-II, q. 96, a. 6 and in II-II, q. 120, a. 1 and a. 2. In the light of this opinion of Van Hove, it seems inconsistent to maintain that in II-II, q. 147, a. 3, ad 2 and a. 4 *epikeia* is not involved, merely because the reason warranting deviation from the words of the law is different from those discussed by the Angelic Doctor in previous passages.

But more important than these observations is the fact that in the passage now being considered, mention of the elements fundamental to *epikeia* is found—a defect in the law due to the universality of its expression, and a judgment on the part of the subject of the law, that it is not the intention of the legislator to bind him in the case at hand.

6. Summary.

To summarize this discussion of the teaching of St. Thomas, we may point out that in the treatment of the nature of *epikeia* the Angelic Doctor very closely follows Aristotle's explanation that *epikeia* is founded on the fact that law sometimes is deficient by

¹²⁵ *Sum. Theol.*, I-II, q. 96, a. 6; II-II, q. 120, a. 1 and a. 2.

¹²⁶ Cf. p. 47 *supra*.

reason of the universality of its expression.¹²⁷ He clearly explains that *epikeia* is a judgment of a subject about the case at hand, and not about the law itself. He distinguishes between *aequitas* meaning justice, and *aequitas* meaning *epikeia*. There is some little evidence of a distinction between *correctio legis* and *mitigatio juris*. That the public good must in some way be involved before an individual subject may deviate from the letter of the law, seems to be a logical inference from the teaching of St. Thomas. The use of *epikeia* in cases where the literal observance of the law would be evil, is certainly justified—possibly also in other cases in which the lawmaker would not be willing to bind the subject were he, the legislator, present. It seems to be the preferable opinion that St. Thomas teaches that in cases where it is certain that the lawmaker would be unwilling to urge obligation, *epikeia* may always be used without recourse to authority; in cases of doubt, an authority with power to dispense must be consulted if time allows, otherwise the words of the law are to be observed; in cases of probability, an authority must be resorted to; but if this is impossible, *epikeia* may be used. Finally, it seems that St. Thomas considers *epikeia* to be a purely private and moral institute, whereas *aequitas* resorted to by a judge in interpreting and applying the law is a public and juridic institute.

III. *Authors Subsequent to St. Thomas*

Gerson (+1429). Passing over a consideration of the brief mention of *epikeia* made by Henry of Hesse (+1397),¹²⁸ we come to

¹²⁷ Kreilkamp concisely states: "The substance of St. Thomas' doctrine is this: because of the complexity of concrete reality and the finitude of the mind, it is impossible for any man, however wise, to lay down completely concrete directions for an agent's conduct in a future concrete situation."—K. Kreilkamp, *The Metaphysical Foundations of Thomistic Jurisprudence*, The Catholic University of America Philosophical Series, Vol. LIII (Washington, D. C.: The Catholic University of America Press, 1939), pp. 152-153.

¹²⁸ Cf. Henricus de Hassia, *Consilium Pacis, de Unione ac Reformatione Ecclesiae in Concilio Universali Quaerenda*, Cap. XV (The work is found in Appendix of Vol. II of *Gerson, Opera Omnia*).

a study of the doctrine of John Gerson. Gerson¹²⁹ explains the basis upon which *epikeia* is founded, in substantially the same way as does St. Thomas—namely, exceptions to general laws may sometimes be made, by reason of the fact that in particular cases such laws are sometimes deficient owing to the universality of their expression.

As to the precise nature of the “exception,” Gerson is not definite. He states that it is sometimes called *epikeia*, sometimes *dispensatio*, sometimes *interpretatio legis*, sometimes *bona fides*, and sometimes *aequitas*. The faculty of making an exception of this type may be exercised, first of all, by a judicial authority. Here Gerson seems to have in mind both a court issuing sentence and an official giving authentic interpretation. Secondly, it may be found among those learned in matters of the law—this is an evident reference to doctrinal interpretation. Thirdly, it may be based upon what he terms “inevitable necessity” where, for example, one must repel force by force, and thus act contrary to the words of the law which forbids the use of force. It is evident, then, that for Gerson, there is no real distinction between *aequitas* as meaning leniency in judging others or benignity in interpreting law on the one hand, and *aequitas* as meaning *epikeia* on the other; for both he considers to be acts of the same virtue.

Gerson finds a basis for the lawfulness of *epikeia*, not merely in reason, but likewise in Revelation. For he interprets the words of the Psalmist—“all thy commandments are justice (*aequitas*)”¹³⁰—as a justification for the use of *epikeia*. He is careful to point out, however, that although transgression of the words of the law by the licit use of *epikeia* leaves one blameless before God, nevertheless, before a human judge the subject of the law who has thus acted, must furnish proof of the inculpability of his conduct.¹³¹

An analysis of Gerson’s treatment of the concept indicates that *epikeia* may be used only in cases of imminent peril which is certain; but it is not necessary that the general welfare be involved. How-

¹²⁹ J. Gerson, *De Potestate Ecclesiastica & Origine Juris & Legum (Opera Omnia* [Antverpiac, 1706], II), Con. X.

¹³⁰ Ps. 118, 172.

¹³¹ “. . . apud illum [i.e., iudicem humanum] idem est de iis quae non sunt & quae non apparent.”—*Loc. cit.*

ever, Gerson is not unaware of the tendency to abuse *epikeia*, and so he warns against its indiscriminate use. For, if resorted to without sufficient reason, it will lead to instability in the law. Hence, two extremes are to be avoided: first, a literal adherence to the law so rigid that *epikeia* is never admitted—this results in the situation envisaged by the adage *summum jus summa iniustitia fit*—and secondly, a frequent and constant resorting to *epikeia* which will break down the stability of the law.

A beautiful description of the results of the use of *epikeia*—understood apparently as benignity—is found in another passage of his works.

It is the function [of *epikeia*] to take into consideration not the bare precept, but all the particular circumstances clothing it; from such a consideration arises a means of harmonizing the rigor of justice and the severity of discipline with the leniency of mercy and propitious pardon. Nay, such is necessary, so that in our every act toward another, we may sing to the Lord mercy and judgment; otherwise, justice becomes iniquity, and severity is turned into cruelty.¹³²

St. Antoninus (+1459). As a justification of *epikeia*, *St. Antoninus*¹³³ quotes the words of the Psalmist: “Let my judgment come forth from thy countenance: let thy eyes behold the things that are equitable.”¹³⁴ By way of comment he states that the *vultus Dei* is the Divine knowledge or Divine will. When an individual equitably deviates from the law, God approves of such an action, because the judgment in the case is in accord with His own Divine will.

¹³² “Cujus est considerare non nudum de se Praeceptum, sed circumstantias omnes particulariter ipsum vestientes; ex hoc consequenter habetur modus concordandi rigorem justitiae atque severitatem disciplinae, cum lenitate misericordiae & favorabilis indulgentiae. Immo sic necesse est ut in omni actu nostro ad alterutrum cantemus Domino misericordiam & judicium: alioquin justitia in iniquitatem et severitas in crudelitatem converterentur.”—*Liber de Vita Spirituali Anima* (*Opera Omnia*, III), Lect. V.

¹³³ *St. Antoninus*, *Summa Theologica* (Veronae, 1740), Pars IV, Tit. V, Cap. XIX.

¹³⁴ Ps. 16, 2.

Understood in a broad sense, the concept of *aequitas*, according to St. Antoninus, is three-fold. It consists, first of all, in "the congruous application of laws."¹³⁵ To deviate from the letter of the law when its observance would be perilous and unreasonable, is a virtue—a virtue which, possessed radically by Divine Wisdom Himself,¹³⁶ is imparted to men. Its presence in men is manifested by the fact that they are directed in "paths of equity" by God Himself;¹³⁷ that is, when circumstances demand it, virtuously they disregard the words of the law in order to follow the mind of the lawgiver. Thus, in the opinion of St. Antoninus, for the judicious use of *epikeia* a special virtue is given by God to the subject of a law, to enable him to recognize when he may discount the words of the law, and follow instead what he deems to be the intention of the legislator. In Holy Scripture too he finds an instance of the use of *epikeia*. For it is there related that many of the army of the Machabees had submitted to the sword of the enemy rather than battle on the Sabbath. But after consultation with the more prudent, Mathathias realized that an act of self-defense was not a violation of the Sabbath; and consequently, by the use of *epikeia* it was decided: "Whoever shall come up against us to fight on the Sabbath day, we will fight against him."¹³⁸

In this same sense St. Antoninus applies *aequitas* also to a judge who shows mercy and leniency in imposing punishment. Such a one follows the example of God Himself, of Whom the Psalmist says: "And He shall judge the world in equity."¹³⁹ In short, St. Antoninus believes that in *foro contentioso* the subject of *aequitas* is he who makes the law or pronounces sentence; in *foro conscientiae* any individual may use *aequitas* in his own personal matters.¹⁴⁰

¹³⁵ *Loc. cit.*

¹³⁶ Cf. Prov. 8, 14.

¹³⁷ Cf. Prov. 4, 11.

¹³⁸ I Mach. 2, 41.

¹³⁹ Ps. 9, 9.

¹⁴⁰ *Op. cit.*, Pars I, Tit. III, Cap. X, § 10. In this section St. Antoninus considers *epikeia* or *aequitas* as leniency, opposed to the rigor of the law. He outlines several rules to be followed by scrupulous individuals, the last of which is: "Praeceptorum discreta epicaizatio."

Secondly, *aequitas* consists in a due and proper commutation of things.¹⁴¹ Apparently St. Antoninus here refers to commutative justice which must be respected in all contracts: "A deceitful balance is an abomination before the Lord: and a just weight is his will."¹⁴²

Thirdly, *aequitas* consists in a proportionate participation of goods.¹⁴³ Thus, says St. Antoninus, it is not equitable that one or a few institutions in a city should possess a disproportionate number of benefices.

In brief, St. Antoninus clearly indicates a distinction among the various senses in which the term *aequitas* is used. Yet he seems to be of the opinion that these various acts are functions of one and the same virtue—even the acts which pertain strictly to commutative justice.¹⁴⁴

With regard to the extent of *epikeia*, he mentions that it may be used when the observance of the law would result in something "unsuitable" or "perilous" or "unreasonable."¹⁴⁵ No elaboration of these terms is to be found, but that some rather grave reason must exist to warrant the use of *epikeia* is implied in the statement that one may disregard the words of the law not "at pleasure, but from necessity."¹⁴⁶

Cajetan (†1534). A rather complete study of *epikeia* is found in the works of Cajetan. Lucidly he explains not only the doctrine of St. Thomas on the point, but also the treatment by Aristotle.¹⁴⁷ In

¹⁴¹ "In rerum debita commutatione."—*Op. cit.*, Pars IV, Tit. V, Cap. XIX.

¹⁴² Prov. 11, 1.

¹⁴³ "In honorum proportionata participatione."—*Loc. cit.*

¹⁴⁴ Of the three divisions of *aequitas*, one seems to be identified with commutative justice. Another, corresponding more or less to legal justice, involves the exercise of leniency on the part of a judge, which, however, is not due in strict justice. The third, akin in some ways to distributive justice, seems to concern a distribution of goods, not according to the rigid norms of strict justice, but rather according to the requirements of equity and fairness. Here seem to be found the seeds of the more elaborately developed doctrine of Vermeersch on the existence of three species of *aequitas*. Cf. Vermeersch, *Quaest. de Iust.*, n. 484.

¹⁴⁵ *Op. cit.*, Pars IV, Tit. V, Cap. XIX.

¹⁴⁶ *Loc. cit.*

¹⁴⁷ "Profundam explicationem hujus [i.e., Aristotelis] definitionis dat Cajetanus."—Prümmer, *op. cit.*, I, n. 231, note 2.

commenting upon the Aristotelian definition¹⁴⁸—"the correction of law defective because of its universality"—he explains that *epikeia* is called "*directio*" because it rectifies some point; it is applicable to all law, both natural and positive; its proper *materia* consists in those acts relative to which the law is deficient. Cajetan insists that *epikeia* or *aequitas* has place only when the deficiency in the law is due to the universality of its expression. The law may be defective from some other standpoint, but *aequitas* deals only with cases where the defect in the law arises from the fact that the law is universal in its expression.

In reference to the distinction between the law with regard to its words only, and the law with regard to the intention of the legislator, Cajetan makes an important observation.¹⁴⁹ He notes that the purpose of the law as signified by its words, constitutes the intrinsic end of the law; whereas the intention of the lawmaker is the extrinsic end. Now, the ultimate and extrinsic purpose of every law (that is, the intention of the legislator) is the good of the citizens for whom it is enacted. Consequently, if a conflict should arise between the extrinsic end and the intrinsic end (that is, the proximate purpose of the law as evidenced by its words), the former must prevail. The example adduced by St. Thomas¹⁵⁰ may be considered from this viewpoint. Should the law requiring the return of deposits be observed, when there is question of returning a sword to its owner who is insane? The intrinsic end of the law as expressed in the words, is that the dominion of an individual over his possessions be safeguarded. But in the circumstances at hand the extrinsic purpose or intention of the legislator—the general good of the citizen—would certainly not be fulfilled by the return of the sword. Consequently, in the conflict the intrinsic end is to be disregarded, and the extrinsic end to be followed.

It is noteworthy that Cajetan, who very carefully limits his discussion of *aequitas* to those cases where a *correctio legis* is involved, clearly states that it may licitly be used only when the literal observ-

¹⁴⁸ *Op. cit.*, in II-II, q. 120, a. 1.

¹⁴⁹ *Ibid.*, a. 2.

¹⁵⁰ *Sum. Theol.*, II-II, q. 120, a. 1.

ance of the law would result in something sinful.¹⁵¹ He fully realizes, of course, that the basic definition of *epikeia* by Aristotle—a correction of the law where it is defective due to its universality¹⁵²—will apparently allow a broader field for the use of *epikeia*. And so, he qualifies the Aristotelian definition by indicating that *epikeia* has place only when there is in the law a *defectus obliquitatis*, that is, when, owing to the universality of the law, its purpose ceases contrarily—and not when it ceases merely negatively.¹⁵³ In other words, in every case in which *epikeia* is permissible the observance of the law would not merely be useless, but sinful.

To substantiate his view Cajetan adduces a three-fold argument. The first argument arises from the very concept of *aequitas* itself. *Aequitas* is a kind of justice (“*justitia quaedam*”). The *materia* of each species of justice is an act or operation which, if justice were lacking, would be evil or sinful. Consequently, the *materia* of *aequitas* must likewise be some act or operation which, if *aequitas* were lacking, would be evil or sinful. In other words, without commutative justice, for example, there would be no rendering to one private individual by another what is due to the former. It is only by the direction of commutative justice that what is due to one individual is rendered to him by another. The *materia* of commutative justice, therefore, must be that which, without the direction of commutative justice, would be evil. So too, without distributive justice there would be no rendering to the citizens by the community what is their due. Hence, the *materia* of distributive justice must be that which, without the direction of distributive justice, would be evil. Likewise, in the case of *aequitas*, argues Cajetan, the *materia* is constituted by those operations which, if the general law were always to be observed, would be evil. *Aequitas* can have place, then, only when the literal observance of the law would result in something evil or sinful.¹⁵⁴

¹⁵¹ *Op. cit.*, in II-II, q. 120, a. 1.

¹⁵² Cf. *Nicomachean Ethics*, V, 10.

¹⁵³ *Op. cit.*, in II-II, q. 120, a. 1.

¹⁵⁴ “Videmus autem quod commutationes sine commutativa justitia, distributiones sine distributiva justitia, recte non fierent. Operationes igitur illae quae obliquarent a recto servando legem universalem sunt propria materia aequitatis et propter eas solas necessaria est directio.”—*Loc. cit.*

Cajetan's second argument¹⁵⁵ is expressed in the form of a *reductio ad absurdum*. If *aequitas* has place when the purpose of a law ceases only negatively, he states, then it is conceivable that many heinous crimes could sometimes be committed without sin. The ultimate reason, he explains, why fornication, for example, is sinful and forbidden, is the good of the offspring, its care, upbringing, education—marriage being necessary in order that children may not be deprived of such essentials. But, continues Cajetan, it might very easily happen that the reason for this prohibition would cease in a particular case—if, for example, the parties to the crime were sufficiently capable of making provision for the offspring and were willing to do so. Therefore, in such a case, fornication would be licit. Now obviously this conclusion is absurd; hence also the supposition upon which it is based, namely, that *aequitas* may be used when the purpose of the law ceases only negatively.

The third proof is an argument from authority. Citing a passage from St. Thomas,¹⁵⁶ Cajetan maintains that the Angelic Doctor distinguishes between a case in which one may deviate from the law even though it expresses the intention of the lawgiver, and a case in which one may deviate from the law because it does not express the intention of the lawgiver. For the first instance a dispensation is needed; for the second *aequitas* alone is sufficient. Apparently the force of the argument lies in the belief that in the second instance, where there is a divergence in a particular case between the intention of the legislator and the words of the law, such a divergence is caused by the opinion that in the case to observe the law as it stands would be sinful. To be freed from the obligation of following the law in a case where observance would not be harmful (and hence where there is no conflict between the intention of the legislator and the words of the law) one must obtain a dispensation.

From the three foregoing arguments Cajetan concludes that *aequitas* may be used only when the purpose of the law ceases contrarily.¹⁵⁷

¹⁵⁵ *Loc. cit.*

¹⁵⁶ Cf. St. Thomas, *Sent.* III, dist. 37, q. 1, a. 4.

¹⁵⁷ For a critical evaluation of these arguments, cf. pp. 143 et sqq. *infra*.

Nowhere does Cajetan expressly state whether the public good must be involved before *aequitas* may licitly be used. Nevertheless, his whole context would seem to indicate that he envisions its use even for the benefit of private individuals without necessary reference to the good of the community—provided, of course, that the general welfare is not harmed. Added weight seems to be given to this opinion by the fact that without qualification Cajetan states that *aequitas* has place whenever a law owing to its universality is deficient contrarily. Finally, in discussing, in the light of the distinction between the intrinsic and the extrinsic end of law, St. Thomas' example of the return of the deposit to its owner, Cajetan seems to imply that there is question only of the private good of an individual.

There remains to be considered Cajetan's opinion on the question of the necessity of recourse to a Superior. Reference has already been made to this opinion,¹⁵⁸ and so only a brief summary is here required. In his commentary on the *Summa Theologica* of St. Thomas, Cajetan states¹⁵⁹ that in a case where the intention of the lawgiver is manifestly opposed to the signification of the words of the law, *aequitas* may be used. In cases of probability¹⁶⁰ recourse to an authority with power to dispense is necessary; but if the case be one of emergency where such recourse is impossible, the subject may licitly use *epikeia*. Finally, in cases of doubt, where not even probability is present, if recourse is impossible the words of the law must be obeyed.

Soto (+1560). *Soto's* treatment of *epikeia* is in the form of a commentary on St. Thomas, and consists of three divisions.¹⁶¹

First, with the Angelic Doctor *Soto* stresses the doctrine that a law has the power to bind, only insofar as it is directed to the common good. If there be any aberration from this ordination, to that extent the law does not bind. This, asserts *Soto*, is admitted by all.

¹⁵⁸ Cf. pp. 41 et sqq. *supra*.

¹⁵⁹ *Op. cit.*, in I-II, q. 96, a. 6.

¹⁶⁰ Cajetan himself does not use this term. But that he has in mind cases which may rightly be called cases of probability, seems clear from his explanation of the statement: "In ambiguis datur latitudo."—*Loc. cit.* Cf. p. 43 *supra*.

¹⁶¹ *Op. cit.*, Lib. I, q. VI, a. 8.

Secondly, Soto explains after St. Thomas that laws, being universal, may become defective in particular instances; for this reason the Angelic Doctor asserts that in cases where observance of the law would be harmful to the general welfare, the law does not bind. According to Soto, this principle, precisely as it stands, is not accepted by all theologians. For many (and Soto himself is included) maintain that *epikeia* may be used even in favor of private individuals where the common good is not concerned. Thus, for example, a person who knows that his life will be in danger from an enemy if he goes to Mass, is not bound to leave his home. However, *epikeia* may be used only when the law commands something which is unjust—that is, when the purpose of the law ceases contrarily.

Thirdly, Soto takes up the question of the necessity of recourse. Prefacing his observations with the remark that he is following the teaching of St. Thomas, he comes to the same conclusions as does Cajetan. In a case where it is certain that the legislator, if he were present, would not bind the subject, one may deviate from the words of the law, whether there be an emergency or not. In cases of doubt, if the individual cannot recur to an authority, he must obey the words of the law. In cases of probability,¹⁶² when an emergency arises and there is no opportunity to reach an authority, *epikeia* may be used. However, if action can be delayed, recourse is necessary.

¹⁶²This seems to be a correct interpretation of the words of Soto. For he speaks of three possible cases. The first is a case of certainty. In the second case no assent is given to either side. The third case appears to be identified with what is today called a probable case (i.e., assent is given to one side, but there exists fear that the opposite side may be true). Of such a case Soto thus speaks: "Si vero medio modo se habet [i.e., subditus] ita ut certus omnino non sit, neque prorsus ambiguus sed in illam partem propendat quod potest facere contra legem. Itaq; illius partis opinionem habet cum formidine alterius. . . ." Soto (*loc. cit.*) allows the subject to deviate from the words of the law in this last type of case, when recourse to a Superior is impossible. It is noteworthy that Suarez (*De Legibus*, Lib. VI, Cap. VIII, n. 3) discussing cases of probability, names Soto as one of the theologians who maintains that in such circumstances a subject may consider himself freed from the obligation of the law, when he cannot recur to an authority. D'Annibale (*op. cit.*, I, n. 187, note 48), however, believes that Soto allows deviation from the letter of the law only if the judgment that the legislator would not bind in the case is more probable.

Covarruvias (+1577). No detailed analysis of the treatment of *aequitas* by Covarruvias need be made, inasmuch as his discussion of the point is primarily canonical and concerns the official application of the law by public authority. Two facts in particular are to be noted, however.

In the first place, Covarruvias establishes a close relationship between *aequitas* and *bona fides*. Thus, for example, he states: "*Bona fides* for the most part signifies what is *aequum et bonum*."¹⁶³

In the second place, Covarruvias considers *aequitas*, being opposed to *jus strictum*, as a mitigation and interpretation of the written law, based on a consideration of circumstances involving "persons and things and times."¹⁶⁴ It is "a regulating, so to speak, of all matters with an admirable moderation which proceeds from a perfect use of reason,"¹⁶⁵ and is opposed to justice, only if justice be understood as identical with positive law. As an illustration Covarruvias offers the example of a *peregrinus* who, in spite of a law forbidding such action under pain of death, ascends the walls of a city, in order to repel an enemy. What is important to note is that the *aequitas* to which Covarruvias has reference, is not the judgment of the *peregrinus* that the law does not include the case at hand—no allusion to such a judgment is made at all. Rather the *aequitas* of which mention is made, refers to the benign judgment that the life of the *peregrinus* should be spared, in view of the circumstances in which he violated the letter of the law.

Medina (+1581). At the outset of his commentary on St. Thomas' treatment of *epikeia*, Medina points out that the matter under discussion concerns the question as to whether or not a *subject* of the law may licitly use *epikeia*. That a *ruler* may make use of it is clear, Medina believes, from the teaching of Aristotle.¹⁶⁶

¹⁶³ "Bona fides plerumque significat quod aequum et bonum sit."—D. Covarruvias a Leyva, *Opera Omnia* (Genevae, 1734), Regula, *Possessor Malae Fidei*, Pars II, § 6, n. 2.

¹⁶⁴ *Ibid.*, n. 3.

¹⁶⁵ ". . . admirabile quoddam temperamentum quod ex perfecta ratione omnia moderatur."—*Loc. cit.*

¹⁶⁶ B. Medina, *op. cit.*, in I-II, q. 96, a. 6. Soto (*op. cit.*, Lib. I, q. VI, a. 8) makes substantially the same remark.

Just as legal justice concerns cases which commonly occur, so too there is another virtue, the author states, called ἐπιείκεια in Greek, and *aequitas* in Latin, which directs and exercises moderation over positive law. Since laws are universal, there will sometimes arise the need of correcting their defects in relation to certain particular, extraordinary cases, "which could not be foreseen by the positive law." This function of correcting such defects pertains to the virtue of *epikeia*.

In explanation of his doctrine five propositions are offered by Medina. They may be summarized as follows:

First, when a law is only negatively defective in a particular case, the subject may not licitly act in opposition to the words of the law.

Secondly, when a law is contrarily deficient in a particular case, and this fact is known by the subject with certainty, he may make use of *epikeia*, nor is there any need to recur to a Superior for interpretation of the law.

Thirdly, when there exists a doubt as to whether or not the law obliges in a particular case, the subject is bound to consult the Superior who is the legitimate interpreter of laws. Should there be given no opportunity so to do, he must observe the law, not only because *in dubio tutior pars eligenda est*, but likewise because *melior est conditio possidentis*—and the law is in possession.

Fourthly, if it is doubtful whether or not a law obliges in a particular case, but at the same time it appears likely ("*verosimile*") to a prudent man that, if the legislator were present, he would not demand observance of the law, the law does not bind. The reason is to be found in the fact that, although there exists a speculative doubt, there is present nevertheless, moral and prudent certitude, sufficient to warrant the use of *epikeia* by the subject. Medina cites Cajetan in favor of this view.

Finally, when, in a case of doubt as to the binding force of a law, there exists another doubt as to whether danger to one's safety will ensue from the observance of a law, there is no obligation to obey the law. To substantiate this view Medina points out that right reason dictates that when any matter is doubtful, and there exists danger on each side, the lesser peril is to be chosen. And in the case

under consideration the danger in not observing the law is less than that involved in placing one's life in jeopardy.

Navarrus (+1586). During the course of his study of the nature of *epikeia* Navarrus alludes to an interesting fact not hitherto mentioned. He states¹⁶⁷ that some authors of his time conceive of a two-fold *aequitas*: restrictive *aequitas* and extensive *aequitas*. The former represents the traditional concept that the letter of the law may not bind in a particular case although the case is included in the words of the law. The latter would occur where a law is defective owing to its "particularity,"¹⁶⁸ and it would be the function of *aequitas* thus understood, to extend a favorable law to similar cases not included in the words of the law. It is the opinion of Navarrus himself, however, that *aequitas* concerns only those cases where the law is deficient by reason of the universality of its expression.

Since Navarrus believes that a law ceases when its total final cause ceases¹⁶⁹—for it would not be the lawmaker's intention to include a case where the very reason which he had in making the law is not even partially verified—he cannot agree with Cajetan that *aequitas* may be used only when the purpose of the law ceases contrarily.

Vasquez (+1604). Having outlined the teaching of Soto¹⁷⁰ and Cajetan¹⁷¹ on *epikeia*, Vasquez proceeds to explain points of similarity and points of difference between their doctrine and his (which he holds as "more probable"). He agrees with Cajetan that *epikeia* may be used only when the purpose of the law ceases contrarily, and not when it ceases merely negatively.¹⁷² For only in the former instance can the law be said to "sin." By its very definition *epikeia* is an emendation of a law which is deficient, but no law is really deficient or really errs unless its observance would be rendered

¹⁶⁷ *Comm. in Rub. de Judiciis*, n. 72.

¹⁶⁸ That is, the law is defective because it is excessively restricted in its expression, and hence is limited in its application.

¹⁶⁹ *Ibid.*, n. 74.

¹⁷⁰ Vasquez, *op. cit.*, in I-II, Disp. 176, Cap. II, nn. 7-8.

¹⁷¹ *Ibid.*, nn. 9-12.

¹⁷² *Ibid.*, n. 14; cf. also *op. cit.*, in III, Disp. 211, nn. 42 et sqq.; in III, Disp. 219, n. 14.

pernicious. Moreover, Vasquez seems to agree with Soto that *epikeia* may be used, even when observance of the law would tend to the detriment of the subject only, and not to that of the community.¹⁷³

As to the question of recourse, Vasquez¹⁷⁴ states with Cajetan that *epikeia* is permissible without recourse to authority when it is evident that the legislator would not bind in the case—whether the case be one of emergency or not. To corroborate his opinion he cites St. Thomas.¹⁷⁵ But he differs sharply from Cajetan on the question of cases where certainty is not had.¹⁷⁶ His opinion may thus be summarized. In cases in which it is not evident that the legislator would not impose obligation were he present, this uncertainty may arise from either of two sources. First, the power of the legislator to demand obedience to such a law may be in question. In such an instance any prudent individual may use *epikeia*, for, utilizing the rules of theology and jurisprudence, he can examine and judge whether the lawmaker exceeded his authority. It is to be noted that Vasquez does not require recourse to authority, even when it is possible.¹⁷⁷

Secondly, it may be certain that the legislator had the power to enact the law under consideration, but his intention as regards the case at hand is in question. This uncertainty about intention may be due to the ambiguity of the words of the law. In such an instance any prudent person may interpret the law. But this is not *epikeia*; for *epikeia* pertains to a single case where the words of the law are clear and certainly include the instance at hand. Again, the uncertainty about intention may be due to the fact that, although a particular case is included in the letter of the law, it perhaps would

¹⁷³ *Op. cit.*, in I-II, Disp. 176, Cap. II, n. 7.

¹⁷⁴ *Ibid.*, Cap. III, nn. 13-14.

¹⁷⁵ Reference is made to the *Summa Theologica*, II-II, q. 120, a. 1.

¹⁷⁶ *Op. cit.*, in I-II, Disp. 176, Cap. III, nn. 15 et sqq. Vasquez seems to make no distinction between cases where sound probability is had, and cases which are merely doubtful. This is an important distinction for Cajetan and Soto. Cf. pp. 60, 61 *supra*.

¹⁷⁷ Hence, it does not seem to be entirely accurate to state, as does Viva, that Vasquez without qualification demands certainty before *epikeia* may be used. Cf. D. Viva, *Opuscula Theologico-Moralia* (Patavii, 1721), Opus. II, Quaest. IV, Art. II, n. 1.

not have been the intention of the lawgiver to bind the subject if he had foreseen the circumstances. In this latter case Vasquez maintains that the law as written must be observed. His opinion is based upon three considerations. First, by supposition it is certain that the case is included in the words of the law; moreover, it is certain that the observance of the law would not be harmful. On the other hand, that the legislator would have been willing to exclude it is only doubtful. Therefore, since the certain must prevail over the doubtful, the law as it stands is to be obeyed. Secondly, since the law is not defective, and does not "sin," there is no place for *epikeia*. Thirdly, if *epikeia* were permitted here, every type of fraud and abuse would ultimately follow.

In regard to the discussion of *epikeia* by Vasquez, this important fact should be noted. Although he makes it clear that *epikeia* may be used only when observance of the law would be evil, yet his distinction between the power of the legislator and the intention of the legislator is a starting point from which subsequent theologians will develop the idea that *epikeia* may sometimes be used even in cases in regard to which the following of the letter of the law would not be sinful or unjust.

Resumé. In the period between St. Thomas and Suarez one finds the concept of *epikeia* widely discussed by theologians. On the one hand, there is an endeavor to clarify certain points in the teaching of the Angelic Doctor, which seem more or less obscure. On the other, there is a broadening of the notion of *epikeia*, and in general an increased leniency with regard to its use. All agree with Aristotle and St. Thomas that the legitimacy of *epikeia* is based upon the fact that laws, being universal, may become deficient in some particular cases, and hence need correction. To substantiate this deduction of reason the authority of Holy Scripture is invoked, especially by St. Antoninus and by Gerson. The precise nature of *epikeia*, as differentiated from dispensation, interpretation, good faith and *aequitas* remains somewhat vague. Indeed the terms *aequitas* and *epikeia* are used interchangeably, but there seems to be a realization that the former is broader in scope than the latter. Some of the theologians of this period, however, make no mention of *epikeia* or *aequitas* in any connection, except insofar as these terms connote a correction

of the law. Increased leniency is seen in the rather general agreement that *epikeia* may be used by a subject of the law, even when the common good is not involved, and that recourse to a Superior is not required if it be certain that, in the case at hand, the legislator did not will to bind the subject. However, if an individual cannot form a probable judgment that the precept does not obligate him in regard to the case before him, he must consult a Superior—else observance of the law as it stands is necessary. In reference to cases where such a probable judgment can be formed, there is a tendency to teach that, although recourse is necessary if possible, in the absence of the possibility, *epikeia* may be used. This latter opinion, however, is not expressed by all the theologians of the period, nor is the exact meaning of those who subscribe to it always clear. The strict view of Cajetan that *epikeia* may be used only when observance of the law would be sinful, is followed by most of the authors. Navarrus, however, breaks with it definitely, and although Vasquez adheres to it, his distinction between the power of the legislator and the intention of the legislator opens the door to further elaboration by later theologians.

ARTICLE 2. SUAREZIAN DOCTRINE

Suarez (+1617). No theologian treats so comprehensively the concept of *epikeia* as does Suarez. In fact, subsequent moralists depend almost entirely, in a direct or indirect way, upon the teaching on this point, not only of Aristotle and of St. Thomas, but also of Suarez. The various passages of his *De Legibus* dealing with *epikeia* bear out Del Giudice's estimate of this work in general as a "master-piece of theological and philosophical systematization of the general doctrines of law."¹⁷⁸

The doctrine of Suarez on *epikeia* may be considered under the following headings: 1. Nature and lawfulness of *epikeia*; 2. The scope of *epikeia*; 3. Relation of *epikeia* to the common good; 4. Relation of *epikeia* to a *damnum emergens* and a *lucrum cessans*; 5. Relation of *epikeia* to affirmative and negative precepts; 6. Necessity of recourse to a Superior.

¹⁷⁸ *Art. cit.*, p. 235, note 1.

1. *Nature and lawfulness of epikeia.*

Suarez' concept of *epikeia* is based radically upon the explanation found in the *Nicomachean Ethics* and in the *Summa Theologica*. Commenting on the Aristotelian treatment, he points out that *epikeia* is "an emendation of the *justum legale*," when a judgment is made that in a particular case a law as written is not to be observed, because to comply with it would be "a practical error."¹⁷⁹ Suarez follows the traditional explanation regarding the fact that laws are sometimes deficient by reason of the universality of their expression, and there is added the note that, even if the legislator could foresee future cases, he could not, without causing "infinite confusion and diffuseness,"¹⁸⁰ expressly make provision in his law for all exceptions. And so, human law must be understood to exclude those cases where observance of the precept would be unjust and unreasonable.

Suarez is careful to point out that *aequitas*, the Latin term for *epikeia*, has several meanings. It may sometimes be taken to signify justice; again, it may mean *moderatio animi*; and at other times it is distinguished from *jus scriptum et rigorosum*.¹⁸¹ In this final sense it is the same as the Greek *epikeia* or "differs little from it," and it is this *aequitas* which Suarez now proceeds to explain.

In its essence *epikeia* incorporates two elements.¹⁸² First, it is a judgment of the intellect which declares that here and now this law, in spite of its universal comprehension when taken literally, does not oblige in this particular case. Secondly, it is an act of the will conformable to this intellectual judgment, which directs a deed that is contrary to the words of the law. To Suarez it seems that, each in its own order being an act of virtue, there is no need to posit a special virtue. Moreover, the subject of the law is by no means the only person in whom *epikeia* may reside. A judge who leniently applies the law and a Superior who benignly interprets it are likewise using *epikeia*.¹⁸³

¹⁷⁹ *De Legibus*, Lib. II, Cap. XVI, n. 4.

¹⁸⁰ *Ibid.*, Lib. VI, Cap. VI, n. 4.

¹⁸¹ *Ibid.*, n. 5. There seems to be insinuated here a distinction between *mitigatio juris* and *correctio legis*.

¹⁸² *Loc. cit.*

¹⁸³ *Ibid.*, n. 6. Cf. also Lib. I, Cap. II, n. 10.

2. *The scope of epikeia.*

The position that *epikeia* may be used when the purpose of a law ceases only negatively in a particular case, cannot be defended, Suarez states, "unless it be explained in a reasonable way."¹⁸⁴ In order that the obligation of a general law cease in a particular case, it is necessary that the law be deficient contrarily in some way. That this is the opinion of St. Thomas he derives from the fact that in exemplifying *epikeia* the Angelic Doctor constantly makes use of instances in which, in point of fact, the law is defective contrarily. Likewise, he alleges the words of St. Thomas in support of his position: ". . . especially if the case be such that the legislator, were he present, would not insist upon the observance of the law."¹⁸⁵

In further arguing for the opinion that *epikeia* may not be used where the purpose of the law ceases only negatively, Suarez bases his proof on the Aristotelian explanation of *epikeia*. According to the Philosopher *epikeia* has place where the law "sins," and thus needs emendation or correction. But in a case where the purpose of the law ceases only negatively, argues Suarez, the law certainly does not "sin," for it commands nothing "unjust or inhumane."¹⁸⁶ Moreover, he continues, many absurdities would follow if the mere negative cessation of the purpose of a law would warrant the use of *epikeia*. Here he adduces the argument of Cajetan, already mentioned,¹⁸⁷ concerning fornication.

In fine, although in a particular case the reason for a law may cease negatively, nevertheless, in the opinion of Suarez, there remain greater and more universal reasons for observing it—not to obey the law in such circumstances would be contrary to the common good; and, in addition, the necessity of uniform activity between the part and the whole is a powerful reason for urging the observance of the

¹⁸⁴ ". . . nisi sano modo explicetur."—*Ibid.*, Lib. VI, Cap. VII, n. 3.

¹⁸⁵ St. Thomas, *Sum. Theol.*, II-II, q. 147, a. 3, ad 2. It may be remarked that the teaching of St. Thomas in the passage cited does not seem to bear out the Suarezian opinion to the extent that Suarez alleges. In point of fact, the passage implies that any reasonable cause in a particular case will excuse one from observing a general law. For the full text of the passage, cf. p. 31 *supra*. For a further explanation of this passage by Suarez, cf. p. 72 *infra*.

¹⁸⁶ *De Legibus*, Lib. VI, Cap. VII, n. 4.

¹⁸⁷ Cf. p. 59, *supra*.

law. While it is true, he admits, that the subject in the case may perhaps not participate in the particular advantage intended by the law in question, he will nevertheless participate in the general advantage which follows upon such uniformity of acting.¹⁸⁸

It is evident, then, that Suarez will allow *epikeia* to be used only when the reason for the law ceases contrarily. But Suarez' meaning of the clause *ratio legis cessat contrarie* is quite comprehensive. He differs sharply from Cajetan who maintains that *epikeia* may be used only when the law is so deficient that to observe it would be sinful.

Cajetan's opinion, Suarez maintains,¹⁸⁹ is too rigorous and too circumscribed. The purpose of a law ceases contrarily, he continues, not merely in cases where observance of the law would be sinful, but in other cases as well. If Cajetan's opinion were true, the use of *epikeia* would always be a matter of obligation—because the avoidance of sin is always a matter of obligation. No case could be thought of in which a subject could use *epikeia* and yet not be obliged to do so. Now since, in point of fact, deviation from the written law is sometimes possible without being obligatory (for example, when a very great inconvenience must be undergone in the observance of a law, a subject is free not to obey it,¹⁹⁰ although to observe it and thus undergo the very great inconvenience involved would certainly not be evil), then there can be instances in which *epikeia* may, but need not, be used. Consequently, concludes Suarez, it pertains to prudence not merely to discern when the literal observance of a precept would be evil, but also to judge when a precept does not oblige, though it could be obeyed without sin.¹⁹¹

But Cajetan maintains, says Suarez, that only when observance of the law would be sinful can the Aristotelian concept of *epikeia* be verified; for only then does the law "sin." This argument of Cajetan Suarez denies:

A law would sin, not only by commanding what it should not, namely an evil act; but also by commanding when or how it should not, namely, by obliging with greater rigor than is fair.

¹⁸⁸ *De Legibus*, Lib. VI, Cap. VII, n. 5.

¹⁸⁹ *Ibid.*, n. 9.

¹⁹⁰ This is true ordinarily; there are exceptions, however. Cf. pp. 156-157; Chap. IV, notes 22 and 43 *infra*.

¹⁹¹ *De Legibus*, Lib. VI, Cap. VII, n. 10.

Each of these sins of the law *epikeia* emends, and in each case are verified the definition and explanation of Aristotle. St. Thomas too is to be understood in the same way. For it is the intention of the lawmaker not only to command what is right, but also to command in a manner which is right . . .¹⁹²

In another argument,¹⁹³ Cajetan bases his position upon a consideration of the very concept of justice, of which *epikeia* is a part. This proof also is attacked by Suarez:

I reply that here also [i.e., in cases of excessive rigor] the concept of justice intervenes on the part of the lawmaker, insofar as he does not obligate in such a case, even though to comply with the law is not a sin; therefore if, in regard to such a case, recourse were made to the legislator, he would in justice have to interpret that the law does not bind. Consequently, on the part of the subject it is sufficient that he be able justly and morally to deviate from the law in such a case, should he so desire—even though he is not obliged to do so; because for such too is needed a special prudence.¹⁹⁴

Finally, as to the argument of Cajetan concerning fornication, Suarez points out that it merely establishes that the obligation of a law does not cease when the purpose of a law ceases negatively—a point upon which both Cajetan and Suarez are agreed; it does not establish that the purpose of a law ceases contrarily only when the observance of the law would be sinful.¹⁹⁵

¹⁹² “Non solum peccaret lex praecipiendo quod non debet, id est iniquum, sed etiam praecipiendo quando vel quomodo non debet, id est, obligando cum majori rigore quam par sit. Utrumque ergo peccatum legis emendat epikia, et in utroque habet locum definitio Aristotelis et discursus ejus, et oedem modo est intelligendus D. Thomas. Nam intentio legislatoris non solum est recta praecipere, sed etiam recte . . .”—*Loc. cit.*

¹⁹³ Cf. p. 58 *supra*.

¹⁹⁴ “Respondeo etiam hic intervenire rationem justitiae ex parte legislatoris non obligandi in tali casu per suam legem, etiamsi exequi illam malum non sit, ideoque si ad ipsum legislatorem fieret recursus in tali casu deberet secundum justitiam interpretari legem tunc non obligare. Unde ex parte subditi satis est, quod possit juste, et non declinando a rectitudine, non servare legem in tali casu, si velit, etiamsi ad hoc non obligetur; nam ad hoc etiam specialis prudentia necessaria est.”—*Loc. cit.*

¹⁹⁵ *Loc. cit.*

Suarez and Cajetan, then, agree in allowing *epikeia* to be used only when the reason for the law ceases contrarily; but they disagree as to when actually the reason for the law ceases contrarily. Cajetan maintains that such happens only when the observance of the law would be sinful. Suarez, on the other hand, contends that in addition, the purpose of the law ceases contrarily—and hence *epikeia* may licitly be used—when the observance of the law would be “excessively intolerable,”¹⁹⁶ when the law would command “something harsh and excessively difficult.”¹⁹⁷ For in issuing commands of such a nature the legislator acts beyond his power, and hence the law “sins.”

Moreover, there can be included, according to Suarez, a third class of cases—cases in which from circumstances it is judged that it was not the intention of the lawmaker to bind, even though actually he had the power to do so.¹⁹⁸ And the reason for this last classification of cases is to be found in the fact that a lawgiver is not deemed to have willed to bind his subjects with the utmost rigor, and in every case in which he could impose obligation. This, according to Suarez, is the meaning of Aristotle, when the Philosopher says that *epikeia* emends the law in such wise as would the legislator himself if he were present.¹⁹⁹ It is likewise the meaning of St. Thomas, in his statement that it is function of *epikeia*, disregarding the words of the law, to follow the presumed intention of the lawmaker.²⁰⁰ For here too, as well as in the first and second classes of cases, there is an emendation of the law, inasmuch as the law is judged to include in its written expression more than actually was, or would have been, within the scope of the legislator's intention. Therefore, concludes Suarez, to use *epikeia* licitly, it is not necessary that the case be deemed outside the law by reason of the

¹⁹⁶ *Loc. cit.*

¹⁹⁷ *Ibid.*, n. 11.

¹⁹⁸ “. . . ut, verbi gratia, non solum censetur quis excusari a praecepto jejunii propter aegritudinem gravem, in qua non posset superior obligare, sed etiam propter minorem debilitatem, qua non obstante potuisset Ecclesia obligare sed nihilominus creditur ex benignitate noluisse, quae intentio legislatoris colligi potest ex aliis circumstantiis temporis, loci et personarum, et ex ordinario modo praecipendi cum illa moderatione subintellecta, licet non exprimat.”—*Loc. cit.*

¹⁹⁹ Cf. Aristotle, *Nicomachean Ethics*, V, 10.

²⁰⁰ Cf. *Sum. Theol.*, II-II, q. 147, a. 3, ad 2.

fact that the lawmaker did not have the power to include it; it is sufficient that one judge that the legislator, though having the power, was unwilling, or would be unwilling were he now present, to include the case in his law.

The teaching of Suarez as to the scope of *epikeia* may thus be summarized. *Epikēia* may licitly be used only where the purpose of the law ceases contrarily. But this condition is found in three separate instances. First, it is found in cases in which the observance of the law would be sinful. Here the use of *epikeia* is obligatory. Secondly, it is found in cases in which compliance with the law would be too difficult. To bind to the observance of the law in such cases is deemed to be beyond the power of the legislator. Consequently, *epikeia* may be used, but it is not obligatory. Thirdly, it is found in cases in which it is judged that due to particular circumstances it was not the will of the legislator to obligate the subjects. To bind to the observance of the law in such cases as are included in this last category is within the power of the lawmaker, but it is deemed not to be his intention to do so; and so, here too the use of *epikeia* is permissible, but not obligatory.

3. Relation of epikeia to the common good.

Not only does Suarez deny that the public good must be concerned in order that *epikeia* be used licitly,²⁰¹ but he likewise believes that his opinion is conformable to that of St. Thomas. Any private individual may use *epikeia* in his own favor, provided that to observe the letter of the law would be a grave inconvenience, and provided that there is no other reason connected with the common good which obliges that it be observed. Suarez admits that St. Thomas²⁰² speaks of a detriment to the general welfare, but he maintains that in the terms used the Angelic Doctor includes, implicitly at least, a detriment which would accrue to private individuals—for such would eventually redound to the injury of the state. In point of fact, it would seem to be the opinion of Suarez that any injury accruing to a private citizen, in some way or other affects the

²⁰¹ *De Legibus*, Lib. VI, Cap. VII, n. 13.

²⁰² Reference is made to the *Summa Theologica*, I-II, q. 96, a. 6.

welfare of the community. Thus, he proposes the example of an individual who misses Mass in order to assist in extinguishing the fire which is burning his neighbor's house. The damage which would accrue to the latter person, he says, would always redound to the community, for it is to the state's interest that the goods of its citizens be in no way diminished.

4. *Relation of epikeia to a "damnum emergens" and a "lucrum cessans."*

Suarez allows *epikeia* to be used not only in order to prevent that damage be done to goods which are already possessed by an individual or his neighbor, but likewise in order that some great temporal profit be acquired.²⁰³ He admits that many deny the lawfulness of *epikeia* in such circumstances, on the ground that men would neglect the observance of precepts in order to bend themselves to the acquisition of wealth. Yet Suarez himself maintains that loss of a large and just profit which is in the offing may, from a moral point of view, be equivalent to an injury or loss sustained by an individual regarding goods already in his possession. He admits, however, that, although other things being equal a *lucrum cessans* is sufficient reason for using *epikeia*, nevertheless, a *damnum emergens* of its nature constitutes a more just and grave basis for excusing one's self from the literal observance of the law.

²⁰³ *De Legibus*, Lib. VI, Cap. VII, n. 14. The opinion that one may engage in servile work on a feast day in order to gain a notable profit, is called "more probable" by St. Alphonsus. But he lists Suarez as among those who are opposed to this view. Cf. St. Alphonsus, *Theologia Moralís* (ed. Gaudé; Romae, 1905-1912), Lib. III, n. 301. On the other hand, Leurenus cites Suarez in favor of the opinion that *epikeia* may be applied to a law not only to prevent damage to one's goods, but likewise to make a notable gain. Cf. P. Leurenus, *Forum Ecclesiasticum* (Venetiis, 1729), Vol. I, Lib. I, Tit. II, q. 156, n. 3. So too D'Annibale, *op. cit.*, I, n. 187, note 49. However, Suarez' opinion on this point, expressed in another work, seems to differ from that mentioned here, and undoubtedly is the basis for St. Alphonsus' belief as to Suarez' position. For there Suarez seems to teach that the making of a notable gain is not sufficient to excuse an individual from the observance of a feast, unless the case is one of necessity, or unless the following of the law would cause a "non mediocre nocumentum." Cf. Suarez, *De Virtute et Statu Religionis (Opera Omnia, XIII)*, Tract. II, *De Praeceptis Affirmativis Religionis*, Lib. II, Cap. XXXIII, n. 9.

5. *Relation of epikeia to affirmative and negative precepts.*

Considering the question as to whether the use of *epikeia* is restricted to cases involving negative precepts, Suarez expresses the belief²⁰⁴ that both affirmative and negative precepts constitute the *materia* to which *epikeia* may be applied—though not equally so. It is true that *epikeia* strictly so-called (that is, as distinguished from interpretation) may be used in regard to affirmative laws which designate a definite time for their fulfillment, or when they involve, or are based upon, negative precepts (as, for example, the precept requiring restitution of goods to their owner). But in regard to those affirmative precepts compliance with which is not obligatory immediately or at a definitely stipulated time, *epikeia* properly understood seems to be inapplicable. If a subject deems himself exempt from the obligation of such laws in a particular case, his decision is based not upon *epikeia*, but upon his interpretation of the law.

6. *Necessity of recourse to a Superior.*

In the second book of *De Legibus* Suarez, dealing with an example of *epikeia* commonly adduced—an individual to protect his life carries weapons on a journey at night, despite the law forbidding this bearing of arms—makes the following statement in connection with

. . . the usual example about the prohibition to bear arms at night; for if the necessity be evident and so urgent that permission cannot be requested from a superior, justly we interpret that then the precept does not bind. . . .²⁰⁵

From these words it might be deduced that Suarez teaches that recourse to authority is always necessary, if the case is not so urgent as to preclude the possibility of it. However, such a conclusion is not justified in the light of other statements made in the course of a formal discussion of the point. Actually it is the belief of Suarez

²⁰⁴ *De Legibus*, Lib. VI, Cap. VI, n. 7.

²⁰⁵ “. . . in exemplo communi de prohibitione ferendi arma noctu, nam si sit evidens necessitas et ita urgens ut non possit a superiori licentia postulari, juste interpretamur tunc praeceptum non obligare. . . .”—*Ibid.*, Lib. II, Cap. XVI, n. 12.

that, if to observe the law would certainly be sinful or contrary to another precept or virtue possessed of greater binding force, then the obligation of the law ceases, and on his own authority a subject may deviate from it without recourse to a Superior.²⁰⁶ This opinion, he says, is based upon the teaching of St. Thomas in the *Summa Theologica*.²⁰⁷ The reason for this position is to be found in the fact that in such a case the authority of the Superior can have no effect. For even if after recourse has been made, the Superior should command that the law be observed, the subject would be unable to comply with the precept, "for God is to be obeyed rather than man." The objection may be raised, continues Suarez,²⁰⁸ that sometimes permission ought to be sought for the sake of preserving good order, even though it is not necessary to do so. In answer, he replies that it is the common opinion that in such a case recourse is not required even though opportunity for it be given—there is no precept which prescribes recourse, nor is there to be found any reason in the nature of the case itself which would require it. He admits, however, that in a public case recourse might be rendered necessary in order to avoid scandal, or for some similar reason—but in such instances the necessity of recourse would arise from a merely accidental and extrinsic circumstance.

Moreover, in a case where it is certain that the law does not oblige, even though it could be observed without sin, the subject on his own authority and without recourse may deviate from it.²⁰⁹ The reason, says Suarez, is the same as that outlined for the previous case, namely, that the authority of the Superior can have no effect. This difference, however, is to be noted. In the first case the subject is bound not to observe the law; in the second case he is free to obey it or not, as he wishes, provided, of course, there is no sin involved from some other source.

Turning to a consideration of cases of probability, Suarez main-

²⁰⁶ *Ibid.*, Lib. VI, Cap. VIII, n. 1.

²⁰⁷ Reference is made to the *Summa Theologica*, II-II, q. 120, a. 1, ad 3; I-II, q. 96, a. 6, ad 2. It should be noted that Suarez reads "*excusatione*," rather than "*executione*" in the former passage of St. Thomas. For the complete text of St. Thomas cf. note 74 *supra*.

²⁰⁸ *Loc. cit.*

²⁰⁹ *Ibid.*, Lib. VI, Cap. VIII, n. 2.

tains that a subject who with probability judges that the case at hand is not included in the law (this he distinguishes from being included in the words of the law), is excused from the obligation of the law, for "it is licit to follow a probable judgment by setting aside in a practical manner a doubtful conscience."²¹⁰ As will be seen, however, this is purely a speculative position and Suarez would not reduce it to practice.

With modifications this is likewise the opinion of Cajetan,²¹¹ Soto²¹² and Medina,²¹³ Suarez continues. The modifications, however, are of extreme importance. As has been seen, these theologians allow the use of *epikeia* based on probability, only in cases of emergency, when delay is impossible, and recourse to authority cannot be had. When there is time to consult a Superior, this must be done. Such, they claim, is the teaching of St. Thomas. This seems to have been the common opinion in Suarez' day,²¹⁴ but it was not universally held.

Attacking the opinion of Vasquez,²¹⁵ Suarez²¹⁶ contends that, true probability being present, a subject may without recourse act contrary to the words of the law in cases of necessity, even where there is question of the will only and not of the power of the law-maker. His reason is based upon the belief that a probable judgment in moral matters is sufficient for prudent action, if certainty cannot be obtained. To demand more would be to tax human nature and human prudence, "since almost every human cognition is conjectural, especially regarding actions to be performed."²¹⁷ It would mean that in practice *epikeia* would almost never be used, for no one is so certain as to the sufficiency of the cause for it, as not to have some doubt or fear. Moreover, in these cases the unlearned

²¹⁰ ". . . licet sequi iudicium probabile conscientiam dubiam practice deponendo."—*Ibid.*, n. 3.

²¹¹ Cf. Cajetan, *op. cit.*, in I-II, q. 96, a. 6.

²¹² Cf. Soto, *op. cit.*, Lib. I, q. VI, a. 8.

²¹³ Cf. Medina, *op. cit.*, in I-II, q. 96, a. 6.

²¹⁴ So Suarez terms it. Cf. *De Legibus*, Lib. VI, Cap. VIII, n. 9.

²¹⁵ Suarez does not mention Vasquez, but the opinion which he criticizes is that of Vasquez. Cf. pp. 65, 66 *supra*.

²¹⁶ *De Legibus*, Lib. VI, Cap. VIII, nn. 4 et sqq.

²¹⁷ *Ibid.*, n. 6.

could not safely follow the opinion of a wise and intelligent man—nor indeed could the latter give advice—because in almost every instance the opinion or advice would be based on a probable judgment. Finally, Suarez insists that there is no reason why, when uncertainty is had in each instance, a distinction must be made between a case involving the *power* of the legislator and one involving his presumed *intention*.

With regard to the arguments of those who maintain that when the intention of the legislator, and not his power, is involved, *epikeia* may never be used in cases of probability, Suarez makes the following observations.²¹⁸ As to the statement that the words of the law in such cases possess a *quasi* right, Suarez replies that the words possess no right to bind, except insofar as they express the will of the lawgiver. When circumstances arise in a particular case, such as with probability to limit the scope of the words, it is no longer certain that the case is included in the law by reason of the *force* of the words, even though it is still certain as far as the *signification* of the words is concerned. The argument that the words of the law possess a *quasi* right has value only where there is no probable judgment to the effect that the law does not bind in the case.

To the argument that the law does not “sin,” and hence cannot be emended by the use of *epikeia*, Suarez replies that it is true that, in the case under consideration, neither a sinful act nor one excessively difficult is commanded. Nevertheless, the law does “sin,” in the sense that its words signify more than the legislator had in mind—and such a defect can be corrected by the use of *epikeia*.

Finally, that all manner of evils would follow if *epikeia* be allowed in cases of probability, Suarez denies. Such would not occur if the judgment upon which the use of *epikeia* is based, be truly probable and prudent, he maintains. To say that they would ensue from an abuse of the principle is beside the point. Indeed much greater disadvantages would follow, he concludes, if in such circumstances men could not resort to *epikeia*.

But what of the opinion of Cajetan that a subject with merely a probable judgment may not use *epikeia*, if recourse to authority is

²¹⁸ *Ibid.*, n. 7.

possible? With this statement Suarez in theory does not agree.²¹⁹ But in practice he advises that it be followed, inasmuch as it is the common opinion and has been confirmed by the use of conscientious and prudent men. It would seem to be a perversion of the right order, he admits, to use conjectures, and on the basis of them to deviate from the words of the law, when certain knowledge of the legislator's intention can be attained by recourse.²²⁰

Finally, Suarez takes up the question of cases of doubt—cases in which the subject cannot judge even with probability that the general law does not bind in the case at hand. To the common opinion taught by St. Thomas,²²¹ Cajetan,²²² Soto,²²³ Medina²²⁴ and others Suarez subscribes. Recourse to a Superior must be had, if this can be done. Suarez argues that without recourse, where recourse is possible, the individual in deviating from the words of the law would act with a conscience practically doubtful—and such is always evil.²²⁵ But must the subject obey the law as it stands, in cases of urgency, when an authority cannot be reached? There is an imposing array of theologians who answer in the affirmative.²²⁶ They argue not merely that the presumption in such cases is for the law, but more fundamentally that the practical doubt arising from the lack of even a probable judgment in the agent cannot be eliminated by the mere impossibility on the part of the individual to recur to a Superior. Inability to recur does not transform doubt into practical certitude. Although this is the common opinion, it is not universal, according to Suarez. With it, however, he himself agrees, though with some reservations.²²⁷

²¹⁹ *Ibid.*, nn. 3, 8.

²²⁰ *Ibid.*, n. 9.

²²¹ Cf. *Sum. Theol.*, II-II, q. 120, a. 1, ad 3; I-II, q. 96, a. 6, ad 2.

²²² Cf. *op. cit.*, in I-II, q. 96, a. 6.

²²³ Cf. *op. cit.*, Lib. I, q. VI, a. 8.

²²⁴ Cf. *op. cit.*, in I-II, q. 96, a. 6.

²²⁵ *De Legibus*, Lib. VI, Cap. VIII, n. 10.

²²⁶ Suarez (*ibid.*, n. 11) names Cajetan, Soto, Medina and Sanchez.

²²⁷ Thus, e.g., if two contradictory laws occur, which demand simultaneous fulfillment, the subject must transgress that which he believes to be less grave, even though he has no probable reason (apart from its being in conflict with another law) for believing that it no longer binds.

Such, then, is a summary of the doctrine of Suarez on the concept of *epikeia*. It is clear that his treatment is far more detailed than that of any of the moralists who preceded him. Its importance can be calculated from the dependence of so many subsequent theologians upon his teaching in this matter.

ARTICLE 3. POST-SUAREZIAN DEVELOPMENT

Lessius (+1623). A slightly different viewpoint on the notion of *epikeia* is observable in the teaching of Lessius.²²⁸ This theologian maintains that, when a private individual using *epikeia* deviates from the words of the law, he does not do so principally in order to conform himself to the presumed intention of the legislator, although he may act to some extent from this motive. But his primary reason is to be found in the fact that he wishes to refrain from offending another virtue—which would be the case were he to observe the letter of the law.

Epikeia may be used, then, when observance of the law would violate a virtue. But the words of the law may be disregarded in other cases as well, namely, when it is required for the common good, or when from the transgression of the letter of the law a greater good would ensue than from compliance with it. In general, the teaching of Lessius on the point is quite strict. Perhaps the best indication of his attitude lies in his belief that the prudence required for the proper use of *epikeia* is lacking in many, due either to scrupulousness of conscience or to unsubstantiality of judgment.

Bonacina (+1631). The theologian Bonacina discusses *epikeia* as applicable in cases where the observance of a general law in a particular case would be illicit or pernicious to the common welfare or too difficult.²²⁹ It may lawfully be used also in other cases in which from circumstances it is judged that the legislator would not intend the law to bind, were he present. Moreover, the basis for the legiti-

²²⁸ L. Lessius, *De Iustitia et Iure Ceterisque Virtutibus Cardinalibus* (Antverpiae, 1617), Lib. II, Cap. XLVII, Dub. IX. For discussion of a kindred point cf. Cap. XXXI, Dub. III, n. 10.

²²⁹ M. Bonacina, *De Morali Theologia* (Venetiis, 1687), Vol. II, Disp. I, Quaest. 1, Punct. ult., Prop. II, nn. 8 et sqq.

macy of *epikeia* is not merely the fact that no one is bound to the impossible, or the fact that to demand obedience where observance of the law would be extremely difficult exceeds the lawmaker's power. It must also be taken into consideration that human laws should be framed in imitation of the gentleness and mildness of divine commands.²³⁰

With regard to cases of probability, invoking the authority of Suarez, Bonacina teaches that an individual is excused from observing the words of a law when it is believed with probability that in regard to the particular case at hand the legislator would not be willing to impose obligation. In cases of doubt, as distinguished from those of certainty and those of probability, Bonacina requires that a Superior be consulted; but if this recourse is not possible and immediate action is necessary, the subject is allowed to use *epikeia*. The author admits that this opinion is contrary to that held by St. Thomas, Cajetan, Soto and others, but maintains that it is consonant with that of Sanchez.²³¹ He argues that if the doubt cannot be expelled after moral diligence has been used, there is present a *dubium juris*, similar to that which occurs when one doubts about the existence of a law, and liberty remains in possession. This extremely liberal view is immediately limited, however, by a rather involved qualification, indicating that if the case at hand is in some other way included in the law, a mere doubt will not allow one to disregard the precept.²³²

²³⁰ Cf. Ps. 118, 96; 1 John 5, 3; Mt. 11, 30.

²³¹ In point of fact it does not seem that Sanchez can be invoked in favor of Bonacina's opinion. Cf. Sanchez, *op. cit.*, Lib. II, Disp. 41, n. 37.

²³² "Hoc tamen intelligendum est, modo talis casus alias comprehensus non fuerit sub lege, nam si alias comprehensus fuit, & modo dubitatur an nunc comprehendatur, iudicandum est adhuc comprehendi, quia possessio stat pro lege; consequenter lex servanda est. . . . Hinc sequitur servandam esse legem in iis casibus, ad quos verba legis iuxta suam significationem extenduntur, licet ob aliquas circumstantias dubitetur, an legislator voluerit illos casus comprehendere, nam possessio & juris praesumptio stat pro lege . . . & hoc valet sive pateat aditus ad legislatorem, sive non pateat ob imminentem aliquem casum qui non patiat moram & inducias, adhuc enim lex possidet, & est iusta, ut suppono."—*Op. cit.*, Vol. II, Disp. I, Quaest. 1, Punct. ult., Prop. II, nn. 10-11.

Malderus (+1633). In discussing *epikeia* Malderus is most insistent on the principle that it does not allow one to act *contra legem*, but rather *praeter verba legis*.²³³ For law must be considered in reference to the intention which its maker had in mind, rather than to the words in which the precept is expressed, since "sometimes the law itself [i.e., the precept as it exists in the legislator's mind] is in some way *praeter verba legis*." Hence, he who disregards the words of the law and obeys the intention of the law-maker does not violate the law; on the other hand, a subject who observes the words which are contrary to the legislator's intention does actually transgress the law.

Malderus admits the use of *epikeia* as lawful not only in a case where the observance of the words of the precept would be illicit or excessively difficult, but also in an instance where a prudent judgment can be made that the legislator did not will to include the case at hand. However, he warns that in this last type of case one must proceed with greater caution, and that the circumstances must be carefully weighed.²³⁴

The use of *epikeia* is not restricted to cases involving the general welfare. However, there is no place for *epikeia* except when the purpose of the law ceases contrarily, or at least, if it ceases only negatively, the cessation must be universal. In cases of doubt recourse is necessary; otherwise the words of the law must be obeyed. But in cases of probability *epikeia* may be used where the emergency is so pressing as to preclude the delay necessary for consulting the Superior.

Laymann (+1635). It is primarily from a judicial and canonical viewpoint that Laymann considers at some length the notion of *epikeia*.²³⁵ His entire discussion is set into a background wherein he treats of *aequum et bonum*, insofar as it is distinguished from *jus strictum*. The use of *epikeia* arises from an attitude that looks more

²³³ J. Malderus, *Commentarius in Primam Secundae Sancti Thomae* (Antverpiae, 1623), q. 96, a. 6.

²³⁴ ". . . maiori cautela est procedendum, consulendaeque circumstantiae, & praesertim usus, modus regiminis, & mos interpretandi similes Leges. . . ."—*Loc. cit.*

²³⁵ *Op. cit.*, Lib. I, Tract. IV, Cap. XVIII, nn. 2-4; Cap. XIX, nn. 1 et sqq.

to the *aequum et bonum* than to the *jus strictum*, he states. Hence, for that reason *epikeia* is concerned with a more benign interpretation of law.

Although Laymann's teaching does not differ essentially from that of many earlier theologians, his emphasis is slightly different. For he considers the matter to a greater extent from the viewpoint of the lawmaker and the authoritative law interpreter, and less from that of the private subject of the law. The lawgiver is presumed to be equitable rather than rigorous, and so from him benign legislation is to be expected. It is the intention of the lawmaker which is of supreme importance, for "the mind and will of the legislator are, as it were, the spirit and soul of the law."²³⁶ However, it is not to be concluded that Laymann teaches an excessively lenient doctrine in this matter as regards practical conclusions. Rather, he is conservative and cautious, indicating clearly that "the correction of laws must be avoided, insofar as is possible."²³⁷

Epikeia has place where the law cannot be observed except by violating another precept which is more grave, where the observance of the law would be an impediment to a higher virtue, where to obey the law would be over-difficult, and sometimes in instances where it is presumed that the legislator did not include in his general law the case at hand, although in strict justice he could have done so.

Laymann points out that, if by reason of the immediately foregoing circumstances it is "manifest" that a particular case is not included in the general law, *epikeia* may be used. In cases in regard to which "it is doubtful whether the law ceases through *epikeia*," literal observance of the precept is demanded.²³⁸ No mention of cases of probability is to be found.

Continuing his discussion Laymann envisions a group of cases not hitherto treated by theologians in connection with *epikeia*.²³⁹ Is a person who is legitimately excused by *epikeia* from fulfilling

²³⁶ *Ibid.*, Cap. XVIII, n. 4.

²³⁷ *Ibid.*, n. 2.

²³⁸ *Ibid.*, Cap. XIX, n. 3. It is the opinion of D'Annibale that Laymann allows *epikeia* to be used solely in cases of certainty. Cf. D'Annibale, *op. cit.*, I, n. 187, note 148.

²³⁹ *Op. cit.*, Lib. I, Tract. IV, Cap. XIX, n. 5.

part of a precept, likewise excused from the part which remains? It is the opinion of Laymann that he who is excused from what is accidental in the precept, must nevertheless observe the substance of it, if this be possible. Thus, it could happen that a person finds himself unable to be present at Mass before the Preface on a day of obligation. He is bound to hear the rest of Mass, "for the part of the Mass from the Consecration to the priest's Communion properly and substantially pertain to the Holy Sacrifice."²⁴⁰ Conversely, if, in connection with a single precept, a person is excused from its substance, then he is excused from the entire precept. Thus, he who cannot fulfill his vow to say the entire Rosary, need not say part of it. This last assertion, however, is somewhat restricted by Laymann in reference to cases where that part of the precept which cannot be observed, becomes slight. Thus, if he who lost his Breviary knows by heart all the Psalms of Matins of a ferial, but does not know the Lessons and Responsories, he is obliged to recite the Psalms—for the part omitted is not notable. The opposite would be true on a day requiring the recitation of nine lessons, for then the part omitted would be notable. Finally, if the precept is divisible, he who is excused from one part of it, must, nevertheless, observe the other parts. Thus, he who is unable to recite Matins, is still bound to recite the rest of the Office.²⁴¹ Again, he who is excused from fasting for most of Lent, must fast on days when the excusing reason ceases. Laymann takes into account, however, those cases in which it is certain that the subject cannot observe the greater part of the law (for example, cannot recite the greater part of the Office or fast for the greater part of Lent), but is doubtful as to what part is possible without harm to himself. In such instances, he says, *epikeia* will dictate that the part which is certain (that is, the part from which the subject is excused) will absorb the uncertain part, for otherwise anxieties and scruples would arise.²⁴²

²⁴⁰ *Loc. cit.*

²⁴¹ This opinion was confirmed by the Holy Office some years after Laymann's death. Cf. H. Denzinger, C. Bannwart, J. Umberg, *Enchiridion Symbolorum Definitionum et Declarationum de Rebus Fidei et Morum* (ed. 21-23; Friburgi Brisgoviae: Herder & Co., 1937), 1204.

²⁴² *Op. cit.*, Lib. I, Tract. IV, Cap. XIX, n. 7.

Tamburini (+1675). Tamburini,²⁴³ influenced greatly by Laymann in this matter, indicates that *epikeia* may be used not only in regard to cases which according to prudent judgment the legislator is unable justly to include in his law, but also when it is prudently deemed that he would not have willed to include them in his law. However, this theologian is concerned mainly in pointing out what must be done in particular cases where the individual lacks certainty as to the presumed intention of the legislator. His whole development of the matter occurs in relation to an illustration which he adduces: A law has been enacted whereby all, under threat of imprisonment, are forbidden to leave the city. Now, at some point outside the city the father of one of the citizens, being gravely ill, needs the assistance of his son.

Tamburini maintains that if this necessity is morally certain, without hesitation the individual may use *epikeia*, for he may prudently judge that his case in view of the urgent necessity is not included in the general law. This is true likewise when there is only probability that a real necessity is present. If, however, there exists merely a doubt—and no true probability—that the father is in need of the son's aid, then the citizen must recur to authority. If in this latter case recourse is impossible, the law as it stands must be observed, since the law is in possession; and a law that is certain cannot be disregarded on the basis of an excusing cause which is doubtful. Thus far Tamburini differs in no way from many of his predecessors who discuss this point. But in explaining the matter further he introduces another element. Even if the citizen in the example adduced still remains in doubt, the law may be disregarded when the fulfillment of it would be burdensome and inconvenient ("*molesta et incommoda*"). The reason is to be found in the belief that a legislator is presumed to be unwilling to bind a subject in a particular case in the midst of circumstances which make observance of the law incommodious or detrimental. It is the task of a prudent man, weighing carefully all the factors involved, to discern precisely of what gravity the inconvenience must be, in order to warrant the disregarding of the words of the law.

²⁴³ T. Tamburini, *Theologia Moralis* (Venetiis, 1748), Vol. I, Lib. I, Cap. III, § 7, sub lit. "e."

At first sight Tamburini may appear to be very lax on this last point. Yet, a close scrutiny of his opinion will not bear out this impression. For he does not allow the use of *epikeia* when the presumption as to the intention of the legislator lacks probability. What he seems to teach is this: if it is certain, or at least probable, that the fulfillment of the written law would be very difficult, the words may be disregarded, even though there is at hand no other certain or probable excusing cause. As to the doubt, that hinges about the excusing cause—as distinct from the difficulty involved. But it is certain, or at least probable, that the intention of the legislator not to bind in such a case can be reasonably presumed, owing to the difficulty involved in observing the law as it stands.

Tamburini's final point has reference to the necessity of using *epikeia*. In the illustration adduced, if the observance of the law would result in the transgression of the precept of charity, the citizen must disregard the law. On the other hand, although a subject by using *epikeia* may licitly deviate from the letter of the law in order to acquire an extraordinary gain, for example, he is in no way required to take advantage of the benign interpretation, but may observe the law notwithstanding. Similarly, it can happen that it is so laudable for an individual to act in conformity with the law, that, when it is in conflict with another precept, he may disregard this latter precept. Thus, states Tamburini in exemplifying his last point, a Carthusian on account of the praiseworthy example of observing the laws of his Order, may choose to continue to abstain from meat even in his final sickness, although *epikeia* would allow him to do otherwise, and meat is needed to maintain his life.

The Salmanticenses (1665-c. 1725). The Salmanticenses²⁴⁴ insist that the reason for the justification of *epikeia* is to be found in the fact that law is deficient owing to its universality. However, this defect is not in all instances to be traced to the inability of the lawmaker to foresee all future possible cases—such is true only in reference to the human legislator. With regard to the Divine Legislator, His knowledge of the future is in no way limited; yet, He was unwilling to make specific provision for particular exemptions,

²⁴⁴ *Op. cit.*, Vol. III, Tract. XI, Cap. IV, Punct. III, nn. 19 et sqq.

due to the profuseness and confusion which would inevitably result from the incorporation into the law of mention of all future exceptions. Rather, He provided that by the use of *epikeia* men could correct defects arising from the universality of law. It is noteworthy that the Salmanticenses invoke the authority of St. Thomas²⁴⁵ in support of this explanation.

The Salmanticenses deny the possibility of the lawful use of *epikeia* in cases of doubt; but they advance a very liberal opinion with regard to cases of probability, implying that recourse to authority is not necessary even when possible. This opinion is obviously in disagreement with that of Cajetan²⁴⁶ and Soto,²⁴⁷ and is more akin to that of Herincx²⁴⁸ on the point. The Salmanticenses cite St. Thomas²⁴⁹ in support of their opinion that *epikeia* may be used not only when the public welfare is involved, but also where a private good is in question. Moreover, they maintain that *epikeia* has place only when the purpose of the law ceases contrarily. Yet, such occurs not only when to observe the law would be sinful, but also when it would be very difficult, for all law should be modelled on that of Christ Whose yoke is easy and burden light. No mention is found of the third category of cases explained by Suarez.²⁵⁰ But reference is made to the Suarezian opinion²⁵¹ that *epikeia* may be used not merely when there is question of avoiding grave damage or injury to things already acquired, but likewise when an extraordinary gain would be lost were the words of the law to be observed. However, no explicit evaluation of this position is given, although there seems to be an implicit approval of it.

²⁴⁵ They refer to the *Summa Theologica*, I-II, q. 96, a. 6, ad 3.

²⁴⁶ Cf. *op. cit.*, in I-II, q. 96, a. 6.

²⁴⁷ Cf. *op. cit.*, Lib. I, q. VI, a. 8.

²⁴⁸ Cf. G. Herincx, *Summa Theologica Scholastica et Moralis* (ed. 2; Antverpiae, 1680), Pars II, Tract. III, Disp. III, Quaest. XV, n. 198.

²⁴⁹ They refer to the *Summa Theologica*, II-II, q. 120, a. 1. They emphasize the belief that in regard to St. Thomas' example of the sword which is to be returned, only private individuals, and not the general welfare, are concerned.

²⁵⁰ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 11.

²⁵¹ *Ibid.*, n. 14.

Viva (+1726). Viva²⁵² treats rather extensively several points of importance concerning *epikeia*. Perhaps the most noticeable divergence of his teaching from that of preceding theologians is found in his statement that for the licit use of *epikeia* it is not required that the purpose of the law cease contrarily. However, the difference exists more in words than in reality. For whereas some earlier theologians consider *finis legis cessat contrarie* to mean that the observance of the law would be either sinful or exceedingly difficult, Viva limits the signification of this expression in such wise that it refers only to those cases where observance of the law would be sinful. Thus, without changing the common teaching he may say that *epikeia* is licit also in cases (for example, cases of extreme difficulty) other than those where the purpose of the law ceases contrarily. Nevertheless, in several matters he is more liberal in his allowance of *epikeia* than Cajetan, for example.

Viva's explanation of the notion of *epikeia* rather closely resembles that of the Salmanticenses. *Epikēia* is based not necessarily upon the inability of the legislator to foresee a particular future case with all its circumstances and details. It may also be founded upon the unwillingness of the legislator to make specific provision in his law for the particular case, even though he clearly foresees that it will arise.

In laying down several conditions for the licit use of *epikeia* Viva manifests clearly his own conception of the basic nature and extent of *epikeia*: First, "that the case be not excepted by reason of the fact that it is here and now illicit."²⁵³ Thus, for example, if a man should omit Mass on Sunday in order to care for a dying person, he could not be said to have used *epikeia*. For in such circumstances the natural law of charity demands that Mass must be omitted. Here, strictly speaking, there is no question of benignly interpreting a positive law; the individual must observe the higher law of charity. Viva seems to be the first theologian who clearly expresses this point—a point of great importance. For Viva realizes that it is not precise to say that *epikeia* excuses a subject from

²⁵² *Opus. Theol.-Mor.*, Opus. II, Quaest. IV, Art. II and III.

²⁵³ "Quod casus non excipiatur eo quod sit hic et nunc illicitus."—*Ibid.*, Art. II, n. IV.

obeying a law whose observance is sinful. Actually by the very fact that in the given circumstances one would sin by adhering to the positive law, that law ceases. A command contrary to the natural precept of avoiding evil is no law.²⁵⁴

Secondly, "that the case be not excluded by the law itself."²⁵⁵ Thus, for example, a judge who imposes the death penalty cannot be said to use *epikeia* in regard to the law "Thou shalt not kill." For actually the law itself rightly understood, independent of any use of *epikeia*, excludes such a case from its scope. This consideration by Viva is likewise extremely important. For if it be kept in mind, it will solve many of the apparent contradictions among moral theologians regarding *epikeia* in reference to the natural law.

Thirdly, "that the general law include in its words, according to its species, this particular case."²⁵⁶ Here Viva merely repeats what is taught by all theologians who discuss the notion of *epikeia*. Obviously no problem would arise in regard to a particular case, if that case were not included in the words of the law.

Fourthly, "that such circumstances arise, that the case in particular is prudently deemed not to be included [in the law], from the viewpoint of the legislator's intention; and so, if the legislator were present, he would surely exclude it."²⁵⁷ This, then, in Viva's opinion is essentially the type of case in which *epikeia* may be used. But a further point Viva seems to neglect. Does this category include only those cases in regard to which observance of the law is excessively difficult? Or does it also include the third classification mentioned by Suarez?²⁵⁸ Viva does not definitely state, but it would seem that for Viva use of *epikeia* would not be licit in such cases.

²⁵⁴ "Si vero in aliquo a lege naturali discordet, jam non erit lex, sed legis corruptio."—St. Thomas, *Sum. Theol.*, I-II, q. 95, a. 2.

²⁵⁵ "Ut non excludatur casus ab ipsa lege."—*Loc. cit.*

²⁵⁶ "Ut lex universalis comprehendat verbis suis secundum sui speciem casum hunc particularem."—*Loc. cit.*

²⁵⁷ "Quod tales circumstantiae concurrant ut casus in particulari prudenter existimetur non comprehensus secundum mentem legislatoris; atque adeo si legislator adesset, utique illum excluderet."—*Loc. cit.*

²⁵⁸ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 11.

Viva teaches that if it is very difficult and burdensome to obey a law in a given instance, *epikeia* may correct the defect and allow the subject to deviate from the words of the precept. The reason is to be found in the fact that it would be unbecoming a prudent law-maker to command excessively difficult acts which are not necessary for the common good. But lest he be understood in a lax manner, Viva adds a word of caution, indicating that his doctrine is applicable only when the matter in question is not intrinsically evil and thus forbidden by the natural law, as are, for example, fornication and perjury. For such sins one is always bound to avoid in every case and despite every inconvenience.²⁵⁹

Viva discusses at some length the question as to whether a probable judgment that the law does not oblige in a particular case is sufficient for the lawful use of *epikeia*. His opinion, in brief, is that it is licit to use *epikeia*, provided that recourse to a Superior cannot be had.

Finally, Viva takes up a consideration of cases of doubt.²⁶⁰ First, is a person bound to obey the law when he is in doubt whether the thing commanded is licit? Some theologians hold that to observe the law in such circumstances would be wrong, he remarks, since it is intrinsically evil to perform an act when one doubts whether or not it is lawful, and since the mere precept of a Superior cannot make licit what is otherwise illicit. Viva himself believes, and he offers it as the more common opinion, that the subject must obey. Only in cases where the unlawfulness is certain may the subject be excused, for no Superior is bound to give to his subjects a reason for his commands. Moreover, *per accidens* the precept of a Superior can render licit what otherwise seems unlawful, in the sense that the precept gives an efficacious basis (and also an obligation) for setting aside a conscience which is speculatively doubtful. Thus, what speculatively seemed illicit may practically be deemed lawful. A sick person, for example, would be bound to obey his Superior who forbade him to fast, or to recite the Breviary; a soldier who after due diligence cannot rid himself of a doubt about the justice of a

²⁵⁹ *Loc. cit.*

²⁶⁰ *Ibid.*, Art. III, nn. 1 et sqq.

war, may engage in it when legitimately commanded to do so. In short, that a subject be bound to obey, it is not necessary that to him the lawfulness of the thing commanded be certain; it suffices that the opposite be not evident.

Such, in brief, are the main points of Viva's teaching on *epikeia*. As is evident, his treatment is comprehensive. It is likewise valuable, especially insofar as his contribution to a better understanding of the precise nature of *epikeia* is concerned.

Catalanus (+1732). Although *Catalanus*²⁶¹ believes that St. Thomas, Cajetan, Soto and other theologians allow *epikeia* to be used only when observance of the law would be evil, he himself subscribes to what he calls the common opinion, that *epikeia* in regard to positive laws, especially human laws, may be used also when to obey the law would be too onerous and burdensome. For in such cases, he maintains, the law may be said to "sin," insofar as it fails to impose obligation after the fashion of the law of God, Whose yoke is easy and burden light.²⁶²

Turning next to a consideration of cases in which certainty is lacking, *Catalanus* teaches that in cases of doubt—"when the excusing cause does not attain to probability, but the one interpreting remains in doubt as to whether the Legislator willed to include this case"²⁶³—a Superior must be consulted. For no one may deviate from a law, if there exists the opportunity to dispel the doubt as to whether or not it binds. Furthermore, if a doubt arises as to whether the legislator has the power to include in the law a case which is actually comprehended by the words of the law, the decision must be made in favor of the legislator's power, for it, and hence also the law, are in possession. *Catalanus* does not explicitly state what must be done in regard to a doubtful case where recourse to a Superior is impossible. But the impression conveyed by the passage in its entirety seems to warrant the conclusion that in such an instance the law as it stands must be obeyed.

²⁶¹ *Op. cit.*, Vol. I, Pars I, Quaest. II, Cap. XIV, n. 9.

²⁶² Mt. 11, 30.

²⁶³ ". . . quando causa excusans non attingit probabilitatem sed interpretans haeret dubius, an voleurit Legislator comprehendere casum illum."—*Loc. cit.*

Roncaglia (+1737). Teaching that *epikeia* is permissible when the law is defective contrarily, or when the observance of a precept would be onerous and very difficult, Roncaglia²⁶⁴ discusses *epikeia* particularly from a practical viewpoint. He illustrates his teaching by several examples, and advises confessors not to avoid the use of *epikeia* in regard to matters which are not intrinsically evil, as often as there would arise from the observance of laws the proximate danger of grave harm either to themselves or to others. Thus, for example, if a confessor perceives that from material integrity of confession there will ensue danger to the well-being of a penitent now in ill health, or an intolerable perplexity of conscience to a scrupulous person, he should judge that the divine law requiring integrity of confession no longer binds. Again, if a cleric would be tortured with scruples from the recitation of the Divine Office, *epikeia* may be used in regard to this obligation, since in the circumstances this duty has become "a most grave burden." (For the greater peace of mind of the individual concerned, however, Roncaglia advises that a dispensation from a Superior be obtained.) Again, *epikeia* is applicable to the regulations concerning the proper method of carrying Holy Viaticum to the sick. As regards the obligation of publishing the banns in a case where a marriage cannot without grave scandal be postponed for such a time as to allow the law to be fulfilled, and where recourse to the Bishop is impossible, the author believes that, if the priest does not use *epikeia*, "certainly many scandals can arise from his ignorance."²⁶⁵

Attention should be called to Roncaglia's distinction between doubt and probability. It is the contention of Roncaglia that "if it is merely doubtful whether the lawgiver wished to include a particular case," the words of the law must be obeyed. However, when there is a probable reason indicating that

this or that case must not be deemed to have been included by the Legislator—either because a circumstance arises which he could not have foreseen, or because in this case some special

²⁶⁴ C. Roncaglia, *Universa Moralis Theologia* (Venetiis, 1760), Vol. I, Tract. III, Quaest. IV, Cap. III.

²⁶⁵ *Loc. cit.*

element is found which is not common to others of the same species, or because the purpose intended by the Legislator is best attained by a course of action different from what he prescribed—then *epikeia* may be used.²⁶⁶

Mazzotta (+1746). Referring to the opinion of Cajetan that *epikeia* is permissible only in regard to cases where observance of the law would be sinful, *Mazzotta* ²⁶⁷ subscribes to the more lenient view of Suarez—which he calls the common opinion—that it may be used likewise in reference to a case where to follow the letter of the law would not be sinful, provided only that it is reasonably believed that the legislator was unwilling to include such a case in his law. To illustrate his teaching he offers the following example. There exists a precept which prohibits under pain of excommunication the taking of books without permission from the city of Rome, lest among them be found one which it is forbidden to read. An individual, being certain that the book which he wishes to take from the city is not a forbidden book, and at the same time being keenly aware that to wait until permission is obtained will be very inconvenient, may use *epikeia* and benignly interpret the mind of the legislator to the effect that he was unwilling to include the case in his law, even though he had the power to do so.

Mazzotta maintains that for the licit use of *epikeia* a probable judgment suffices, even though there exists a more probable opinion in favor of the opposite side. Nor can it be objected, continues the author, that the law is in possession and hence must be obeyed. The fact is that, although the words of the law include the case, there exists a sufficiently probable opinion that the legislator was unwilling to bind the subject in the instance under consideration. Hence, it is incorrect to say that the law is in possession, for the words of the

²⁶⁶ "Si vero ratione vere probabili probetur hunc vel illum casum non censendum esse comprehensum a Legislatore, vel quia datur circumstantia quae non potuit ab ipso praevideri, vel quia datur particularis ratio quae non est communis caeteris casibus ejusdem speciei, vel quia melius obtinetur finis intentus a Legislatore diversimode agendo, ac ille praescripserit, epikeia locum habet."—*Loc. cit.*

²⁶⁷ N. *Mazzotta*, *Theologia Moralis* (Augustae Vindel. & Cracoviae, 1756), Vol. I, Tract. I, Disp. II, Quaest. IV, Cap. II.

law without the intention of the legislator have no binding force. However, Mazzotta approves of the opinion that in such a case a Superior must be consulted, if recourse is conveniently possible.

Finally, insofar as cases of doubt are concerned, Mazzotta believes that one should not depart from the common teaching that recourse, if possible, is obligatory, and that if a Superior cannot be reached, the words of the law must be followed. Nor can it be objected that *lex dubia non obligat*. This principle is true, Mazzotta explains, only when there is a doubt about the law in its entirety—whether the words of the law include the case. It is not true when it is certain that the case is embraced by the words of the law, but doubtful whether it was the intention of the legislator to bind in the case. And yet, concludes Mazzotta, “if the fulfillment of the law is very difficult, there can be place for *epikeia*, if it can prudently be judged that the legislator was unwilling to bind in a doubtful case with great inconvenience.”²⁶⁸

Billuart (+1757). The discussion of *epikeia* by Billuart is both a commentary on St. Thomas’ ideas and an extension of them. The traditional explanation is set forth, namely, that laws are sometimes deficient by reason of the universality of their expression.²⁶⁹ Billuart repeats the teaching of Cajetan relative to the distinction between the intrinsic or proximate intention of the legislator (existing in the legal formula) and his extrinsic or ultimate intention (existing outside the legal formula).²⁷⁰

As to the extent of *epikeia*, Billuart lists three categories of cases in which it may be used:²⁷¹ first, when literal observance of the law would be harmful to the common good; secondly, when it would involve a notable detriment to the subject observing it, in health, reputation or fortune—since this would redound against the general welfare; thirdly, when observance of the positive law would be contrary to the natural law, or to some superior human law, or when its observance would be evil or very difficult.

²⁶⁸ *Loc. cit.*

²⁶⁹ *Op. cit.*, Tract. *De Caeteris Virtutibus Justitiae Annexis*, Dissert. III, Art. IX; Tract. *De Legibus*, Dissert. II, Art. IV.

²⁷⁰ *Ibid.*, Tract. *De Caeteris Virtutibus Justitiae Annexis*, Dissert. III, Art. IX.

²⁷¹ *Ibid.*, Tract. *De Legibus*, Dissert. V, Art. IV.

Must a Superior be consulted if time permits? Billuart²⁷² believes that when it is evident that the observance of the law would be injurious, recourse to a Superior is unnecessary; then it is licit to use *epikeia* whether the matter is urgent or not. He cites St. Thomas in favor of this opinion.²⁷³ If it is only probable or even more probable, and the matter is not urgent, recourse to authority must be made. In cases of emergency, where recourse is impossible, and the doubt still remains, the law as it stands must be obeyed. However, if it is more probable that the legislator would not have intended the law to bind in this case had he foreseen the circumstances, then *epikeia* may be used; for "necessity has the dispensation attached."²⁷⁴ Billuart's somewhat involved language here can be understood only if it be kept in mind that he was an ardent probabiliorist. What he seems to mean is this: When the reasons allowing deviation from the letter of the law are not certain but are more probable, then in cases of urgency where recourse to authority is impossible, *epikeia* may be used. If the reasons are only probable, the written law must be obeyed.²⁷⁵ In cases where there is no urgency, a Superior must be consulted.

Pope Benedict XIV (+1758). In several sections of the work *De Synodo Dioecessana* reference is made to *epikeia* by Pope Benedict XIV (Prosper Lambertini). His general attitude toward the matter is indicated in a passage found in the twelfth book,²⁷⁶ where he calls attention to the fact that circumstances sometimes arise not foreseen by the general law. In such instances by the use of *epikeia*, "or the tacit permission of Law itself," a Bishop may mitigate the severity of the law, especially if postponement of the case is impos-

²⁷² Tract. *De Legibus*, *loc. cit.*

²⁷³ Reference is made to the *Summa Theologica*, II-II, q. 120, a. 1, ad 3.

²⁷⁴ *Ibid.*, I-II, q. 96, a. 6.

²⁷⁵ Sasserath (+ c. 1775) takes a similar stand as to the necessity that the judgment of the subject in the case be at least more probable. Cf. R. Sasserath, *Cursus Theologiae Moralis* (ed. 6; Augustae Vindelicorum, 1787), Vol. I, Tract. I, Dissert. III, Quaest. XV. Another contemporary, Reuter (+ 1762), disputes this view, maintaining that probability is sufficient. Cf. J. Reuter, *Theologia Moralis* (Coloniae Agrippinae, 1750), Vol. I, n. 194.

²⁷⁶ Benedict XIV (P. Lambertini), *De Synodo Dioecessana* (Mechliniae, 1842), Lib. XII, Cap. VIII, nn. 1-2.

sible, and the Sovereign Pontiff cannot be reached. He warns against any abuse in this regard, however, pointing out that it is illicit for a Bishop to enact "as a universal statute what is permitted to him only in a most special case."

In still another section²⁷⁷ the author cautions that dispensations from a papal law, granted without urgent and just cause by an inferior authority resorting to the use of *epikeia*, are illicit and invalid.

Reference may be made here to another mention of *aequitas* to the effect that "as often as a law seems to be too harsh . . . a certain more equitable interpretation is to be accepted in order that, insofar as is possible, the austerity of the law may be mitigated."²⁷⁸

It should be noted that in each of the above-cited passages the implication is that the mitigation of the rigor of the law is made by some ecclesiastical authority. Insofar as can be ascertained, nowhere does the Pope mention *epikeia* as exercised by a private subject of the law.²⁷⁹

Patuzzi (+1769). It is not surprising to find a rather rigorous doctrine expressed in regard to *epikeia* by *Patuzzi*. As is well known, his views on matters of Moral Theology are strict and severe.²⁸⁰ In this connection, he states that nothing is more frequently on the lips of men than the phrase "*de aequo et bono*," and yet nothing is more frequent than its abuse. For though a man may himself be equitable and good, it does not therefore follow that he can make a judgment *de aequo et bono*. Such judgments can be made only by those who,

²⁷⁷ *Ibid.*, Lib. XIII, Cap. V, n. 7.

²⁷⁸ *Ibid.*, Lib. XIII, Cap. XXIV, n. 20. Cf. also Lib. XIII, Cap. XII, n. 20.

²⁷⁹ *Konings*, distinguishing between "authentic" and "doctrinal" *epikeia*, believes that the former is exemplified in the Declaration of Pope Benedict XIV concerning the validity of marriages in Holland and Belgium in which heretics were involved, and in regard to which the Tridentine form was not observed. Cf. A. *Konings*, *Theologia Moralis* (ed. 7; Neo-Eboraci, 1890), I, n. 146. For the text of the Declaration cf. *Coll. P.F.*, n. 333. Doctrinal *epikeia*, *Konings* teaches, is that used by a private individual.

²⁸⁰ Of him *Lehmkuhl* writes: ". . . in re morali rigidus, S. Alphonsi adversarius erat, quem scriptis propter benigniores opiniones impugnavit."—*Op. cit.*, II, p. 858.

possessed of a penetrating mind, are endowed with exquisite and consummate prudence, candor of spirit, integrity of morals and an absolute freedom from prejudice.²⁸¹

Patuzzi attacks what is asserted to be Viva's doctrine, that *epikeia* may be used when the purpose of a law ceases negatively in a particular case.²⁸² In opposition, he states that the only reason which justifies the use of *epikeia* is the prudent judgment that in the given circumstances the legislator would not impose obligation, because observance of the law would be prejudicial to the common good.²⁸³ However, such a prudent judgment cannot arise merely because a private individual finds some inconvenience in observing a law; for every law, being a restriction of liberty, entails some inconvenience.

Patuzzi not only denies that a probable opinion is sufficient to warrant the use of *epikeia*, but he insists that Suarez cannot be invoked in favor of such a view.²⁸⁴ "A firm judgment" is required in interpreting the mind of the legislator. Abuses often occur, however, so that the interpretation is actually made "not according to truth, but according to our desires."²⁸⁵

St. Alphonsus (+1787). In his very definition of the concept *St. Alphonsus* indicates that *epikeia* may be used in cases of probability—"a presumption, at least probable, that the legislator in a certain set of circumstances was [or, would be] unwilling to urge obligation."²⁸⁶

For the licit use of *epikeia* he requires that the law cease contrarily. By this clause, however, he signifies not merely that the observance of the law would be sinful, but also that it would be very difficult and burdensome.²⁸⁷ He makes no mention of Suarez' third

²⁸¹ J. Patuzzi, *op. cit.*, Vol. I, Tract I, Dissert. IV, Cap. V, n. 8.

²⁸² *Ibid.*, Cap. VI, nn. 3 et sqq. It should be noted that Viva's teaching is not nearly so benign as Patuzzi implies. Cf. p. 88 *supra*.

²⁸³ *Ibid.*, n. 3. Despite this statement Patuzzi seems later to admit that *epikeia* may be used even for the good of an individual. Cf. *ibid.*, n. 8.

²⁸⁴ *Ibid.*, n. 4.

²⁸⁵ *Ibid.*, n. 9.

²⁸⁶ ". . . praesumptio saltem probabilis, quod legislator in aliqua rerum circumstantia noluerit obligare."—*Homo Apostolicus*, Tract. II, n. 77. Substantially the same definition is found in his *Theologia Moralís*, Lib. I, n. 201.

²⁸⁷ *Theol. Mor.*, *loc. cit.*

category of cases. He maintains that if the total purpose of a law ceases *in communi*, the law ceases; but if the total purpose ceases *in particulari*, to excuse from the obligation of the law the cessation must occur contrarily. Otherwise, there would be grave danger that an individual would be deceived in his own case.²⁸⁸

With regard to questions of doubt as to whether the legislator is a legitimate Superior, and hence whether he has the power to bind St. Alphonsus believes that the law in such an instance must be obeyed.²⁸⁹ Likewise, when the justice of the law is in doubt, to deviate from it is not permitted.²⁹⁰

St. Alphonsus discusses at some length the opinion that one is excused from the words of the law, not only when a grave detriment will result from observing the law, but likewise when a notable gain that would otherwise accrue would be lost by obeying the law. The point is first treated in connection with servile works performed on a holyday of obligation. Authorities of great importance are listed on each side. Both opinions, states St. Alphonsus,²⁹¹ are probable, but that which holds that the subject is excused from the law in such circumstances is more probable. The amount to be gained, however, must be extraordinary, and not merely the sum usually earned for the work of one day.²⁹² The same doctrine is extended to the case where the notable gain to be acquired necessitates the missing of Mass.²⁹³

Some Theologians of the Nineteenth Century. Vermeersch²⁹⁴ points out that the writings on Moral Theology in the nineteenth century consist for the most part of Manuals and Compendia. It is true that in relation to the concept of *epikeia* little development is

²⁸⁸ *Homo Apostolicus*, Tract. II, n. 77.

²⁸⁹ *Theol. Mor.*, Lib. I, n. 98.

²⁹⁰ *Ibid.*, n. 99.

²⁹¹ *Ibid.*, Lib. III, n. 301.

²⁹² For a discussion of this point cf. V. Kelly, *Forbidden Sunday and Feast-Day Occupations*, The Catholic University of America Studies in Sacred Theology, No. 70 (Washington, D. C.: The Catholic University of America Press, 1943), p. 179.

²⁹³ *Theol. Mor.*, Lib. III, n. 332.

²⁹⁴ *Theol. Mor.*, I, n. 21.

to be found, save among a few theologians to be discussed more in detail in the next chapter. And so it suffices here merely to mention in passing some of the moralists of the period.²⁹⁵

Kenrick (+ 1863) in a short treatise on *epikeia* insists that for the licit use of it a most grave cause is required.²⁹⁶ *Gury* (+ 1866) in a brief discussion of the topic²⁹⁷ maintains that, if the observance of a law involves a manifest detriment, *epikeia* may be used; but in other cases recourse to a Superior is necessary. *Ballerini* (+ 1881) discussing *epikeia* in relation to matters of doubt, states that recourse is necessary if possible. If it is not possible, one must follow the general rules laid down by theologians in treating of a doubtful conscience.²⁹⁸ Reference has already been made²⁹⁹ to the distinction of *Konings* (+ 1884) between "authentic" *epikeia* and "doctrinal" *epikeia*. This author further teaches that even in cases where the observance of the law would be very difficult, recourse to authority is necessary if the matter will permit of delay.³⁰⁰ *Marc* (+ 1887) believes that *epikeia* may be used in cases in which the legislator was not able or not willing to bind.³⁰¹ *Müller* (+ 1888) teaches that *epikeia* is permissible if compliance with the letter of the law would be harmful or excessively difficult, and evokes the authority of Pope Benedict XIV to corroborate his view.³⁰² *Bouquillon* (+ 1902) distinguishes a two-fold *epikeia*—one which does not exceed the limits

²⁹⁵ Some of the theologians discussed in this section lived well into the twentieth century. However, since their works herein referred to first appeared in the last century, these moralists may appropriately be considered here.

²⁹⁶ F. Kenrick, *Theologia Moralís* (Mechliniae, 1860-1861), Vol. I, Tract. IV, Cap. III, n. 38.

²⁹⁷ Gury-Ballerini-Palmieri, *op. cit.*, I, n. 113.

²⁹⁸ A. Ballerini, *Opus Theologicum Morale in Busenbaum Medullam* absolutit edidit D. Palmieri (ed. 3; Prati, 1898-1901), I, n. 471.

²⁹⁹ Cf. note 279 *supra*.

³⁰⁰ *Op. cit.*, I, n. 146.

³⁰¹ C. Marc, *Institutiones Morales Alphonsianae* (ed. 7; Romae, 1893), I, n. 173. Later editions indicate that recourse to a Superior is necessary if possible, where there is question of the unwillingness, and not of the inability, of the lawgiver to bind the subject. Cf. C. Marc-F. X. Gestermann, *Institutiones Morales Alphonsianae*, recog. a. J. Raus (ed. 19; Lugduni-Lutetiae Parisiorum: Vitte, 1933-1934), I, n. 173.

³⁰² E. Müller, *Theologia Moralís* (ed. 6; Vindobonae, 1889), Vol. I, § 65.

of interpretation strictly so-called, and another which is an emendation of the law and which may be used by any private individual in cases where the legislator would not urge the obligation of the law if he were present.³⁰³ Quoting Pope Benedict XIV, Bouquillon states that in cases of doubt a Superior only may make such a correction of the general law. *Bucceroni* (+1918) teaches that the use of *epikeia* may sometimes be licit even when the literal observance of the law would be neither sinful nor unjust nor excessively burdensome. In such cases judgment is made on the basis of the presumed equity and benignity of the lawgiver. But recourse to a Superior is necessary where possible.³⁰⁴ *Lehmkuhl* (+1918) expresses the belief that if an authority can be reached, the use of *epikeia* is not licit, unless by reason of circumstances the law should become harmful and unjust.³⁰⁵ *Waffelaert* (+1932) citing Suarez, maintains that if it is probable that the obligation of some law is unjust, and if a subject cannot recur to an authority, he is not bound by the law in the particular case.³⁰⁶ Unlike Suarez, however, he seems to hold that *epikeia* may be used only when the observance of the law would be unjust or too difficult.

Resumé. In the period extending from the death of Suarez to

³⁰³ T. Bouquillon, *Theologia Moralis Fundamentalis* (ed. 2; Brugis, 1890), n. 159.

³⁰⁴ J. Bucceroni, *Institutiones Theologiae Moralis* (ed. 6; Romae, 1914-1915), I, n. 179.

³⁰⁵ *Op. cit.*, I, n. 243.

³⁰⁶ G. Waffelaert, *De Dubio Solvendo in Re Morali* (Lovanii, 1880), p. 269.

³⁰⁷ In addition to the theologians mentioned above cf. Castropalao (+1633), *op. cit.*, Vol. I, Tract. III, Disp. V, Punct. III, § II, nn. 2-4; Vol. I, Tract. I, Disp. III, Punct. VIII, n. 4; J. Bossius (+1665), *Moralia Varia* (Lugduni, 1649-1651), Vol. I, nn. 1236-1250; H. Busenbaum (+1668), *Medulla Theologiae Moralis* (Tornaci, 1863), Lib. I, Tract. II, Cap. IV, dub. 3 (a very vague reference); J. Caramuel (+1682), *Theologia Moralis Fundamentalis* (Lugduni, 1675-1676), Vol. IV, n. 618; A. Reiffenstuel (+1703), *Theologia Moralis* (Mutinae, 1708), Vol. I, Tract. II, Disp. IV, Quaest. I, nn. 9 et seq.; *Jus Canonicum Universum* (Parisiis, 1864-1870), Lib. I, Tit. II, § XV, nn. 378 et sqq.; F. Henno (+c. 1713), *Theologia Moralis et Scholastica* (Coloniae Agrippinae, 1718), Vol. III, Tract. III, Disp. I, Quaest. V; C. La Croix (+1714), *Theologia Moralis* (Parisiis, 1874), Vol. I, Lib. I, nn. 829 et sqq.; P. Antoine (+1743), *Theologia Moralis Universa* (Avenione, 1818), Vol. II, Tract. *De*

the end of the nineteenth century,³⁰⁷ the literature on *epikeia* seems especially to revolve about two points. First, may *epikeia* be used licitly in regard to cases in which the observance of the law would be neither sinful nor so excessively difficult as to exceed the power of the legislator to demand obedience? In other words, is *epikeia* lawful also when based solely on the will of the lawgiver, as Suarez maintains? There is no universal agreement on the point. Many authors avoid discussion of the problem entirely. Some take a position opposed to that of Suarez. Others subscribe completely to the Suarezian doctrine. In this matter there is no little vagueness, especially insofar as many moralists state without explanation that *epikeia* is applicable in a particular case to a law, the observance of which would be "too difficult." Uncertainty arises as to whether they judge the difficulty mentioned to be so great as to forbid a legislator to demand obedience to his law in the case, or merely to be of such a nature as to lead the subject to believe that the legislator would not urge the obligation of the law, although in justice he could do so.

A second point with which moralists of this period are concerned is the course of action to be followed, relative to *epikeia*, in cases of certainty, of doubt, and of probability. Out of the maze of conflicting opinions there is a more or less general agreement on two matters. First, in cases where it is certain that the legislator, if he were present, would not demand obedience to the law as it stands, *epikeia* may be used. But even here there is a controversy as to its lawfulness when a Superior can be reached. Some authors subscribe to a very strict view; the majority, however, seem to allow the use of *epikeia*. Secondly, practically all moralists teach that in cases where the subject cannot form even a probable judgment that the legislator, were he present, would not bind him, he must comply with the law even in instances that will not admit of delay. But in regard to cases other than those falling within these two classifications, there is a wide diversity of opinion among theologians. It would seem true

Legibus, Sect. III, Cap. V, Quaest. III; Patres Societatis Jesu in Alma Universitate Wirceburgensi (1766-1771), *Theologia Dogmatica, Polemica, Scholastica et Moralis* (ed. 2; Lutetiae Parisiorum, 1852-1854), Vol. III, Pars Prior, Tract. *De Legibus*, Cap. I, Art. V, n. 26.

to say that, as to the lawfulness of *epikeia* in relation to cases of probability, theologians in their teaching manifest more or less the tenets of the Moral System to which they adhere in general.³⁰⁸

³⁰⁸ For a more detailed discussion of the influence of the Moral Systems on the teaching of theologians regarding *epikeia* cf. pp. 179 et sqq. *infra*.

CHAPTER III

MODERN POINTS OF VIEW: ANALYSIS AND COMMENTARY

DURING the present century, and in some cases during the late years of the nineteenth century, a somewhat different and very important point of view regarding the concept of *epikeia* is discernible in the writings of many of the moralists. It is the purpose of this chapter to submit to an analysis some of the doctrines of these theologians, especially insofar as they treat of the precise nature of *epikeia*—either expressly, or in the course of statements indicating the exact conditions under which *epikeia* strictly so-called may be used.

D'Annibale (+1892). Among the first openly to deviate from the Aristotelian and Scholastic teaching on the precise nature of the circumstances which must be present in order that *epikeia* strictly so-called may be used, is Cardinal D'Annibale.¹ At the outset of his discussion this author follows the traditional treatment of the matter, indicating that laws enacted *generaliter* may sometimes undergo a restrictive interpretation. When the application of the written law in a particular case involves such great difficulty that it becomes evident that the legislator was unwilling to bind the subject, there is place for the use of *epikeia*. *Epikēia* is described as a species of *aequitas*, and is defined as the correction or restriction of the law when the law is deficient by reason of its universality. *Epikēia* may not be used, of course, to correct a precept which is enacted for particular cases—this in reality would not be a correction of the law, but an overthrowal of it.²

¹ *Op. cit.*, I, n. 187.

² This same warning is repeated by Ojetti and Toso. Cf. B. Ojetti, *Synopsis Rerum Moralium et Iuris Pontificii* (Romae, 1899), s.v. *Epikēia*; A. Toso, *Ad Codicem Iuris Canonici Commentaria Minora* (Romae: Marietti, 1920-1934), I, p. 60.

But D'Annibale after this introduction proceeds to insist that the essence of *epikeia* is the interpretation of the legislator's *will*. He readily admits that in stressing this element he deviates somewhat from the Aristotelian and Thomistic concept. For this concept, which was followed with exactness by practically all the Scholastic moralists, was of such a nature as to allow the use of *epikeia* whenever and wherever the law was deficient owing to the universality of its expression. Thus, its use was conceived as permissible when a legislator in demanding observance of his general law in a particular case, exceeded his legitimate power, or when a law could not be observed due to its being sinful, or to its being in conflict with a higher law, or when the obeying of the law would entail a grave inconvenience. But if the law is unjust, argues D'Annibale, then the law ceases to exist. Moreover, when one law is in conflict with another higher law, then the latter must prevail. And finally, if a law cannot be observed except with such grave inconvenience, though the law itself does not thereby cease to exist, its obligation ceases in relation to the person and the case concerned.³

Thus, insists D'Annibale, in each of these cases either the law itself ceases to exist, or the obligation to obey it ceases. Now, in view of the fact that cases of these types have their own rules, and in view of the fact that these cases concern the power, and not the will of the legislator, what need is there of resorting to *epikeia*? *Epikeia* is concerned always and exclusively with the *will* of the law-maker, he concludes.⁴

³ The author makes certain reservations with regard to his statement that the obligation of a law ceases when its observance would involve a grave inconvenience. Cf. *op. cit.*, I, nn. 177-178.

⁴ Van Hove, however, believes that the proper *materia* for *epikeia* according to D'Annibale's opinion, does not include any "excusing cause" whatsoever, apparently even though such a cause be dependent upon the legislator's will. He contends that the *epikeia* of D'Annibale has a much more restricted scope, and has reference only to extremely rare and extraordinary cases in which it is believed that the legislator is unwilling to urge the obligation of the law. It is difficult to agree with Van Hove on the point. The relation between *epikeia* and excusing cause will be discussed subsequently, but here it may be pointed out that, when D'Annibale states that "epichejam totam versari in interpretanda voluntate legislatoris" (*op. cit.*, I, n. 187, note 49), there would seem to be no

What is of major consequence in D'Annibale's treatise is his insistence that *epikeia* is concerned essentially with the *will* of the legislator.⁵ To be sure, St. Thomas and most of the other Scholastics likewise stress the volitional element on the part of the lawmaker, but then they proceed immediately to discuss in terms of *epikeia* those cases which are not and cannot be dependent on the legislator's will at all—cases where observance of the law, for example, would be unjust or even seriously sinful. Secondly, it is clear that D'Annibale does not consider *aequitas* and *epikeia* to be identical and hence coextensive terms. This is evident from the statement that *epikeia* is a species of *aequitas*.

There are several other points of importance which should be noted in connection with this study of the teaching of D'Annibale. Thus, he distinguishes between natural *aequitas* which is identical with justice, and civil *aequitas* which has many significations, the most important being the moderating or mitigating of the rigor of the law. Speaking of *epikeia* properly so-called, he warns that it scarcely has any place in the external forum. And even in the internal forum, judgment as to the legitimacy of its use should ordinarily not be left to the person concerned; rather, because of the fact that such a person is always in danger of deceiving himself if he acts as judge in his own case, the decision should be referred to a disinterested upright man.⁶ Moreover, even then *epikeia* may be used only if the legislator cannot be consulted without grave inconvenience.

reason to restrict his meaning so as to exclude so-called excusing causes which are dependent on the presumption of the benign will of the legislator. It is the adherence of Van Hove to this position that involves him in difficulty concerning the interpretation of St. Thomas, *Sum. Theol.*, II-II, q. 147, a. 3, ad 2. (Cf. pp. 50 et sqq. *supra*.) In any event, it seems scarcely correct to say that most modern theologians hold this opinion. (Cf. Van Hove, *De Legibus Ecc.*, nn. 278, 287, 292.) For an interpretation of D'Annibale's teaching which coincides with that of this dissertation, cf. L. Godefroy, "Epikie," *DTC*, V, 360; E. Leroux, "De Epikeia," *REL*, VII (1911-1912), 258.

⁵ *Op. cit.*, n. 187, note 49.

⁶ The same thought is expressed by Tanquerey. Cf. A. Tanquerey, *Synopsis Theologiae Moralis et Pastoralis* (Vol. I, ed. 12; Vols. II, III, ed. 10; Parisiis: Desclée et Socii, 1936-1937), II, n. 341.

This last point is of more than passing interest. D'Annibale seems to maintain that recourse is always necessary where possible. Nor does he restrict this rule to cases of probability, although the passage of Suarez to which he refers at this point,⁷ deals only with such cases. But lest D'Annibale be judged to be over-strict, two factors must be kept in mind. First, for D'Annibale *epikeia* properly speaking is not concerned with cases where observance of the law would be sinful or unjustly difficult. Consequently, when the rule is laid down that recourse is always necessary, it must not be forgotten that D'Annibale's concept of *epikeia* is restricted to those cases involving only the will of the legislator. In the second place, D'Annibale is not over-severe in his interpretation of the *grave incommodum* which excuses from recourse to the legislator. For he states explicitly: "However, an inconvenience of this kind will scarcely ever be lacking in places where the authority with power to dispense does not dwell."⁸

D'Annibale teaches that the obligation of a law ceases, not only when it is certain that the legislator was unwilling to include the particular case at hand in his general law, but also when there is a probable judgment to that effect. (The legislator must be consulted, of course, if this is possible.) He cites St. Alphonsus, the Salmanticenses and others in favor of this view. Strangely enough, he states that Soto requires that the judgment of the legislator's unwillingness to impose obligation must be more probable. And he asserts that Laymann demands certainty in every instance.⁹

Finally, D'Annibale treats the question of *epikeia* in cases where observance of the law would result in injury to the common good. That it may be used in such instances no one doubts, he asserts. Moreover, he affirms that it is the accepted teaching (and he himself subscribes to it) that its use is legitimate even in cases where to obey the law would involve detriment to a private individual only. For the opinion that *epikeia* has place not only when an injury is to be avoided, but even when a great profit is to be earned, he cites St.

⁷ Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 9.

⁸ *Op. cit.*, I, n. 187, note 47.

⁹ *Ibid.*, note 48.

Alphonsus, Suarez and the Salmanticenses. But may *epikeia* be admitted if the right of a third person is thereby injured? D'Annibale believes¹⁰ that in the internal forum, *epikeia* must be admitted when charity prevails over justice. That is to say, *epikeia* is used against the precept which binds in justice, in order that an individual may perform a work of charity.¹¹ However, in the external forum such use of *epikeia* is not admitted, unless perchance there is in question a right that flows from the law itself which is being interpreted, as would be the case in the following example.¹² A priest is ordered to absolve Seius from certain censures, if Seius will first pay to Caius a sum of money which he owes. Seius cannot restore the money but he is prepared to make a suitable deposit ("*idoneam cautionem dare*"). May the priest absolve? D'Annibale answers in the affirmative, on the ground that the priest does no injury to Caius. For Caius' right that absolution be withheld from Seius until the debt is paid, flows not from the natural law but from ecclesiastical law—in other words, the right flows from the law itself which is being interpreted by *epikeia*.

Vermeersch (+1936). Perhaps no theologian has outlined more clearly than Vermeersch the distinction which exists between *aequitas* and *epikeia*, the exact difference between *mitigatio juris* and *correctio legis*. The matter is treated rather briefly in his *Theologia Moralís*,¹³ but at considerable length in his *Quaestiones de Iustitia*.¹⁴ It is to the point to consider in some detail this treatise of Vermeersch; for although this dissertation is not concerned with *aequitas* as such, the precise nature and function of *epikeia* can be better understood from a discussion of its connection with the more general virtue to which, according to D'Annibale, it bears the relation of *species* to *genus*.

¹⁰ *Ibid.*, note 49.

¹¹ “. . . justitiae praevallet caritas quando debitor nequit restituere sine gravi damno superioris ordinis; vel ejusdem, sed longe graviori, quem nempe caritas jubet creditorem pati. . . .”—*Ibid.*, n. 177, note 4.

¹² *Ibid.*, n. 187, note 49.

¹³ *Theol. Mor.*, I, n. 190.

¹⁴ *Quaest. de Iust.*, nn. 478 et sqq.

After pointing out that the term *aequitas* is used constantly in a loose and inexact manner, Vermeersch proceeds to distinguish a threefold meaning of this term. In the first place, *aequitas* is often taken to signify natural justice. Thus understood, *aequitas* gives rise to rights and duties strictly so-called.¹⁵

In the second place, *aequitas* is often used synonymously with *epikeia*, to designate a deviation from the letter of the law, based upon an interpretation of the intention of the lawgiver. Vermeersch points out that in this sense especially, and almost exclusively, *aequitas* is used by the older moral theologians and by the Scholastics.¹⁶

In the third place, *aequitas* in modern usage, designates "a certain congruous moderation which, in the one devoted to the practice of it, signifies a certain remitting of his right, and in him for whose benefit it is exercised, a sort of imperfect title to request it or to expect it."¹⁷

Proceeding to an analysis of *aequitas* understood in this third sense, Vermeersch teaches that it is a special virtue¹⁸ which inclines

¹⁵ *Ibid.*, n. 479. Vermeersch (*ibid.*, n. 489) believes that *aequitas* in the Encyclical "*Rerum novarum*" of Pope Leo XIII sometimes signifies natural justice.

¹⁶ *Ibid.*, n. 479.

¹⁷ ". . . congruam quamquam moderationem quae, in aequitatis studioso, dicit aliquam iuris remissionem; et in eo cui prodest, titulum quemdam imperfectum ad hanc postulandam, vel expectandam."—*Loc. cit.* *Aequitas* is used in this sense occasionally by earlier writers. Thus, Thomasius states: "Justitia . . . denotat conservationem, seu accuratius non laesionem juris alieni, aequitas concessionem & communicationem juris proprii."—*Tract. Jurid. de Aequit.*, etc., L. 2, *Cod. de Rescindenda Venditione ejusque Usu Practico*, Cap. I, § 2.

¹⁸ Vermeersch's proof is as follows: "Virtus specialis habetur, ubi probatur adesse *honestas quae propria sit et coniuncta cum difficultate*. A. Uti iure suo eo modo qui congruit alterius personae et parat amicitiam, quid *honestius* et magis consentaneum recto ordini, quo imperatur personarum observantia et suadet earum societas? Quid *honestius* etiam, ut alio quasi nomine idem probemus, quam satisfacere titulis etiam minus perfectis debiti cujuscumque naturalis?—Honestatem porro illam esse aequitatis *propriae*, eo constat quod pertinet ad ordinem peculiarem quo specialis materia, usum dico iurium, dirigitur ad rectum convictum hominum inter se.—Nec. abesse vincendam *difficultatem* patet bifariam: tum quia agitur de temperando usu iuris, i.e., facultatem

one to a humane use of his rights. Standing between justice and charity, it is more akin to the former (in fact, it is a potential part of justice) than to the latter; of justice it is a sort of complement (“*quaedam consummatio*”) and of charity a commencement (“*initium*”). Its place and fittingness Vermeersch thus describes:

In addition to those things which are so joined to the good of a human person that they participate in his inviolability, and give rise to rights properly so-called, there are other things which greatly befit a person on the one hand, yet on the other cannot strictly be demanded without greater detriment to the common good and to men's relations with one another—which is the superior end to which rights and duties are directed. And so nature concedes no inviolable faculty of doing or exacting such things; it even sanctions the right to omit them, exercise of which right remains valid, though perhaps not licit. But if these things are accorded to another, it is not merely a matter of favor or of friendship, since there exists a title in the other as such. It is in this sphere that *aequitas* functions. . . . We could suspect that between those things that are strictly due to others and those which are in no way due at all, there stand many things which are due imperfectly, from a sort of inchoative right or adumbration of right. . . .¹⁹

The subject of this special virtue of *aequitas*, continues Vermeersch, quoting Aristotle, is he who, though he possess a *jus*, does not with rigor and severity demand of others the fulfillment of those

tatis, quo genere, cum sit in bonum nostrum, insolenter abuti solent homines; tum quia praestatio cedit in alterius commodum, ad quod procurandum, repugnante falso amore proprio, non adeo sumus propensi.”—*Ibid.*, n. 482.

¹⁹“Praeter ea quae ita cum bono personae humanae copulantur ut eius participant inviolabilitatem eiusque efficiant *iura*, presse talia, alia sunt quae hinc quidem valde *congruunt personae*, illinc tamen stricte ab ea exigi non possent sine maiore detrimento boni communis et hominum convictus, qui finis superior est ad quem diriguntur *iura* et officia. Facultas itaque inviolabilis illa faciendi vel exigendi non conceditur a natura; immo haec sancit ius contrarium illa omittendi, cuius usus manet validus, etsi fortasse illicitus. Si tamen praestantur, res non est mere gratiae et amicitiae, cum titulus sit *in altero qua tali*. Iam vero, hunc ordinem medium procurat *aequitas*. . . . Illud enim suspicari poteramus, inter ea quae *stricte* et alia quae *nullo pacto* debentur aliis, plura esse quae debeantur *imperfecte* ex iuris quodam initio et adumbratione. . . .”—*Ibid.*, n. 485.

obligations which are the counterpart of this *jus*. In other words, the subject of *aequitas* understood in this sense, is a man who is “no stickler for his rights (ἀκριβοδίκαιος).” But here immediately will be discerned the difference between the opinion of Aristotle and that of Vermeersch on this point. For the former, he who exhibits none of the traits of the ἀκριβοδίκαιος is the subject also of ἐπιείκεια (the virtue which is “a correction of law owing to its universality”).²⁰ But for Vermeersch, such a man is the subject of the special virtue of *aequitas*, which is not identical with ἐπιείκεια. The subject of *aequitas* is, as it were, a creditor possessing a *jus* upon which he does not insist; whereas the subject of *epikeia*, according to Vermeersch, is not a creditor at all, but rather a debtor, in a sense, to the law. Thus, the *equitable* man is not so much he who omits the literal observance of the law by resorting to *epikeia*, but rather he who as a judge or ruler does not, for example, exact punishment with all possible severity from those guilty of violating the law, or he who

on his own initiative remits part of his right: as when an employer does not keep for himself all his large profit, but shares it with his employees. . . . That delay also may be called equitable which is granted to a debtor, which, though doing no harm to the creditor expedites matters for the debtor who is in difficult straits.²¹

This distinction between the subject of *aequitas* and the subject of *epikeia*, and consequently between *aequitas* itself (*mitigatio juris*) and *epikeia* (*correctio legis*) is even more clearly manifest in Vermeersch’s treatment of the objection that Aristotle does not consider *aequitas* to be a special virtue: “It is not a special virtue. This is the clear teaching of the Philosopher who writes (*Ethics* V, 10): *Aequitas* is a sort of justice, and is not a habit different from it.”²²

²⁰ Cf. *Nicomachean Ethics*, V, 10.

²¹ “. . . sponte sua aliquid de iure suo remittit: ut cum negotii magister magnum lucrum non sibi totum retinet, sed cum operariis communicat. . . . Aequa dicitur quaedam mora concessa debitori, quando creditori non nocet, debitorem autem magna expedit angustia.”—*Quaest. de Iust.*, n. 482. Cf. also Vermeersch, *Theol. Mor.*, II, n. 637.

²² *Quaest. de Iust.*, n. 483.

Vermeersch replies by pointing out that Aristotle is here dealing not with *aequitas* but with *epikeia*. The latter, he concedes, is not distinct from legal justice, but the former is a special virtue.²³

In determining further the exact nature of *aequitas*, Vermeersch offers an interesting and important explanation.²⁴ While it is true, he states, that the debtor has no strict right to the *aequitas* manifested by the creditor, and that the creditor has no strict obligation to exercise this virtue toward the debtor, nevertheless the latter does possess a *quasi titulus* or a *quasi jus* in virtue of which he is justified in requesting or expecting this *aequitas*.

It must be kept in mind, however, that this title is imperfect, and for that reason *aequitas* of its nature does not oblige *sub gravi*,²⁵ nor does the lack of this virtue point to any sentiment of hate or hostility toward one's neighbor; it merely manifests an overweening adherence to one's own rights. Moreover, because there is no strict *jus* involved, the lack of *aequitas* can never be an injustice. Hence the dictum *summum jus summa injuria* is never applicable where *aequitas* strictly understood is concerned.²⁶ Yet, so true is it that the basis of *aequitas* is a *quasi jus* or *titulus imperfectus* that the virtue itself is often defined in terms of these elements. Thus, for example,

²³ *Loc. cit.* The validity of this reasoning is open to doubt. It does not seem justifiable for Vermeersch, on the one hand to maintain that Aristotle here refers to *epikeia* in a strict sense (the correction of law), and on the other to quote from the same passage of Aristotle in favor of Vermeersch's own opinion concerning the subject of *aequitas* (the special virtue). As was seen above, Vermeersch uses Aristotle's words to describe the man who is equitable according to Vermeersch's meaning of that term. That Vermeersch recognizes the weakness of his reply to the objection seems evident from his further remarks: "Quod si idem reponas, dicendo praesentem aequitatis rationem etiam attingi, expedita est responsio, aequitatem non esse alium habitum, quatenus saltem, ut pars ejus potentialis, non refertur ad aliam virtutem quam ad justitiam."—*Loc. cit.*

²⁴ *Ibid.*, nn. 479, 485, 486.

²⁵ *Theol. Mor.*, II, n. 637.

²⁶ *Quaest. de Iust.*, n. 491. "(a) Effatum illud est verissimum ubi aequitati dictae de *iustitia naturali* opponatur contrarium ius *positivum*. (b) Verum est etiam de spuria interpretatione legis quae reiciat *epikeiam*. (c) Deminute tantum transferri valet in violationem *aequitatis proprie talis*. Fieri enim nequit ut praetermissio debiti imperfecti summa evadat iniuria."—*Loc. cit.*

aequitas may be explained as “a more perfect justice which directs the exercise of one’s rights in a manner conformed to the imperfect titles or *quasi* inchoative rights that exist in another.”²⁷

Vermeersch refers also to St. Thomas’ approval of Andronicus’ description of *aequitas* as “*voluntaria justificatio*.”²⁸ But it should be noted that St. Thomas does not stress the existence of any *titulus imperfectus*, but rather “refers our *aequitas* to friendship . . .”²⁹ Although Vermeersch sees some implication of this *titulus imperfectus* in St. Thomas,³⁰ nevertheless, the fact remains that the Angelic Doctor seems to reduce this virtue to friendship, whereas Vermeersch maintains that *aequitas* “is not a matter merely of favor and of friendship,”³¹ nor can *aequitas* and *affabilitas* be identified.³²

As justice is three-fold, so too is the special virtue of *aequitas*, in the opinion of Vermeersch.³³ First, it exists in private individuals, insofar as they exercise a certain mitigating of the rights due to them from commutative justice. Secondly, it exists in private individuals, insofar as they allow without envy a distribution of common goods which, though not strictly impartial, is more in accord with the common good or with some private exigency in another. This exigency it is fitting, but not necessary *ex iustitia*, to recognize. Thirdly, it exists in the community itself, and is exercised by those who act on the community’s behalf when they temper the severity of laws “lest they be too severe in exacting the terms of the law or punishment.”³⁴

²⁷ “. . . perfectior iustitia quae adaequat usum iurium ad titulos imperfectos et quasi inchoata iura quae sunt in altero.”—*Ibid.*, n. 486.

²⁸ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 80, a. unic., ad 4.

²⁹ Vermeersch, *Quaest. de Iust.*, n. 487.

³⁰ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 80, a. unic. in corp., ad 2 and ad 3.

³¹ *Quaest. de Iust.*, n. 485.

³² “Etsi St. Thomas, q. 80, ad 3, videtur incidenter ad affabilitatem referre nostram aequitatis rationem, ex his duobus tamen non possumus facere unum.”—*Ibid.*, n. 488.

³³ *Ibid.*, n. 484.

³⁴ Taken in this last sense, however, Vermeersch believes *aequitas* to be connected with commutative justice. “Haec tamen moderata exigentia, quia simul pertinet ad rectam rationem fungendi munere suo, ponit in magistratu officium iustitiae commutativae. Hoc est, ex iustitia commutativa, qua tenetur

This last point is of particular importance, inasmuch as it breaks definitely with the opinion of those theologians who consider such benignity and leniency in governing states and applying laws to be a manifestation of *epikeia*. Indeed, Medina and Soto believe that Aristotle conceives of *epikeia* as being the function of the ruler only, and not of the subject. Vermeersch's words, however, clearly indicate that he considers such benignity or leniency on the part of rulers to be a manifestation, not of the virtue of *epikeia*, but rather of the special virtue of *aequitas*.

From this brief survey and commentary some notion of the importance of Vermeersch's contribution on this point may be gained. For no other theologian has made such a bold and successful endeavor to point out the indefiniteness of earlier moralists with regard to this concept, and to offer a theory which does much to eliminate this vagueness by indicating the exact positions of *aequitas* and *epikeia* in the system of moral virtues.

Noldin (+1922). *Noldin*³⁵ commences his discussion of *epikeia* by explaining this concept in the traditional way from St. Thomas and Suarez. It may legitimately be used as often as a prudent judgment can be made that, due to special circumstances, the law-maker was unwilling to include in his law the particular case at hand. Specifically, this is true in three instances: first, when the observance of the law would be evil or pernicious; secondly, when to obey the law would be excessively difficult and burdensome; thirdly, when from circumstances it can prudently be judged that the legislator in this case, although compliance with the law is not excessively difficult, was unwilling to impose obligation, even though he could

erga societatem, debent iudex et princeps cum congrua moderatione urgere leges.—*Loc. cit.* And again: "Vidimus enim a magistratu qui urgeat legem contra aequitatem, derogari de iis quae ex *commutativa* iustitia debet civitati."—*Ibid.*, n. 487. Vermeersch's position in this matter seems somewhat inconsistent. If an act of *aequitas* exercised by a judge is due in commutative justice, *aequitas* and justice strictly understood would appear to be identical. And if the *aequitas* exercised by a judge does not pertain to the special virtue with which Vermeersch is concerned, it is difficult to see why he considers it to be a species of that *aequitas* which is only a potential part of justice.

³⁵ *Noldin-Schmitt, op. cit.*, I, n. 160.

do so—because rightly he is presumed to be unwilling to impose obligation with the utmost severity, and in every case.

What is of importance to our analysis is the fact that Noldin asserts that only in this last case is there place for *epikeia* strictly so-called. For in the other cases the law ceases, due to the fact that the lawmaker has no power to include them in his law; but in the last case the legislator is judged "*ex quadam aequitate*" to be unwilling to include the case, even though he has the power to do so.³⁶ In other words, although Noldin does not expressly state it thus, he conceives *epikeia* strictly so-called, as involving exclusively the *will* of the legislator.

It is not to be thought that this distinction is purely speculative and without value in the practical order. Its importance *in praxi* is immediately made evident from the fact that Noldin requires no recourse to the legislator at any time, when there is question of the first two cases. But in the last case recourse is always necessary, if it is possible. In other words, Noldin, like D'Annibale, sets forth the general rule that *epikeia* in the strict sense may never be used legitimately (and he does not restrict the rule to cases of probability or to cases of doubt), when it is possible to approach a Superior.

Merkelbach (+1943). A study of the treatises on *aequitas* and *epikeia* in the *Summa Theologiae Moralis* of Merkelbach reveals a very close adherence by this author to the above described opinion of Vermeersch, regarding the difference which exists between *epikeia* and the special virtue of *aequitas*.³⁷ Merkelbach believes that *aequitas* may be taken in a general sense to mean natural justice, or it may be understood in a strict sense to signify either *epikeia* or "a fitting moderation of a right properly so-called." *Epikeia* as a virtue is to be found in general in debtors; *aequitas* in creditors.³⁸ This latter *aequitas*, which is a potential part of particular justice,

³⁶ *Loc. cit.*

³⁷ *Summa Theol. Mor.*, I, nn. 296-297; II, nn. 890 et sqq. The fact that *aequitas* and *epikeia* are treated separately is in itself significant, and indicative of the development which has occurred in this matter during the past few decades. Cf. also *ibid.*, II, n. 258, note 1: "Haec aequitas non sumitur in eodem sensu ac epichia, quae est aequitas specialis pertinens ad iustitiam legalem."

³⁸ *Ibid.*, II, n. 890.

may thus be defined: "A virtue inclining one to the humane use of his right in conformity with right reason."³⁹ *Epikeia*, on the other hand, is a subjective part of legal justice, and may be defined as a virtue which directs the law when it is deficient by reason of the universality of its expression.⁴⁰ Both virtues reside in the will.

Like Vermeersch, Merkelbach quotes the words of Aristotle⁴¹ to describe an individual who possesses the virtue of *aequitas*. Moreover, although the Scholastics and older theologians for the most part use the term *aequitas* synonymously with *epikeia*, Merkelbach believes that *aequitas* in this special sense was not unknown to them.⁴²

Merkelbach expresses the opinion that, although he who must fulfill an obligation has no strict right either in law or by contract to demand a manifestation of *aequitas* on the part of the creditor, nevertheless there does repose in him a "*titulus imperfectus decentiae*," to which there corresponds in the creditor "*aliquale debitum merae honestatis*." Yet, because there is no strict obligation to accord this *aequitas*, the virtue *per se* binds only *sub levi*, and not with grave inconvenience.⁴³

It is worthy of note that Merkelbach does not indicate what virtue is exercised by a ruler who exhibits kindness in benignly interpreting and applying the law. As was seen above, Vermeersch expressly states that the special virtue of *aequitas* is manifested in such instances. But on this point Merkelbach is silent.

In dealing with the scope of *epikeia*, Merkelbach gives no evidence of departing from the traditional concept. In his opinion

³⁹ "Virtus inclinans ad humanum juris usum conformiter ad rectam rationem."—*Ibid.*, II, n. 892. It is noteworthy that Merkelbach believes this virtue to be a potential part of *particular justice*. Vermeersch, teaching that it is a potential part of justice, does not restrict it to particular justice. Cf. Vermeersch, *Quaest. de Iust.*, n. 482.

⁴⁰ *Summa Theol. Mor.*, II, n. 891.

⁴¹ Cf. *Nicomachean Ethics*, V, 10. The same objection may be offered as was raised in the analysis of the opinion of Vermeersch. For Merkelbach, too, quotes from the same passage of Aristotle, both to define *epikeia* and to describe the subject of *aequitas*.

⁴² *Summa Theol. Mor.*, II, n. 890. Merkelbach refers to St. Thomas, *Sum. Theol.*, II-II, q. 80, a. unic., ad 3.

⁴³ *Ibid.*, II, n. 892.

epikeia may legitimately be used when observance of the law would be evil or excessively difficult. It also has place when there is a prudent judgment that, due to circumstances, it was not the intention of the legislator to bind the subject in a particular case—especially in view of the ordinary way in which obligation is imposed, namely, with moderation.⁴⁴ Merkelbach does not restrict the concept of *epikeia* properly understood, as do D'Annibale⁴⁵ and Noldin,⁴⁶ to this final category of cases. He cautions that *epikeia* should not be commonly used, but may be resorted to only in rare cases. Finally, he indicates that in cases of certainty recourse is not necessary; but when there is doubt, an authority must be approached. However, if there be no time for recurring, *epikeia* may be used, provided that there exists probability that the obligation of the law has ceased in the particular instance.⁴⁷

Prümmer (+1931). Prümmer's discussions of *aequitas* and of *epikeia*⁴⁸ give evidence of the influence of Vermeersch.⁴⁹ He explains that *epikeia* may be taken in a two-fold sense: first, insofar as it is connected with legal justice, and secondly, insofar as it pertains "to a sort of natural justice."

In the first sense, *epikeia* may be defined in Aristotle's words, as "a correction of law where it is defective owing to its universality." Thus understood, it is not a virtue but rather an act pertaining to legal justice. Moreover, by using *epikeia* a man constitutes himself "an arbitrator of law, and his own *quasi* lawmaker."⁵⁰ *Epikieia* licitly has place whenever the law becomes harmful, or very burdensome or difficult to observe.⁵¹ Thus, the development which was noted in the analysis of the teaching of D'Annibale and Noldin, finds no mention in Prümmer's treatise.

⁴⁴ *Ibid.*, I, n. 297.

⁴⁵ *Op. cit.*, I, n. 187, note 49.

⁴⁶ *Op. cit.*, I, n. 160.

⁴⁷ *Summa Theol. Mor.*, I, n. 297.

⁴⁸ *Op. cit.*, I, nn. 231 et sqq.; II, nn. 617 et sqq.

⁴⁹ "Prümmer states that in the *Quaestiones de Iustitia* of Vermeersch "bene et late de virtute aequitatis disseritur."—*Ibid.*, II, n. 618, note 3.

⁵⁰ ". . . arbitrum legis et quasi proprium legislatorem."—*Ibid.*, I, n. 231.

⁵¹ *Ibid.*, I, n. 232.

With regard to the legitimate use of *epikeia*, Prümmer is very strict. He states that there is place for it only rarely and in extraordinary cases. It cannot licitly be resorted to if an authority with power to dispense can easily be consulted. If this last requirement is analyzed, the fact will become clear that few theologians are as strict in this matter as is Prümmer. He demands recourse in every case—hence, apparently even in cases of certainty. And since for him *epikeia* may involve instances where observance of the law would be injurious or excessively burdensome, it would seem that even in these cases to recur is necessary. This rather extreme position involves Prümmer in an inconsistency. As an illustration of the use of *epikeia* he discusses the case of a priest who labored all day in the confessional and in the pulpit, with no time to recite the Breviary. Now at eleven o'clock in the evening he is completely wearied by the day's work. Prümmer believes that the priest may use *epikeia*—but only if the Bishop or a regular Superior with power to dispense cannot easily be reached.⁵² Yet, in discussing the cessation of obligation by reason of moral impossibility, where he makes use of practically the same example, Prümmer draws the following conclusion: “. . . moral impossibility is wont to excuse from every positive law. . . . it [i.e., the law] would no longer be useful to the common good, but harmful, and hence it would not be a true law.” [Italics not in original.]⁵³ That is to say, if the case be looked at from this point of view, the priest is excused—without a dispensation—by reason of the fact that *impotentia moralis* exempts him from the obligation; but when Prümmer discusses the case of the priest in his tract on *epikeia*, he demands recourse if such is possible.

One is justified in asking why recourse to authority is necessary if the precept no longer be a true law. Moreover, what is the purpose of recourse if the legislator or authority consulted cannot legitimately impose obligation in the case—since even if he should refuse a dispensation, the priest still would not be bound to recite the

⁵² *Ibid.*, I, n. 233.

⁵³ *Ibid.*, I, n. 235.

Breviary, according to Prümmer? For due to the circumstances, the precept commanding recitation in this case "would not be a true law."

Understood in the second sense, *epikeia* or *aequitas* may be defined as "a sort of fitting moderation of a strict right."⁵⁴ This is a virtue—and not merely an act—which pertains "to a kind of natural justice." It is not identical with natural justice; rather it is "justice tempered by the sweetness of mercy." It stands between justice and charity, pertaining more to the former than to the latter. Prümmer makes no mention of the *quasi jus* or *titulus imperfectus* alluded to by Vermeersch and Merkelbach, but he implies its existence when he states: ". . . it pertains to what is due in a sort of way from justice, not to burden excessively one's neighbor by the strict exacting of a debt."⁵⁵

Like Vermeersch, Prümmer sees in Aristotle's description of a man who is not an ἀκριβοδίκαιος, the subject of this virtue of *aequitas*, although Prümmer too quotes from the same passage of Aristotle to explain *epikeia* taken in a strict sense. However, unlike Merkelbach, Prümmer does not believe that St. Thomas considers *aequitas* to be a special virtue; but rather "St. Thomas reduces this virtue to affability or friendship."⁵⁶

Loiano (+1933). In the discussion which Loiano⁵⁷ devotes to *epikeia* several elements worthy of note are to be found. His treatment of the matter may be considered under three headings: the nature of *epikeia*, the use of *epikeia* from a theoretical viewpoint, and the use of *epikeia* from a practical viewpoint.

For Loiano *epikeia* is a species of interpretation, inasmuch as it involves an inquiry into the mind of the lawgiver as regards certain particular cases. However, this interpretation has reference, not to the words of the law which, it is supposed, are clear, but rather to the will of the legislator. Moreover, *epikeia* is to be confused neither with excuse exempting one from the obligation to obey

⁵⁴ ". . . congrua quaedam moderatio stricti iuris."—*Ibid.*, II, n. 617.

⁵⁵ ". . . ad aliquale autem debitum iustitiae pertinet non nimis onerare proximum per strictam exactionem debiti."—*Ibid.*, II, n. 618.

⁵⁶ *Loc. cit.*

⁵⁷ *Op. cit.*, I, nn. 139-142.

a law, nor with the cessation of a law. In cases where these factors are in question, "the law ceases to oblige other than by *epikeia*, namely on the basis of the principles of law."⁵⁸

Concerning the use of *epikeia*, Loiano⁵⁹ insists upon the fact that a law never obliges beyond the intention of the legislator. If, then, it can rightly be presumed that a certain case is not really included in the law (as representative of the lawmaker's mind), the law, insofar as this particular case is concerned, does not bind. Next, turning to the question as to whether *epikeia* has any standing in the external forum, he mentions D'Annibale as maintaining that it is valid only in the internal forum.⁶⁰ He himself subscribes to the view that while "in civil law today generally *epikeia* is not admitted," nevertheless, as regards canon law, "the use of *epikeia* even for the external forum is generally admitted." To substantiate this statement, he invokes the authority of Coronata.⁶¹

Loiano⁶² remarks that some theologians teach that there is no need for *epikeia* even in the internal forum, inasmuch as all the cases to which *epikeia* may have reference, can easily be reduced to the category of causes excusing from the obligation of the law, or to that of moral impossibility. In refutation of this theory Loiano points out that this reasoning may be valid insofar as laws are concerned which do not urge with grave inconvenience; in reference to other laws, however, it is not to be accepted. No further explanation is given; but he concludes that one must not deviate from the *sententia communissima* which speculatively and practically admits *epikeia*.

On the question of recourse Loiano expresses the belief that the use of *epikeia* generally is not licit, if a Superior can easily be reached. For to presume the will of a Superior is fraught with peril. Moreover, even in cases where it is impossible to approach a Superior, the subject of the law, in order that he may not be the ultimate judge in his own case, should consult some prudent adviser. Citing

⁵⁸ *Ibid.*, n. 139.

⁵⁹ *Ibid.*, n. 140.

⁶⁰ The reference is to D'Annibale, *op. cit.*, I, n. 187. But cf. p. 234 *infra*.

⁶¹ The reference is to Coronata, *Institutiones*, I, n. 29.

⁶² *Op. cit.*, I, n. 140.

Ballerini-Palmieri, however, Loiano expresses the opinion that, when it is clear that a particular case is not included in the law, any private individual may exempt himself from its obligation without the necessity of recurring to a Superior. In cases of doubt recourse is always required. If it can be judged with probability that the legislator would be unwilling to include in his law the case at hand, the subject may turn aside from the words of the law on his own initiative, when recourse to a Superior is impossible.

Loiano's final consideration⁶³ has reference to the use of *epikeia* from a practical viewpoint. *Epikeia* is licit, he states, in regard to cases that could be exempted by the obtaining of a dispensation which, however, grave inconvenience prevents from being sought. Thus, for example, if on a day of abstinence a dinner is prepared for a group of guests by a host who is unaware that meat is forbidden on that particular day, the guests, using *epikeia*, may eat meat. Again, continues Loiano, *epikeia* has place in regard to matters of less moment—for example, the obligation to observe silence in a religious community. However, when the law expressly includes a certain particular case, in regard to that case *epikeia* is not permissible, inasmuch as the mind of the legislator is clear, and a contrary intention cannot reasonably be presumed.

From this brief outline it is evident that Loiano calls attention to several factors connected with *epikeia*, not previously discussed by theologians to any considerable extent—for example, its value in the external forum, and the possibility of its being reduced in every instance to some other institute of Moral Theology. No reference is made to the distinction between *epikeia* as a *correctio legis* and *epikeia* as a *mitigatio juris*. From the tenor of his discussion, however, it would appear that for Loiano *epikeia* is concerned only with the correction of a human positive law in a particular case.

Finally, it may be observed that Loiano, implicitly at least, adheres to the teaching of D'Annibale that *epikeia* strictly so-called concerns only the will of the legislator. This is evident throughout his discussion of the concept, but more particularly from his insist-

⁶³ *Ibid.*, n. 141.

ence that a law binds only insofar as it represents the will of the legislator, and that the use of *epikeia* is fraught with peril precisely because it consists in a judgment of the will of the lawmaker.⁶⁴

McHugh-Callan. McHugh-Callan devote considerable attention to the study of *epikeia* and bring to light several points of importance and interest. Their teaching may be summarized as follows:

Epikeia (*epieikeia*) is a private interpretation of human law used in extraordinary cases, which declares that a particular case does not fall under the law.⁶⁵ In ordinary cases the explanation of a law is rendered by interpretation; but in extraordinary cases it is the function of *epikeia* thus to act.⁶⁶ It differs from the various causes on account of which the obligation of a law ceases, since it is predicated upon the assumption that the obligation of the law, insofar as the case at hand is concerned, never existed at all.⁶⁷ And so, *epikeia* is not cessation of obligation due to impossibility, nor presumed permission, nor dispensation, nor self-dispensation, nor revocation of the law, nor desuetude, nor restrictive interpretation. It is not allowed by civil law, although an individual may seek relief in a court of equity in regard to cases not provided for in law.⁶⁸

The lawfulness of *epikeia* is ultimately based upon the fact that "human laws regulate particular and contingent cases according to what usually happens, and since they must therefore be expressed in general terms, exceptional cases will occur . . ." ⁶⁹ which were

⁶⁴ Special note should be taken of Loiano's insistence that *epikeia* is not to be confused with an excusing cause nor with cessation of law. Such a statement seems to establish clearly that for Loiano *epikeia* is concerned only with the will of the lawmaker. Whether or not there is an implication that *epikeia* is distinguished even from an excusing cause which itself depends solely upon the will of the legislator, is difficult to determine. Such a view may form the basis of his rather obscure reply to the objection that all the cases to which *epikeia* may have reference, can easily be reduced to the category of causes excusing from the obligation of the law.

⁶⁵ *Op. cit.*, I, n. 358.

⁶⁶ *Ibid.*, n. 385.

⁶⁷ *Ibid.*, n. 412.

⁶⁸ *Ibid.*, n. 417.

⁶⁹ *Ibid.*, n. 411.

never foreseen by the legislator, and for which he would have made provision, had he been aware of them.

In such exceptional cases, legalism insists on blind obedience to the law-books, but the higher justice of *epieikeia* or equity calls for obedience to the lawgiver himself as intending the common welfare and fair treatment of the rights of each person.⁷⁰

Although the use of *epieikeia* is sometimes lawful, it must nevertheless be considered as dangerous, continue McHugh-Callan, inasmuch as every individual has a tendency to make decisions in his own favor, even to the detriment of the best interests of the community and ultimately of himself.⁷¹ Hence, "it is never lawful to use *epieikeia* without reasonable certainty that the legislator would not wish the law to apply here and now."⁷²

The teaching of D'Annibale, to which reference was made above,⁷³ that *epieikeia* strictly so-called concerns only those cases in regard to which the will, and not the power, of the legislator is involved, is repeated by McHugh-Callan.⁷⁴ These authors refer to *epieikeia* in a strict sense as a judgment that the legislator had not the wish to include in his law the case at hand, and to *epieikeia* in a wide sense as an interpretation that the lawmaker had not the power to include it. Moreover, *epieikeia* strictly understood, "may be used for all those cases in which the opposite interpretation would suppose in the lawgiver a severity that is not likely."⁷⁵ To illustrate this point, the authors indicate that an individual may deviate from the precept of Sunday observance in order to earn a notable sum of money on a Sunday morning. Again, a person who on a day of fasting, although he is not ill, feels that he will be not a little inconvenienced if he fasts, may have resort to *epieikeia*.

Concerning cases in regard to which a law no longer serves its

⁷⁰ *Loc. cit.*

⁷¹ *Ibid.*, n. 413.

⁷² *Ibid.*, n. 415.

⁷³ Cf. pp. 104-105 *supra*.

⁷⁴ *Op. cit.*, I, n. 416.

⁷⁵ *Loc. cit.*

purpose, McHugh-Callan point out ⁷⁶ two important facts. In the first place, if to follow the words of the law would result in a detriment to the purpose intended by the lawgiver, "*epikeia might be used.*" Thus, if an individual, desiring to defend the Faith from attack, finds it necessary to read a book which has been placed on the Index, but cannot petition for the required faculty, he may use *epikeia*.

In the second place, if the observance of the law would be unnecessary, yet not detrimental insofar as the purpose of the legislator is concerned, "*epikeia may not be used.*" Thus, an individual, relying on the fact that his faith is strong, may not, for the sake of studying the literary qualities of the author, use *epikeia* to read a forbidden book. Nor may a priest, who is requested to officiate immediately at a marriage, use *epikeia* in regard to the law prescribing the publishing of the banns, merely because he knows that no impediment exists.

Wouters (+1933). The most noteworthy feature of the treatment of *epikeia* by Wouters ⁷⁷ is his incorporation into the definition, of a clause which indicates that *epikeia* strictly understood is involved only with regard to cases which the legislator has full power to include in his law.⁷⁸ Nor is he satisfied with a mere statement of this belief. He proceeds to explain that "there is no place for *epikeia* properly so-called, if the observance of the law, by reason of special circumstance, becomes evil or morally impossible"⁷⁹ although the term, understood in a broad sense, not infrequently includes such cases. The example which Wouters offers to illustrate the use of *epikeia* strictly so-called concerns the deviation by a subject from the precept of the observance of a feast day, in order that he may make a notable gain.⁸⁰

⁷⁶ *Ibid.*, n. 503.

⁷⁷ L. Wouters, *Manuale Theologiae Moralis* (Brugis: Beyaert, 1932-1933), I, nn. 142-144.

⁷⁸ ". . . quamvis stricte loquendo illum [i.e., casum] lege comprehendere potuisset [i.e., legislator]."—*Ibid.*, n. 142.

⁷⁹ ". . . locus non est proprie dictae epikeiae, si legis observatio ob adiuncta specialia mala vel moraliter impossibilis evadat."—*Loc. cit.*

⁸⁰ *Ibid.*, n. 144. This example refers to *epikeia* strictly understood. But if an individual should exempt himself from attendance at Mass in order not to

With regard to the necessity of recourse to a Superior, Wouters⁸¹ confines himself to the statement that, since in regard to an instance involving *epikeia* strictly so-called the legislator could have included the case in his law, the subject must always recur to an authority, if it is conveniently possible to do so.

Three observations may be made in completing this brief study of Wouters' teaching on *epikeia*. In the first place, the author avoids any discussion of the problem relating to cases of probability and to cases of doubt. No indication is given as to whether *epikeia* is permissible under such circumstances. Secondly, it is to be noted that Wouters apparently demands recourse to a Superior, if such is possible, even in cases of certainty. This is obviously a strict requirement. The implication may be, however, that in cases where *epikeia* strictly so-called is involved, certainty is usually impossible. Finally, Wouters' most valuable contribution to the development of *epikeia* lies in his definite and unequivocal insistence that it concerns only the will of the legislator, and that deviation by a subject from a law, on the basis of the belief that observance of it would be beyond the power of the legislator to demand, is not to be explained as an instance of the use of *epikeia*.

Rodrigo. In his outstanding work on law Rodrigo discusses *epikeia* with that keen discernment and careful thoroughness which characterize his entire book. A resumé of his teaching may be considered under two headings: the nature of *epikeia* and its extent.

Pointing out that *epikeia* is both a juridic and a moral institute,⁸² Rodrigo addresses himself to the task of explaining its inner nature. It is not interpretation strictly so-called, nor permission ("*licentia*"), nor dispensation.⁸³ Rather, it is "the benign mitigation of a law in a particular case, contrary to the words of the law, but in ac-

suffer a notable loss of his goods, he would not, in the opinion of Wouters, use *epikeia* properly so-called. For in such a case, to observe the law is "morally impossible." Wouters implies that to demand that the individual attend Mass in such a situation is beyond the power of the legislator.

⁸¹ *Loc. cit.*

⁸² *Op. cit.*, p. 292.

⁸³ *Ibid.*, n. 392.

cordance with the mind of the legislator.”⁸⁴ It has reference to *aequitas*, which may be defined as:

a virtue which inclines one to a sort of remission of, and to a benign exacting of a debt or fulfilling of a right—which debt or right is due either in commutative justice, or, as in our case, in legal justice, being constituted by positive law for the common good.⁸⁵

This virtue resides primarily in a Superior or judge who, by authoritatively mitigating in a particular case the rigorous application of a law, establishes an objective “*ius aequum*,” which is valid even in the external forum. In the second place, it resides in any private individual who, on the basis of a prudent judgment, mitigates the law in the case at hand—the effect of which is produced only in the internal forum. Rodrigo notes that some authors use the term *epikeia* in reference to the virtue as exercised both by the judge (or Superior) and by the subject; but he himself subscribes for the most part to the view of other writers who call this virtue *aequitas* insofar as it is found in a judge, and *epikeia* insofar as it is found in a subject of the law.⁸⁶

Continuing, Rodrigo points out⁸⁷ that it is the function of *epikeia* to mitigate, because of special circumstances, a law in its application to a particular case which is certainly included in the words of the general statute. In his opinion this mitigation is justified, it is important to note, “by reason of a prudently conjectured lack of intention in the legislator, inasmuch as the legislator is rightly presumed to have willed to include in his law only what usually happens.”⁸⁸ Moreover, the particular case with which *epikeia* is con-

⁸⁴ *Ibid.*, n. 390.

⁸⁵ “. . . virtus inclinans ad benignam cum aliquali remissione exactionem debiti seu iuris iustitiae sive commutativae, sive pro casu nostro *legalis*, in commune bonum constituti per legem nimirum positivam.”—*Loc. cit.*

⁸⁶ *Loc. cit.*

⁸⁷ *Ibid.*, n. 391.

⁸⁸ “. . . ex defectu voluntatis in legislatore prudenter coniecturato in quantum recte praesumitur legislator noluisse sub lege comprehendere nisi ea quae plerumque accidunt.”—*Loc. cit.*

cerned may have reference to the entire community or to a single individual in it.

The reason allowing the use of *epikeia*, Rodrigo believes, is to be found in the peculiar harshness of the law in relation to the particular case in question, insofar as in that case to demand observance of it would be evil (contrary to the natural law), or lacking in humaneness (beyond the power of a human legislator to demand), or harsh to the extent that, although the legislator could demand its observance, it is rightly believed that to do so would be repugnant to the benignity which he is presumed to have. But although Rodrigo mentions these three classes of cases, actually he is of the opinion that in a strict and proper sense *epikeia* refers only to the third.⁸⁹

The author distinguishes⁹⁰ between the "*mens singularis legislatoris*," which is contained and expressed in the verbal formula of each law, and the "*mens generalis legislatoris*," which dominates and restricts the other, existing outside the legal formula and demanding that obedience be given to the written law in particular cases, only insofar as there is no infringement upon the virtue of *aequitas*—a virtue concerned not so much with strict rights due in justice, as with the harmonious inter-relation of justice with the virtues of humaneness, piety and charity. It is with this "*mens generalis legislatoris*" that *epikeia* and *aequitas* are concerned.

Turning to a discussion of the necessity of recourse to a Superior, Rodrigo distinguishes⁹¹ between cases in which the power of the legislator is involved (*epikeia* in a loose sense), and those which concern his will (*epikeia* in a strict sense). With regard to the first, the author expresses the belief that, where the lack of power in the legislator is certain, recourse to a Superior is entirely unnecessary.

⁸⁹ ". . . ultimus casus videtur magis proprie et specificè constituere epiqueiam."—*Loc. cit.* ". . . pronuntiare . . . ob specialia casus particularis adiuncta, legis mitigationem ex defectu voluntatis in legislatore prudenter coniecturato . . ."—*Loc. cit.* ". . . circa casum epiqueiae *strictè talis*, in quo nempe legis obligatio atque efficacia non ruit ex iniquitate aut crudeli acerbitate contraria legi naturali, sed potius ex duriori acerbitate quae tamen adhuc *strictè* patitur legis obligationem atque urgentiam."—*Ibid.*, n. 394.

⁹⁰ *Ibid.*, n. 391.

⁹¹ *Ibid.*, n. 395.

Moreover, where the lack of power in the legislator is "positively doubtful"—"*probabilis tamen*"—recourse to a Superior is not required. To substantiate this latter statement, Rodrigo points out that, when there exists doubt about the justice or humaneness of a law in general, the presumption is in favor of the legislator, and hence one must either obey the law or recur to a Superior. The matter is altogether different, however, continues Rodrigo, when the doubt concerns the justice or humaneness of a law in a particular case. In such an instance the presumption is not in favor of the legislator. He is deemed to have considered the ordinary cases of application of the law, when he was in the process of enacting it—not the exceptional cases. He is thought to have been unable to foresee such cases, and hence not to have intended to include them—on the basis of the entirely reasonable presumption of his being in general possessed of an equitable and benign will, which dominates and directs his entire legislative activity. In point of fact, states Rodrigo, in a case involving *epikeia*, there is not so much a question of the presumption of the legislator's right to issue a command—which presumption is in his favor—as there is of the benignity of his will in regard to the case, no infringement being made upon his rights.⁹²

With regard to cases which involve not the legislator's power, but his will, a distinction must likewise be made between instances in which the unbecoming harshness is certain (and hence the will

⁹² This point is somewhat obscure. One might object that it seems unnecessary and even inappropriate to consider the benign and equitable will of the lawmaker when discussing a case in which it would be beyond his power to demand observance of the law. However, it should be pointed out that Rodrigo is not discussing a case in which to demand compliance with the law would *certainly* be beyond the legislator's power, but rather one in which there is only probability to that effect. The substance of Rodrigo's argument seems to be that, even in such a case, *epikeia* may be used, and no recourse is necessary because, since the legislator is presumed to be equitable and benign, he would not demand observance of his law in a case where it is probable that it exceeds his power to do so. Nevertheless, why for this reason a subject would not be required to recur when a Superior may easily be reached, is difficult to understand. On this point (but not in cases of probability where the legislator's will only is concerned) Rodrigo's view seems to be substantially the same as that of Vasquez. Cf. p. 65 *supra*.

of the legislator not to bind the subject is morally certain), and those in which it is only probable (and hence, the lack of the will of the legislator to bind is only probable). In reference to the first instance, the use of *epikeia* is licit without recourse, in the opinion of Rodrigo. In reference to the second instance, if recourse to a Superior is difficult and morally impossible, *epikeia* may licitly be used; for, by reason of the probable benign will of the legislator, the obligation of the law in the particular case is doubtful, the doubt being invincible. If, however, the Superior may easily be reached, it is the common opinion—to which Rodrigo subscribes—that, recourse being omitted, there is no place for *epikeia*. The reason arises from the fact that the doubt about the benign will of the legislator, and hence about the binding force of the law in the case at hand, is vincible. Consequently, either the law must be observed, or the doubt must be dispelled by recourse to the Superior or in some other way which will sufficiently establish the fact of his benign intention.

Brief mention may be made of two other points discussed by Rodrigo in connection with his consideration of the nature of *epikeia*. First, the author⁹³ expresses the opinion that in a case in which *epikeia* is licitly used, the objective obligation of the law ceases in such a way that there is not even a material violation of the law. Secondly, he⁹⁴ weighs the objection urged against the lawfulness of *epikeia*, to the effect that, being based on the merely interpretative will of the legislator, it has no valid standing. Both these points will be treated in greater detail below.⁹⁵

Discussion of Rodrigo's opinion regarding the extent of *epikeia*, insofar as it concerns cases involving the natural law, the divine positive law and human invalidating laws is reserved to subsequent chapters of this dissertation. Only this point need be noted here—that Rodrigo's views as to the extent of *epikeia* are intimately connected with his opinion that there are two separate bases, upon either of which the legitimacy of the use of *epikeia* in a concrete case is

⁹³ *Op. cit.*, n. 393.

⁹⁴ *Ibid.*, n. 394.

⁹⁵ Cf. pp. 231 et sqq.; pp. 161 et sqq. *infra*.

founded.⁹⁶ The first is a defect in the verbal formula of the law—being of necessity brief and universal in expression, the formula cannot include extraordinary cases. The second is a defect in the legislator (and this obviously is true only of a human legislator), who is unable both to foresee all future cases, and to make provision for all those which he can foresee.

In connection with the foregoing resumé, the following brief observations may be made. It is beyond doubt that Rodrigo considers *epikeia* strictly understood to refer to particular cases in which the legislator has the power to demand literal observance of his law, but is presumed to be unwilling to do so. This view is obviously identical with that proposed by D'Annibale.⁹⁷ Moreover, Rodrigo, like Vermeersch,⁹⁸ sees in *aequitas* a virtue which inclines one to exact a just debt benignly and with a certain diminution or remission of it. He clearly states that this debt or obligation may arise out of the demands either of commutative justice or of legal justice.

With regard to the subject of this virtue, it is the belief of Rodrigo that *aequitas* may exist first in the judge (or Superior), whose benign application of the law will have standing in both the internal and the external forum. Secondly, this same virtue of *aequitas* (but now called *epikeia*) may exist in the subject of a law, but his action will be valid only in the internal forum.

In their treatment of *epikeia* Cajetan⁹⁹ and Billuart¹⁰⁰ distinguish the "intrinsic intention" of the legislator from his "extrinsic intention." The former, being understood as that which is expressed in the words of the law itself (for example, an article which has been deposited must be returned to its owner) would seem to coincide with what Rodrigo calls "*mens singularis legislatoris*." The "extrinsic intention" to which Cajetan and Billuart refer, is superior and extrinsic to the words of the law (for example, what belongs to an individual should be given to him as being useful, and fitting from the point of view of the common good). It should be noted that

⁹⁶ *Op. cit.*, n. 396.

⁹⁷ Cf. D'Annibale, *op. cit.*, I, n. 187, note 49.

⁹⁸ Cf. Vermeersch, *Quaest. de Iust.*, nn. 481 et sqq.

⁹⁹ Cf. Cajetan, *op. cit.*, in II-II, q. 120, a. 2.

¹⁰⁰ Cf. Billuart, *op. cit.*, Tract. *De Caeteris Virtutibus Justitiae Annexis*, Dissert. III, Art. IX.

this "extrinsic intention" of which mention is made by Cajetan and Billuart, differs from the "*mens generalis legislatoris*" referred to by Rodrigo. In the view of the latter, this general intention is not a more or less universal norm embracing the specific intention connected with a particular law. Rather, it is the definite intention that no law is to bind in a concrete case, if to demand observance of it would be contrary to the virtue of *aequitas*.

Resumé. The foregoing considerations give evidence of the extensive development of the concept of *epikeia* by moralists during the last several decades. In this period attention is no longer centered to such a degree on the question as to the procedure to be followed in cases of probability and cases of doubt. Theologians are more concerned with the precise nature of *epikeia* itself.

Modern developments in this regard proceed along two lines. In the first place—in the chapter immediately preceding, attention was called to the fact that not all theologians of the period to which that chapter is devoted, subscribed to the Suarezian view that a subject may, on his own initiative, deviate from the words of the law when observance of it, although not sinful or excessively difficult, would be contrary to the reasonably presumed intention of the legislator. In the period with which the present chapter is concerned, there is among theologians a rather general agreement with the opinion of Suarez on this point. But beyond that, many modern moralists adhere to the teaching of D'Annibale¹⁰¹ that *epikeia* strictly

¹⁰¹ As has been seen (cf. pp. 88 et sqq. *supra*), this teaching is foreshadowed by Viva. Certain observations of the jurist Grotius are likewise noteworthy. He insinuates that since *epikeia* is involved only when a defect exists on account of the universality of the law's expression, excluded from consideration in this regard are laws which command what is morally wrong, or forbid what necessarily must be done. While apparently Grotius has in mind certain enactments which from the very outset prescribe the performance of acts that are morally wrong, yet the same reasoning might in some way be extended to laws, the observance of which in particular cases would be sinful. For although in such cases there does exist a defect owing to the universality of the law's expression, this is not the fundamental reason why a subject is not only justified, but is required, to deviate from the words of the law. The fundamental reason is to be found in the fact that observance of the law would be opposed to the natural precept that sin must be avoided. Such a view would seem to be a logical inference

so-called is concerned exclusively with cases in regard to which the legislator has power to bind his subject, but is believed not to be willing to do so. This opinion is shared not only by Noldin-Schmitt, Loiano, McHugh-Callan, Wouters, and Rodrigo, mention of whose teaching has already been made, but likewise by Vives,¹⁰² Tanquerey,¹⁰³ Telch¹⁰⁴ and Jone.¹⁰⁵

In the second place, some modern theologians follow the opinion of Vermeersch in regard to the nature of *aequitas* and its position in the system of virtues. In so doing, they point out that *epikeia* and *aequitas* are not identical, although the terms were used convertibly by most theologians of past centuries. It must be admitted, however, that in regard to the relation which *epikeia* bears to *aequitas* and to justice, there is no universal agreement. D'Annibale,¹⁰⁶ for example, believes that *epikeia* is a species of *aequitas*; Rodrigo¹⁰⁷ states that "it is referred to the virtue of *aequitas*"; Van Hove¹⁰⁸ contends that it is "of a nature altogether different from that *aequitas* which is exercised by a public authority in the external forum"; Vermeersch¹⁰⁹

from the statement of Grotius. Yet he himself in another work, in illustrating the use of *epikeia*, mentions cases in regard to which compliance with the words of the law would be evil, that is, would be in conflict with the precepts of the natural or divine positive law. Cf. H. Grotius, *De Aequitate, Indulgentia et Facilitate* (Amstelaedami, 1680), Cap. I, n. 11; *De Jure Belli ac Pacis Libri Tres* (Amstelaedami, 1680), Lib. II, Cap. XVI, n. 26.

¹⁰² J. Vives, *Compendium Theologiae Moralis* (ed. 8; Romae, 1904), n. 72, note 2.

¹⁰³ *Op. cit.*, II, n. 341.

¹⁰⁴ C. Telch, *Epitome Theologiae Moralis Universae* (ed. 6; Oeniponte, 1924), p. 31.

¹⁰⁵ H. Jone (U. Adelman, trans.), *Moral Theology* (Westminster, Md.: The Newman Bookshop, 1945), n. 56. Aertnys-Damen state that modern authors generally restrict *epikeia* properly so-called to cases dependent on the legislator's will. Cf. J. Aertnys, *Theologia Moralis*, recog. a C. Damen (ed. 14; Taurini: Marietti, 1944), I, n. 176. The opinion that *epikeia* concerns only the will of the lawmaker is not mentioned in some earlier editions. Cf., e.g., J. Aertnys, *Theologia Moralis* (ed. 7; Paderbornae, 1906), I, nn. 174, 175.

¹⁰⁶ *Op. cit.*, I, n. 187.

¹⁰⁷ *Op. cit.*, n. 390.

¹⁰⁸ *De Legibus Ecc.*, n. 286.

¹⁰⁹ *Quaest. de Iust.*, n. 492.

says that “the habit of *epikeia* is the same as justice”; Merkelbach,¹¹⁰ Hering,¹¹¹ and Hugon¹¹² consider it to be a subjective part of legal justice in one sense, and superior to legal justice in another.

¹¹⁰ *Summa Theol. Mor.*, II, n. 891.

¹¹¹ H. Hering, “De Genuina Notione Iustitiae Generalis seu Legalis iuxta S. Thomam,” *Angelicum*, XIV (1937), 481.

¹¹² *Art. cit.*, *Angelicum*, V, 362-363.

PART II

THE NATURE AND USE OF EPIKEIA

CHAPTER IV

THE NATURE OF *EPIKEIA*

ARTICLE I. THE BASIS AND LAWFULNESS OF *Epikēia*

THE historical notes which constitute the first part of this dissertation accord ample evidence of the fact that there exist numerous points of disagreement among theologians with regard to *epikeia*. Various opinions are offered as to its precise nature; authors are not one in stating the conditions under which it may be used; not all express the same rules in connection with the necessity of recourse. But upon one fact all without exception seem to agree—the lawfulness of *epikeia* in itself.¹

This lawfulness is based upon various considerations. Of their very nature laws are general and universal. They are enacted not for a particular case but for the general run of cases. In the concrete, however, the details, circumstances and contingencies which may clothe a particular case are numberless, variable and unpredictable. But the legislator enacts his law with a view to what happens in normal cases. He is not concerned primarily with the peculiar circumstances which will render a particular case exceptional. As a consequence, the verbal formula which embraces the law may sometimes be deficient in reference to that case.² The variability of con-

¹ Cf. Godefroy, *art. cit.*, *DTC*, V, 360.

² De Page points out that a fiction is involved in "cette présomption que le loi est parfaite et expressive de l'entière du Droit."—H. De Page, *De L'Interprétation des Lois* (Bruxelles, 1925), I, p. 77. Huguency notes: ". . . les formules écrites sont impuissantes à exprimer la loi morale tout entière . . . jamais la formule livresque ne peut donner la dernière mot de la direction pratique."—Huguency, "Imperfection," *DTC*, VII, 1290. Pound states that "the very fact

crete conditions may render inept and inapplicable in a particular case a law otherwise just and commendable. In regard to such a case, the law as it stands does not truly represent the will of the legislator, and

the words of a law without the [legislator's] will have neither the force nor the authority to obligate. For the words of the law in themselves serve merely to point out the will of the legislator, as an express sign of it; this sign, however, is not so certain as not to be able to be restricted and extended according to circumstances. . . .³

It is entirely beyond the ability of any human legislator to foresee all possible cases, or to legislate for them. Nor indeed is it reasonable to demand of a lawmaker that he endeavor minutely to inves-

that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them mechanical in their operation. A mechanism is bound in nature to act mechanically, and not according to the requirements of a particular case."—R. Pound, "The Decadence of Equity," *CLR*, V (1905), 20-21. Another civil lawyer lists among the deficiencies of law "the rigor of the law, by which is meant the frequent harshness of legal rules, or perhaps a want of humane consideration for the misfortunes of humanity and an indifference to the hardship occasionally resulting from those rules," and "the rigidity of the common law by which is meant the generality of legal principles and the judicial practice to apply such principles with logical and sometimes literal consistency, and without allowance for exceptional cases and for circumstances which make the usual rules produce unjust results."—Keigwin, *art. cit.*, *GLJ*, XVIII, 48. The entire matter is very well summarized by Maggiore: ". . . la vita si trasforma di continuo, verrà prima o poi a trovarsi in contrasto con le norme. La norma è *generale* in quanto regola il maggior numero di casi possibili; ma la sua generalità è guadagnata col sacrificio della concretezza; giacchè ella deve tener conto delle grandi medie; e le medie quanto sono più vaste tanto sono più povere di contenuto, quanto più riguardano l'identico tanto più trascurano il vario. La norma vuol essere certa, ma la sua certezza, non è che del caso singolo, di una situazione di fatto determinato; quindi è inevitabile che accada un conflitto tra la certezza formale a quella di fatto. . . ."—*Art. cit.*, *RIFD*, III, 260.

3 " . . . verba legis sine voluntate non habere vim, nec auctoritatem ad obligandum. Verba enim legis secundum se tantum sunt ad ostendendam voluntatem legislatoris tanquam signum expressum ejus; non est tamen hoc signum tam certum, quin possit ex circumstantiis limitari et extendi. . . ."—Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 7.

tigate, and carefully to make provision for every possible condition which may arise in the future. In other words, the inability of the legislator to foresee all possible cases is an element which is of no less importance in any consideration of *epikeia*, than is the deficiency of the verbal formula in which the law is stated. But is it essential? Is it necessary that *epikeia* always and exclusively be based upon a presumption that the legislator could not and did not foresee the case as it now exists in the concrete, modified and extenuated by countless and various circumstances? The question is of great consequence. For if an affirmative reply must be forthcoming, then *ipso facto* without any further consideration, *epikeia* must of its very nature be confined to human laws. If, on the other hand, one must answer in the negative, then the possibility of applying *epikeia* to the divine law cannot be excluded on this basis, that is, that the legislator could not foresee the case at hand. Careful consideration must be given the matter. But in the final analysis it would seem that even if a lawmaker were endowed with the capacity to foresee all future cases, surrounded by their own peculiar and proper circumstances and qualifications, he could not reasonably be expected to incorporate into his law explicit mention of all the exceptions which, by reason of those circumstances, he would desire to make. To do so would cause endless confusion and verbosity. In other words, *epikeia* is not based solely upon the inability of the legislator to foresee all future cases. Indeed ultimately it is not based upon his inability at all, but rather upon his unwillingness to include in his law the case at hand.⁴ Those who would deny this opinion would logically be obliged to demand

⁴ Rodrigo (*op. cit.*, n. 396) mentions a two-fold deficiency as the basis of *epikeia*: a deficiency in the formula of the law, and, with regard to human laws, a deficiency in the legislator. More precisely, however, it would seem that *epikeia* is based ultimately on the legislator's will not to include this case in his law. For the subject who is confronted with a situation in which he is debating whether or not the use of *epikeia* is licit, it is of little import whether the legislator could or could not foresee the case at hand. His concern is whether or not the lawmaker willed to include in his law such a case with all the circumstances now surrounding it. The defect of the verbal formula and the inability of the legislator to foresee all future cases enter into a consideration of *epikeia*, to be sure, but more fundamental is the lawmaker's unwillingness that the subject should be bound in this case.

of every legislator that he incorporate into the statement of his law every exception now foreseen that he wishes in the future to make—a requirement hardly in accord with reasonableness.⁵

Epikeia is based upon the presumed intention of the legislator. It is unnecessary to state that no legislator is considered to harbor the intention of binding his subjects to the performance of acts which are evil or impossible. Such does not lie within his power. Indeed legislators are not presumed to be willing to press the obligation of observance of all their laws in every case to the utmost extent within their power. True it is that in some instances this is their wish. But in the main the legislator is deemed to be just, fair and benign.

Theologians in discussing the lawfulness of *epikeia* frequently substantiate their observations with biblical texts. One may here refer to these texts, not for the purpose of entering into any exegesis of them, nor with the implication that the legitimacy of *epikeia* can be established solely on a scriptural basis. But they do afford an indication of the characteristic benignity of the Divine Legislator from Whom all human lawmakers derive their power, and in imitation of Whom they should exercise it.⁶

⁵ Consequently, in evaluating various definitions of *epikeia*, one must keep in mind the fact that some theologians consider the inability of the legislator to foresee future cases, to be the sole basis of *epikeia*. Dens, e.g., in explaining *epikeia*, states that it follows the intention which the legislator actually did not have, but would have had, or reasonably should have had, if he had foreseen the case at hand. Cf. P. Dens, *Theologia ad Usus Seminariorum et Sacrae Theologiae Alumnorum* (Mechliniae-Paris, 1828-1830), II, n. 57. Haine offers a similar explanation of *epikeia*. Cf. A. J. Haine, *Theologiae Moralis Elementa* (Lovanii, 1881-1883), I, q. 76. In the light of what is presently to be said concerning an interpretative intention these explanations cannot be accepted.

⁶ Cf. Eccles. 7, 17 (“Be not over just”); Prov. 8, 14 (“Counsel and equity is mine, prudence is mine, strength is mine”); Prov. 4, 11 (“I will show thee the way of wisdom, I will lead thee by the paths of equity”); Mt. 11, 30 (“For my yoke is easy, and my burden light”); 2 Cor. 10, 1 (“Now, I myself, Paul appeal to you by the meekness and gentleness of Christ . . .”); 1 John 5, 3 (“For this is the love of God, that we keep his commandments: and his commandments are not burdensome”). The following sentence occurs in Phil. 4, 5: “Τὸ ἐπεικέες ὑμῶν γνωσθήτω πᾶσιν ἀνθρώποις.” “Let your moderation be known to all men” (Confraternity trans.); “let your modesty be known to all men” (Challoner trans.). τὸ ἐπεικέες has no reference here to an emendation of law. St. Thomas has the following comment: “Ad epicheiam pertinet

ARTICLE 2. THE DEFINITION OF *Epikēia*

Despite the broad development that has been made in regard to the concept of *epikēia* since Aristotle⁷ discussed it, any clear notion of it must be based essentially upon his explanation. Keeping that explanation in mind, we may define *epikēia* as a correction or emendation of a law which in its expression is deficient by reason of its universality, a correction made by a subject who deviates from the clear words of the law, basing his action upon the presumption, at least probable, that the legislator intended not to include in his law the case at hand.

The foregoing definition seems to include all the elements essential to *epikēia*. In regard to the deficiencies which exist by reason of a law's universality, ample explanation seems to have been offered both in this and in preceding chapters. The fact that it is the subject of the law who makes use of *epikēia* will be treated at some length when the relation of *epikēia* to *aequitas* is discussed.⁸ The final element, namely, the presumed intention of the legislator, will occupy our attention for most of the remainder of this chapter. It will be considered: (a) in itself; (b) in reference to the extent of *epikēia*; (c) in regard to the objection that being only interpretative it is ineffectual; (d) in relation to affirmative and negative precepts; (e) in reference to the private good of an individual subject; (f) insofar as it concerns a *damnum emergens* and a *lucrum cessans*; (g) in regard to the necessity of recourse to a Superior.

ARTICLE 3. THE LEGISLATOR'S INTENTION *In Se*

If the importance of the legislator's intention to the concept of *epikēia* in Moral Theology were always realized, the danger of invoking *epikēia* arbitrarily would undoubtedly be very much diminished.

aliquid moderari, scilicet observantiam verborum legis. Sed modestia quae ponitur pars temperentiae, moderatur exteriorem hominis vitam, puta in incesso, vel habitu, vel aliis hujusmodi. Potest tamen esse quod nomen epicheiae apud Graecos per quamdam similitudinem transferatur ad omnes moderations."—*Sum. Theol.*, II-II, q. 120, a. 2, ad 3.

⁷ Cf. *Nicomachean Ethics*, V, 10; *Rhetoric*, I, 13.

⁸ Cf. also pp. 47 et sqq. *supra*.

Such arbitrary use unfortunately is frequent, and might contribute to an attitude that would scorn *epikeia* as merely a technique to evade the law. It is far from that. Its objective standing as a legitimate institute of Moral Theology is undeniable—its acceptance by all theologians, even the strictest, is ample evidence of that fact.⁹

Failure to consider the importance of the legislator's intention has resulted in the formation of definitions of *epikeia* which give rise to misunderstandings. Frequently it is stated, for example, that *epikeia* is "a benign interpretation of the mind of the legislator."¹⁰ Such a definition seems to be far too subjective. Surely if in regard to the particular law in question, it is the just intention of the legislator to be rigorous and stringent, then a benign interpretation of that intention on the part of the subject cannot be justified.¹¹ It would be more correct to state that *epikeia* is a *quasi* interpretation, made by the subject of the law, of the presumably benign intention of the legislator. That is to say, before *epikeia* may lawfully be used, there

⁹ Ferraris points out clearly that by the admission of the lawfulness of *epikeia*, no prejudice is done the legislative power, precisely since "praesumatior legislator in simili casu eadem fuisse dicturus . . ."—*Op cit.*, Vol. V, s.v. *Lex*, Art. V, n. 43. Azorius states: ". . . benignius leges interpretendae sunt quo voluntas earum conservetur."—J. Azorius, *Institutiones Morales* (Colonia Agrippinae, 1602), Vol. I, Lib. V, Cap. XVI, Quaest. IX. Cf. Chap. I, note 5 *supra*.

¹⁰ Cf., e.g., Reiffenstuel, *Theol. Mor.*, Vol. I, Tract. II, Dist. IV, Quaest. I, n. 9; C. De Cursiis, *Universa Theologia Moralis*, elaboratum a J. Grassi (Aesii, 1852-1854), Vol. I, Tract. III, Cap. VI; B. Melata, *Manuale Theologiae Moralis* (Romae, 1888), Lib. I, Pars II, Cap. I, Sect. I, Art. III, § 3; H. Gatterer, *Compendium Theologiae Moralis* (Merani, 1889), Vol. I, Pars I, Cap. II, § 22; T. Slater, *A Manual of Moral Theology for English-Speaking Countries* (ed. 3; New York, 1909), Vol. I, p. 103; T. Iorio, *Compendium Theologiae Moralis juxta methodum J. P. Gury, redactum a R. Tummo* (ed. 5; Neapoli: M. D'Auria, 1934), Vol. I, Tract. III, n. 112.

¹¹ Kirk points out that "it is unwise to define ἐπιείκεια as 'a benign interpretation of the law' for this suggests that it is in some way opposed to severity, even where the latter is equitable—an interpretation specifically rejected by St. Thomas. . . . It is not a mitigation of the law in favor of privileged individuals, but rather a just interpretation of the law with due reference to the circumstances of the particular case."—K. Kirk, *Some Principles of Moral Theology and Their Application* (London-New York-Toronto: Longmans, Green & Co., 1930), p. 208, note 1.

must be a sound presumption that the mind of the legislator is benign, is less rigorous than would seem to be indicated by the literal application of the law to the case at hand. Superficially, it may appear that this is a mere quibbling of terms. Actually, it is a matter of the gravest consequence. Benignity is presumed to characterize the legislator; it is of little import, as far as the objective lawfulness or unlawfulness of deviating from the words of the law is concerned, whether the subject who makes the interpretation, or whether the interpretation itself based merely on the subject's wish, is benign or not.

In connection with this discussion of the intention of the legislator, reference should again be made to a distinction found in the treatment of *epikeia* by Cajetan¹² and Billuart.¹³ As has been pointed out above, according to these theologians, the purpose of a law as signified by its words constitutes the intrinsic end of the law, whereas the intention of the legislator is the extrinsic end. If there should occur a conflict between them, the primary and extrinsic purpose (which is the good of the citizens for whom the law is enacted) must prevail over the proximate and intrinsic purpose.

While this point is well taken, nevertheless, it might be inferred from it that for the licit use of *epikeia* the public good must be involved, or that deviation from the letter of the law is permissible only when observance would be sinful. Indeed upon this latter point Cajetan very emphatically insists. Of greater consequence, it would seem, is the distinction made by Rodrigo¹⁴ between the *mens singularis legislatoris* and the *mens generalis legislatoris*. The former is manifested in the verbal formula of the law; the latter, existing outside the legal formula, restricts it in such a way that obedience to the law as written is demanded in particular cases, only insofar as there is no infringement of *aequitas*—a virtue concerned not so much with the strict rights of justice as with the harmonious union of justice with humaneness, piety and charity. It is the presumptive existence of this *mens generalis legislatoris* that makes the use of *aequitas* and *epikeia* licit.

¹² *Op. cit.*, in II-II, q. 120, a. 2.

¹³ *Op. cit.*, Tract. *De Caeteris Virtutibus Iustitiae Annexis*, Dissert. III, Art. IX.

¹⁴ *Op. cit.*, n. 391.

ARTICLE 4. THE LEGISLATOR'S INTENTION AND THE SCOPE OF *Epikieia*I. *Cases Involving the Legislator's Power*¹⁵

There is no author who disputes the fact that a legislator may not enact any law which requires his subjects to perform an action which is sinful. On the basis of the fundamental definition of law given by St. Thomas,¹⁶ such an enactment would not be a true law and hence would have no binding force. And it is important to note that this is verified not only when the legislator in the precept itself imposes upon all his subjects the performance of evil acts, but even if the observance of a law which in general is praiseworthy, by reason of certain circumstances that arise in a particular case, would be evil. Thus, for example, the ecclesiastical law requiring attendance at Mass on Sunday is certainly just and commendable. But to obey it would be evil, objectively at least, in a particular case in which its fulfillment would require transgression of a higher law—for example, the abandoning of a dying person who would otherwise be unattended. All authors admit the possibility that a situation may arise in which to demand observance of a law would exceed the legislator's power—because the law would require the performance of something which in the particular case would be evil.

However, it would seem to be wholly erroneous to maintain, as does Cajetan,¹⁷ that a law ceases to bind only when compliance with it would be evil. For to demand observance of his law also exceeds the legislator's power in certain instances other than those in which obedience would be sinful. It cannot be denied that the nature of law demands, as may be deduced from the very definition of law, that it be endowed with certain qualities, if it would give rise to a duty in conscience to obey it.¹⁸ If these qualities, or any one of them, be

¹⁵ In this connection reference should be made to the theological principles involved in cases in which the *finis* of a law ceases. Cf., e.g., St. Alphonsus, *Theol. Mor.*, Lib. I, n. 199; Rodrigo, *op. cit.*, n. 541; Noldin-Schmitt, *op. cit.*, I, n. 199; Konings, *op. cit.*, I, n. 165.

¹⁶ "Ordinatio rationis ad bonum commune ab eo, qui curam communitatis habet, promulgata."—St. Thomas, *Sum. Theol.*, I-II, q. 90, a. 4.

¹⁷ *Op. cit.*, in II-II, q. 120, a. 1.

¹⁸ Cf. St. Alphonsus, *Homo Apostolicus*, Tract. II, n. 3.

lacking, there is no law in the proper sense of the term. Now, among the characteristics which pertain to the very essence of law is this: that he who makes the law and imposes the obligation have the power to do so. By this is not meant merely that he must be possessed of jurisdiction. An individual may have the necessary jurisdiction to legislate and to obligate, and yet lack the power to insist upon the binding force of some particular law. Thus, for example, a law may be enacted by a fully authorized legislator, yet joined with its observance normally and *per se*, for all or for the greater part of the subjects upon whom it is imposed, and in all or nearly all the cases in which it will apply, there is some excessive encumbrance out of proportion with the necessity or usefulness of the law itself.¹⁹ Such a law the legislator, howsoever competent he may be juridically, has no power to enact, nor has he the power to demand its observance, if it has already been enacted.²⁰ A law is an *ordinatio rationis*. This is not.²¹ A law has reference *ad bonum commune*, either directly or indirectly. This has not; rather it is harmful and injurious to the common welfare. It is no reflection, but a distortion, of that ideal law which every human precept must strive to represent and imitate. Consequently, a legislator may not enact such a law, and should he do so, it will lack all binding force. For a law *per se*²² obliges in

¹⁹ This is not to be confused with the case where, intrinsic to the law, *per se*, and of its nature normally joined to the observance of the law, is some proportionately grave sacrifice, or difficulty, or restriction of liberty. For such a difficulty is part of the substance of the precept; it is in accordance with the reasonable will of the legislator; it is not excessive if the seriousness of the *materia* be considered. E.g., a certain repugnance and shame always accompany the confessing of grievous sins; they are intrinsic to the precept. But the obligation of confession is not thereby unjust, nor does it for that reason cease to exist.

²⁰ Cf. Rodrigo, *op. cit.*, n. 16.

²¹ Commenting on St. Thomas' definition of law, Merkelbach points out that the term "*ordinatio*" signifies a "*dispositio ad finem per media proportionata*," which is imperative, effective of obligation, and *de se* stable. As to the meaning of "*rationis*," Merkelbach explains that "*voluntas superioris, ut lex esse possit, debet esse ratione regulata seu rationi conformis, secus esset magis iniquitas quam lex . . .*"—*Summa Theol. Mor.*, I, n. 222.

²² *Per accidens* a law may sometimes bind, even if it lacks some essential quality. To avoid scandal, to preserve public order, or for some other grave reason, a law enacted by a usurper, e.g., might be of obligation.

conscience only insofar as it possesses those qualities essential to it. “. . . all prescriptions of human reason can have force of law only inasmuch as they are the voice and the interpreters of some higher power on which our reason and liberty necessarily depend.”²³

But it is not to be supposed that a law ceases to bind only when these vitiating elements *per se* and ordinarily accompany its observance. It may happen that in some cases a law which is otherwise not defective, which is in itself a commendable enactment, places upon an individual or upon a few individuals or even upon an entire region, by reason of the occurrence of certain circumstances, an obligation which exceeds the power of the legislator to impose. This is certainly no contention that every law which becomes difficult to observe thereby ceases to bind. It is simply an assertion of the fact that *per accidens* and extrinsically to the law itself, a situation may arise in which the legislator cannot urge observance of his law.²⁴ And the reasons why, in the presence of this excessive extrinsic encumbrance, the law ceases, are basically the same as those explained above. For while it is true that directly and immediately a law has reference to the common good, nevertheless, through this indirectly and mediately it also procures the private good of some individuals. Conversely, then, when a law becomes harmful or unjust or excessively difficult for a private individual—especially if spiritual interests are at stake—the common good is likewise adversely affected.²⁵

From these considerations it would seem to be a logical conclusion that an individual may licitly deviate from the clear words of a law, not only when observance of the law would be evil, but likewise when it would be excessively and disproportionately difficult.

²³ Encyclical Letter “*Libertas*,” Leo XIII, 20 June, 1888, *ASS*, XX (1887), 597. (Eng. trans.: *The Christian Constitution of States* [New York: The Paulist Press, 1941], p. 7.)

²⁴ “. . . saepe fit, ut praecepta quaedam non obligent, cum eorum observatio cederet in grave alicujus incommodum . . .”—St. Alphonsus, *Theol. Mor.*, Lib. I, n. 175. Whether such a case be considered as exemplifying the existence of impossibility as an excusing cause, or of a conflict of laws, basically in each instance it may be said that the “law” has no power to bind.

²⁵ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 58, a. 5; Konings, *op. cit.*, I, n. 97; Gury-Ballerini-Palmieri, *op. cit.*, I, n. 81, note 1.

A brief comment on the arguments proposed by Cajetan²⁶ in support of his position that deviation from the words of a law is permissible, only when observance of the law would be evil, seems sufficient.

With regard to the first argument—suffice it to point out in passing that one need not agree with the fundamental premise upon which it is based, namely, that *epikeia* bears to justice a relation of *species* to *genus*. This point will be developed in the following chapter.

Concerning Cajetan's invoking of the authority of St. Thomas, it may be recalled that although in some passages the Angelic Doctor seems to confine the use of *epikeia* to those cases in which to obey the letter of the law would be evil, in that it would cause grave harm to the common welfare, nevertheless other passages of his works²⁷ lend weight to the theory that he did not wish thus to restrict the use of *epikeia*. In point of fact, with regard to the passage which Cajetan cites,²⁸ he merely assumes that the Angelic Doctor teaches that the divergence in a particular case between the intention of the legislator and the words of the law results because a sin would be involved, if one should comply with the law as it stands.

To substantiate his belief that *epikeia* may be used only when observance of the law would be evil, Cajetan argues that the opposing view would lead to all manner of absurdities. It would be forced, he charges, to condone fornication in a case where the parties involved would be sufficiently able and willing to provide for the offspring—for the ultimate reason underlying the forbidding of fornication is the good of the offspring.

We may agree with Cajetan that the specific sinfulness of fornication is based on the fact that it is contrary to the proper upbringing of the offspring. This point is lucidly explained by St. Thomas.²⁹ We may further agree that even when *per accidens* it happens that proper provision may be made for the offspring, the precept still binds,

²⁶ Cf. *op. cit.*, in II-II, q. 120, a. 1. Cf. pp. 58 et sqq. *supra*.

²⁷ Cf. *Sum. Theol.*, II-II, q. 147, a. 3, ad 2; II-II, q. 147, a. 4; *Sent.* IV, dist. 15, q. 3, a. 1, sol. 4, ad 3.

²⁸ *Sent.* III, dist. 37, q. 1, a. 4.

²⁹ Cf. *Sum. Theol.*, II-II, q. 154, a. 2.

since it forbids what is *per se* (that is, normally and in ordinary cases) illicit in regard to the use of the generative faculties. This is likewise the clear teaching of St. Thomas.³⁰

It would appear, however, that Cajetan does not answer the point at issue—may one deviate from the words of the law *in any case* other than that in regard to which observance of the law would be sinful. Cajetan's argument does not prove, for example, that in human laws it can never happen that a law ceases by reason of its being disproportionately difficult. One may agree with Cajetan that a law does not cease when its purpose ceases only negatively—and yet maintain that it is possible for a law to cease even though its observance is not sinful on the one hand, and even though its purpose has not ceased merely negatively on the other. The substance of Cajetan's position is that a subject is not bound to obey a law, only when the lawmaker exceeds his power by imposing an obligation, compliance with which in the particular case at hand would be sinful. But it is equally true that a subject is not bound when the legislator exceeds his power by imposing an obligation, compliance with which in the particular case at hand would be disproportionately difficult.³¹ In other words, *datur tertium quid*. To deny the teaching that one may transgress the words of the law only when to follow them would be to sin, is not to state that negative cessation of the purpose of the law excuses the subject from obedience to the law.

Continuing our comment on the teaching of Cajetan and of those who believe with him that one may turn aside from the words of the law only when to obey literally would be evil, we may point out that this view would make *epikeia* obligatory. For since it is always necessary to refrain from the performance of an act which is evil, *epikeia*, whenever used, would always be necessary. It could

³⁰ “. . . id quod cadit sub legis determinatione, judicatur secundum id quod communiter accidit, et non secundum id quod in aliquo casu potest accidere.”—*Loc. cit.* It may also be added that if the law were relaxed even for a single case, the way would be open to all manner of abuses.

³¹ So true is this in St. Alphonsus' opinion, that he considers such difficulty to cause the law to cease contrarily. Contrary cessation he believes to occur “quando . . . materia legis redderetur in illo casu nociva vel valde difficilis.” Moreover, “tunc omnes asserunt legem non obligare.”—*Theol. Mor.*, Lib. I, n. 199.

never be freely chosen. In every occasion upon which it could be resorted to, its use would be an obligation and a duty. This surely is contrary to the whole concept of *epikeia* as explained by Aristotle and developed by most subsequent writers.

Finally, it should be noted, as Suarez indicates, that it is inexact and inadequate to state that a law "sins" only when it commands something evil. It may likewise "sin" by imposing an act with unjust rigor. "It is the intention of the legislator not only to command what is right but also in a manner which is right . . ." ³²

And so, with these observations discussion of the point may be concluded—a discussion undertaken in the endeavor to establish that a law ceases to bind, not only when to obey it would be evil, but also when its observance would entail excessive and disproportionate difficulty. ³³

II. Cases Involving the Legislator's Will

To demand that a subject obey the law when obedience would be evil or disproportionately difficult would exceed the power of the legislator. But there are other instances in which one may disregard the words of a precept, even though to insist upon obedience would clearly be within the rights of the legislator. ³⁴ It may licitly be presumed that a lawmaker is not anxious to demand observance of his every law with all the stringency and rigor which he could justly

³² Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 10.

³³ It should be noted that we say that a law ceases to bind. As to whether *epikeia* is used in such a case, cf. pp. 148 et sqq. *infra*. Attention should likewise be called to the fact that the principle that a law involving a disproportionate difficulty is not an *ordinatio rationis*, is true of law in general. Obviously, however, this condition will not be verified in regard to divine law, for to ascribe a defect to divine law would be equivalent to ascribing a defect to the Divine Lawmaker. Moreover, it is clear that the observance of a human law may be very difficult, and yet not be disproportionately so. On this point, cf. pp. 152 et sqq. *infra*.

³⁴ Of course, it would also be contrary to the intention of a just legislator to insist upon the observance of laws where to do so would exceed his power. But fundamentally in such cases his power, and not his will, would be involved. In the cases now under consideration, only his intention, and not his power, is concerned.

exercise in every case. The truth of this position is attested to, as has been pointed out in the first part of this dissertation, by many of the most outstanding theologians of the past, as well as by practically all, if not actually all, of the moralists of the present day. In other words, turning aside from the clear words of a precept is permissible, not only when the legislator exceeds his power, but likewise in some instances where his will alone is involved.

To subscribe to this view is not the same as to maintain that a law ceases when its purpose ceases negatively in a particular case. Those few who teach this latter principle maintain that the negative cessation of the law's purpose, and that alone, is sufficient to exclude the necessity of obedience to the law. They are not concerned with other factors and circumstances, the presence of which is required, in order that a subject, deeming that the legislator willed not to include in his law the case at hand, may licitly use *epikeia*. In short, to deny that a law ceases when its purpose ceases negatively in a particular case is not to deny that *epikeia* may licitly be involved in such a case. There may well be present certain other circumstances which will lead to a judgment of the unwillingness of the legislator to bind in the case.³⁵

There is no reason to suppose that a lawmaker in every case wishes to be as strict and as severe as he possibly can without transgressing the bounds of strict justice. Legislators are believed—and rightly so—to exercise kindness, benignity and moderation,³⁶ not only from a sense of what is proper, fitting and humane, not only from a realization that a static, unanimated legal formula may sometimes be inept in applying, in certain individual cases which are clothed with peculiar circumstances, the intentions which motivated them in their enactment of the law, but also and especially because in the perform-

³⁵ The author of the article in *L'Ami du Clergé*, referred to above, appears to have this idea in mind when he distinguishes negative from positive *epikeia*. Negative *epikeia* signifies that the subject sees no reason to justify the law in the particular case, but, on the other hand, sees no positive reason to condemn it. Positive *epikeia* signifies that the subject is aware of positive reasons against the obligation of the law in the case. The former—negative *epikeia*—is never permissible. Cf. "L'Epikie," *L'Ami du Clergé*, XXV, 167.

³⁶ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 11.

ance of the duties of their position they should strive to imitate the mildness and forbearance characteristic of the Divine Lawgiver.³⁷ Consequently, at least in some cases, they are presumed to be unwilling to bind with all possible rigor. That this is the Christ-like spirit that permeates the Church as a legislator³⁸ is evident from numerous canons in the Code of Canon Law. Reference may be made to Canons 2214, § 2, 2193, 2218, § 1, for example. Attention may be called also to the allocution of the Holy Father to the Sacred Roman Rota in 1944, in which, referring to rules of judicial procedure, he insists upon the principle that laws are for men and not men for laws.³⁹

That this spirit of benignity is not alien to civil legislators⁴⁰ is evident from the following remarks of eminent authorities.

One of the most fundamental social interests is that the law shall be uniform and impartial. Uniformity ceases to be a good when it becomes uniformity of oppression. The social interest served by symmetry or certainty must then be balanced against the social interest served by equity and fairness or other elements of social welfare.⁴¹

37 “. . . ipsae [i.e., leges humanae] ad exemplar divinae legis ferri debent; eo magis quod in humano legislatore potestas non sit, sicut est in divino, ad virium deficientiam pro legis observantia supplendam.”—Rodrigo, *op. cit.*, n. 16. Cf. Bonacina, *op. cit.*, Vol. II, Disp. I, Quaest. I, Punct. ult., Prop. II, n. 9.

38 After speaking of the Aristotelian *epikeia*, Cicognani states: “Multo magis obtinere debet aequitas in ecclesiastica disciplina, in iure canonico, in Ecclesia; nam praeterquam Ecclesia est mater misericordissima, sancta et benigna . . .”—H. Cicognani, *Ius Canonicum*: Vol. I, *Prolegomena Iuris Canonici* (Romae, 1925), n. 9. The author goes on to point out that the *finis* of the Church is the salvation of souls which is the *suprema lex*, that sometimes requires the mitigating of other laws.

39 Allocution to S. R. Rota “*L’inaugurazione del nuovo anno*,” Pius XII, 2 Oct., 1944, *AAS*, XXXVI (1944), 281-290.

40 It should be very clearly noted that there is no implication here that *epikeia* has juridic value in civil law, or that modern Courts of Equity are tribunals for the exercise of *aequitas*, understood in the traditional sense. The purpose here is simply to point out that neither ecclesiastical nor civil law-makers should be presumed to impose obligation in every possible case with all the rigor within their power.

41 B. Cardozo, *The Nature of the Judicial Process* (New Haven, 1922), pp. 112-113.

... modern equity ... has tremendously extended its effectiveness as the spiritual principle or soul of the law in remedying its shortcomings, correcting its mistakes and leading in its reform by the establishment of broad principles of social justice . . .⁴²

In view of these considerations it would seem to be reasonable to conclude that for a subject licitly to deviate from the words of a law, it is not necessary that he judge, on the basis of the lack of power in the legislator, that the case at hand is not truly included in the law. It is sufficient that he judge that the legislator was unwilling to include it, even though actually he had the power to do so. And the reason why this unwillingness is not expressly indicated in some way in the verbal formula, is to be found either in the fact that in legislating, the lawmaker was unable to foresee all future cases, or in the fact that, although foreseeing them, or at least some of them, he wished to avoid the prolixity and confusion which would arise from the insertion into his law of mention of various exceptions. Hence the occasion for correcting the law, for it is deficient in its expression, in that it embraces in its terminology more cases than it was the will of the legislator to include.

These two elements are found in every example of *epikeia*—a judgment and a correction. The latter has reference to the verbal statement of the law as it now stands. The former is concerned with the presumed will of the legislator regarding the case at hand, which is not expressed in the verbal statement of the law because the law-giver was unable to foresee the present situation, or was unwilling to make explicit provision for it in his law.

These observations give rise to another consideration of the greatest consequence. If it is true that the essential constituent elements of *epikeia* are a judgment concerning the legislator's will and a correction of the verbal statement of the law, then it would seem that *epikeia* properly and strictly so-called is invoked only in regard to cases in which to demand observance of the law would be beyond the will of the legislator, but not beyond his power. This is no denial of the fact that, when to obey a law would be sinful or excessively and disproportionately difficult, the subject may deviate from it.

⁴² W. Walsh, "Is Equity Decadent?," *MLR*, XXII (1937-1938), 496-497.

But such deviation is not based upon the use of *epikeia*. *Epikeia* strictly understood has reference only to cases concerning which a prudent judgment is made that the legislator, although he could insist upon the observance of his law, nevertheless does not do so.

If to demand the observance of the law would exceed the power of the legislator, then such a law *ipso facto* normally⁴³ ceases to bind. What need, then, is there of evoking *epikeia*? The fact is that *epikeia* has no part to play at all in such instances. All agree that it may be used only when circumstances dictate the judgment that it was the intention of the legislator not to impose obligation in the case at hand. But in a strict sense this judgment cannot be based ultimately upon the position that the lawmaker has exceeded his power, nor upon the theory that to obey the law would be sinful, or that to observe the law would be to follow the less important in a conflict of laws, nor upon the belief that a disproportionately grave inconvenience would be involved in the observance of the law. If the basis for *epikeia* were to be found in these elements, there would be no necessity of investigating the legislator's will.

There is involved here no mere quibbling of terms. When a law demands the performance of something evil, the subject has both the right and the obligation to refuse obedience. If the observance of the law would involve a difficulty so excessive and disproportionate as to exceed the legislator's power, the subject normally has a strict right, though not an obligation, to deviate from it. If in these instances, transgressing the words of the law would involve the invoking of *epikeia*, then the use of *epikeia* would be a strict right in justice—and in the first case an obligation as well. Yet, the very concept of *epikeia* is concerned more with benignity than with justice strictly so-called. Even those moralists who apply the term to cases involving the power of the legislator, usually explain it, strangely enough, as a deviation from the verbal legal formula, on the basis of the presumed benignity, mildness, humaneness and equity of the legislator

⁴³ The word "normally" is included because, where there is question of a law the observance of which is even extremely difficult, the subject may be obliged to obey it on the basis of some more fundamental obligation—e.g., to avoid giving scandal. But the obligation then arises, not from the positive law in question, but from the natural law.

—no one of which concepts involves a strict *ius* in justice, on the part of the subject of the law.⁴⁴

To examine the matter from another point of view—theologians who have treated of *epikeia* during the past seven hundred years have in almost every instance devoted part of their study to a discussion of the necessity of recourse to a Superior. Now, in regard to cases which involve the legislator's power, what precisely would be the purpose of recourse? If, for example, in reference to a case where to obey the words of the law would be certainly sinful, the subject should recur to a Superior, and by him be commanded to comply with the precept in question, actually the subject would be forbidden by the law of God to do so. In other words, the will or intention of the legislator in such an instance would be immaterial. Whether the subject would recur or not, whether he would be commanded to follow the words of the law or directed to disregard them, would be of no consequence. For in any event, he is strictly forbidden by the law of God to obey the human precept as it stands, whether such obedience be in accord with the wishes of the lawmaker or not. So too, where there is question of a law, compliance with which would be disproportionately difficult, the subject would normally not be obliged to observe it, regardless of the wishes of the legislator.⁴⁵ Now, as is clear from the historical background of this concept, *epikeia* of its very nature is ultimately based upon a sound presumption of the legislator's will. How then can a situation, such as those here under consideration, which is in no way at all dependent upon the legislator's will, be said to involve *epikeia*?

Finally, when to demand that a subject follow the law exceeds the legislator's power, insofar as the subject is concerned the law in

⁴⁴ This seems to be recognized by Suarez, in spite of the fact that he refers *epikeia* both to the power and to the will of the legislator. He states: "Si in virtute alterius legis fiat exceptio, jam non erit epiikia, sed jus."—*De Legibus*, Lib. V, Cap. XXIII, n. 5. It is to be noted that such a conflict always occurs when observance of the positive law would be sinful.

⁴⁵ Pignatelli points out that if a ruler should enact a law which is contrary to the interests of his subjects, such a law would be "inefficacious" because it would be "unreasonable." Cf. J. Pignatellus, *Consultationes Canonicae* (ed. 5; Venetiis, 1736), Vol. III, Consul. XXXIII, n. 7.

reference to the particular case under consideration ceases.⁴⁶ On the other hand, *epikeia* from the time of its explanation by Aristotle has always been described as involving the correction or emendation of a law. Surely it cannot be maintained that one corrects or emends a law when the law has ceased to exist.⁴⁷ Yet such seems to be the impasse to which one is logically led if he maintains that even in cases where to insist upon observance of the law would exceed the lawmaker's power, the subject in deviating from the law makes use of *epikeia*.⁴⁸

We may conclude, then, that *epikeia* is invoked only on the basis of the presumed intention of the legislator. It is an institute of Moral Theology which, in a particular case, directs to the path of benignity and equity a verbal legal formula which, although in general it may possess the characteristics of humaneness and moderation, has strayed from the path insofar as the particular case at hand is concerned.

It would be absurd to deny that it is frequently difficult to determine in a particular case whether the lawmaker could not, or merely would not, insist on obedience to the letter of his law. But it would seem to be unreasonable to reject merely on that account the thesis here set forth. With regard to this difficulty, one senses that Suarez is quite aware of it. For on no point in his treatment of *epikeia* is he less detailed, indicating merely that when one judges of the inten-

⁴⁶ ". . . in quantum habet de iustitia, in tantum habet de virtute legis. In rebus autem humanis dicitur esse aliquid iustum ex eo quod est rectum secundum regulam rationis."—St. Thomas, *Sum. Theol.*, I-II, q. 95, a. 2.

⁴⁷ This same argument is effectively used in another connection by Ballerini—to point out that when an impediment ceases, there is no need of a dispensation: "Absurdum est autem quaerere relaxationem legis aut obligationis, quando lex aut obligatio non existit."—Gury-Ballerini-Palmieri, *op. cit.*, II, n. 652, note 82. Tournely states: ". . . quod nihil est, pro eo tempore quo nihil est, epicheiam non capit."—H. Tournely, *Tractatus de Universa Theologia Morali* (Parisii, 1733-1740), Vol. III, Tract. *De Legibus*, Cap. III, Art. III, Sect. II, Concl. II. Cf. also D'Annibale, *op. cit.*, I, n. 178, note 6.

⁴⁸ Vives' summary of the matter is worthy of note: ". . . quando lex servari non potest absque iniustitia, cessat lex; si servari non possit ob concursum alterius legis, v.g., auditio missae et assistentia infirmo, praevallet potior; si lex servari nequeat absque gravi incommodo, iterum, cessat lex; quibus in casibus, necessaria non est *epikeia*, sed sufficiunt principia generalia moralitatis."—*Op. cit.*, n. 72, note 2.

tion of the legislator, presumptions or conjectures must be used, based upon circumstances of time, place and person involved in each case, upon the practice of the governing administration (“*ex usu et modo regiminis*”), upon the manner of interpreting similar laws, and upon the ordinary way in which laws are enacted—with reasonable moderation understood, even if not expressed.⁴⁹ Yet our discussion cannot be satisfied with a merely passing reference. Further comment appears necessary.

Consideration of cases where insistence upon observance of the law would be tantamount to the command to sin, would confiscate a basic natural right, or would result in positive harm to the community, may be set aside, because the fact is patent that such insistence is beyond the power, and not merely the will, of the legislator. Our attention for the moment is centered upon the element of difficulty in observing a law. When does it become such that the legislator has no power to demand that his law be obeyed, and when is it such that only his will and not his power is involved?

This question is by no means easy to answer, and no claim is made that what is stated here is absolutely definitive. Whether in a concrete case to insist upon observance of a law is beyond the power of the lawmaker, will oftentimes be in doubt. Border-line cases will not be infrequent. It seems, however, that certain observations of some practical utility can be made. But it must be remembered that the norms suggested, while true, should be employed circumspectly. Circumstances will alter cases, and a prudent consideration of the influx of circumstances in the solution of a problem is always of major import.

To consider the problem negatively at the outset, it may be stated that it by no means exceeds the power of a human legislator to insist upon the observance of his law, even if there arises some difficulty or inconvenience extrinsic to it and entailed in its observance—when that inconvenience is reasonable, commensurate with, and in proportion to, the gravity of the law and its purposes. Attendance at Mass on Sunday, for example, is demanded by a grave ecclesiastical precept. There is no question of any extreme inconvenience intrinsic to

⁴⁹ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 12.

the law, which would cause it to be unjust. We may imagine two cases involving persons who are about to fulfill the precept on a particular Sunday morning. One lives adjacent to a church where Masses are celebrated at every hour until noon. The other has a residence at such a distance that a twenty-five minute walk is required for him to reach the Church nearest his home. Moreover, in that Church only one Mass is offered on Sunday, and that at a rather early hour. On the day in question, the weather, while not tempestuous, is unpleasant and disagreeable. Now all these factors in the second case combine to make the fulfillment of the ecclesiastical precept inconvenient. This inconvenience is extrinsic to the law. It does not exist in the first case. However, insofar as a normal individual in good health is concerned, the discommodity surely would not be out of proportion with the seriousness of the ecclesiastical law itself. That is to say, although there is present an inconvenience which is extrinsic to the law, and which renders observance of the law more difficult for one subject than for another, nevertheless, because the difficulty is commensurate with the seriousness of the law itself, it certainly does not exceed the power of the legislator to demand that his precept be observed.

In this connection, there is necessary a word of caution with regard to the principle sometimes expressed by moral theologians: *lex positiva non obligat cum incommodo proportionate gravi*.⁵⁰ Unfortunately moralists do not all understand this principle in the same way. Some consider *incommodum proportionate grave* as practically synonymous with moral impossibility; others deem it to involve a difficulty of considerably less magnitude than moral impossibility. Moreover, there is wide disagreement among theologians as to the precise meaning of "moral impossibility."⁵¹ In any event, as used in this dissertation, the principle *lex positiva non obligat cum incommodo proportionate gravi* does not refer to a law which is beyond the power of the legislator to urge. That is to say, this principle is here understood to be valid because of the benign intention of the legislator. It is not deemed to be based upon the lack of

⁵⁰ Haring remarks that the use of this principle is "fraught with difficulty."

—H. Haring, "Die Lehre von der Epikie," *ThQS*, LII (1899), 797.

⁵¹Cf. *ibid.*, 798.

power in the lawmaker to demand observance of his law. In the case where to require fulfillment of the law exceeds the power of the legislator, the law is not an *ordinatio rationis*.⁵² But where the above mentioned principle alone is involved, to demand observance of the law would seem to be just and permissible, precisely because the law has not ceased to be an *ordinatio rationis*. Every legislator has the power to impose a law, the observance of which requires a restriction of liberty or a sacrifice commensurate with, and proportionate to, the necessity, importance and utility of the law under consideration. To deny this fact, on the basis that obedience to the law is difficult, is pointless. Practically every law is in some way or other a restriction of liberty, and hence difficult. Certainly it does not therefrom follow that it is beyond the power of the legislator to enact laws or to insist that they be obeyed. When the restriction of liberty or the difficulty involved in the observance of the law is entirely proportionate to the need and usefulness of the law, it is within the power of the legislator to require that it be fulfilled. It is only when the encumbrance attendant upon obedience to the law is altogether out of proportion to the need and utility and gravity of the law, that the law then exceeds the power of the legislator, and for that very reason normally ceases to bind—in general if this condition is verifiable in the community, in particular even if this condition is verifiable only in an individual case.

On the other hand, to consider the problem positively, we may point out that any law normally ceases to bind if in connection with its observance, some extrinsic encumbrance or detriment should arise, entirely out of proportion with the seriousness of the law and the good which it is intended to protect or to promote.⁵³ Law is an *ordinatio rationis*. It ceases to be reasonable if the difficulty involved in obeying it is altogether incommensurate with the need and

⁵² Cf. note 21 *supra*.

⁵³ “. . . if the burdens which they [i.e., rulers] claim the right to impose are excessive or disproportionate to the good which they are to secure, then such laws are said to be unjust and no one can be held in conscience to obey them. There may, of course, be a temporary obligation to observe them in order to avoid scandal or disorder, but sooner or later they must be modified.”—E. Gilson (E. Bullough, trans.), *The Philosophy of St. Thomas Aquinas* (ed. 2; Cambridge: W. Heffer & Sons, Ltd., 1929), p. 330.

utility of the law. A human lawmaker has no right to restrict the liberties of his subjects beyond what is necessary and useful. This is not to affirm that a human legislator has not the power to insist upon the obligation of his law, though it involve an inconvenience proportionately grave. Here there are envisioned cases in which the inconvenience is disproportionate, and hence renders the human lawgiver incapable of demanding obedience to his law in such circumstances. Or the matter may be considered from this point of view. If the *materia* of a law is in itself reasonable, and involves no disproportionate difficulty in its observance, but nevertheless becomes unreasonable and unjust due to the occurrence of circumstances which render obedience to the law excessively and disproportionately incommodious, then actually the *materia* of the law has been notably altered. The law ceases to bind, for it is no longer the same precept imposed by the lawgiver.

In a concrete case the judgment as to whether the encumbrance is proportionate or disproportionate demands the highest prudence and discretion. For the principle concerning disproportionate inconvenience requires relativity in its application. What is a difficulty entirely reasonable in the observance of one law may be utterly incommensurate in regard to another. The decision in any given case must take into account the seriousness of the difficulty involved in relation to the *materia* and gravity of the law, and the reasonable intention of the legislator. In general, a legislator is empowered to impose serious matter *sub gravi* or *sub levi*. But matter of little or no gravity cannot *per se* be enjoined *sub gravi*.⁵⁴ Oftentimes, however, the seriousness of the law must be weighed in the light of the lawgiver's reasonable estimation of it. Davis, for example, points out that:

Positive precept—such as that of fasting Communion—which is interpreted by the legislator, the Church, to be always binding unless a dispensation is obtained, always binds even under the gravest inconvenience, for a member of the Church is bound to accept the Church's interpretation of its own law, where such interpretation has been given.⁵⁵

⁵⁴ Cf. Noldin-Schmitt, *op. cit.*, I, n. 162.

⁵⁵ *Op. cit.*, I, pp. 168-169. Without at all denying the importance of weighing the gravity of the law from the point of view of the Church's interpre-

In this connection it may be pointed out that it is not unjust under certain circumstances for a legislator to demand observance of his law even at the peril of the subject's life. That God has the power so to do is, of course, incontrovertible, and need not concern us here.⁵⁶ But it is likewise true that a human legislator sometimes possesses this power.⁵⁷ Ordinarily a human legislator has no right to command heroic acts, not only because the common good which is the purpose of law can be promoted without his so doing,⁵⁸ but also because such a course of action would invite frequent and habitual transgression and thus defeat the very intent of the law.⁵⁹ Yet, in certain circumstances a human lawgiver can insist upon obedience to his law even though it involves risk of life—precisely because in those circumstances the encumbrance though extremely grave, is nevertheless not disproportionate. He may require an unqualified observance of his law if transgression of it would result in contempt of faith or religion, or in harm to the eternal welfare of souls. Again, a human legislator is empowered at times to insist that a subject risk his life for the common good. Thus, a sentry even to save his life cannot desert his post of duty if grave harm to the state would result.⁶⁰ And, of course, one who freely enters a state of life characterized by rigorous obligations is justly bound to their fulfillment.⁶¹

tation of it, one may call into question whether the obligation of the Eucharistic fast is meant, in the mind of the Church, "always" to bind, as Davis believes.

⁵⁶ Thus, e.g., blasphemy is never licit under any circumstances, and the obligation to refrain from it, as indeed from all acts prohibited by the natural law, never ceases, however grave may be the reasons alleged. Moreover, "lex positiva divina actus heroicis praecipere potest: nam hinc quidem Deus absolutus est hominum dominus, inde vero ipse hominum vires augere potest, quibus observatio legis etiam difficillimae fiat moraliter possibilis."—Noldin-Schmitt, *op. cit.*, I, n. 140. Cf. Lehmkühl, *op. cit.*, I, n. 220.

⁵⁷ Cf. Van Hove, *De Legibus Ecc.*, n. 79.

⁵⁸ Cf. Konings, *op. cit.*, I, n. 105.

⁵⁹ Cf. Lehmkühl, *op. cit.*, I, n. 220.

⁶⁰ Noldin-Schmitt point out that "sunt . . . qui dicant, in hoc casu potius legem naturalem quam positivam actum difficilem praecipere, legem scilicet, bonum commune praefendum esse bono privato."—*Op. cit.*, I, n. 140.

⁶¹ "Sic moniales obligantur ad perpetuam clausuram, sacerdotes ad castitatem perfectam, nonnulli religiosi ad servitium infirmorum qui peste infecti sunt . . ."—Noldin-Schmitt, *loc. cit.* Cf. Konings, *loc. cit.*

In brief, then, it may be concluded that human laws oblige at very grave inconvenience

if the transgression is in contempt of God, religion or the Church; if the common good is at stake; if a freely chosen position imposes certain heroic sacrifice; if another person would otherwise be placed in extreme spiritual need.⁶²

These cases, however, do not disprove the truth of the principle that a human law ceases to bind when to urge obligation exceeds the power of the legislator, by reason of a disproportionate encumbrance involved in its observance. Nor indeed do they even constitute exceptions to it. They simply illustrate the fact that there are certain acts, the performance or omission of which is so necessary that no excuse, other than absolute impossibility, can cause the cessation of the binding force of laws prescribing them. In other words, extreme inconvenience in their regard is not disproportionate. These cases, then, demonstrate the relativity of the principle in its application; they do not destroy but rather exemplify its truth.

From the foregoing discussion one may conclude that, although it is frequently difficult to determine when the inconvenience or encumbrance involved in following a law in a particular case is such as to render insistence on the observance of the law beyond the power of the legislator, and when it is such as to render it merely beyond his will, nevertheless between the two categories of cases there is a vast difference. Furthermore, this difficulty is not a little augmented by the arbitrary and loose use on the part of moralists of a phrase which must now be considered. The problem may thus be briefly stated: When it is said by authors that to observe a law is "morally impossible," is it to be concluded that the law in question is beyond the power of the legislator to enforce, insofar as the particular case at hand is concerned?

There are few terms employed in Moral Theology with more indefiniteness than the term "morally impossible." Rodrigo defines moral impossibility as "a proportionately grave inconvenience extrinsic to the observance of a law, but accompanying that observ-

⁶² Jone, *op. cit.*, n. 69.

ance.”⁶³ But the problem arises as to what theologians consider to be the basic reason why a law ceases to bind when its observance becomes “morally impossible.” Specifically, would it be beyond the power, or merely beyond the will, of the legislator to insist upon obedience to his law in such circumstances?

It is the opinion of Merkelbach that moral impossibility “on account of *epikeia* regularly excuses from the observance of positive law because the law *must* [italics not in original] prescribe acts which are morally possible.”⁶⁴ For Vermeersch

the reason [why the obligation of a law ceases when its observance is morally impossible] is the divine benignity if there is question of divine law; but if there is question of human law, this *per se cannot* [italics not in original] command things that are too difficult for that would be contrary to the common good.⁶⁵

The view of Genicot-Salsmans⁶⁶ is substantially the same as that

⁶³ “. . . incommodum proportionate grave, et legis observationi extrinsecum, eidem observationi adnexum.”—*Op. cit.*, n. 430. Cf. also Noldin-Schmitt, *op. cit.*, I, n. 177; Marc-Gestermann-Raus, *op. cit.*, I, n. 221; Merkelbach, *Summa Theol. Mor.*, I, n. 376; Davis, *op. cit.*, I, p. 168; Vermeersch, *Theol. Mor.*, I, n. 214; A. Sabetti, *Compendium Theologiae Moralis* concinnatum a T. Barrett, recog. a D. Creeden (ed. 34; Neo-Eboraci: Frederick Pustet Co., Inc., 1939), n. 92; Arregui, *op. cit.*, n. 68; I. Ferreres, *Compendium Theologiae Moralis* (ed. 16; Barcinone: Subirana, 1940), I, n. 177; Konings, *op. cit.*, I, n. 137; Gury-Ballerini-Palmieri, *op. cit.*, I, n. 108. Prümmer states: “. . . impotentia moralis tunc adest, quando opus praescriptum fieri nequit, nisi adhibendo labores prorsus extraordinarios.”—*Op. cit.*, I, n. 235. Van Hove following Michiels (*op. cit.*, I, p. 369), considers spiritual moral impossibility to consist in the danger of harm to a soul which would arise from the fulfillment of a law—c.g., danger of taking scandal or of fostering scruples. Natural moral impossibility “est *specialis difficultas* per accidens coniuncta cum observantia legis . . .”—*De Legibus Ecc.*, n. 291.

⁶⁴ “*Impotentia moralis*, ob epichiam, excusat *regulariter* ab observantia legis positivae, quia lex debet praecipere actus moraliter possibiles.”—*Summa Theol. Mor.*, I, n. 377.

⁶⁵ “Ratio est divina benignitas, si agitur de lege divina; si vero agitur de lege humana, haec per se nimis difficilia iubere nequit, namque, id bono communi adversaretur.”—*Theol. Mor.*, I, n. 214.

⁶⁶ E. Genicot, *Institutiones Theologiae Moralis* recognitum ab I. Salsmans (ed. 14; Buenos Aires: Ed. Desclée, De Brouwer, 1939), I, n. 134.

of Vermeersch. Prümmer believes that if the legislator, foreseeing such grave difficulties involved in observing his law, were to insist upon its observance, "such a law would not be useful but harmful to the common good, and hence it would not be a true law."⁶⁷

These authors clearly believe that for a legislator to insist upon obedience to his law when such would involve "moral impossibility" is beyond his power—although, according to Vermeersch at least, when there is question of divine law, not to urge observance in such cases is a matter of divine benignity.

Certain other authors, on the contrary, believe that "moral impossibility" involves only the will, and not in any way the power, of the legislator. Thus, Sabetti-Barrett-Creedon state that moral impossibility excuses one from observing a law because "the legislator is not considered to urge the obligation with such great inconvenience."⁶⁸ Substantially the same position is held by Marc-Gestermann-Raus,⁶⁹ Konings,⁷⁰ Gury-Ballerini-Palmieri⁷¹ and Ferreres.⁷²

According to Rodrigo the doctrine that "moral impossibility" will excuse from the obligation of a law, is based, insofar as human laws are concerned, upon the fact that "there is lacking in the Superior either the will to bind or even the power."⁷³ Van Hove⁷⁴ quotes approvingly from Suarez, to the effect that

⁶⁷ "Si igitur legislator praevidens tantas praevaricationes legis, nihilominus illam urgeret, iam talis lex non esset bono communi utilis, sed nociva; ac proinde non esset vere lex."—*Op. cit.*, I, n. 236.

⁶⁸ ". . . non censetur legislator obligationem urgere cum tanto incommodo."—*Op. cit.*, n. 92.

⁶⁹ *Op. cit.*, I, n. 223.

⁷⁰ *Op. cit.*, I, n. 137.

⁷¹ *Op. cit.*, I, n. 108.

⁷² *Op. cit.*, I, n. 177.

⁷³ ". . . deest in Superiore aut voluntas obligandi aut etiam potestas."—*Op. cit.*, n. 436. The reason, insofar as divine laws are concerned, is found "in ipsa amicabile consociatione virtutum inter se, quarum aliae aliis subordinantur ex ipsa earum natura, attento bono honestatis quod singulae virtutes tumentur, uno quidem altero excellentiori magisque etiam necessario."—*Loc. cit.*

⁷⁴ *De Legibus Ecc.*, n. 291.

to oblige to [the performance of] every act of a precept, notwithstanding any accidental necessity that may occur, would be beyond the power of the human legislator . . . and although sometimes the obligation may not be openly unjust or beyond his power, if it is too grave and harsh, it is thought to be beyond the will of the legislator.⁷⁵

The meaning is clear. For Rodrigo and Van Hove, moral impossibility may involve either the lawmaker's power or his will.

These brief observations regarding the cessation of the obligation of laws due to the "moral impossibility" on the part of the subject to obey them, should be sufficient warning that when the term "moral impossibility" is employed by theologians, their meaning must be carefully analyzed. For in the opinion of some, once it has been verified that circumstances render observance of a law morally impossible, normally the subject has a strict right to deviate from it. According to other moralists there exists no such strict right. If the subject may transgress the letter of the law in such instances, his action must be based upon the presumed benignity of the intention of the lawgiver—not upon his lack of power to insist upon observance of his law.⁷⁶

The relation of these remarks to *epikeia* is clear. In view of them it is obvious that it would not be altogether correct simply to state that *epikeia* strictly so-called may be used when to follow the words of a law would be morally impossible—for if this latter term is taken to describe a condition in the presence of which a legislator cannot justly impose his law, obviously his power, and not his will, is involved. Hence, one may justifiably deviate from the law without invoking *epikeia*. On the other hand, it would be similarly incorrect to assert without qualification that where the observance of a

⁷⁵ "Obligare autem ad quemcumque actum praecepti, non obstante quacumque accidentali necessitate insurgente, esset supra potestatem legislatoris humani . . . et quamvis aliquando non sit aperte injusta obligatio vel supra potestatem, si sit nimis gravis et dura, censetur esse praeter voluntatem legislatoris."—Suarez, *De Legibus*, Lib. III, Cap. XXX, n. 6.

⁷⁶ Because of this confusion with regard to the precise meaning of the term "moral impossibility," an effort has been made in this dissertation to set aside the use of the term altogether.

law would be morally impossible its obligation ceases without the invoking of *epikeia* properly understood—for if “morally impossible” is understood as involving the will and not merely the power of the legislator, then obviously the obligation of the law does not of itself cease, but there may be a basis for the licit use of *epikeia*. As is evident from the historical notes which constitute the first section of this dissertation, many moralists, following the lead of Suarez,⁷⁷ maintain that *epikeia* may lawfully be used when observance of the law would be: first, sinful or harmful; secondly, morally impossible or too difficult; thirdly, beyond the presumed benign intention of the legislator. For the reasons offered earlier in this chapter we believe *epikeia* properly so-called to be confined to cases involving only the will of the legislator. In other words, in relation to the three categories of Suarez and his followers, *epikeia* strictly understood is applicable to the third class; it is never applicable to the first. It may or may not be applicable to the second, depending upon the precise meaning of the theologian when he states that to observe the law is “morally impossible.”⁷⁸

ARTICLE 5. THE LEGISLATOR'S INTENTION: NOT MERELY
INTERPRETATIVE

Throughout this chapter stress has been laid upon the importance of the presumed intention of the legislator. It has been pointed out that a subject, using *epikeia*, may licitly deviate from the words of the law only on the basis of a prudent judgment that the legislator intended to exclude from his law the case at hand.

The objection may be raised that, according to the teaching of theologians,⁷⁹ an interpretative intention is ineffectual. Now, he who seeks to justify, through the use of *epikeia*, an act performed con-

⁷⁷ *De Legibus*, Lib. VI, Cap. VII, n. 11.

⁷⁸ Suarez himself seems to believe that this second category has reference to the power of the legislator. If that be true, *epikeia* strictly so-called would not be invoked when one deviates from a law, the observance of which would be “morally impossible” in the Suarezian sense of this latter term.

⁷⁹ Cf., e.g., St. Alphonsus, *Theol. Mor.*, Lib. VII, n. 275; D'Annibale, *op. cit.*, I, n. 136; Vermeersch, *Theol. Mor.*, I, n. 44; Jone, *op. cit.*, n. 8.

trary to the clear words of a law, appeals to an intention which the legislator would have had, but which he did not have—that is, an interpretative intention. Consequently, to deviate from the clear words of a law cannot be justified on the basis of a judgment that the legislator would not insist upon the observance of his law in the case at hand.

In reply to this objection, it may be conceded at the outset that an interpretative intention is ineffectual “for no one is thought to will or to have willed what previously he never thought about, and at the present time is not thinking about . . .”⁸⁰ The point at issue, then, is reduced to this: Does the subject who makes use of *epikeia* appeal to an interpretative intention of the legislator? It is the aim of the following considerations to establish that he does not.

An intention is *actual* if, presently elicited, it here and now exists and influences the act while the act is being posited.⁸¹ Thus, he who here and now intends to baptize and does so, has an actual intention.

An intention is *virtual* if, previously elicited, it here and now perseveres, influences the act, but is not adverted to when the act is being performed.⁸² Thus, an individual has a virtual intention of baptizing if he confers the Sacrament, which previously he had actually decided to confer, but does so while distracted.

An intention is *habitual* if it was once actually elicited but, “although not revoked, nevertheless does not continue in itself nor in its effect, and therefore does not influence the resultant action.”⁸³ Such an intention would be had, for example, by one who in the past had elicited the intention to receive Extreme Unction, has never since retracted it, but now is destitute of his senses. In actions to

⁸⁰ “Nemo igitur velle, aut voluisse intelligitur id, de quo antea nunquam cogitavit, et in praesens non cogitat . . .”—D’Annibale, *loc. cit.*

⁸¹ Cf. Noldin-Schmitt, *op. cit.*, I, n. 43; Merkelbach, *Summa Theol. Mor.*, I, n. 55; Jone, *op. cit.*, n. 8; Vermeersch, *Theol. Mor.*, I, n. 44; Gury-Ballerini-Palmieri, *op. cit.*, I, n. 5; Davis, *op. cit.*, I, p. 14.

⁸² Cf. Noldin-Schmitt, *loc. cit.*; Vermeersch, *loc. cit.*; Gury-Ballerini-Palmieri, *loc. cit.*; Jone, *loc. cit.*; Merkelbach, *loc. cit.*

⁸³ Jone, *loc. cit.* Cf. also Noldin-Schmitt, *loc. cit.*; Merkelbach, *loc. cit.*; Vermeersch, *loc. cit.*; Gury-Ballerini-Palmieri, *loc. cit.*

be performed a habitual intention is of no effect; ⁸⁴ it is sufficient for him upon whom an action is performed—for example, the recipient of a Sacrament. Of course, an habitual intention is not sufficient for him who receives a Sacrament in which some action must be posited by the recipient, as in the case of Penance and Matrimony.

The actual intention, the virtual intention, and the habitual intention may be explicit or implicit. An intention is *explicit* when what is intended is clearly and distinctly apprehended.⁸⁵ It is *implicit* when what is intended is in some way contained in that which is explicitly known and intended.⁸⁶ With regard to the administration of Baptism, for example, the former is had when an individual specifically intends to confer the Sacrament of Baptism; the latter is had when the individual baptizing intends to do what he has seen the priest do in this regard.

An intention is *expressed* if it is manifested by words or signs.⁸⁷ It is *tacit* if it is manifested by silence; that is, from the circumstance of silence the intention is discernible by reason of some fact or some omission.⁸⁸ The owner of an article, for example, tacitly consents to its use when he sees that it is being used, could easily dissent, and yet does not do so.⁸⁹

An intention is *presumed* when for certain reasons, for example an individual's inclination or tendency, it is prudently judged now to be present or to have been present, for a presumption is a probable conjecture of an uncertain thing.⁹⁰ Thus, for example, a religious

⁸⁴ “. . . enim non influit in actum nec facit proinde ut ex deliberatione rationis et influxu libertatis procedat et humano modo fiat.”—Merkelbach, *loc. cit.*

⁸⁵ Cf. Noldin-Schmitt, *op. cit.*, I, n. 43; Vermeersch, *Theol. Mor.*, I, n. 41.

⁸⁶ Cf. Noldin-Schmitt, *loc. cit.*; Vermeersch, *loc. cit.*

⁸⁷ Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 57; Vermeersch, *Theol. Mor.*, I, n. 42; Noldin-Schmitt, *op. cit.*, I, n. 43; Gury-Ballerini-Palmieri, *op. cit.*, I, n. 5.

⁸⁸ Cf. Merkelbach, *loc. cit.*; Vermeersch, *loc. cit.*; Noldin-Schmitt, *loc. cit.*; Gury-Ballerini-Palmieri, *loc. cit.*

⁸⁹ Cf. Vermeersch, *loc. cit.*

⁹⁰ Cf. Merkelbach, *loc. cit.*

who, because he is in great need of it, buys a book in the absence of his Superior whom he cannot consult, presumes the consent of the Superior.⁹¹

An *interpretative* intention is that which never existed, which does not now exist, but which merely would have existed or would exist, if the matter had been brought to an individual's attention.⁹² Thus, for example, a priest would wish to offer Mass for his father if he knew he were dead.⁹³

It is very important, though often difficult, to distinguish clearly between these two latter intentions—the presumed and the interpretative.⁹⁴ “The former indicates that which according to a prudent judgment exists or did exist, whereas the latter indicates that which would exist, the fulfillment of some condition being supposed.”⁹⁵ The former is sometimes called a presumption *de praesenti*, and the latter a presumption *de futuro*.⁹⁶

Now, to consider the objection in the light of these definitions—the following explanation is proposed. The benign intention of the legislator upon which, in the final analysis, the lawfulness of the use of *epikeia* is based, is not merely interpretative. If the matter be carefully considered, the reason why the subject may licitly deviate from the words of the law is not merely because he believes that if the legislator knew the circumstances of the case he would not impose obedience—in the sense that the legislator does not now, nor never did, in point of fact, have this intention, but merely would have had it. The matter is not thus to be explained. But rather, the benign intention of the legislator is the intention which he constantly has, which he now has if he is still living, which he had in

⁹¹ Cf. Merkelbach, *loc. cit.*

⁹² Cf. Merkelbach, *ibid.*, I, n. 58; Jone, *op. cit.*, n. 8.

⁹³ Cf. Merkelbach, *loc. cit.*

⁹⁴ D'Annibale points out that frequently authors use these terms interchangeably, in spite of the difference between them. Cf. D'Annibale, *op. cit.*, I, n. 136.

⁹⁵ “Hoc indicat id quod secundum prudentem aestimationem *exstat vel existit*, illud autem quod, supposita conditione, *exstaret*.”—Merkelbach, *Summa Theol. Mor.*, I, n. 58.

⁹⁶ Cf. Vermeersch, *Theol. Mor.*, I, nn. 42, 44.

some way at the time of the enactment of the law. It is an underlying disposition to make his laws just, reasonable, fair and humane. In other words, it is an intention, at least implicit, had by the legislator, which perdures during the continuance of the law. And the fact must be kept in mind that an implicit intention is no less effective than an explicit one. For the distinction between the two refers not to the will, but rather to the intellect. Nor is this intention of the legislator merely habitual, in the sense that it has no influence on his act. It is considered so to permeate him that actually, or at least virtually, even though perhaps only implicitly, he restricts, limits and moderates that act of the will which is directed to the enactment of the law. When, therefore, a case arises in which, by reason of certain peculiar circumstances, an individual prudently judges that he may licitly turn aside from the words of the law, reference is made to the presumed intention, strictly so-called, of the legislator, and not merely to an interpretative intention. That is to say, the subject now judges that, at the time of the enactment of the law the legislator had the intention, at least virtual and implicit, to exclude from his law the case at hand. For the lawmaker, as Rodrigo points out, retains for himself as present, this principle which directs all his legislative activity: “. . . without infringing upon equitable moderation and benignity, according to the peculiarities of each case, in the application of the law which I am now enacting.”⁹⁷ And while it is true that this principle may perhaps be retained by the legislator only in a very general and indeterminate way, it is sufficient, nevertheless, to warrant the use of *epikeia* by the subject, for there is “a similar retention and operation of many other principles in the daily life of every man.”⁹⁸

Such undoubtedly is the construction that must be placed upon

⁹⁷ “. . . salva aequa moderatione et benignitate pro lege quam condo applicanda, iuxta peculiaritatem casus cuiusque.”—*Op. cit.*, n. 394.

⁹⁸ “. . . alia multa principia similiter retenta et operantia in vita hominis cuiusque quotidiana.”—Rodrigo, *loc. cit.* Humphrey says that in regard to a case to which *epikeia* is applied, the lawgiver “had not the will to place that case under the obligation of this law.”—W. Humphrey, *Conscience and Law, or Principles of Human Conduct* (ed. 2; London, 1903), p. 143. It would be even more accurate to state that the judgment is that the legislator had the will not to place that case under the obligation of this law. Here also attention may

an important, but frequently overlooked passage of Suarez,⁹⁹ where he points out that human law should be conceived as coming from the legislator with a condition—that it does not bind if its observance would be unjust and unreasonable. In the light of what has been explained above, we may add to this statement of Suarez the qualification that the law does not bind if its observance would not be benign and human.¹⁰⁰

However—and this point is of the greatest importance—this benignity is not something absolute. It is relative, dependent upon many circumstances, especially upon the nature of the law in question. It cannot be reasonably presumed that the legislator is wholly indifferent or only half-heartedly interested in the fact of whether or not his law is obeyed. Indeed some laws are of their nature so important and so necessary that the lawgiver cannot be presumed to allow any exception. A sentinel at his post, for example, may not desert in a critical moment by invoking a benign condition, presumably attached to the command of the Superior who stationed him there. But at least in regard to some laws, if, in a particular case, to demand observance of the law would be lacking in humaneness, then the subject may licitly deviate from the words of the law, provided that he has a sound reason for believing that the situation is such that he may appeal to the unexpressed condition presumed to be attached to the law, in virtue of which the legislator, were he now present, would not include this case in his law—precisely because that benign disposition or inclination did exist in the legislator when he enacted the law.

be called to the inaccuracy of the statement that *epikeia* is based upon the judgment that the legislator *would not* include the case at hand in the law. Actually, *epikeia* is based upon the judgment that the legislator *did not* include the case at hand in the law. The former statement frequently occurs in discussions concerning *epikeia*, but it is not to be accepted—for, at least, must be properly interpreted. Cf. Dens, *op. cit.*, II, n. 57; Haine, *op. cit.*, I, q. 76.

⁹⁹ *De Legibus*, Lib. VI, Cap. VI, n. 4.

¹⁰⁰ Rodrigo points out: "Quaevis lex humana fertur aut iure praesumitur lata, hac subintellecta clausula limitante: salva humanitate et aequa benignitate in casu singulari extraordinario prudenter aestimato: quae clausula, utpote universalis atque rationabiliter ex natura rei derivans, iure praetermittitur in singulis legibus, quin tamen ipsa vere desinat limitare materiam et obligationem determinatam cuiuscumque humanae legis."—*Op. cit.*, n. 393.

ARTICLE 6. THE LEGISLATOR'S INTENTION: AFFIRMATIVE AND
NEGATIVE PRECEPTS

Continuing our explanation of the presumed intention of the legislator, we may make reference to the relationship of *epikeia* to affirmative and to negative laws.

An affirmative or preceptive law is one which commands the performance of some act; for example, Mass must be attended on feast days. A negative or prohibiting law commands the omission of some act; for example, servile work must not be performed on feast days.¹⁰¹ Rodrigo points out that the character of a law—that is, whether it be affirmative or negative—must be judged, not so much from the formula in which it is embodied, as from the *matèria* concerned. Thus, the law of fasting, although it may be expressed affirmatively—for example, fasting must be observed in Lent—is really negative; for the *materia*—fasting—consists in the fact that on the same day more than one full meal is forbidden.¹⁰²

An affirmative law binds *semper* but not *pro semper*. It binds *semper*. That is to say, its obligatory force remains intact until such time as the law is revoked, suspended, or in some other way ceases. When, therefore, circumstances are such that its fulfillment is required, there is no need of its being newly imposed by the lawgiver. It is an affirmative precept, for example, that all Catholics must attend Mass on Sunday and holydays of obligation. This precept binds throughout the whole week. It must be executed, however, only when a Sunday or holyday of obligation occurs. But in order to have her subjects fulfill it, it is not necessary that the Church newly impose it when a Sunday or holyday of obligation arrives.

¹⁰¹ Cf. Van Hove, *De Legibus Ecc.*, n. 139; Noldin-Schmitt, *op. cit.*, I, n. 110; Merkelbach, *Summa Theol. Mor.*, I, n. 234; D'Annibale, *op. cit.*, I, n. 165. With regard to a permissive law, it may be defined as one which "aut ius firmat ad aliquid iam licitum libere agendum vel omittendum, v.c. lex permittens recipere stipendium pro Missa, aut ius tribuit ad aliquid forte per se vetitum licite vel saltem impune agendum vel omittendum, ut lex patiens lectionem libri prohibiti aut publicum meretricium."—Rodrigo, *op. cit.*, n. 23.

¹⁰² *Loc. cit.* Merkelbach expresses a similar thought: "Affirmativa et negativa non ex verbis sed ex fine sunt desumendae."—*Summa Theol. Mor.*, I, n. 234, note 1.

An affirmative law does not bind *pro semper*. That is to say, it is neither obligatory nor even physically possible that the act imposed be performed every moment. Obviously the precept of giving alms to the poor, for example, could not be complied with every moment of the day.

On the other hand, a negative law binds *semper* and *pro semper*. It binds *semper*, in the sense explained above. Moreover, it binds *pro semper*, in the sense that the act forbidden must *per se* be omitted at each moment. Its non-violation can occur every moment, for the execution of a negative law is a simple omission. And hence, its violation is an individual act. *Per se* the act must be continually omitted—without exception if there is question of the natural law (for negative precepts of the natural law forbid what is intrinsically evil). If there is question of a negative precept of the positive law, the non-violation must continue each moment until such time as the prohibition of the act by the lawgiver ceases, in some way or other. Thus, for example, one must refrain each moment from blasphemy—without exception; one must refrain each moment from reading a book forbidden by positive law only—but there may be reasons which cause this law to cease.¹⁰³

Some affirmative laws indicate precisely the circumstances in which they must be fulfilled. Others do not embody any specific mention of the conditions which must be present in order that they be executed *in actu secundo*. Thus, for example, the ecclesiastical precept to attend Mass indicates clearly when and where it must be fulfilled. But the divine precept requiring that a person profess his faith, has no determinate indication as to when it must be executed. It is the duty of an authoritative body, or of persons skilled in the law, or of the individual to interpret when, and under what circumstances, a positive undetermined precept, which binds *semper*, but not *pro semper*, is obligatory *in actu secundo*.

¹⁰³ St. Thomas states: “. . . praecepta negativa sunt magis universalia et quantum ad tempora et quantum ad personas. Quantum ad tempora quidem quia praecepta negativa obligant semper et ad semper: nullo enim tempore est furandum et adulterandum: praecepta autem affirmativa obligant quidem semper, sed non ad semper, sed pro loco et tempore: non enim tenetur homo ut omni tempore honoret parentes sed pro loco et tempore . . .”—*Commentum in Epistolam ad Romanos (Opera Omnia, XX)*, Cap. XIII, Lect. II.

With regard to *epikeia*, it is clear that it may sometimes be applied to negative laws.¹⁰⁴ For, since a negative law binds *semper* and *pro semper*, if its obligation for some reason ceases, then it cannot be alleged that the reason for the cessation is the interpretation strictly understood, that the circumstance of time is such as not now to require the fulfillment of the precept *in actu secundo*. Some other basis must be responsible for the cessation—and this basis may be the use of *epikeia*.

On the other hand, the reason why an individual is not bound to fulfill an affirmative precept in a given set of circumstances, may well lie in the interpretation strictly understood, that the affirmative law does not bind *in actu secundo* at the present moment, that this is not the opportune time for its execution. Obviously this is an instance of interpretation strictly so-called, not an example of the use of *epikeia*. We may rightly form the conclusion, then, that the use of *epikeia* will be less frequent in regard to affirmative laws than to negative laws.

But can it be maintained that *epikeia* may never be applied to affirmative laws, that every non-execution of an affirmative precept is to be explained on the score that interpretation strictly understood, and not *epikeia*, is involved? Such a theory must be denied, certainly insofar as affirmative precepts are concerned, which have a definitely designated time for their fulfillment, “for if at that same time an unthought-of impediment should arise, there is place for *epikeia* in its most proper sense.”¹⁰⁵ If, on the other hand, there is question of an affirmative precept which does not demand fulfillment immediately or at any specifically designated time, then in regard to it the use of *epikeia* will be very infrequent—if indeed *epikeia* may ever be applied to it. It is the opinion of Suarez that in reference to such a precept “*epikeia* seems to have no place.”¹⁰⁶

¹⁰⁴ Reference is here made to negative laws in general. Special mention will later be made of the natural law, the divine positive law, and human invalidating laws.

¹⁰⁵ “. . . nam si eodem tempore veniat non cogitatum impedimentum, habet locum propriissime epikeia.”—Suarez, *De Legibus*, Lib. VI, Cap. VI, n. 7.

¹⁰⁶ “. . . non videtur in illa habere proprie locum . . . epikeia.”—*Loc. cit.*

ARTICLE 7. THE LEGISLATOR'S INTENTION AND
THE PRIVATE GOOD OF A SUBJECT

Considerable controversy was aroused in past centuries in regard to the question as to whether *epikeia* might licitly be used if deviation from the words of the law would result in benefit to an individual only, and not to the community.¹⁰⁷ Reference has been made above to some of the theologians who offered arguments in support of one side or the other.¹⁰⁸ As D'Annibale points out,¹⁰⁹ the accepted opinion now is that *epikeia* may be used even when only the private good of an individual is concerned. Surely we are justified in subscribing to this view. The good of an individual is not in itself contrary to the common good, but is merely subordinated to it.¹¹⁰ Consequently, if that private good can be fostered or protected or furthered by the individual's deviation from the letter of the law in accordance with the presumed intention of the legislator, there would appear to be no sound reason to forbid such deviation, simply on the basis that the common welfare is not advanced—even though, by supposition, it is not harmed.¹¹¹ The opposite opinion would seem to be

¹⁰⁷ There is, of course, no question here of a detriment to the community caused by an individual's deviation from the letter of the law. If such a detriment would ensue, the use of *epikeia* would not be licit.

¹⁰⁸ Cf. Part I of this dissertation where the point is discussed in relation to the teaching of St. Thomas, Soto, Vasquez, Suarez, Billuart, the Salmanticenses, etc. The teaching of St. Thomas on this point is admittedly uncertain. Several passages have already been cited indicating that he may have allowed the use of *epikeia* even if only the private good of a subject were concerned. The following passage, though it refers primarily to distributive justice, is of some cogency analogically, in regard to the matter in question here, if the "*specialis gratia*" be extended to mean freedom from the obligation of the law as it stands. ". . . quando conditio alicujus personae requirit rationabiliter ut in ea aliquid specialiter observetur, non est personarum acceptio, si ei aliqua specialis gratia fit."—*Sum. Theol.*, I-II, q. 97, a. 4, ad 2.

¹⁰⁹ *Op. cit.*, I, n. 187.

¹¹⁰ An exception must be made to this latter clause in regard to certain matters; e.g., an individual basic right may not be entirely confiscated even for the good of the community. Cf. pp. 410 et sqq., and 426 *infra*, where the individual's right to marry is discussed.

¹¹¹ Suarez states: ". . . inferam . . . non solum posse cessare obligationem legis quando in particulari eventu esset contra bonum commune servare legem,

based on the fallacious supposition that, because a law must be ordained to the common good, it is not in any way at all concerned with the good of an individual as such. As Ballerini points out¹¹² mediately and indirectly a law tends to the private good of each subject, inasmuch as the good of each member of the community redounds to the good of the community as a whole.¹¹³ This point is of special importance in regard to human invalidating laws, and in the chapter dealing with such legislation a more detailed treatment of it will be offered.

ARTICLE 8. THE LEGISLATOR'S INTENTION: *Damnum Emergens* AND *Lucrum Cessans*

Brief reference may next be made to a point mentioned by several theologians in the past. May a subject licitly use *epikeia* not only in regard to a *damnum emergens*, but likewise in regard to a *lucrum cessans*—acting on the presumption that the lawmaker was not willing to include the case at hand in his law? In other words, may one deviate from the words of the precept not only in order to avoid the loss of goods already in possession, but likewise in order to acquire some notable and extraordinary gain?

There seems to be no sound reason for denying *a priori* that *epikeia* may be used in either instance. The existence of the fundamental basis upon which the justification for the use of *epikeia* rests—that the law by reason of the universality of its expression is deficient, inasmuch as it includes a case which the lawgiver willed not to include—may be verified when there is question of a benefit to be

sed etiamsi sit tantum contra bonum particularis personae, dummodo sit nocuum grave, et nulla alia ratio communis boni obliget ad illud ferendum vel permittendum.”—*De Legibus*, Lib. VI, Cap. VII, n. 13.

¹¹² Gury-Ballerini-Palmieri, *op. cit.*, I, n. 81, note 1.

¹¹³ Pope Leo XIII declares: “The first duty, therefore, of the ruler of the State should be to make sure that the laws and institutions, the general character and administration of the commonwealth, shall be such as to produce of themselves public well-being and *private prosperity*” [Italics not in original].—Encyclical Letter “*Rerum novarum*,” Leo XIII, 15 May, 1891, ASS, XXIII (1890-1891), 656. (Eng. trans.: *Four Great Encyclicals* [New York: The Paulist Press, n. d.], p. 18.)

gained, just as when there is question of a loss to be avoided. The latter of its nature may ordinarily constitute a more grave and just reason for transgressing the letter of the law.¹¹⁴ But that fact by no means leads logically to the conclusion that *epikeia* is not permissible at all with regard to the former. Provided that the subject has a truly sound reason for judging that the legislator wished to exclude the case at hand from his law, he may deviate from it, regardless of whether a *damnum emergens* or a *lucrum cessans* be involved. This circumstance, however, is to be noted. It may happen (and more easily so, in connection with cases concerning a *lucrum cessans*) that if frequent violations of the letter of the law occur, one or both of the following results will ensue. Such transgressions may cause grave scandal, or may lead to an attitude in the subject of lack of respect for law, with a consequent disregard of it for little or no reason. The presence of such circumstances will, of course, change the nature of the case. But even in such eventualities the basic reason which would then prevent the resorting to *epikeia*, would not be the mere fact that a *lucrum cessans* is involved, but rather the fact that scandal and disrespect for law would be consequent upon its use.

The following case is sometimes considered by theologians to be an illustration of the opinion that *epikeia* may licitly be used when a *lucrum cessans* is involved. An individual has the opportunity of making a notable and extraordinary gain by performing some servile work on Sunday. May he use *epikeia* in reference to the ecclesiastical precept forbidding such work?¹¹⁵

St. Alphonsus, while noting that the matter is by no means uncontroverted, believes that both the affirmative and the negative opinions are probable, though the former is more probable; for the ecclesiastical law forbidding the performance of servile work must not be considered to bind with such rigor.¹¹⁶

¹¹⁴ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 14.

¹¹⁵ In the case envisioned the only reason for the labor is the fact that an extraordinary gain would be made. There is no question of necessity or public utility.

¹¹⁶ *Theol. Mor.*, Lib. III, n. 301; *Homo Apostolicus*, Tract. VI, n. 22. Kelly states: ". . . the majority of theologians would allow one to work for a great gain, and they seem to make it depend on the amount of the gain, and the con-

But may *epikeia* be used in regard to the precept requiring attendance at Mass?

St. Alphonsus adheres to the view, which he terms probable, that the individual in question may licitly miss Mass.¹¹⁷ This is surely the accepted opinion today, at least insofar as individual (and not habitual) cases are concerned.

As to the estimation of what a notable and extraordinary gain is, no exact rule can be given. Berardi points out¹¹⁸ that a customary day's wage is not sufficient. In regard to the precept forbidding servile work, Kelly believes that

the "time and a half" and sometimes double pay, which a laboring man or tradesman may receive for working on a Sunday would seem to be such a gain, and it would seem to justify one in working, at least occasionally, on Sunday. He should, however, make a reasonable effort to attend Mass.¹¹⁹

Concerning the missing of Mass, Guiniven states that

authors insist that only the loss of some extraordinary and transitory gain would suffice to constitute an excusing cause. However, it seems that also the financial condition of the person concerned must be taken into consideration. Hence, for the poor the loss of a small sum might easily cause notable inconvenience and so might reasonably be considered as an excusing cause.¹²⁰

dition of the worker."—*Op. cit.*, p. 179. Cf. Merkelbach, *Summa Theol. Mor.*, II, n. 689; Vermeersch, *Theol. Mor.*, III, n. 802. It may here be pointed out that while occasionally such work could be allowed, habitual labor on Sunday performed merely by reason of notable pay received, cannot be justified.

¹¹⁷ *Theol. Mor.*, Lib. III, n. 332; *Homo Apostolicus*, Tract. VI, n. 22. Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 371, and II, n. 703; Noldin-Schmitt, *op. cit.*, I, n. 160 and II, n. 263; Davis, *op. cit.*, II, p. 65; Vermeersch, *Theol. Mor.*, III, n. 794. Wouters believes that when there is question of avoiding a notable loss in regard to goods already in possession, attendance at Mass could not be demanded. In reference to a notable gain to be made, he states that an individual could use *epikeia*, on the basis of the presumably benign will of the legislator.—Cf. Wouters, *op. cit.*, I, n. 143.

¹¹⁸ A. Berardi, *Praxis Confessariorum* (Faventinae, 1903-1905), I, n. 586.

¹¹⁹ *Op. cit.*, p. 179.

¹²⁰ J. Guiniven, *The Precept of Hearing Mass*, The Catholic University of America Canon Law Studies, No. 198 (Washington, D. C.: The Catholic University of America Press, 1942), p. 146.

Vermeersch¹²¹ observes that if a man were to receive twice his regular day's wages he could consider himself excused from the precept which requires attendance at Mass.¹²²

ARTICLE 9. THE LEGISLATOR'S INTENTION AND THE
NECESSITY OF RECOURSE

The question of recourse is of major consequence in any treatment of *epikeia*. Inasmuch as the present discussion will involve the necessity of distinguishing carefully among various concepts, it is important at the outset that the precise meaning of the terms to be used be clearly set down.

Certitude is defined by St. Thomas as: "Firmness of adherence, on the part of the cognitive faculty, to the thing known."¹²³ One is certain, then, of some truth, when his mind firmly assents to it without fear of error, that is, without fear that the opposite is true.¹²⁴ The note which is common to all certitude is this exclusion of the fear of error. Depending upon the foundation upon which this exclusion is based, certitude is *metaphysical*, *physical*, or *moral*.¹²⁵ "The first is founded on the very essence of things, and hence in absolute necessity. Thus, it is metaphysically necessary that God exist. . . ." ¹²⁶ *Physical certitude* is based upon the constancy of physical laws. Thus, it is physically certain that the sun will rise tomorrow. *Moral certitude* is based upon men's normal and ordinary manner of acting. Thus, with moral certitude one may affirm that

¹²¹ *Theol. Mor.*, III, n. 794.

¹²² As to the case where an employee may receive double pay for work on Sunday, and rest from labor on some other day, Kelly believes that the worker may not consider himself excused from the law. "In such a case the worker is merely receiving one extra day's pay for working on the Sunday than he would receive for working on an ordinary week day, and, as St. Alphonsus says, this does not seem to be an extraordinary gain."—*Op. cit.*, p. 180.

¹²³ *Sent.* III, dist. 26, q. 2, a. 4.

¹²⁴ The definitions and explanations in this section are for the most part dependent upon Vermeersch, *Theol. Mor.*, I, nn. 313-319.

¹²⁵ It is in this connection that St. Thomas states: "Secundum Philosophum certitudo non est similiter quaerenda in omnibus, sed in unaquaque materia secundum proprium modum."—*Sum. Theol.*, II-II, q. 47, a. 9, ad 2.

¹²⁶ Vermeersch, *Theol. Mor.*, I, n. 313.

mothers love their children. In addition to this moral certitude strictly so-called, there is another moral certitude taken in a less proper sense. It usually involves ethical matters, and is the assent which is given to a view that is the only probable view, that is, one supported by grave reasons and opposed by no serious reason.¹²⁷

One has *direct certitude* about a matter when it is demonstrable by proofs or arguments. One has *indirect* or *reflex certitude* about a matter when the certitude arises from the imposition of some superior and anteriorly known principle—for example, “a doubtful law does not oblige,” or, “no one is bound by a law that he does not know.”¹²⁸

That is *probable* which is founded upon grave reasons, that are not, however, apodictical. The reasons are not fully convincing, in the sense that they do not exclude every fear of the opposite. Whereas certitude gives rise to knowledge (*scientia*), probability gives rise to opinion (*opinio*), which is an assent accompanied by some fear that the opposite is true.¹²⁹ *Intrinsic probability* is had when the motive of assent is based upon internal evidence, perceived by the person assenting, whereas *extrinsic probability* occurs when the motive of assent is based upon the authority of learned individuals who have given utterance to their views on the matter in question. If the motives for two opposite opinions are of equal or almost equal weight, the opinions are said to be *equally probable*. If of two opinions one is based upon motives of greater weight, and the other upon motives of lesser weight, the first is said to be *more probable*, and the second *less probable*.¹³⁰

Doubt is a suspension of judgment; there is no assent to either side, either because no sound reason can be found to substantiate

¹²⁷ *Ibid.*, n. 314.

¹²⁸ *Ibid.*, n. 313. The ignorance is to be understood, of course, as being inculpable.

¹²⁹ *Ibid.*, nn. 315, 319. Vermeersch further distinguishes opinions into *opinio plena* where the only fear arises from the intrinsic possibility of the opposite, and *opinio minus plena* where the fear arises from the fact that there are grave reasons to support the opposite view. It is Vermeersch's belief that, according to the modern view at least, *opinio plena* is really certitude taken in a wide sense.

¹³⁰ *Ibid.*, n. 315.

either side (*negative doubt* or *strict doubt*), or because each side is supported by reasons (*positive doubt* or *doubt in a wide sense*).¹³¹

Suspicion is said to be present when one side has more appearance of truth than the other, and yet not to such an extent that the mind assents to it.¹³²

These definitions seem to suffice for the purpose at hand. There is no attempt to deny, however, that some of the terms mentioned are occasionally explained, today as well as in the past, by some authors in a way which differs somewhat from the immediately foregoing. But the discrepancies, at least insofar as they affect the problem which is here being discussed, are not substantial.

A brief digression may here be made, in order to elucidate a point in connection with the opinions of some of the moralists referred to in the first section of this dissertation. Uncertainty as to their views may easily arise by reason of the occasional ambiguity of some authors in their use of the terms "doubt" and "probability." Consideration of this matter was purposely delayed until this point, in order that it might be treated in the light of the foregoing definitions.

In the historical notes and commentary, to which the first part of this dissertation was devoted, it was frequently seen that in regard to a case where "probability" as to the intention (often taken in a wide sense to include both *potestas* and *voluntas*) of the legislator not to bind the subject was present, and at the same time there was an urgent need for action but no opportunity for recourse, some moralists allowed the subject to deviate from the words of the law by using *epikeia*. If in the same circumstances of urgency and impossibility of recourse, there was "doubt" as to the legislator's presumed intention not to urge obligation, theologians generally believed that the conditions necessary for the licit use of *epikeia* were not present, and hence observance of the law as it stood was required. In the presence of "certainty" that the legislator did not intend to include in his law the case at hand, it was usually taught that the law could licitly be disregarded without recourse to a Superior, whether such recourse was possible or not.

¹³¹ *Ibid.*, n. 316.

¹³² *Ibid.*, n. 317.

Now, it would seem from a study of the context, that these theologians, or at least most of them, in thus proposing these views, had in mind distinctions between certainty, probability, and doubt, substantially the same as those explained in the immediately preceding paragraphs of this chapter. Specifically, they considered three types of cases. On one extreme was that case in regard to which the subject was certain that it was not the intention of the legislator to include it in his law. As has been said, most moralists allowed the subject in such a case to deviate from the words of the law without recourse, even if a Superior was easily accessible.

On the other extreme was a case of "doubt." It would seem that theologians considered a doubtful case in this connection to be one in which the subject had some slight reason to believe that the case at hand was not included in the law, insofar as the lawmaker's intention was concerned. But the reason was so slight that he could not give even a hesitating assent to the view based on it.¹³³ At the same time, however, the subject was certain that the written law itself existed, and that the case was included in its words.

However, regarding this interpretation of the meaning of the earlier theologians in speaking of cases of "doubt," there arises a difficulty, from the fact that they asserted that in doubtful cases neither an affirmative nor a negative reply could be given to the question: Does the law bind in the case. How is this assertion to be explained, in view of the fact that the law certainly existed and was known by the subject to exist?

The difficulty is by no means insurmountable if one's attention is centered upon the precise point at issue. That point was not whether the written law existed, nor whether the case at hand was included in its words. Both those facts were presupposed at the outset. The point at issue was this: Considering the intention of the lawgiver *apart from the words of the law*, was the subject now free

¹³³ This is clearly insinuated in the question posed by Catalanus: "Quid faciendum quando causa excusans non attingit probabilitatem, sed interpretans haeret dubius . . ."—*Op. cit.*, Vol. I, Pars I, Quaest. II, Cap. XIV, n. 9. Cf. also the contrast made by Roncaglia between a doubtful case ("*mere dubium sit*") and a probable case ("*ratione vere probabili probetur*").—*Op. cit.*, Vol. I, Tract. III, Quaest. IV, Cap. III.

to transgress the legal formula? In a "doubtful" case, the reason allowing such transgression was slight, tenuous, negligible. The subject could not give even a hesitating affirmative assent to the proposition that he was free. True, on the other hand there may have been no positive indication, apart from the written law itself as it stood, that the lawmaker willed to bind the subject in the case. But the fact was that the existing law did appear to bind him, and the appeal against it to the intention of the legislator was based only on a weak and unsubstantial reason. Consequently, in such circumstances use of *epikeia* was not permissible. The subject could recur to a Superior, or he could comply with the certainly existing legal formula. But he could not licitly deviate from the words of the law.¹³⁴

Between certainty of the intention of the legislator on the one hand, and doubt as to that intention on the other, there lay a third state. Within this sphere should be placed cases of "probability." Again, the point at issue was the same: On the basis of the intention of the legislator, considered apart from the written law, was the subject free to transgress the letter of the law? But the subject now had a solidly probable reason for an affirmative reply. He could give assent to the belief that he was free, insofar as the intention of the legislator was concerned, although there still existed a fear that the opposite opinion might be true.¹³⁵ In such a situation might the subject licitly deviate from the words of the law? It was the almost unanimous opinion of theologians that he might not, if a Superior were accessible. But what of cases of urgency where recourse was impossible, and the matter would not admit of delay? In answering this final question each theologian was more or less influenced by the

¹³⁴ "Dicendum est de casu dubio, in quo judicari non potest probabiliter, an casus comprehendatur sub legis obligatione, necne. In quo sententia communis est, recurrendum esse ad superiorem, si fieri possit, vel si non possit, servandam esse legem. Ita D. Thom. . . . Cajet. et Medin. et Soto . . ."—Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 10. This so-called case of "doubt" appears to be almost equivalent to what is now called a case of negative doubt.

¹³⁵ Thus, Suarez speaks of an individual who judges with probability that the present case is not included in the law, insofar as the legislator's intention is concerned, and adds "etiamsi formidet, vel utrinque habeat rationes probabiles dubitandi."—*Ibid.*, n. 3. This so-called case of "probability" appears to be almost equivalent to what is now called a case of positive doubt.

particular Moral System to which he adhered. (A few brief remarks on the influence of the Moral Systems on the development of *epikeia* will next concern us.)

Before concluding the present discussion two points should be noted. The first concerns a fact in regard to the historical aspect of the question of recourse, of which no mention was made by most of the theologians who contributed to the development of *epikeia*. As has been pointed out, the term *epikeia* was indiscriminately applied by many moralists to the deviation by the subject from a law, the observance of which would be sinful, or excessively difficult, or contrary to the presumed intention of the legislator (though within his power). Cases found in either of the first two categories usually had reference to the legislator's power, in the last to his will. Now, surely in the very nature of things it will be easier for a subject's judgment to be certain in regard to the lawmaker's power, than it will to be certain in regard to his intention.¹³⁶ In point of fact, it will be only infrequently that a subject will have real certainty when there is in question a decision about the legislator's intention to demand or not to demand the observance of a written law, which in justice the lawmaker has power to enforce.

Again, it is important to note that for many theologians discussion of the rules regarding necessity of recourse always concerned cases in which only the power of the legislator was involved. For as has already been shown, some moralists made no reference at all to the possibility of licitly using *epikeia*, except in instances where observance of the law would be sinful or excessively difficult. It is well to keep these observations in mind in any study of the views of theologians in regard to the need of recourse to a Superior.

Continuing the study of *epikeia* as related to the need of recourse to a Superior, we come to a consideration of the question as to what influence the various Moral Systems exerted upon the conclusions of theologians in reference to this point.¹³⁷

¹³⁶ This is clearly implied by Suarez when he states that ordinarily recourse is more necessary in cases where the will rather than the power of the legislator is concerned. Cf. *De Legibus*, Lib. VI, Cap. VIII, n. 9.

¹³⁷ For an explanation of the Moral Systems, cf. Noldin-Schmitt, I, nn. 228 et sq.; Merkelbach, *Summa Theol. Mor.*, II, nn. 77 et sq.; Prümmer, *op. cit.*,

There can be no doubt that the Moral Systems affected the development of the theology of *epikeia*. But it would be very easy to over-exaggerate that influence. Emphasis must not be misplaced. It would be entirely incorrect to try to identify the development of *epikeia* in Moral Theology with the fortunes of any one Moral System. *Epikeia* was discussed by theologians long before the Moral Systems—at least as we know them today—were formulated. As has been pointed out, the use of *epikeia* is based upon the prudent judgment that, by reason of circumstances which have arisen in regard to the case at hand, the legislator did not include it in his law. It is in determining of what weight this judgment must be, that the Moral Systems were sometimes involved.

In cases of certainty there was obviously no need to appeal to the tenets of any Moral System. But in connection with the so-called cases of probability and cases of doubt, the Moral Systems did play a part in the development of the theology of *epikeia*. Normally a Probabiliorist, for example, required greater probability as a basis upon which the judgment of the subject could be formed, than did a Probabilist. For the former, the opinion that it was not the intention of the legislator to include in his law the case in question had to be more probable than the opposite, if *epikeia* were to be used licitly.

Antoine, for example, teaches a very strict doctrine on the point.¹³⁸ According to him, it is permitted to resort to *epikeia* when, to use his own phraseology, it is evident that the law cannot be observed without grave harm, in the presence of which it is certain that the law does not oblige—at least if a Superior cannot be approached. In cases of doubt, if the Superior cannot be reached, the law as it stands must be obeyed, for *in dubio tutior pars elegi debet*. Indeed, it seems to be implied here by Antoine that all cases must be classified either as certain or as doubtful; hence there is no room for a category

I, nn. 337 et sqq.; Aertnys-Damen, *op. cit.*, I, nn. 96 et sqq. For the development of the views of St. Alphonsus in this matter, cf. L. Gaudé, *De Morali Systemate S. Alphonsi de Liguori* (Romae, 1894); Mondino, *Studio Storico-Critico sul Sistema Morale di S. Alfonso M. de Liguori* (Monza, 1911). Cf. also U. Lopez, "Thesis Probabilismi ex S. Thoma Demonstrata," *Periodica*, XXV (1936), 162*-170*.

¹³⁸ Cf. *op. cit.*, Vol. II, Tract. *De Legibus*, Cap. V, Quaest. III.

of probable cases, in which one may deviate from the written law without recourse in time of emergency.

Again, reference may be made to the stringent doctrine of Patuzzi,¹³⁹ to his requirement that for *epikeia* to be used licitly there must be "a firm judgment" that the law does not bind in the case, and to his attack upon what he terms is the doctrine of Viva, which is "false" and which flows "from the false principles of Probabilism."¹⁴⁰

Billuart in discussing *epikeia* is quite evidently a Probabiliorist. For he expresses the opinion that in cases of emergency where recourse to a Superior is impossible, and a doubt as to his presumed intention cannot be dispelled, the words of the law must be obeyed, except if it becomes more probable that the legislator, were he present, would not include the case in the law.¹⁴¹

On the other hand, Equiprobabilists do not seem to insist upon their views insofar as the use of *epikeia* is concerned. St. Alphonsus incorporates the word "probable" into his definition.¹⁴² Marc-Gester-mann-Raus¹⁴³ accept this definition as it stands. So too, Gousset explains *epikeia* as a "probable presumption that the legislator did not wish to bind . . ."¹⁴⁴

Those who subscribe in general to the school of Probabilism carry their views to the solution of the problem as to whether *epikeia* may licitly be used in cases of probability, when recourse is impossible. Mazzotta's position¹⁴⁵ is typical. He states clearly that probability

¹³⁹ Cf. *op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. V-VI. Cf. also Henno, *op. cit.*, Vol. III, Tract. III, Disp. III, Quaest. XIV, Concl. II.

¹⁴⁰ *Ibid.*, Cap. VI, n. 4.

¹⁴¹ *Op. cit.*, Tract. *De Legibus*, Dissert. V, Art. IV.

¹⁴² ". . . est praesumptio saltem probabilis, quod legislator in aliqua rerum circumstantia noluerit obligare."—*Homo Apostolicus*, Tract. II, n. 77. Cf. also *Theol. Mor.*, Lib. I, n. 201. It should be recalled, however, that St. Alphonsus discusses *epikeia* only in relation to cases in which observance of the law would be harmful or excessively difficult. Moreover, it may well be that the word "probable" in the definition signifies "*unice probabilis*," which gives practical certitude. Surely the general principles of Equiprobabilism would seem to demand that the reason for deviating from the law be at least equally probable.

¹⁴³ *Op. cit.*, I, n. 173.

¹⁴⁴ T. Gousset, *Théologie Morale* (ed. 10; Paris, 1855), Vol. I, *Traité de Lois*, Cap. X.

¹⁴⁵ *Op. cit.*, Vol. I, Tract. I, Disp. II, Quaest. IV, Cap. II.

of the benign will of the legislator, where recourse is impossible, suffices to allow a subject to deviate from the letter of the law, even if there is a more probable opinion on the opposite side. On the other hand, in cases of doubt, if the Superior cannot be reached, the words of the law must be obeyed.¹⁴⁶

Finally, many of those who are looked upon as Laxists are characteristically lenient in their views on the use of *epikeia*. Diana,¹⁴⁷ for example, discusses the problem of whether *epikeia* may be used in a case of doubt. He clearly refers to a case where the excusing cause is not substantial enough to result in the formation of a truly probable opinion, for he cites that passage of Suarez¹⁴⁸ which deals with precisely such a case. Both to the opinion which teaches that *epikeia* may be used in such an instance, and to the opinion which denies its lawfulness, Diana accords the note of probability.

Turning aside from the historical aspects of the matter, we come to a discussion of the problem itself, as to when and under what circumstances recourse to a Superior is necessary in order that a subject may deviate from the words of a law. For reasons heretofore adduced, the position has been taken that *epikeia* strictly so-called has reference only to the will, and not to the power, of the legislator. This fact must be clearly kept in mind in this section of the dissertation regarding the necessity of recourse.

A study of the problem seems to lead to the following conclusions:

(1) When the circumstances of a particular case are such that the subject is certain that the legislator willed to exclude it from his law, the subject may licitly use *epikeia*. Recourse will never be necessary. It would seem that this principle is clear, and needs little

¹⁴⁶ Cf. also A. Terillus, *Tractatus Theologicus de Conscientia Probabili* (Londini, 1667), Quaest. 22, n. 83; Quaest. 23, n. 19. Van Hove sees the influence of Probabilism in the opinion of some theologians—apparently reference is made to Vasquez, but specific mention is made of no theologian—that one may deviate from the law on the basis of a probable judgment when the power of the legislator is in question, recourse never being necessary; but when the legislator's will is involved, either the law must be obeyed or the Superior reached. Cf. Van Hove, *De Legibus Ecc.*, n. 276.

¹⁴⁷ A. Diana, *Resolutiones Morales* (ed. 12; Venetiis, 1640), Pars IV, Tract. III, Resol. 23.

¹⁴⁸ Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 10.

if any further explanation. Surely if an individual has true certainty that the legislator does not wish to restrict his subject's liberty in reference to a particular case, it would be unreasonable to maintain that the subject is bound either to follow the words of the law or to recur to a Superior. It is only in virtue of the exercise of the law-maker's legislative authority that the subject is bound by any positive law. If he is certain that, in regard to a particular case, that authority is not being exercised, obviously the subject is free.¹⁴⁹

Now, while the truth of this principle would seem to be indisputable, attention must be called to the fact that its application will be, in the very nature of things, infrequent. For it is evident that it will be only relatively rarely that a subject can attain certainty regarding the presumed will of the legislator not to obligate, when the precept is entirely within his power to enforce. Moreover, in regard to some laws, it may be the will of the legislator to bind until recourse is had. One may not, for example, read a forbidden book, solely on the strength of his knowledge that if he were to approach the Ordinary, he would be granted permission. So too, it is fallacious for a subject to argue that he may licitly disregard the law and neglect recourse, inasmuch as he knows that in practically every instance the Superior when approached, dispenses from the law or grants permission to deviate from it. It is fallacious, not only because the granting of a dispensation is an act of jurisdiction, but also because, as will be explained in a subsequent chapter, both the granting of a dispensation and the conceding of permission imply that the case at hand is included in the law. The individual who wishes to use *epikeia* may do so licitly, only on the basis of a sound judgment that the case is not included in the law.

And yet, rare though the situation will be in which certainty is attained, it should not be thought that it can never occur. For it is sufficient that the certainty required in order to render recourse to a Superior unnecessary, be moral certainty in a wide sense, as described above.¹⁵⁰ Hence, if the opinion that the legislator willed not

¹⁴⁹ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 120, a. 1, ad 3.

¹⁵⁰ Cf. p. 175 *supra*. "Ad licite operandum, sufficit ordinarie certitudo moralis, etiam lata."—Marc-Gestermann-Raus, *op. cit.*, I, n. 37. This statement, made in general, may rightly be applied to the matter here under consideration.

to include in his law the particular case at hand, is the only probable opinion, it may be accepted as morally certain, in a wide sense; *epikeia* may be used; recourse, even if possible, will be unnecessary.

(2) In cases of doubt, that is, where the evidence regarding the presumed intention of the legislator not to include in his law the case at hand, is so unsubstantial that the subject cannot even hesitatingly assent that he is free, *epikeia* may not be used. If recourse is not possible, the law as it stands must be followed, since it is in possession.¹⁵¹ The opposite would seem to be sheer laxism.

As the underlying reason for this opinion, it may be stated that it is never licit to act with a conscience that is practically doubtful.¹⁵² In the case envisioned here, there exists a practical doubt, for the subject is in doubt as to the lawfulness of the act which he here and now wishes to place. In point of fact, he is certain that the case is included in the words of the law. The subject's attitude actually is: "I think that the legislator might have meant . . ." There is not sufficient evidence for him to state: "It is probable that the legislator did mean . . ." For an individual to act contrary to the written law in these circumstances, without attaining even probability as to the moral goodness of the deed, would be to place himself in the proximate peril of transgressing the law,¹⁵³ and to render himself guilty of the misconduct forbidden by the law.¹⁵⁴

If the circumstance of the great need for immediate action, coupled with the impossibility of recurring in a particular case, be urged as a possible objection to this view, it may be pointed out in reply that the principle that one may not act on the basis of a conscience which is practically doubtful, is universal, and that necessity of action and the mere impossibility of reaching a Superior are in themselves of no avail in transforming a practically doubtful conscience into a certain conscience.

¹⁵¹ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 10; St. Thomas, *Sum. Theol.*, I-II, q. 96, a. 6, ad 2; II-II, q. 120, a. 1, ad 3.

¹⁵² Cf. Suarez, *loc. cit.*; Noldin-Schmitt, *op. cit.*, I, n. 224; Lehmkuhl, *op. cit.*, I, n. 121; Jone, *op. cit.*, n. 88.

¹⁵³ Cf. Merkelbach, *Summa Theol. Mor.*, II, n. 89.

¹⁵⁴ Cf. St. Alphonsus, *Theol. Mor.*, Lib. I, n. 22; Prümmer, *op. cit.*, I, n. 330.

(3) If a subject can make a soundly probable judgment that the circumstances of the particular case at hand are such that the legislator willed not to include it in his law, then he may deviate from the words of the law, on the strength of that presumed intention of the legislator—but only when recourse to a Superior is impossible, and when there cannot be a delay until such time as recourse becomes possible.

The first part of this statement is true by reason of the fact that only a law which is known can induce obligation. “No one is bound by a precept, except insofar as he has knowledge of it.”¹⁵⁵ Now, even when it is not certain that the legislator willed to exclude from his law the case at hand, but there is a sound basis for the opinion to that effect, the extent of the law itself (not the words of the law) must be said to be uncertain, to be doubtful. It cannot give rise to that *scientia* which must be present in regard to a law, in order that the law bind.¹⁵⁶

¹⁵⁵ “Nullus ligatur per praeceptum aliquod nisi mediante scientia praecepti.”—St. Thomas, *De Veritate (Opera Omnia, XIV-XV)*, q. 17, a. 3. “*Scientia* in praesenti apud S. Thomam, non sumitur in sensu stricto philosophico de cognitione evidenti deducta ex principiis evidentibus; sed in sensu lato, pro notitia (uti patet ex contextu) seu quacumque *cognitione certa*; nam nemo dicitur aliquid noscere, scire, habere notitiam, qui non sit saltem moraliter certus. Non dicimus, in praecitatis verbis, S. Thomam attingisse quaestionem nostram, aut etiam demonstrasse adagium: lex incerta non obligat; non enim agit de casu quo adest notitia dubii circa praecepti existentiam, sed de casu quo nulla adsit notitia praecepti. Attamen principium generale ex quo argumentatur S. Thomas, etiam valet in casu praecepti dubii, quia notitia dubii non attingit mentem ita quod eam liget. Principium scil.: nullus ligatur nisi mediante scientia praecepti, non solum ostendit necessitatem notitiae legis sed etiam insufficientiam notitiae dubii, quia cognitio dubii humanam mentem non ligat.”—Merkelbach, *Summa Theol. Mor.*, II, n. 92, note 2, pp. 89-90. The ignorance which excuses is, of course, considered to be inculpable.

¹⁵⁶ Cf. Merkelbach, *ibid.*, II, n. 92. Rotarius argues that if the reason excusing from the obligation of the law is “probable and sufficient to induce opinion,” one may use *epikeia* if he cannot reach a Superior—because the precepts of Superiors (he is discussing Religious Superiors) are those of a father and not of a sovereign. Cf. T. Rotarius, *Theologia Moralís Regularium* (Venetiis, 1735), Vol. II, Lib. II, Cap. I, Punct. 12, n. 13. It must be said, however, that the basis for Rotarius’ opinion is entirely too restricted.

Again, the matter may be considered from this point of view. It is essential to the very concept of the law—or at least it is a *conditio sine qua non*—that it be promulgated. Now, if there exists a truly sound opinion (that is, even if it be not certain) that the case at hand is not really included in the words of the law, it cannot be said that the law, insofar as this particular case is concerned, is sufficiently promulgated.¹⁵⁷

Moreover, the certain right of liberty is not required to yield to an uncertain obligation, born of an uncertain law.¹⁵⁸ If the circumstances in the case are such that the subject can form a sound, though not a certain, judgment that the legislator willed not to include the case in his law, surely the subject is not bound to sacrifice his liberty in order to follow the words of the law. Nor can it be said that “the law is in possession.” Such a statement would beg the question. For in a case in which *epikeia* is involved, the point at issue is not whether the law as it stands has ceased. Obviously the verbal legal formula is still in effect, and the case in question is still included in it, if the words alone are considered. The point at issue is whether or not the case at hand actually ever was included in the law, insofar as the will of the legislator is concerned. Given the fact that there is a truly sound probability that it was not, given the fact that there is need of immediate action, given the fact that, by reason of the impossibility of recourse to a Superior, that probability cannot be replaced by certitude, it seems logical that the subject be allowed

¹⁵⁷ Cf. Merkelbach, *Summa Theol. Mor.*, II, n. 92. “Promulgatio est publica et authentica testificatio de existentia legis eiusque denuntiatio facta communitati.”—*Ibid.*, I, n. 226. “Promulgatio scil. *obiectiva* debet in *subiectivam* transire ut eadem lex in actu secundo obliget. . . . Hinc notitia promulgationis *obiectivae* seu legis applicatio est quasi altera promulgatio, scil. *subiectiva*; et a pluribus simpliciter vocatur promulgatio, etiam a S. Alphonso . . .”—*Ibid.*, II, p. 90, note 1. Davis states: “In the case of a real doubt concerning the obligation of a law . . . a solidly probable opinion in favor of personal liberty as against the law is equivalent to invincible ignorance of the law, because, in order to be bound by law, a man must clearly apprehend its manifest obligation here and now.”—*Op. cit.*, I, p. 105.

¹⁵⁸ “Lex incerta non potest directe vi propria obligationem certam imponere: obligatio enim est effectus legis; effectus autem nequit superare virtutem causae.”—Merkelbach, *ibid.*, II, n. 92.

to deviate from the words of the law. To demand otherwise would be to tax human nature unduly,¹⁵⁹ and to place upon men a harsh and heavy burden, seemingly out of accord with that benignity which legislators are presumed to exercise in imitation of the Divine Law-giver.

If the question be raised as to what probability this sound, though not certain, judgment must attain, it may be pointed out that an individual must be guided in this matter by the general principles of the Moral System to which he subscribes. All will agree that the two most widely held systems today are Probabilism and Equiprobabilism. Further to treat of the matter would take us too far afield.

It has been stated that when a subject is not certain as to the presumed intention of the legislator, he may not use *epikeia* if recourse to a Superior is possible. The reason for this latter requirement is quite simple. No individual may justifiably act on the basis of indirect certitude, when it is possible to attain direct certitude. The truth of this principle would seem to be so fundamental to all Moral Theology as to be indisputable.¹⁶⁰ Suarez well states: “. . . it is inordinate to use conjectures, and on account of them alone to abandon the words of a law, when the mind and will of the legislator can be established with certainty.”¹⁶¹ “If recourse is easy . . . the doubt about the benign will of the Superior and consequently about the urgency [i.e., the obligating force of the law] is vincible,” writes Rodrigo; “therefore, either the law must be observed, or the doubt must be repelled through recourse to a Superior, or in some other way . . .”¹⁶²

Only this observation need be made. When it is taught that in cases of probability *epikeia* may not be used if recourse is possible,

¹⁵⁹ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VIII, n. 6.

¹⁶⁰ Cf., e.g., Jone, *op. cit.*, n. 92; Noldin-Schmitt, *op. cit.*, I, n. 224; Vermeersch, *Theol. Mor.*, I, n. 330; Konings, *op. cit.*, I, n. 61.

¹⁶¹ “. . . inordinatum est uti conjecturis, et propter illas solas relinquere verba legis, ubi potest certo constare de mente et voluntate legislatoris.”—*De Legibus*, Lib. VI, Cap. VIII, n. 9.

¹⁶² “Si facilis sit recursus . . . dubium de voluntate benigna Superioris et consequenter de urgentia legis est vincibile; ergo, vel lex est observanda, vel secus dubium deponendum aut per recursum ad Superiorem aut alio modo . . .” —*Op. cit.*, n. 395.

this latter clause must be understood reasonably. That is to say, accessibility to the Superior presupposes no disproportionately grave inconvenience. Here again, as in regard to so many points dealing with *epikeia*, a prudent judgment of what means should be considered ordinary, is required. Obviously the more important the law in question, the more grave is the need of taking steps toward recourse. The easier the possibility of recourse, the more necessary it will be. A negative guide as to what is considered to be the ordinary means to be employed in an effort to reach the Superior, is offered in the decision of the Commission for the Interpretation of the Code, issued on November 12, 1922, relative to Canons 1044 and 1045, to the effect that "it is to be considered that the Ordinary cannot be reached, if recourse to him can be had only by telegraph or telephone."¹⁶³ In fact, one may subscribe to the view of D'Annibale, who states that an encumbrance such as renders recourse to a Superior impossible "will scarcely ever be lacking in places where he who has the power to dispense does not reside."¹⁶⁴

Finally, it may be pointed out that, when it is stated that recourse is necessary, it is not implied that the lawmaker himself must always be approached. Obviously such a requirement would be in most cases impractical. The subject is bound to recur (when recourse is necessary) to that duly authorized Superior who, by declaring what the intention of the legislator is, will satisfy the subject as to whether the case at hand is, or is not, included in the law.¹⁶⁵ Or, in the event that this is impossible, he may dispense the subject, should he see fit to do so, and thus render the subject certainly free of the obligation which arises from the law if, in point of fact, the case at hand is included in the law.¹⁶⁶ It is unnecessary to state except in

¹⁶³ AAS, XIV (1922), 662. (Eng. trans.: T. Bouscaren, *The Canon Law Digest* [Milwaukee: Bruce Publishing Co., 1934-1943], I, p. 502.)

¹⁶⁴ ". . . hujusmodi incommodum, in locis ubi non moratur is qui dispensandi potestatem habet vix unquam deerit."—*Op. cit.*, I, n. 187, note 47.

¹⁶⁵ As to who may authentically interpret Canon Law, and as to the force of authentic interpretation, cf. Can. 17.

¹⁶⁶ In practice the Superior will not usually determine for the subject whether or not the case is included in the law. If good reason exists, he will simply dispense. By this procedure he will avoid the necessity of passing judgment upon the precise point at issue. It is to be noted that Canon 15 allows the

passing, that the statement that "the legislator or Superior is not present" does not mean merely that he is not on the scene. It signifies that he is not accessible, that he cannot be reached.

ARTICLE 10. PRACTICAL POINTS

Before any endeavor is made to illustrate the foregoing principles, this observation should be made. Practically all authors who treat of *epikeia* insist that it may be used only with the greatest discretion and prudence. Arbitrary resort to it would be dangerous, and would open the door to all manner of abuses. Davis, for example, warns that "its use should be prudent and reasonable, since self-interest is apt to mislead us."¹⁶⁷

Similar words of caution are uttered by authorities on civil law. Speaking of the Aristotelian *epikeia*, Allen says: "We are on slippery ground when we speak of doing that for the law which the law has not done for itself. . . ."¹⁶⁸ Clarke states:

Attention must be called here, however, to the common weakness of individuals to consider their own case exceptional. It is sometimes true that exception ought to be made, that needless hardship would result if the rule were applied to his case. But the index to the exception is in the *needlessness* of the hardship, not in the hardship alone. Inconvenience, and even suffering, are sometimes salutary, and involve no injustice. If hardship were a justification for exception to the rule, we should have to permit exceptions even to intrinsically good rules. . . .¹⁶⁹

Another point to which attention must be paid is that an individual who would seem to be justified in using *epikeia*, may often be prevented from doing so, by reason of the fact that deviation from the words of the law would give rise to scandal. Because the supreme law of charity often obliges one to undergo serious inconveniences in

Ordinary to dispense in cases in which a *dubium facti* arises, provided there is question of laws in regard to which the Pope is wont to dispense.

¹⁶⁷ *Op. cit.*, I, p. 188. Cf. also Prümmer, *op. cit.*, I, n. 231; Beste, *op. cit.*, p. 82.

¹⁶⁸ *Op. cit.*, p. 203.

¹⁶⁹ W. Clarke, *The Soul of the Law* (Boston: B. Humphries, Inc., 1942), p. 207, footnote.

order to avoid giving such scandal, one author declares that "it is only in occult cases that the liberty of *epikeia* is complete."¹⁷⁰ It is one thing for a priest to omit the recitation of the Breviary by using *epikeia*; it is quite another to deviate from the law of abstinence in public by resorting to *epikeia*. What is *per se* sufficient reason for deviating from the words of a law may *per accidens* become entirely insufficient.

Because of the danger which, as is generally conceded, is involved in the use of *epikeia*, some theologians¹⁷¹ urge that before one resorts to it, if the matter is of any considerable importance, he should consult some wise and prudent counsellor, and thus, to some extent at least, avoid being a judge in his own cause. (The supposition is, of course, that recourse to a lawful Superior is impossible.) The suggestion seems to be praiseworthy. Certainly its value is not in any way diminished by the remark of one writer,¹⁷² that it is disadvantageous for a person to accustom himself to consult others too much, but that he should form his own conscience by study and reflection, and thus stand on his own opinion in all honesty before God. One may observe in passing that occasions for the licit use of *epikeia* surely will not be so frequent as to cause an individual to form any habit.

Leaving aside, for the moment, mention of the natural law, divine positive laws, and human invalidating laws, (which will be discussed in subsequent chapters) we may conclude that in view of the facts already presented, *epikeia* may be applied to any and to all human laws, provided that there is a sound judgment that the legislator (and in cases where only probability is had, recourse if possible is necessary) willed not to include the cases in question in his law. As has been referred to above, what constitutes this sound judgment will vary in different cases. The gravity of the law, the urgency of the situation, the condition of the subject, the circumstances of the case, the practice of the lawmaker, the method of interpreting laws similar to the one in question—all must be taken into considera-

¹⁷⁰ Cf. "L'Epikie," *L'Ami du Clergé*, XXV, 168.

¹⁷¹ Thus, Prümmer, *op. cit.*, I, n. 231; D'Annibale, *op. cit.*, I, n. 187; Loiano, *op. cit.*, I, n. 140; Tanquerey, *op. cit.*, II, n. 341.

¹⁷² Cf. "L'Epikie," *L'Ami du Clergé*, XXV, 164.

tion.¹⁷³ Dens¹⁷⁴ points out that for the lawful use of *epikeia* there is required at least as grave a reason as is necessary for obtaining a dispensation. Stapf¹⁷⁵ asserts that a much more serious reason is demanded than suffices for the granting of a dispensation. Without entering into a consideration of this question, we may consider the following cases mentioned by theologians.

A student has been given an important assignment which involves the reading of some philosophical or literary work that has been forbidden by the Church. The assignment must be carried out immediately, and there is no time for recourse to a Superior—or recourse has been made in writing, but the answer has not as yet been received. If there is no proximate peril of sinning, for good reason the individual could presume that it is not the intention of the Church to include this case in her law.¹⁷⁶

A prospective convert under instruction by a priest, offers to the priest a forbidden book, in order that he may explain immediately certain difficulties contained therein. The priest believes that it would be ill-advised not to accede to the catechumen's request. He may licitly use *epikeia*.¹⁷⁷

On the day of his first public Mass a newly ordained priest inadvertently breaks his fast. May he apply *epikeia* to the ecclesiastical precept which forbids the celebration of Mass when one's fast has been broken after midnight?

When one considers the circumstances which usually surround such an occasion, it may reasonably be presumed that the Church does not wish to include such a case in her law. It would seem that this solution is possible, even if there would arise from postponement no such serious scandal as to cause a conflict between the ecclesiastical precept on the one hand, and the natural precept which protects an individual's reputation and forbids the giving of scandal,

¹⁷³ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 12.

¹⁷⁴ *Op. cit.*, II, n. 57.

¹⁷⁵ A. Stapf, *Theologia Moralís* (Oeniponte, 1855-1857), Vol. I, § 67, n. 3.

¹⁷⁶ Cf. A. Vermeersch, *De Prohibitione et Censura Librorum* (ed. 3; Romae, 1889), p. 117.

¹⁷⁷ Cf. Vermeersch, *Theol. Mor.*, I, n. 190.

on the other.¹⁷⁸ This same reply seems probable in the case of a deacon who inadvertently breaks his fast on the morning on which he is to be ordained to the priesthood. In the case of a subdeacon who is to receive diaconate, the *ordinandus* should receive the Order, but should not, unless there is danger of grave scandal or infamy, receive Holy Communion.

May the same answer be given in regard to a child who breaks his fast on the morning of his First Holy Communion? (The presumption is that he is seven years of age, and that the fact of the breaking of the fast is not generally known.)

The matter is controverted. Anglin states:

The same inconvenience would not be present . . . as in the instance of a newly ordained priest, and therefore one cannot argue . . . *a pari*. The danger of scandal, or of inconvenience, would be extremely slight on the day of a child's first Communion if for any reason he did not receive. . . . The law of the Eucharistic fast is a very strict law subject to the strictest interpretation and . . . really serious reasons are required before one may rightly consider anyone exempt from it.¹⁷⁹

Jone points out that "some authors allow this [i.e., the use of *epikeia* in regard to the fast] on the occasion of First Holy Com-

¹⁷⁸ Cf. Noldin-Schmitt, *op. cit.*, III, n. 156; Arregui, *op. cit.*, n. 546; Jone, *op. cit.*, n. 511; F. Cappello, *Tractatus Canonico-Moralis De Sacramentis* (Vol. I, ed. 3, 1938; Vol. II, Pars I, ed. 3, 1938; Vol. II, Pars II, 1932; Vol. II, Pars III, 1935; Vol. III, ed. 4, 1939; Taurinorum Augustae: Marietti, Romae: Pont. Univ. Gregoriana), I, n. 513. Merkelbach (*Summa Theol. Mor.*, III, n. 283) states that the milder opinion is held by most theologians with probability. J. Gury-J. Ferreres (*Casus Conscientiae* [ed. 4; Barcinone, 1920-1921], Vol. II, *De Eucharistia*, cas. 20) are inclined to be slightly more strict in the case, but are in substantial agreement with the solution here presented. Anglin points out that "if the fact that he had broken his fast had become known," the priest could not offer Mass, "since the celebration of the Holy Sacrifice of the Mass after people were aware that he had broken the Eucharistic fast, would prove a greater scandal."—T. Anglin, *The Eucharistic Fast*, The Catholic University of America Canon Law Studies, No. 124 (Washington, D. C.: The Catholic University of America Press, 1941), p. 113.

¹⁷⁹ *Loc. cit.*

munion.”¹⁸⁰ Prümmer¹⁸¹ makes the same statement. Merkelbach¹⁸² indicates that many authors believe this view to be probable. Bonzelet declares that “breaking the fast accidentally before . . . first Holy Communion also seems reason enough to disregard the law of fasting before Holy Communion.”¹⁸³

It would seem reasonable to maintain that the mere disturbance of plans, or confusion which would arise in reference to the group, or disappointment on the part of the child or its parents or friends would not be sufficient bases for the use of *epikeia*. On the other hand, if some special circumstance intervenes—for example, the child in question is the only one to receive First Holy Communion and a very large number of friends has gathered, or were the reception of First Holy Communion postponed, the father of the child, a non-Catholic, would take great offense, with possible consequent harm to the child’s Catholic upbringing—the use of *epikeia* would seem permissible.

A priest who has been assigned to offer two Masses on a Sunday or holy day of obligation, inadvertently takes the ablutions at the end of his first Mass. May he use *epikeia* and celebrate the second Mass, if no other priest is available to substitute for him?

It is generally agreed that the mere fact that the faithful could not otherwise hear Mass, is not sufficient reason to allow a priest who is not fasting, to celebrate Mass. This is clear from a decision of the Holy Office given on December 2, 1874.¹⁸⁴ Now, it may be

¹⁸⁰ *Op. cit.*, n. 511.

¹⁸¹ *Op. cit.*, III, n. 204.

¹⁸² *Summa Theol. Mor.*, III, n. 283.

¹⁸³ H. Bonzelet, *The Pastoral Companion* (ed. 9; Chicago: Franciscan Herald Press, 1943), p. 32.

¹⁸⁴ *Coll. P.F.*, n. 1425. The decision also indicates that fear of scandal or wonder by the faithful is likewise insufficient reason. It seems likely, however, that the term “scandal” as here used, refers to *admiratio populi*. It is thus interpreted by Vermeersch, *Theol. Mor.*, III, n. 289. Anglin states: “This answer does not seem to deal with this question as one of legal principle. In other words, it does not imply that the observance of the ecclesiastical law of the Eucharistic fast . . . is a law of a higher order than is the divine law which calls upon men to avoid scandal. The answer is rather concerned with a disputable question of fact, that apparently was assumed in the proposed query . . .

true that since dispensations from fasting are today granted somewhat more liberally than in the past, the law of fasting is probably not so strictly to be interpreted as previously.¹⁸⁵ However, there seems to be no sound reason to suppose that anything less than the danger of real scandal or of serious infamy will render permissible, deviation from the words of the law here under consideration. That is to say, the priest in the case in question may offer Mass only if he prudently judges that the ecclesiastical precept is in conflict with the natural law—and in such a case *epikeia* strictly so-called is not invoked. This in substance seems to be the view of many modern theologians—namely, that Mass may be offered by a priest who is not fasting, only when to omit it would result in the danger of grave scandal or infamy.¹⁸⁶ It would seem to be a prudent judgment that such might usually ensue, when the Mass is to be a public parish Mass, and so the Holy Sacrifice might be celebrated under these circumstances.¹⁸⁷ But the fact remains that it is not in virtue of the use of *epikeia* strictly understood that such will be permissible.

the interpretation of this decision of the Holy Office is that for reasons of scandal and wonderment the second Mass may not be said, simply because with a reasonable effort all scandal and wonderment can be forestalled, when the law of the Church is properly explained to the people.”—*Op. cit.*, p. 109.

¹⁸⁵ Thus, Prümmer, *op. cit.*, III, n. 201. On the other hand, cf. Can. 858, § 1; Can. 247, § 5.

¹⁸⁶ Cf. Jone, *op. cit.*, n. 511; Arregui, *op. cit.*, n. 546; Cappello, *De Sacrament.*, I, n. 512.

¹⁸⁷ Cf. Cappello, *loc. cit.* It is the belief of Anglin that “a changed viewpoint concerning this question of fact has emerged since 1874. In the opinion of the majority of present day theologians and canonists, this danger of scandal is nearly always present in such a case. Hence, they would allow a priest to say a second Mass in these circumstances. . . . There would be a lurking suspicion in the minds of at least some people as to why the priest was not able to celebrate the Holy Sacrifice, unless the priest is so very well known to his people, that he enjoys a reputation among them that is beyond all danger of reproach and suspicion. . . . In practice it pertains to the individual priest to judge according to the accepted principles whether or not he would feel justified in saying a second Mass after having inadvertently broken his fast.”—*Op. cit.*, pp. 109-112.

CHAPTER V

THE RELATION OF *EPIKEIA* TO CERTAIN OTHER CONCEPTS IN MORAL THEOLOGY

ARTICLE 1. THE RELATION OF *Epikēia* TO THE VIRTUES OF JUSTICE, PRUDENCE, AND *Aequitas*

I. *Introductory Notions*

JUSTICE is concisely defined by St. Thomas as "a habit according to which an individual constantly and perpetually wills to accord to each his due."¹ It has three subjective parts—general or legal justice, commutative justice and distributive justice.² It is to be noted, however, that the more immediate division of justice reduces the virtue to general justice and particular justice. Distributive and commutative justice are subdivisions of particular justice.³

¹ ". . . habitus secundum quem aliquis constanti et perpetua voluntate jus suum unicuique tribuit."—*Sum. Theol.*, II-II, q. 58, a. 1.

² Cf. definitions and explanations in Prümmer, *op. cit.*, II, n. 71. A few theologians enumerate a fourth species of justice—vindictive justice. Cf., e.g., F. Schmalzgrueber, *Jus Ecclesiasticum Universum* (Romae, 1843-1845), Vol. I, Dissert. Proem., § 1, n. 11. Cathrein and Hering believe that legal justice is not one of the four cardinal virtues. Cf. V. Cathrein, *Philosophia Moralis* (ed. 17; Friburgi Brisgoviae: Herder & Co., 1935), n. 192; Hering, *art. cit.*, *Angelicum*, XIV, 476.

³ "Moderni auctores solent triplicem distinguere iustitiam: legalem, distributivam, commutativam. Iustitia enim ordinat hominem ad alios. Atque hic ordo ad alios triplex est, scil. partis ad totum, totius ad partem, partis ad partem. Quae quidem divisio facillime intelligitur, sed iam a *Dom. Solo* . . . impugnata est. Virtutes enim non distinguuntur proprie iuxta subiecta, quae ordinant, sed iuxta obiecta formalia, in quae primo et per se tendunt. Iamvero non triplex sed duplex est obiectum formale, in quod iustitia *primo et per se* tendit, scil. aut bonum commune (iustitia legalis) aut bonum privatum (iustitia distributiva et commutativa). Unde *Aristoteles* . . . et post ipsum *S. Thomas* . . . rectius et profundius bimembrem divisionem iustitiae adhibuerunt, scil. in iustitiam generalem seu legalem, et iustitiam particularem."—Prümmer, *op. cit.*, II, p. 66, note 136. It is the opinion of Hering that "iustitia legalis se habet ad iustitiam particularem (commutativam et distributivam) sicut *totum ad partem*, et ponitur non *iuxta* sed *supra* illam, utpote maioris dignitatis sive ratione obiecti quod est bonum commune, sive ratione materiae quae est omnis virtus."—*Art. cit.*, *Angelicum*, XIV, 465.

Inasmuch as *epikeia* is traditionally considered to pertain to legal justice, it is necessary to inquire into this virtue at greater length. But it is well to point out here that it is not the purpose of this dissertation to put forward any thesis on the exact nature of legal justice, or to adhere to any particular theological opinion as to the *materia* of a virtue which one moralist asserts has caused "amazing confusion . . . among many otherwise outstanding scholars."⁴

If there is any point relative to legal justice upon which theologians agree,⁵ it is this: that the end or aim of this virtue is the common good. This is expressly taught by St. Thomas⁶ and is at least implied by Aristotle.⁷ Nor is there any general disagreement as to the subject of this virtue. It is commonly held that the virtue resides both in ruler and in subject—in the former insofar as he commands what is necessary or helpful for the attainment of the common good, in the latter insofar as he obeys what has been commanded for the common good.⁸ As St. Thomas expresses it: "And thus it [i.e., legal justice] resides in the ruler principally and *quasi architectonice*; in the subjects, however, secondarily and *quasi ministrative*."⁹

⁴ Vermeersch, *Quaest. de Iust.*, n. 21.

⁵ ". . . there has been little room for basic disagreement about the nature of either distributive or commutative justice; there has been little else but basic disagreement about the nature of legal justice."—M. Crowe, *The Moral Obligation of Paying Just Taxes*, The Catholic University of America Studies in Sacred Theology, No. 84 (Washington, D. C.: The Catholic University of America Press, 1944), p. 141.

⁶ Cf. *Sum. Theol.*, II-II, q. 58, a. 6; *In Ethica*, Lib. V, Lect. II.

⁷ Ferree states: "The final cause of social justice [with which he identifies legal justice] is the common good. . . . This was implicit in Aristotle, for whom legal justice was the virtue which obeyed the law or saw to it that it was obeyed, and the law, of course, was for the common good."—W. Ferree, *The Act of Social Justice*, The Catholic University of America Philosophical Studies, Vol. LXXII (Washington, D. C.: The Catholic University of America Press, 1942), p. 205.

⁸ Cf. A. Pottier, *De Jure et Justitia* (Leodii, 1900), p. 115.

⁹ "Et sic est [i.e., *justitia legalis*] in principe principaliter et quasi *architectonice*; in subditis autem secundario et quasi *ministrative*."—*Sum. Theol.*, II-II, q. 58, a. 6. Cf. also *ibid.*, q. 60, a. 1, ad 4.

However, a truly vexing and extremely difficult problem arises from the attempt to find the *materia* of this virtue.¹⁰ Most theologians have held that legal justice has no specific *materia*, that its *materia* is the acts of other virtues which it (legal justice) directs to the procuring of the common good.¹¹ That this is, even in modern times, by far the more common opinion is beyond doubt. Thus, Merkelbach teaches that the principal object of this virtue is "the debt of private individuals toward society,"¹² that the secondary object consists in "the acts of all the virtues insofar as they can be ordained to the common good."¹³ Substantially the same doctrine is taught by all the Scholastic moralists and by such modern theologians as Vermeersch,¹⁴ Gury-Ballerini-Palmieri,¹⁵ Waffelaert,¹⁶ Marres,¹⁷ Pottier,¹⁸ Noldin-Schmitt,¹⁹ Prümmer,²⁰ etc. In a recent scholarly monograph the point is thus stated:

Directed as it is to the good life of the society in general, the acts it [i.e., legal justice] elicits are necessarily the acts of other virtues. But it perfects these virtues by directing them to the common instead of private good. In a politically good act, legal justice and the virtue it uses differ only formally; the act is completely the act of each virtue. But legal justice in eliciting the act has informed the subordinate virtue with a higher principle.²¹

¹⁰ A concise account of the controversy as it existed prior to and during his time is given by de Lugo. Cf. J. de Lugo, *De Justitia et Jure (Disputationes Scholasticae et Morales* [Parisii, 1868-1869], V), Disp. I, Sect. IV, nn. 62-63.

¹¹ To corroborate their views many theologians quote St. Thomas, *Sum. Theol.*, II-II, q. 58, a. 5 and a. 6; *In Ethica*, Lib. V, Lect. II.

¹² ". . . debitum privatorum erga societatem."—*Summa Theol. Mor.*, II, n. 253.

¹³ ". . . actus omnium virtutum in quantum ordinabiles ad bonum commune."—*Loc. cit.*

¹⁴ Cf. *Quaest. de Iust.*, n. 46.

¹⁵ Cf. *op. cit.*, I, n. 518.

¹⁶ Cf. G. Waffelaert, *De Justitia* (Brugis, 1886), I, n. 4, note 1.

¹⁷ Cf. P. Marres, *De Justitia* (Ruraemundae, 1888), I, p. 9.

¹⁸ Cf. *op. cit.*, p. 68.

¹⁹ Cf. *op. cit.*, I, n. 274.

²⁰ Cf. *op. cit.*, II, n. 71.

²¹ L. Shields, *The History and Meaning of the Term Social Justice* (Notre

On the other hand, Ferree in a brilliant and closely reasoned work devoted entirely to the endeavor to find a specific act of legal or social justice, maintains that St. Thomas does not exclude the possibility of an immediate and proper act of legal justice.²² He admits that Aristotle does exclude such a possibility, but contends that the Thomistic concept goes beyond the Aristotelian, and introduces a *specific* virtue of legal justice with a *specific* object.²³ Furthermore, St. Thomas, he asserts, leaves open the problem of whether there is a *specific materia* or *specific act* proper to this virtue. It is the thesis of Ferree that in the light of the teaching of Pope Pius XI, it is now clear that legal justice has an immediate and proper *materia*—"the *organization* of operations and things"²⁴—and that the specific act of the virtue consists in the fact that it "*organizes normally* (i.e., according to the social necessities of human nature itself) all external human acts."²⁵

The point is of importance here, not so much for its own sake, but rather insofar as the whole controversy prompts a deeper investigation into the concept of legal justice as taught by Aristotle and St. Thomas and the great Scholastics who followed them. And surely an understanding of the nature of legal justice is indispensable if one is to appreciate the full meaning of such statements as the following:

What creates the problem is that the equitable is just, but not the legally just, but a correction of legal justice.²⁶ *Epikēia*, being a kind of justice, is a part of justice taken in a general sense, as the Philosopher says. Hence it is clear that *epikēia* is a subjective part of justice; and justice is predicated of it before being predicated of legal justice; for legal justice is directed by *epikēia*.²⁷

Dame, Indiana, 1941), pp. 22-23. Cf. also Hering, *art. cit.*, *Angelicum*, XIV, 465. Shields (*op. cit.*, p. 15) believes Hering's article to be "the best exposition of the Thomistic doctrine of legal justice."

²² Cf. Ferree, *op. cit.*, p. 42.

²³ *Ibid.*, p. 31.

²⁴ *Ibid.*, p. 36.

²⁵ *Ibid.*, p. 79.

²⁶ Aristotle, *Nicomachean Ethics*, V, 10.

²⁷ "Epikēia ergo est pars iustitiae communiter dictae, tamquam iustitia quaedam existens, ut Philosophus dicit. . . . Unde patet quod epikēia est pars

Epikeia is a part of justice understood in a general sense, or legal justice.²⁸

It is clear, then, that in order to understand the Thomistic and Scholastic teaching on the relation of *epikeia* to justice, an inquiry into the development of the point from the brief and rather obscure references of Aristotle is essential.²⁹

II. Opinions

Aristotle. It is noteworthy that Aristotle introduces his tract on *epikeia*³⁰ from the point of view of its relation to justice, and no less than four times states his conclusion.

For the equitable, though it is better than one kind of justice (δικαίου τινὸς ὄν βέλτιον), yet is just (δίκαιον), and it is not as being a different class of thing that it is better than the just (τοῦ δικαίου).³¹

. . . the equitable is just (δίκαιον) but not the legally just (κατὰ νόμον), but a correction of legal justice (ἐπανόρθωμα νομίμου δικαίου).³²

. . . the equitable is just (δίκαιον) and better than one kind of justice (βέλτιόν τινος δικαίου)—not better than absolute jus-

subjectiva justitiae; et de ea justitia dicitur per prius quam de legali; nam legalis justitia dirigitur secundum epicheiam.”—St. Thomas, *Sum. Theol.*, II-II, q. 120, a. 2.

²⁸ “Epikeia est pars justitiae communiter dictae seu legalis justitiae.”—Sylvius, *op. cit.*, in II-II, q. 120, a. 2.

²⁹ Inasmuch as practically all theologians accept without qualification the teaching of St. Thomas on the virtue of prudence, it has been deemed advisable to postpone an explanation of this virtue until the doctrine of St. Thomas is considered. With regard to *aequitas* the salient features of this virtue have already been explained in some detail in the presentation of Vermeersch’s teaching on *epikeia*. Cf. pp. 108 et sqq. *supra*; also pp. 225 et sqq. *infra*.

³⁰ *Nicomachean Ethics*, V, 10. It should be noted at the outset that this section of the dissertation inquires into the relation existing between justice and *epikeia*, insofar as the latter term is taken to mean the correction of a law wherein it is deficient due to the universality of its expression. We are not concerned with *epikeia* or equity insofar as it signifies the mitigation of a strict right.

³¹ *Loc. cit.*

³² *Loc. cit.*

tice (οὐ τοῦ ἀπλῶς), but better than the error that arises from the absoluteness of the statement. And this is the nature of the equitable, a correction of law (ἐπανόρθωμα νόμου) where it is defective owing to its universality.³³

It is plain, then, what the equitable is, and that it is just (δίκαιον) and is better than one kind of justice (τίνος βέλτιον δικάιον).³⁴

These quotations definitely establish the fact that in Aristotle's opinion, *epikeia* falls within the genus of justice (δίκαιον). It is equally clear that *epikeia* is not legal justice (κατὰ νόμον), but rather a corrective of legal justice (ἐπανόρθωμα νομίμου δικαίου). Nevertheless, the exact nature of this legal justice which *epikeia* corrects, as well indeed as the exact nature of *epikeia* itself, is not fully clear, and necessitates further analysis.

At the outset of his tract on justice, Aristotle describes this virtue as follows: "We see that all men mean by justice (δικαιοσύνη) that kind of state of character which makes people disposed to do what is just (πρακτικῶι τῶν δικαίων) and makes them act justly and wish for what is just (τὰ δίκαια)."³⁵ He then proceeds to point out a two-fold division of justice—that by which the law-abiding man (νόμιμος) is just, and that by which the fair man (ἴσος) is just.³⁶ It would appear that justice in the first sense (τὸ νόμιμον) is legal or general justice; justice in the second sense (τὸ ἴσον) is particular justice.

Aristotle begins by recognizing two senses of the word. By "just" we may mean (1) what is lawful, or (2) what is fair and equal; these are "universal" and "particular" justice respectively. The first of these meanings is not one which we should naturally assign to the word "just"; it is to be explained partly by the fact that δίκαιος meant originally observant of custom or rule (δίκη) in general. In later Greek, justice tends to be identical with the whole of righteousness. In particular, ἀδικεῖν was the word used in Attic law to express any breach of law. As the defendant in a civil suit is charged with wronging an individual, the prisoner in a criminal case is thought of as wrong-

³³ *Loc. cit.*

³⁴ *Loc. cit.*

³⁵ *Ibid.*, V, 1.

³⁶ *Loc. cit.*

ing the city. Aristotle thinks that the law should control the whole range of human life and enforce, not indeed morality, since it cannot secure that all men shall act "for the sake of the noble," but the actions appropriate to all the virtues; if the law of a particular state does this only partially, that is because it is only a rough and ready adumbration of what law should be. Justice in this sense, that of obedience to law, is thus co-extensive with virtue, but the terms are not identical in meaning; the term "justice" refers to the social character which is implied in all moral virtue but to which the term "virtue" does not call attention.³⁷

For Aristotle legal justice is the whole of virtue considered in its connection with law³⁸ it is "complete virtue, not absolutely however, but in relation to our neighbor. (αὕτη μὲν οὖν ἡ δικαιοσύνη [i.e., τὸ νόμιμον] ἀρετὴ μὲν ἔστι τελεία, ἀλλ' οὐχ ἀπλῶς ἀλλὰ πρὸς ἕτερον)." ³⁹ It is unfortunate that Aristotle does not treat this general justice at greater length. Actually he introduces the concept only to distinguish it from particular justice, for after a few brief remarks about it he drops consideration of it entirely, saying: "The justice, then, which answers to the whole of virtue, and the corresponding injustice, one being the exercise of virtue as a whole, and the other that of vice as a whole, towards one's neighbor, we may leave on one side."⁴⁰ But even from his few brief observations this much at least is clear. Legal justice is essentially intertwined with the acts of all the virtues insofar as they are directed *ad alterum*. Moreover, legal justice necessarily involves obedience

³⁷ W. Ross, *Aristotle* (ed. 3; London: Methuen & Co., Ltd., 1937), p. 209. Vinogradoff also points out that Aristotle insists on the correspondence between νόμιμον and δίκαιον. Cf. P. Vinogradoff, "Aristotle on Legal Redress," *CLR*, VIII (1908), 548.

³⁸ Maurus points out that Aristotle believes that justice is "virtus quaedam perfectissima et universalis, continens omnes virtutes . . . justitia legalis est per quam exercemus actus omnium virtutum in ordine ad bonum commune." Moreover, "justitia legalis et virtus universalis idem sunt, sed differunt ratione et secundum esse. Idem enim habitus, in quantum est perfectio habentis et facit illum bonum, dicitur virtus; in quantum est ad alterum et intendit bonum commune, dicitur justitia legalis."—*Op. cit.*, *In Ethica*, V, 1.

³⁹ *Nicomachean Ethics*, V, 1.

⁴⁰ *Ibid.*, V, 2.

to law.⁴¹ In point of fact, some have held that Aristotle considered it to be identical with obedience.

. . . by *legal justice* Aristotle seems to understand *obedience*, not insofar as it is a special virtue which performs a deed out of regard for a precept, but a general virtue . . .⁴²

Aristotle's concept of legal justice is further complicated by his introduction of another point. In the seventh chapter, the Philosopher distinguishes "natural justice" from "legal justice."

Of political justice (τοῦ δὲ πολιτικοῦ δικαίου) part is natural (τὸ φυσικόν), part legal (τὸ νομικόν)—natural, that which everywhere has the same force and does not exist by people's thinking this or that; legal, that which is originally indifferent, but when it has been laid down is not indifferent . . . and again all the laws that have been passed for particular cases . . . and the provisions of decrees.⁴³

It appears that these three latter categories—things which are originally indifferent but which lose that indifference once laws concerning them are enacted, precepts governing particular cases, and decrees—are subdivisions of legal justice, as distinguished from natural justice. This St. Thomas clearly teaches.⁴⁴

⁴¹ ". . . all lawful acts are in a sense just acts; for the acts laid down by the legislative art are lawful, and each of these, we say, is just."—*Ibid.*, V, 1. The comment of St. Thomas is as follows: "Unde manifestum est quod justus dicitur dupliciter. Uno modo dicitur justus legalis, id est ille qui est observator legis. Alio modo dicitur justus aequalis, qui scilicet vult aequaliter habere de bonis et malis."—*In Ethica*, Lib. V, Lect. I. This connection of legal justice with law is noted also by Grant: "The lawful (τὸ νόμιμον) is simply all that the state has enacted for the welfare of its citizens. Therefore, in one sense, 'justice' means fulfilling all the requirements of law."—*Op. cit.*, II, p. 98.

⁴² ". . . Aristoteles per *justitiam legalem* videtur intelligere *obedientiam*, non ut est virtus specialis, quae affectu praecepti facit opus, sed ut virtus generalis . . ."—Lessius, *op. cit.*, Lib. II, Sect. I, Cap. I, Dub. III, n. 16.

⁴³ *Nicomachean Ethics*, V, 7.

⁴⁴ "Et videtur ponere tres differentias hujusmodi justitiae [i.e., legalis]."—*In Ethica*, Lib. V, Lect. XII. In St. Thomas' opinion the three categories are universal laws, privileges (private laws), and judicial decisions.

It is the opinion of St. Thomas that the legal justice here mentioned (τὸ νομικόν), is simply positive law as differentiated from the natural law.⁴⁵ It is difficult, however, to reconcile this interpretation with the fact that Aristotle clearly states that both natural justice (τὸ φυσικόν) and legal justice (τὸ νομικόν) are parts of political justice (τοῦ πολιτικοῦ δικαίου). It seems that Aristotle's meaning is that political justice (τὸν πολιτικὸν δίκαιον) which, according to Grant,⁴⁶ is "nearly equivalent" to the τὸ νόμιμον of the first chapter of Book Five, may make provision for matters, some of which are necessary and immutable (i.e., τὸ φυσικόν) and others of which are contingent (i.e., τὸ νομικόν). That is to say, positive law may embody the dictates of the natural law, or it may command or forbid acts which are in themselves neither good nor evil.

Moreover, it should be noted that "τὸ νομικόν is not to be confused with τὸ νόμιμον, which is justice expressed in the law, and which is nearly equivalent to πολιτικὸν δίκαιον, containing therefore both the natural and conventional elements."⁴⁷ In other words, τὸ φυσικόν and τὸ νομικόν may be considered to be subdivisions of τὸ νόμιμον.

We may summarize as follows what has been said of Aristotle's teaching on justice. Justice (δικαιοσύνη) is subdivided according as it is the virtue practiced by the "law-abiding" man (related to τὸ νόμιμον —general or legal justice, concerned with the practice of virtue in general considered *ad alterum*), or the virtue practiced by the "fair" man (related to τὸ ἴσον).⁴⁸ The former justice (τὸ νόμιμον or πολιτικὸν δίκαιον) that is, law (ὁ νόμος), may enunciate natural precepts (τὸ φυσικόν) or may provide by positive legislation for matters in themselves indifferent (τὸ νομικόν). These latter may be general precepts, or particular enactments, or decrees.⁴⁹

⁴⁵ "Et ideo hoc convenienter a Philosopho nominatur legale, id est lege positum, quod et illi dicunt positivum."—*Loc. cit.*

⁴⁶ *Op. cit.*, II, p. 126.

⁴⁷ Grant, *loc. cit.*

⁴⁸ *Nicomachean Ethics*, V, 1.

⁴⁹ *Ibid.*, V, 7.

In the light of the foregoing considerations we may now endeavor to solve the question as to Aristotle's meaning in the tenth chapter where, discussing *epikeia*, he states that "the equitable is just (δίκαιον), but not the legally just (οὐ τὸ κατὰ νόμον) but a correction of legal justice (ἐπανόρθωμα νομίμου δικαίου)." ⁵⁰

The following conclusions seem to be warranted. Considering the teaching of Aristotle in the first and tenth chapters, we may state that *epikeia* in some way falls within the genus of justice; for "it is not as being a different class of thing that it is better than the just." ⁵¹ Of the two main divisions of justice, general or legal (τὸ νόμιμον) and particular (τὸ ἴσον) ⁵² *epikeia* corrects only the first (ἐπανόρθωμα νομίμου δικαίου). ⁵³ Consequently *epikeia* is certainly not part of legal or general justice (οὐ τὸ κατὰ νόμον), but is superior to it. ⁵⁴

Proceeding to a consideration of the Philosopher's teaching in the seventh chapter, we are immediately faced with a difficulty. If *epikeia* is a correction of legal justice (ἐπανόρθωμα νομίμου δικαίου), ⁵⁵ and if legal or political justice (πολιτικὸν δίκαιον) is subdivided into natural (τὸ φυσικόν) and legal (τὸ νομικόν), ⁵⁶ it seems to follow that *epikeia* may correct not only the contingent elements of positive law (τὸ νομικόν) but likewise those elements in it which may emanate from the natural law (τὸ φυσικόν). How can this be reconciled with Aristotle's statements that "natural justice everywhere has the same force," ⁵⁷ and that "that which is by nature is unchangeable and has everywhere the same force"? ⁵⁸

⁵⁰ *Ibid.*, V, 10.

⁵¹ *Loc. cit.*

⁵² *Ibid.*, V, 1.

⁵³ *Ibid.*, V, 10. It is difficult to find justification for the opinion of Vinogradoff that *epikeia* acts "as the correction of both [i.e., general and particular justice] according to circumstances."—*Outlines of Historical Jurisprudence*, II, p. 45.

⁵⁴ *Loc. cit.*

⁵⁵ *Loc. cit.*

⁵⁶ *Ibid.*, V, 7.

⁵⁷ *Loc. cit.*

⁵⁸ *Loc. cit.* It may be remarked that these statements seem to exclude any possibility of Aristotle's applying *epikeia* to the natural law.

The answer to this problem seems to lie in the fact that when Aristotle calls *epikeia* ἐπανόρθωμα νομίμου δικαίου he understands τὸ νόμιμον not insofar as it contains elements of the natural law (τὸ φυσικόν), but only insofar as it concerns contingent matters (τὸ νομικόν). Thus to limit Aristotle's meaning of τὸ νόμιμον in its relation to *epikeia* is not arbitrary and unwarranted. In the first place, he himself is clear on the point that "natural justice everywhere has the same force."⁵⁹ Secondly, it is certain that the Philosopher in defining *epikeia* himself explicitly limits τὸ νόμιμον, since he surely does not include in it what he previously describes as "laws that are passed for particular cases"⁶⁰ and "the provisions of decrees."⁶¹ (These it will be recalled are subdivisions of τὸ νομικόν which is itself a subdivision of τὸ πολιτικὸν δίκαιον.) For *epikeia*, since it is the correction of a law which is deficient by reason of the *universality* of its expression, is not concerned with "laws that are passed for particular cases." Nor is it concerned with "decrees" (τὰ ψηφισματώδη), as is evident from Aristotle's own statement: ". . . this is the reason why all things are not determined by law, viz., that about some things it is impossible to lay down a law, so that a decree is needed."⁶²

In short, *epikeia*, falling within the genus of justice (δικαιοσύνη), is a corrective of general justice as expressed in law (τὸ νόμιμον δίκαιον), but only insofar as certain elements of that law are concerned—that is, not matters which are of the natural law, nor particular precepts or decrees, but only what is "originally indifferent but when it has been laid down [by positive enactment] is not indifferent."⁶³

⁵⁹ *Loc. cit.*

⁶⁰ *Loc. cit.*

⁶¹ *Loc. cit.*

⁶² *Ibid.*, V, 10.

⁶³ *Ibid.*, V, 7. It is clear that St. Thomas considers the Aristotelian *epikeia* to correct enactments of this category only. Attention should be paid to the fact that in commenting on this category he makes use of substantially the same terms as in his commentary on the tenth chapter where he discusses *epikeia* formally. "Manifestat justum legale. Et videtur ponere tres differentias hujusmodi just. Quorum prima est: cum universaliter vel communiter aliquid lege imponitur, illud est legale."—*In Ethica*, Lib. V, Lect. XII. "Dicit ergo primo,

The intellectual judgment which precedes the use of *epikeia* is called *gnome* (γνώμη) by Aristotle, and is defined as "the right judgment of the equitable," which leads men to become "sympathetic judges (εὐγνώμονας)." ⁶⁴ In commenting on this passage, St. Thomas points out the necessity of recognizing the distinction between *epikeia* and legal justice. *Justum legale* has reference to ordinary occurrences, and the act of which it is the object is preceded by an intellectual judgment called *synesis*, that judges normal circumstances from general principles. On the other hand, since law in some instances is deficient, *justum legale* must at times be corrected. This is the function of *epikeia*. And the intellectual judgment which precedes the use of *epikeia* is *gnome*. ⁶⁵

Such in brief is the teaching of Aristotle as to the relation existing between *epikeia* on the one hand, and justice and prudence on the other. It is apparent that the Philosopher does not completely solve the problem of the precise position of *epikeia* in the scale of virtues. ⁶⁶ From a positive viewpoint, his teaching simply is that *epikeia* is in some way or other located under the genus of justice,

quod causa quare justum legale indiget directione, est ista: quod omnis lex datur universaliter.—*Ibid.*, Lect. XVI. The use of the word "*omnis*" in no way refutes our contention. For "*omnis*" here refers to all the cases in this category of *justum legale*—not to all the categories. Obviously, the decrees being particular and not universal, and judicial sentences contrasted by Aristotle with universal laws (*Nicomachean Ethics*, V, 10), do not admit of *epikeia*.

⁶⁴ *Nicomachean Ethics*, VI, 11. Ross translates the Aristotelian term simply as "judgment." Cf. *The Basic Works of Aristotle*, p. 1032. Grant (*op. cit.*, p. 178) turns: γνώμη as "considerateness." The word "charitableness" is used by Hatch. Cf. W. Hatch, *The Moral Philosophy of Aristotle* (London, 1879), p. 343.

⁶⁵ "Et dicit quod illa virtus quae vocatur *gnome* . . . nihil est aliud quam rectum iudicium ejus quod est subjectum *epiichiae*."—*In Ethica*, Lib. VI, Lect. IX. It is difficult to comprehend the reason for Grant's statement (*op. cit.*, II, p. 179) that "γνώμη and σύγγνωμη are acts of equity." Actually they are intellectual judgments which precede the use of *epikeia*.

⁶⁶ Grant's observation regarding the fifth book of the *Nicomachean Ethics* is especially applicable to this matter. "It disappoints the reader . . . by seeming to approach questions without absolutely dealing with them."—*Op. cit.*, II, p. 97.

and that it is preceded by an intellectual act called *gnome*. These points are taken up by St. Thomas in a more thorough analysis of the matter which now demands attention.

St. Thomas. Turning to a study of the doctrine of St. Thomas,⁶⁷ we may first consider his teaching as found in the *Commentum in Quattuor Libros Sententiarum*.

. . . *epikeia* differs from legal justice in that it follows the intention of the law in those matters to which the form of the law does not extend. . . . *Epikēia* is joined to legal justice, and is concerned with the same matters, though it does not direct them from the same viewpoint: because legal justice directs them in the written law, but *epikeia* on the basis of the legislator's intention; and although it is more excellent than legal justice it cannot be called a cardinal virtue: both because it is a supplement of legal justice and presupposes it in some way, and because it bears the same relation in a sort of way to every virtue as does legal justice.⁶⁸

It is noticeable immediately that St. Thomas does not clearly determine just what connection exists between *epikeia* and legal justice. *Epikēia* is, of course, a virtue;⁶⁹ it is not identical with legal justice, but is more excellent than legal justice. Yet "*epikeia* is joined to legal justice"—at least insofar as they both are concerned with the same *materia* ("*circa eadem*"). But beyond that, the manner of this association is tantalizingly vague. What is meant, for example, by the statements that *epikeia* supplements legal justice, that it presupposes legal justice, that it "bears the same relation to every

⁶⁷ The brief treatment of this point by St. Albert the Great has already been alluded to, and further discussion need not be introduced here. Cf. pp. 26, 27 *supra*.

⁶⁸ ". . . epieicia . . . differt a justitia legali in hoc quod servat intentionem legis in his ad quae forma legis se non extendit. . . . Epieicia adjungitur legali justitiae, et circa eadem est, quamvis non ex eodem dirigit: quia legalis dirigit in scripto legis, sed epieicia ex intentione legislatoris; et quamvis sit excellentior quam justitia legali, non tamen potest dici cardinalis: tum quia est in supplementum legalis justitiae, et etiam quodammodo praesupponit illam; tum quia est idem omni virtuti aequaliter, sicut et legalis justitia."—*Sent.* III, dist. 33, q. 3, a. 4, sol. 5.

⁶⁹ Cf. also *ibid.*, III, dist. 37, q. 1, a. 4.

virtue in a sort of way as does legal justice," and for those very reasons cannot be called a cardinal virtue?

St. Thomas' commentary on Aristotle's teaching as to the position which *epikeia* occupies in reference to justice may be expounded in his own words:

What is equitable is just, in a way, and is better than another kind of justice; because, as has been said above, justice which is practiced by citizens is divided into natural justice and legal justice: the equitable is better than the legally just but is contained under the naturally just. And thus it is not said that it is better than the just, as if it were of another genus apart from the genus of justice. And although both are good, namely the legally just and the equitable, the equitable is better . . .⁷⁰
 . . . the equitable is the just in a sense, but not the legally just, but a certain direction of the legally just. For it has been said that it is contained under the naturally just from which arises the legally just.⁷¹

. . . the equitable is just, and is better than a certain kind of justice, but not better than the naturally just which is proposed without qualification, that is, universally.⁷²

And therefore in ending, he concludes that it is evident from what has been said, that the equitable is a sort of justice, and is better than the legally just.⁷³

Briefly, as to the nature of *epikeia*, it is a sort of justice ("*est quoddam justum*"; "*est quidem aliquod justum*," "*est quidem justum*," "*est quoddam justum*"). Clearly, however, it is not the legally

⁷⁰ "Id quod est epiiches est quoddam justum et est melius quodam alio justo: quia, ut supra dictum est, justum quo cives utuntur dividitur in naturale et legale: est autem id quod est epiiches melius justo legali sed continetur sub justo naturali. Et sic non dicitur melius quam justum, quasi sit quoddam aliud genus separatum a genere justi. Et cum ambo sint bona, scilicet justum legale et epiiches, melius est illud quod est epiiches . . ."—*In Ethica*, Lib. V, Lect. XVI.

⁷¹ ". . . id quod est epiiches est quidem aliquod justum, sed non est legale, sed est quaedam directio justi legalis. Dictum est enim quod continetur sub justo naturali a quo oritur justum legale."—*Loc. cit.*

⁷² ". . . epiiches est quidem justum et est melius quodam justo, non quidem justo naturali quod simpliciter, idest universaliter proponitur."—*Loc. cit.*

⁷³ Sic ergo epilogando concludit, manifestum esse ex praedictis quod id quod est epiiches, est quoddam justum quod est melius quodam justo, scilicet legali."—*Loc. cit.*

just ("*justum legale*"). This is expressly stated in the second quotation. Moreover, it is better and nobler than the legally just. This point is made explicitly in three of the above quotations. It is, furthermore, a direction of the legally just ("*directio justis legalis*"). Moreover, the legally just here treated is identical with positive law (*jus positivum*).⁷⁴ This is evident from its being distinguished in the first quotation from the naturally just ("*justum naturale*"). Finally, *epikeia* may function because positive law is enacted *universaliter*. This is clear from St. Thomas' words: ". . . the reason why the legally just needs direction is this—that every law is enacted *universaliter*."⁷⁵

Now, if reference be made to the conclusions drawn directly from the consideration of Aristotle's text,⁷⁶ it will be found that they are practically identical with these here listed. In other words, St. Thomas has refrained from introducing into his commentary any element not found in the Aristotelian text.

There is, however, one exception. In three of the above quotations express mention is made of the naturally just ("*justum naturale*"). Twice it is stated that "the equitable is contained under the naturally just"; in the third quotation it is taught that "the equitable . . . is better than a certain kind of justice, but not better than the naturally just." This insistence on the fact that *epikeia* is intimately connected with the natural law is not found in Aristotle's treatment of the matter.

If the doctrine of St. Thomas as found in the *Summa Theologica* be studied, a much more satisfactory solution to the problem of the relation of *epikeia* to justice presents itself. Such a study will bring to light these facts.

In the first place, *epikeia* falls within the genus of justice, and is a part of "justice taken in a general sense."

. . . virtue has a three-fold part: a subjective part, an integral part, and a potential part. The subjective part is that of which the whole virtue is essentially predicated: and it is less. This

⁷⁴ *Jus positivum* here concerns matters which are indifferent in themselves; it is not a re-statement of precepts of the natural law.

⁷⁵ ". . . causa quare justum legale indiget directione est ista: quod omnis lex datur universaliter."—*Loc. cit.*

⁷⁶ Cf. p. 205 *supra*.

occurs in a two-fold way: sometimes a thing is predicated of several in the same way, as animal is predicated of horse and ox; sometimes it is predicated of one primarily and of the other secondarily, as being is predicated of substance and accident. *Epikeia* therefore is a part of justice taken in a general sense, and is a kind of justice, as the Philosopher states. Hence it is clear that *epikeia* is a subjective part of justice; and of it justice is predicated prior to its being predicated of legal justice; for legal justice is directed by *epikeia*. Hence *epikeia* is, as it were, a superior rule of human actions.⁷⁷

Secondly, *epikeia* corresponds to legal justice. Such is the clear assertion of St. Thomas: “. . . *epikeia* corresponds properly to legal justice . . .”⁷⁸

And so, from St. Thomas' words one is justified in drawing the following conclusions. *Epikeia* is a part of “justice taken in a general sense,” bearing to it a relation similar to that of species to genus. Legal justice is likewise a part of “justice taken in a general sense,” and bears the same relation to it as does *epikeia*. However, “justice taken in a general sense” is not predicated of both in the same way, but rather is predicated analogously of them (“*secundum prius et posterius*”); that is, “justice taken in a general sense” is more perfectly realized in *epikeia* than in legal justice. In brief, then, “justice taken in a general sense” predicated *secundum prius et posterius*, may be considered to be a genus having as species both *epikeia* (*prior*) and legal justice (*posterior*).

Now these conclusions drawn from St. Thomas' own words must be harmonized with the statements in the following passage:

77 “. . . virtus aliqua triplicem habet partem, scilicet partem subjectivam, partem integram et partem potentialem. Pars autem subjectiva est de qua essentialiter praedicatur totum: et est minus. Quod quidem contingit dupliciter: quandoque enim aliquid praedicatur de pluribus secundum unam rationem, sicut animal de equo et bove; quandoque autem praedicatur secundum prius et posterius sicut ens praedicatur de substantia et accidente. Epicheia ergo est pars justitiae communiter dictae, tamquam justitia quaedam existens, ut Philosophus dicit. . . . Unde patet quod epicheia est pars subjectiva justitiae; et de ea justitia dicitur per prius quam de legali; nam legalis justitia dirigitur secundum epicheiam. Unde epicheia est quasi superior regula humanorum actuum.”—*Sum. Theol.*, II-II, q. 120, a. 2.

78 “. . . epicheia correspondet proprie justitiae legali . . .”—*Ibid.*, ad 1.

. . . *epikeia* corresponds properly to legal justice, and in one way is contained under it, and in another way exceeds it. For if legal justice signifies that which obeys the law whether as regards the words of the law or as regards the intention of the lawmaker which is more important, then *epikeia* is the more important part of legal justice. If, however, legal justice signifies only what obeys the law according to the words of the law, then *epikeia* is not a part of legal justice, but is a part of justice taken in a general sense, and is condivided with legal justice and exceeds it.⁷⁹

These words indicate: first, that *epikeia* is “contained under” legal justice, if the latter term be understood to signify obedience to law “whether as regards the words of the law or as regards the intention of the lawmaker”; secondly, that *epikeia*, being concerned with the intention of the legislator, is not a part of legal justice, if legal justice be understood to mean obedience to law only insofar as the words of the law are concerned; and finally, that in this latter hypothesis both *epikeia* and legal justice are parts of “justice taken in a general sense.”

The statements made in this passage of the *Summa Theologica* can be reconciled with those previously quoted if it be kept in mind that the term “legal justice” is used here in two very different senses. Understood as the virtue which inclines one either to comply with the words of law or to act in conformity with the legislator’s intention, “legal justice” and “justice taken in a general sense” are identical. Of this “legal justice” *epikeia* is a species. When, however, “legal justice” is taken to mean observance of the words of the law only, *epikeia* is a species of “justice taken in a general sense.”⁸⁰

⁷⁹ “. . . epicheia correspondet proprie justitiae legali, et quodammodo continetur sub ea, et quodammodo excedit eam. Si enim justitia legalis dicatur quae obtemperat legi sive quantum ad verba legis, sive quantum ad intentionem legislatoris, quae potior est, sic epicheia est pars potior legalis justitiae. Si vero justitia legalis dicatur solum quae obtemperat legi secundum verba legis, sic epicheia non est pars legalis justitiae, sed est pars justitiae communiter dictae, divisa contra justitiam legalem, sicut excedens ipsam.”—*Loc. cit.*

⁸⁰ Lumberras, apparently basing his doctrine on this passage of St. Thomas, teaches that, as to particular justice two species are assigned (distributive and commutative), so also to legal justice—one species being that which seeks the

Here in the *Summa Theologica*, then, is to be found the mature mind of St. Thomas as to the position of *epikeia* as a virtue, and its relation to justice. The vague statements to the effect that *epikeia* is a "sort of justice," as found in his commentary on the *Nicomachean Ethics*,⁸¹ and that "it is associated with the legally just," as found in his *Commentum in Quattuor Libros Sententiarum*,⁸² yield to the definitive expression of the Angelic Doctor's view—namely, that legal justice which concerns obedience to positive law, whether as regards the words of the law or the intention of the law-maker, may be subdivided *secundum prius et posterius* into two subjective parts, the more important being *epikeia* (observance of the legislator's intention *praeter verba legis*), the other being legal justice (observance of the words of the law only).

In seeking the relation between *epikeia* and prudence according to St. Thomas, one must keep in mind the more salient features of his teaching on prudence in general.

Prudence may be defined as "the right plan of things to be done."⁸³ It pertains to the practical rather than to the speculative reason.⁸⁴ Its proper act is the act of commanding.⁸⁵ It has three potential parts—*eubulia* which is the habit of seeking wise counsel to find means for the attainment of the end, *synesis* which is the habit of judging rightly about what is to be done in accordance with the ordinary rules and laws, and *gnome* which is the habit of judging rightly according to higher principles as to what must be done outside the ordinary law (*praeter legem communem*).⁸⁶

It will be seen immediately that *gnome* is in some way connected with *epikeia*. A further study of this concept in the *Summa Theologica* bears out this impression. St. Thomas teaches that it some-

common good according to ordinary rules, and the other (*epikeia*) being that which seeks the common good according to a higher norm. Cf. P. Lumberras, *De Justitia* (Romae: Pontif. Inst. Internat. "Angelicum," 1938), n. 22.

⁸¹ *In Ethica*, Lib. V, Lect. XVI.

⁸² *Sent.* III, dist. 33, q. 3, a. 4, sol. 5.

⁸³ ". . . recta ratio agibillium."—St. Thomas, *Sum. Theol.*, I-II, q. 57, a. 4.

⁸⁴ Cf. *ibid.*, II-II, q. 47, a. 2.

⁸⁵ Cf. *ibid.*, a. 8.

⁸⁶ Cf. *ibid.*, q. 48, a. unic.

times happens that circumstances demand a mode of action which is outside the general law. Thus, for example, a thing deposited is not to be returned to its owner if he plans to use it as a weapon against his country. Such judgments are made according to a higher law, according to higher principles than are the usual judgments as to what must be done in accordance with the law, no extraordinary circumstances intervening. And to judge according to these higher principles, a higher virtue than *synesis* is demanded—namely *gnome*.⁸⁷

In the light of this teaching, the relation between prudence and *epikeia* becomes clear. *Gnome*, being a part of the virtue of prudence, exists in the intellect, whereas *epikeia*, being a part of the virtue of justice, resides in the will. And it is *gnome* as an intellectual judgment that precedes and directs *epikeia*.⁸⁸

Period from St. Thomas to Suarez. The teaching of St. Thomas on the relation of *epikeia* to justice and to prudence has influenced succeeding moralists to such an extent that little positive deviation from his doctrine is discernible among those theologians who discuss the point. This influence is seen as far back as the time of Astesanus⁸⁹ who repeats almost *verbatim* the doctrine of St. Thomas on the relation of *epikeia* to justice, as found in the *Summa Theologica*.

However, most theologians in dealing with *epikeia* simply treat it from the point of view of its function, and make no reference to its relation to justice or prudence. Others, though asserting that *epikeia* pertains to justice, and calling upon the authority of St. Thomas to confirm their stand, fail to indicate its precise connection with this virtue. In point of fact, by the clause "pertains to legal justice," there is meant, it would appear, merely that the function of *epikeia* is the correction of legal justice, and in this way obviously it pertains to legal justice. But the more fundamental point that it

⁸⁷ "Praeter synesim virtutem bene judicativam de agendis secundum quaedam universalia principia, est *gnome* virtus judicativa de agendis praeter communia principia."—*Ibid.*, q. 51, a. 4.

⁸⁸ Cf. also *ibid.*, q. 80, a. unic., ad 4; Cajetan, *op. cit.*, in II-II, q. 120, a. 2.

⁸⁹ Cf. F. Astesanus de Asta, *Summa Astensis* (Romae, 1728), Vol. I, Lib. II, Tit. XXXI.

may be a subjective part of legal justice they seem to avoid. Finally there are several theologians whose teaching on the relation of *epikeia* to justice and prudence contains special features worthy of study.

Reference has already been made ⁹⁰ to the insistence of *St. Antoninus*, that consideration be given this virtue not merely from the point of view of reason, but more particularly from that of revelation. Furthermore, it was noted above that *aequitas*, according to *St. Antoninus*, consists in "a congruous application of laws," "a due exchange of things," and "a proportionate participation of goods." ⁹¹

Regarding the first category, *St. Antoninus* teaches that *aequitas* in this sense is "a virtue inspired and given by God." ⁹² He makes no allusion, however, to any possible relation with other virtues. Moreover, he applies this *aequitas* both to private individuals, who are subjects of the law, and to judges "who use mercy in imposing punishment." ⁹³

When he considers *aequitas* in the second sense, ⁹⁴ *St. Antoninus* states explicitly that it pertains to commutative justice. Obviously, he here refers to the equality which should exist between parties to contracts and such like. And so, the term *aequitas* is used here in a very broad sense.

Finally, *aequitas* applied to the third category does indeed pertain to justice. ⁹⁵ However, this seems to be an example not of *epikeia* which *St. Thomas* lists as a subjective part of legal justice, but rather of the special virtue of *aequitas* which, in *Vermeersch's* opinion, is a potential part of justice. ⁹⁶

Vasquez believes that *epikeia* and *gnome* differ "in little or no way." ⁹⁷ As to the precise distinction between them, he has an

⁹⁰ Cf. pp. 54 et sqq. *supra*.

⁹¹ ". . . congrua applicatione legum . . ."; ". . . rerum debita commutatione . . ."; "bonorum proportionata participatione . . ."—*Op. cit.*, Pars IV, Tit. V, Cap. XIX.

⁹² *Loc. cit.*

⁹³ *Loc. cit.*

⁹⁴ *Loc. cit.*

⁹⁵ *Loc. cit.*

⁹⁶ Cf. *Vermeersch, Quaest. de Iust.*, nn. 481 et sqq.

⁹⁷ *Op. cit.*, in I-II, Disp. 176, Cap. I, n. 5.

unusual opinion. He states that *epikeia* is the emendation of a law *praeter communem regulam* in a case in which it is prudently judged that the law does not oblige; whereas *gnome* is "*epikeia* or *aequitas* exercised in the act of pardon."⁹⁸ Thus, a ruler who chooses not to punish a disobedient citizen exercises *gnome*, and "*epikeia* occurs in this way even without an emendation of law."⁹⁹

Suarez. Suarez¹⁰⁰ adverts to the fact that Aristotle makes *epikeia* a special virtue, a part of justice. But he immediately expresses the belief that to consider it a special virtue is unnecessary. *Epikieia* is both a judgment of the intellect and an act of the will obeying this judgment and acting contrary to the words of the law. Now, each of these two elements, according to Suarez, falls into the category of some already existing virtue, and hence there is no need to appeal to a new virtue.

The intellectual factor, if *epikeia* be considered as existing in the ruler, is simply an act of regal prudence. Insofar as it exists in the subject of the law, it is simply a judgment of ordinary prudence ("*judicium communis prudentiae*"), a judgment which Aristotle calls γνῶμη. Furthermore, it involves no special difficulty (this element would be essential for the constituting of a special virtue), and hence there exists no reason why there should be a special virtue.

Before we continue with the study of Suarez' concept of *epikeia* insofar as it involves the will, several important points should be noted. First of all, in considering that *epikeia* in itself has an essential intellectual element, Suarez differs radically from St. Thomas. For the latter, *epikeia* as a part of justice, definitely resides in the will and not in the intellect. Preceding the use of *epikeia* is a judgment of the intellect, to be sure, but this judgment pertains to an entirely different virtue.

Secondly, it may be pointed out that Aristotle does not consider

⁹⁸ *Loc. cit.*

⁹⁹ *Loc. cit.* Whatever may be thought of the validity of this explanation insofar as it touches upon prudence and *gnome*, at least it indicates clearly that Vasquez sees a distinction between emendation of a law and leniency in imposing punishment, and that he tries to make allowance for the difference by positing the existence of distinct virtues—however little they may differ.

¹⁰⁰ *De Legibus*, Lib. VI, Cap. VI, n. 5.

the intellectual factor of *epikeia* to be a judgment of ordinary prudence. Rather, he defines it as "the right judgment of the equitable."¹⁰¹ And, as has been seen, the equitable has reference to exceptional cases in which one does not follow the words of the law but acts contrary to them, inasmuch as the law is deficient by reason of the universality of its expression.¹⁰²

Epikeia, insofar as it is an act of the will, does not pertain to any one virtue, according to Suarez, but can vary—the basis for the difference being the *materia* involved, and the motive underlying the action of the agent.¹⁰³ In the ruler, the judgment of *epikeia* may be followed by an act of the will to interpret the law in this or that way for the common good. Such an act will pertain to legal justice, because *per se* legal justice is ordained to the common good. Or again, the act of the will may pertain to commutative justice, if it proceeds from a motive of not overburdening the subject, contrary to the equity due him.

Though maintaining that his view on this point is entirely consistent with that of Aristotle, Suarez realizes that it gives rise to a difficulty as to the meaning of the Philosopher in stating that *epikeia* is better than legal justice. This assertion must be understood relatively, Suarez contends. He explains that by *justam legale* Aristotle means that which consists in the observing or imposing of the law. Now, in a particular case where imposition of the obligation of the law would be unjust or excessively rigorous, *epikeia* is preferable to legal justice. Absolutely speaking, however, one cannot say that it is less just to enact a law than it is to admit, through *epikeia*, an excuse for not obeying the law. In point of fact, the former requires greater prudence and a more universal justice.

With regard to the act of the will in the subject of the law,¹⁰⁴ Suarez contends that the intellectual act of prudence, above described, cannot give rise to a proper act of justice in the will, because from

¹⁰¹ *Nicomachean Ethics*, VI, 11.

¹⁰² *Ibid.*, V, 10. This interpretation of Aristotle clearly coincides with St. Thomas' understanding of the Philosopher on this point. Cf. St. Thomas, *In Ethica*, Lib. VI, Lect. IX.

¹⁰³ *De Legibus*, Lib. VI, Cap. VI, n. 6.

¹⁰⁴ *Loc. cit.*

the recognition of the lack of obligation of a law there does not necessarily ensue an act of justice. There may follow an act of any virtue at all, dependent upon the *materia* in question. Thus, if the *materia* be concerned with temperance, the act of the will will pertain to temperance, or if the *materia* be concerned with justice, the act of the will will pertain to justice. But *per se* the volitional act which follows the judgment of *epikeia* need not involve justice. Nevertheless, Suarez admits that *in universum* an act which is performed through the use of *epikeia* can subserve general or legal justice—namely, when an individual acts in a certain manner precisely because by so doing he does not deviate from the intention of the lawgiver nor from what is equitable. Moreover, in this way also the virtue of obedience may intervene—when the agent posits an act because it is in accordance with the tacit will of his Superior, or at least because he is impelled by some other good motive not contrary to obedience.

Lessius. Lessius, like Suarez, maintains that very probably *epikeia* is not a separate virtue distinct from the other virtues—or at least that such a virtue is not necessary.¹⁰⁵ He bases his opinion on the fact that *epikeia* has place in every class (*genus*) of law, and may be concerned with the *materia* of any or all virtues. It has no peculiar *ratio formalis* (“such as obedience which everywhere is concerned with what is due by reason of a precept, and legal justice which is concerned with what is due toward the State on the part of a citizen”¹⁰⁶). Rather, it concerns “different formalities of the morally good (on account of which it deviates from the words of the law) in different matters, even in different cases regarding the same law.”¹⁰⁷ Moreover, Lessius argues that when literal observance of the law would offend some virtue due to the law’s universality of expression, the virtue itself is sufficient to justify deviation from the words of the law, provided that the judgment is directed by prudence. The conclusion is that there need be no special virtue of *epikeia*,

¹⁰⁵ *Op. cit.*, Lib. II, Cap. XLVII, Dub. IX.

¹⁰⁶ “. . . sicut obedientia quae ubique intuetur debitum praecepti, et justitia legalis quae debitum civis erga Rempubicam.”—*Loc. cit.*

¹⁰⁷ “. . . diversas rationes honesti (ob quas a verbis legis recedit) in diversis materiis, immo in diversis casibus circa eandem legem.”—*Loc. cit.*

for it is sufficient that there be exercised first, the virtue of prudence, and secondly, the virtue which would have been violated if the words of the law had been followed literally. From this conclusion there flows the corollary that there is no real, but only a rational distinction between *aequitas* and the other virtues, because each virtue has a *ratio aequitatis* insofar as it may be exercised "contrary to the words of the law, for the sake of its own proper moral goodness."¹⁰⁸

Obviously this opinion seems to be in conflict with that of Aristotle, wherein the Philosopher maintains that *epikeia* falls within the genus of justice.¹⁰⁹ Lessius, recognizing this divergence, admits that *aequitas* is a sort of justice ("*quaedam justitia*"),¹¹⁰ that if legal justice be understood as a virtue which satisfies either the words of the law or the intention of the legislator, *aequitas* is a part of legal justice, and that if legal justice be taken for the virtue which satisfies only the written law, *aequitas* is more excellent. But from these facts it does not follow, he maintains, that in Aristotle's opinion *aequitas* is one virtue. The fact is, argues Lessius, that the legal justice of Aristotle is not one virtue, but is identified with each virtue insofar as it satisfies the law.

However, Lessius does not insist upon his opinion with the same emphasis as does Suarez. Lessius teaches that, as obedience is constituted a separate virtue because it concerns especially a precept expressed in words, so too *aequitas* could be constituted a separate virtue in that it concerns the tacit intention of the lawmaker. Hence, if an individual were to act contrary to the words of the law from the motive of obedience to the tacit intention of the legislator, *aequitas* as a special virtue would come into play. Such, he says, is the meaning of St. Thomas when he asserts that *epikeia* is a separate virtue which is better than legal justice,¹¹¹ (legal justice being, according to Lessius, identical with obedience). In like manner Aristotle can be explained. And thus understood, *aequitas* may be considered as a virtue inclining one to deviate from the words of the

¹⁰⁸ ". . . contra verba legum ex affectu propriae honestatis."—*Loc. cit.*

¹⁰⁹ Cf. *Nicomachean Ethics*, V, 10.

¹¹⁰ *Loc. cit.*

¹¹¹ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 120, a. 2.

law when, due to the universality of its expression, the law is deficient—a deviation undertaken in order that the individual may conform himself to the intention of the legislator.

Lessius contends, then, that if *aequitas* is to be considered a special virtue, the motive—conformity to the tacit will of the lawmaker—is all-important and essential. This virtue will then be annexed to justice in almost the same way as obedience. For just as the latter satisfies the law by conformity with its words, so *aequitas* satisfies the intention of the legislator by deviating from the words of the law.

Nevertheless, it must be admitted, asserts Lessius, that the presence of this motive in the agent is verified in few instances, for usually when an individual acts contrary to the words of the law in this way, he does not do so principally in order to conform himself to the intention of the lawmaker, but rather in order not to offend some virtue. Hence it is that usually the use of *aequitas* involves no separate virtue. And yet, although a separate virtue is not necessary, concludes Lessius, it is useful, so that, impelled by this virtue, the nobility of one's act may be enhanced.¹¹²

Sylvius. Sylvius¹¹³ follows closely the teaching of St. Thomas on the position of *epikeia* among the virtues, but he goes into greater detail in establishing that *epikeia* is a separate virtue. It is such, he maintains, because it has a special object and involves a peculiar difficulty. The former point is proved by the fact that its object is the common good—to be attained, however, not by any means whatever, but rather by a special method, namely, by acting contrary to the words of the law in certain particular cases. And since in such cases, even learned men, prompted by an excessive zeal for the written law, have a tendency to adhere to too great an extent to

¹¹² In view of this extended treatment by Lessius purporting to show that *epikeia* is not a separate virtue, it is not a little surprising to find the following statement in an earlier section of his work: “. . . sicut ἐπιείκεια se habet ad iustitiam, ita γνῶμη se habet ad prudentiam. Est igitur pars potentialis Prudentiae . . .”—*Op. cit.*, Lib. I, Cap. II, Dub. III, n. 15. Possibly in this passage Lessius considers *epikeia* to be a deviation by an individual from the words of the law precisely in order to conform himself to the intention of the legislator.

¹¹³ *Op. cit.*, in II-II, q. 120, a. 1 and a. 2.

the words of the law, it is clear that to act contrary to the written law involves a special difficulty.¹¹⁴

Mayol. Mayol, analyzing St. Thomas' explanation of the relation of *epikeia* to justice, affirms¹¹⁵ that the basis for the division of legal justice (understood as *justitia communiter dicta*) into *epikeia* and legal justice (understood as that which follows the words of the law only) is the fact that law has a two-fold end: one intrinsic and immediate which the legislator directly has in mind, and the other extrinsic and mediate, but more important. It is this extrinsic end which the lawmaker ultimately and principally intends. Thus, for example, a law is enacted forbidding that the gates of a city be opened in time of war, lest the enemy rush in and occupy the city. This final clause represents the intrinsic and immediate end of the law. But the remote and principal end is the safety and security of the state which would be endangered by the invasion of the enemy. Mayol believes that legal justice as such (that is, *justitia communiter dicta*), is concerned with both these ends; it is not restricted to either one of them. *Epikeia*, however, is concerned only with the remote end of the law as its proper object. The safety and security of the state are the rule and measure according to which a judgment must be made as to whether at a given time the enemy is to be resisted, or allowed to enter the city, in order that, by this latter action, for example, the onrushing foe may be subjected to an unexpected counter-attack and defeated. Finally, legal justice, "so called by authors because of a paucity of terms" (the reference is to that legal justice which observes the words of the law only) is concerned only with the proximate end of the law and the literal signification of the words in which it is expressed.

From this explanation it follows that the latter legal justice attains the common good through ordinary laws and regulations. *Epikeia*, on the other hand, does so *praeter regulas communes*, by resorting to higher principles, and thus following the will of the legis-

¹¹⁴ The same explanation is given by Billuart. Cf. *op. cit.*, Tract. *De Caeteris Virtutibus Justitiae Annexis*, Dissert. III, Art. IX.

¹¹⁵ J. Mayol, *Summa Moralis Doctrinae Thomisticae circa Decalogum* (Found in J. Migne, *Theologiae Cursus Completus* [Parisiis, 1863-1866], XIV), *Praelogium de Justitia et Injustitia*, XIV, 443.

lator rather than the words of the law. Furthermore, as Mayol is careful to point out,¹¹⁶ the act of following the legislator's intention contrary to the words of the law involves greater difficulty than that of acting in conformity with the written law.

La Croix. The theologian La Croix¹¹⁷ takes up the Suarezian idea of the identity of prudence and *epikeia* considered in its intellectual aspect, but leaves aside entirely the volitional element. For him, *epikeia* is an act of prudence. It consists essentially and exclusively in the judgment that the words of the law are not here and now to be followed. Obviously, this is but carrying the theory of Suarez¹¹⁸ to a logical outcome. For if *epikeia*, as an act of the will, can in every case be reduced to the category of some other virtue with which it coincides without even an accidental modification, then no special consideration at all is due to this concept in Moral Theology. La Croix, then, is logical in recognizing the uselessness of introducing a volitional element, if immediately *epikeia* must be classified as some other virtue. He is likewise logical in reducing *epikeia*, insofar as its intellectual aspect is concerned, to an act. For if, on the assumption that the Suarezian premises are true, *epikeia* is simply a judgment similar to any other judgment, then it is far less logical to insist on terming *epikeia* a virtue than to abandon it entirely, and simply to refer to it as an act of the virtue of prudence. And this is precisely what La Croix does.

Patuzzi. Subscribing to the doctrine of St. Thomas on this point, Patuzzi¹¹⁹ insists on the necessity of the virtue of *epikeia*. He holds that since human laws cannot be so constituted as to be in no case or no way deficient, there must of necessity be some permanent habit by which men may be guided in reference to the steps that must be taken where the law, due to its universality of expression, is deficient.

Cathrein. No little indefiniteness in regard to the exact nature of *epikeia* and to its place among the virtues is manifested in the treatment found in the article of Cathrein in *The Catholic Encyclo-*

¹¹⁶ *Ibid.*, col. 444.

¹¹⁷ *Op. cit.*, Vol. I, Lib. I, n. 829.

¹¹⁸ Cf. pp. 215 et sqq. *supra*.

¹¹⁹ *Op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. V, n. 2.

pedia.¹²⁰ Speaking of equity,¹²¹ he says that it “consists of the principles of natural justice so far as they are used to explain or correct a positive law, if this is not in harmony with the former.” But whether it be an act or a virtue, whether it pertain to justice or to prudence, whether it be a judgment of the intellect or a disposition of the will, no indication is given.

Cathrein is far more definitive in his *Philosophia Moralis*,¹²² however. There he states that *aequitas*—and he understands the term, not as *mitigatio juris*, but rather as that which “inclines us to act contrary to the words of the law when higher reason demands it”¹²³—is a potential part of justice.

Godefroy. Godefroy¹²⁴ argues that *epikeia* pertains to justice, and is superior to legal justice. But special emphasis is placed on the judgment of prudence which precedes it. He insists that from the fact that prudence directs *epikeia*, it follows that one must not make use of *epikeia* unless he is certain, or at least nearly so, that he has the right to do so. One will acquire this practical certitude either by a study of the special case, or by consulting the detailed rules of Moral Theology, the solutions of cases of conscience or the decisions of jurisprudence in analogous cases.

This discussion of the relation of *epikeia* to justice and to prudence,¹²⁵ considered from a historical viewpoint, may be brought

¹²⁰ V. Cathrein, “Law,” *The Catholic Encyclopedia*, IX, 56.

¹²¹ *Loc. cit.* There can be no doubt that Cathrein refers here to *epikeia*, though perhaps in a rather general sense including the use of equity by judicial authority. The basis of equity he finds in the fact that “a human lawgiver is never able to foresee all the individual cases to which his law will be applied. Hence a law—though just in general—may, taken literally, lead in some unforeseen cases to results which agree neither with the intent of the lawgiver nor with natural justice, but rather contravene them.” Explicit reference is made to the ἐπιείκεια of Aristotle.

¹²² Cf. *Philosophia Moralis*, n. 195.

¹²³ “. . . nos inclinât ad agendum contra verba legis, quando altior ratio id postulat.”—*Loc. cit.*

¹²⁴ L. Godefroy, *art. cit.*, *DTC*, V, 361.

¹²⁵ No prolonged discussion of the opinions of theologians regarding the relation of *epikeia* to *aequitas* need be undertaken here. As was seen in Part I of this dissertation, the terms were used synonymously by moralists until rather recent times. For a modern development in this matter, cf. Vermeersch, *Quaest. de Iust.*, nn. 478 et sqq.

to a close by stating that modern theologians who discuss the point, for the most part do not deviate from the teaching of St. Thomas.¹²⁶

III. *Thesis: Epikeia is Related to Prudence in That it is Directed by the Virtue of Gnome, a Potential Part of Prudence. It is Probable That Epikeia is a Subjective Part of the Virtue of Aequitas, which is a Potential Part of the Virtue of Justice.*

In view of the foregoing historical considerations, there seems to be no reason to dispute the traditional view as to the relationship of *epikeia* to the virtue of prudence. That is, *epikeia* is directed by the virtue of *gnome*. *Gnome*, in turn, is a potential part of the virtue of prudence, and may be defined as "the habit of judging rightly in particular cases in which, because of special circumstances, an exception must be made from the ordinary law."¹²⁷ And this decision to act contrary to the words of the law is made "according to higher principles"¹²⁸ than are invoked in ordinary cases.

It cannot be denied, however, that the whole discussion of the problem of the connection of *epikeia* with justice leaves much to be desired. The solution of St. Thomas, to which most subsequent theologians who make any allusion to the problem at all, subscribe, is by no means entirely satisfactory. Its greatest weakness would appear to lie in the fact that in making *epikeia* a species of legal justice, St. Thomas seems to suppose that to follow the law literally

¹²⁶ Attention should be called to the opinion of Rodrigo, however, that *epikeia* "refertur ad virtutem aequitatis."—*Op. cit.*, n. 390. Prümmer's view also should be noted. He says explicitly that *epikeia* is not a virtue, but rather an act which pertains to legal justice (*op. cit.*, I, n. 231, footnote). No explanation of this opinion is given. And yet, in treating of *epikeia*, he quotes almost in full that very passage of St. Thomas (*Sum. Theol.*, II-II, q. 120, a. 1) which concludes: "Unde patet quod epicheia est virtus." Finally, Sherman's opinion may be mentioned: that *epikeia* is the act of *gnome*.—Cf. J. Sherman, "The Spirit and the Letter of the Law," *ER*, CIX (1943), 226.

¹²⁷ ". . . habitus recte iudicandi in particularibus, in quibus ob particularia adiuncta a communi lege facienda est exceptio."—Noldin-Schmitt, *op. cit.*, I, n. 268.

¹²⁸ Merkelbach, *Summa Theol. Mor.*, II, n. 29.

in a case where *epikeia* is invoked, would be sinful and evil.¹²⁹ Whether the Angelic Doctor wished, as a general principle, to confine the use of *epikeia* to such cases, has been alluded to before,¹³⁰ and it will serve no purpose to take up discussion of the point again. But here it is sufficient to point out that in the question¹³¹ devoted to the problem of the place occupied by *epikeia* in the scale of virtues, St. Thomas considers only those cases in which observance of the words of the law would be "contrary to the equality of justice,"¹³² or "contrary to the common good,"¹³³ or "evil"¹³⁴—cases in which "justice and common utility demand"¹³⁵ deviation from the words of the law. Now, it can readily be admitted that any institute which will be employed to rectify such situations, will of necessity be related to the virtue of legal justice. But still untouched remains the question of the particular nature of the relation existing between justice and *epikeia* strictly so-called, which is involved in a case where observance of the written law would be neither evil, nor so excessively difficult as to be beyond the legislator's power to demand obedience. It by no means follows that because *epikeia* broadly understood is a subjective part of legal justice, *epikeia* in the strict and proper sense of the term has a similar connection with that virtue.

This conclusion seems clear from a study of the two following examples. In the first case: to return a sword to an insane person is obviously contrary to the intention of the legislator, in spite of the

¹²⁹ Herein lies the strength of the argumentation of Cajetan in establishing the scope of *epikeia*. He points out that if *epikeia* is a part of justice "consequens est ut materia ejus sicut et aliarum specierum justitiae, sit operatio illa quae sine ipsius directione recta non esset."—*Op. cit.*, in II-II, q. 120, a. 1. His conclusion is that *epikeia* is concerned only with cases where observance of the law would be sinful. Many succeeding theologians, who disagree with this conclusion, consider the argument advanced in support of it, but never seem to reply to it directly and convincingly. In point of fact, the argument seems to be unanswerable, if the premise upon which it is founded be conceded—viz., that *epikeia* is a species of justice.

¹³⁰ Cf. pp. 36 et sqq. *supra*.

¹³¹ *Sum. Theol.*, II-II, q. 120.

¹³² *Ibid.*, a. 1.

¹³³ *Loc. cit.*

¹³⁴ *Loc. cit.*

¹³⁵ *Loc. cit.*

law demanding that deposits be restored. Consequently an individual who delays such a return, performs an act of legal justice, in that he conforms to the will of the lawmaker. Indeed not only does he act in a more excellent way than if he returned the sword (for he obeys a higher law), but actually to do otherwise—that is, to observe the words of the law—would be sinful, objectively at least. In other words, in deviating from the legal formula, the individual fulfills a debt to society which is due in legal justice, and so he performs an act of that virtue in a strict sense. In the second case: a priest has a sound basis for his judgment that, because of the particular circumstances of the case at hand, he is not bound to read his Breviary—on the basis of the reasonably presumed benign will of the legislator (the circumstances are not such as to render the Church unable to demand his observance of the law if she so wished). It is difficult to see how, in such a case, the priest, refraining from the reading of his Breviary, performs an act of legal justice, how he fulfills any debt to society, how, by omitting it, he acts in a more excellent way than if he should recite the Breviary, or how observance of the letter of the law would be sinful. In other words, the theory that *epikeia* is a species of legal justice seems to be based on the belief that *epikeia* always has reference to cases in regard to which observance of the words of the law would be sinful. In any event, all theologians, insofar as can be ascertained, who endeavor to prove this theory take into consideration only such cases.¹³⁶

A study of the problem seems to lead to the conclusion that *epikeia* strictly so-called is not a subjective part of legal justice at all. Actually it appears to be a species of the virtue of *aequitas*,¹³⁷ which Rodrigo defines as “a virtue which inclines one to exact

¹³⁶ Cf., e.g., Vitoria, who, in answer to the question as to whether *epikeia* is obligatory so that its omission would be sinful, replies: “Respondetur quod sic semper obligat, et hoc est quod sonat dicere, quod est pars subjectiva iustitiae . . .”—F. de Vitoria, *Comentarios a la Segunda Secundae de Santo Tomás* (ed. Beltran de Heredia; Salamanca: Biblioteca de Teólogos Españoles, 1932-1935), V, p. 272. Cf. also Lumberras, *op. cit.*, n. 667; Merkelbach, *Summa Theol. Mor.*, II, n. 891.

¹³⁷ Thus, D’Annibale, *op. cit.*, I, n. 187.

benignly and with a sort of remission his debt or right due in commutative justice or, in our case, legal justice . . ." ¹³⁸

In that section of the historical discussion devoted to a consideration of the contribution of Vermeersch,¹³⁹ it was pointed out that he considers *aequitas* to be a special virtue, standing between justice and charity, being a potential part of the former. The subject of this special virtue is he who, although he possesses a *jus*, does not with rigor and severity demand of others the fulfillment of those obligations which are the counterpart of this *jus*. Moreover, it was seen that in the opinion of Vermeersch, *aequitas* is three-fold, existing first in private individuals, insofar as they overlook certain of the rights due them from commutative justice; secondly, in private individuals, insofar as they acquiesce in a distribution of common goods which, though not strictly equal, is more in accord with the common good or some private need in another; thirdly, in those public authorities who in their official functions temper the severity of laws. From this third division it is clear that *aequitas* may be exercised not only when a debt is due from commutative justice, but likewise when a "debt" is due from legal justice. That is to say, he to whom has been entrusted the enforcement of the law may require less than the full payment of the debt (which is the literal observance of the law), and thus practice the virtue of *aequitas*.

Now, as legal justice (which as a species bears to justice a relation similar to that which this third species of *aequitas* bears to *aequitas*) resides principally in the ruler and secondarily in the subject,¹⁴⁰ it seems probable that this species of *aequitas* likewise is found principally in the ruler and secondarily in the subject. However, it does not necessarily reside in the latter as in the merely passive recipient of the favor of the ruler. Under certain conditions the virtue may be exercised actively, in that the subject acts as a *quasi* judge in a case, and in that capacity is, therefore, in relation to the law no longer merely a "debtor." It should be clearly noted,

¹³⁸ ". . . virtus inclinans ad benignam cum aliquali remissione exactionem debiti seu iuris iustitiae sive commutativae, sive pro casu nostro *legalis* . . ."—*Op. cit.*, n. 390.

¹³⁹ Cf. pp. 107 et sqq. *supra*.

¹⁴⁰ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 58, a. 6.

however, that the subject does not act as a legislator or a *quasi* legislator. He makes no law; as has been shown previously, his whole action is based on the sound presumption that the legislator in enacting the law benignly excluded the case at hand. Nor should objection be made to the statement that the subject acts as a *quasi* judge. For he makes no judgment about the law, but rather about the individual case in its relation to the intention of the legislator.¹⁴¹ Indeed it is precisely because of the recognition of the fact that he does act as judge that moralists are so insistent in demanding that *epikeia* be used with caution. But more important still—it is precisely for this reason that there is given a special virtue to enable the subject to make the judgment in the case, namely *gnome*.¹⁴²

In brief, then, corresponding to the *aequitas* in the ruler, we may place the virtue of *epikeia* in the subject—not in the sense that *epikeia* is practiced by the subject whenever he acquiesces in the practice of *aequitas* by the ruler, but rather in the sense that when there converge in relation to a concrete case, a necessity of action, an impossibility of recourse, and a set of circumstances giving rise to a prudent judgment that the legislator, in enacting the law, motivated by the virtue of *aequitas*, excluded from his law the case at hand, then there is place for the exercise of the virtue of *epikeia* by the subject.

No prolonged consideration need be given the point that *epikeia* is a separate virtue. It is first of all a virtue—for that condition (the variability of finite matters) on account of which laws cannot be so constituted that they will avoid being deficient in regard to

¹⁴¹ Cf. *ibid.*, I-II, q. 96, a. 6, ad 1.

¹⁴² It may be objected that no one should be a judge in his own case. It must be remembered, however, that the proximate, immediate and intrinsic rule of human acts is conscience. If one is certain in conscience of the lawfulness of an act *to be performed*, there is no need of recourse to any judge—whether the act is in accordance with, or contrary to, a legal formula. To maintain otherwise would be equivalent to imposing an intolerable burden on mankind. Of course, if one lacks certainty (and has only probability that the legislator intended not to include the case in his law), recourse if possible is necessary. In point of fact, as has been indicated above, if one is about to act contrary to the words of the law, in matters of importance it is advisable to consult a wise counsellor in any case. Cf. p. 190 *supra*.

some cases, is permanent. Hence the need, as Patuzzi points out,¹⁴³ of a permanent habit enabling men properly to act in such instances. Indeed, in view of the fact that all theologians agree that to make a proper judgment in such cases requires a virtue (*gnome*, a potential part of prudence), and not merely an act, there is no reason to deny that for the execution of such a judgment a virtue is required.

Nor can it be said with Suarez¹⁴⁴ and Lessius¹⁴⁵ that this virtue is identified with whatever other virtue is exercised in the act of deviating from the words of the law. One may argue *a pari* that legal justice supposes the acts of other virtues and ordains them *ad bonum commune*;¹⁴⁶ charity likewise ordains the acts of other virtues *ad bonum divinum*.¹⁴⁷ The fact that the acts in question are elicited by various virtues and commanded by legal justice or charity, does not make legal justice and charity any the less virtues, separate from the other virtues with whose *materia* they are concerned. So too, the mere fact that an act of some other virtue may depend upon the use of *epikeia* does not establish that *epikeia* and that virtue are identical. Attention should be called to the traditional teaching that legal justice, for example, is a special virtue not by reason of its *materia* but by reason of its proper object.¹⁴⁸ So too, although the *materia* with regard to which *epikeia* is exercised may coincide with the *materia* of other virtues, nevertheless, *epikeia* has a proper object¹⁴⁹—first, the correction of the law in reference to a case in which the law “sins”; and secondly, the observance of the benign or equitable will of the legislator, by reason of which benign or equitable will there exists in the subject a *quasi titulus* to deviate from the words of the law.

¹⁴³ *Op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. V, n. 2.

¹⁴⁴ *De Legibus*, Lib. VI, Cap. VI, n. 6.

¹⁴⁵ *Op. cit.*, Lib. II, Cap. XLVII, Dub. IX.

¹⁴⁶ Cf. St. Thomas, *Sum. Theol.*, II-II, q. 58, a. 6.

¹⁴⁷ *Loc. cit.*

¹⁴⁸ Cf. St. Thomas, *loc. cit.* Cf. also *ibid.*, II-II, q. 81, a. 8, ad 1.

¹⁴⁹ “Virtus specialis habetur, ubi probatur adesse *honestas* quae *propria* sit *et coniuncta cum difficultate*.”—Vermeersch, *Quaest. de Iust.*, n. 482.

Moreover, there is a special difficulty involved in the exercise of this virtue¹⁵⁰—the hardship which one experiences in preserving a medium between two extremes. Motivated by the higher and nobler considerations of a special prudence,¹⁵¹ a subject must, on the one hand, break away from the slavish following of the words of the law in some cases. On the other hand, he must cautiously and sedulously avoid any deviation from the law which will result either in disrespect for it on the part of himself or of others, or in a general weakening of the stability of the legal system of the community.

As has been said, when a debt is due another in rigorous justice, the virtue of *aequitas* presupposes, in the debtor a *quasi jus* or *quasi titulus*. Now similarly, the subject of the law (who is a debtor in the sense that there is incumbent upon him the payment of the debt which is the observance of the law) may well be considered to possess a *quasi jus* or a *quasi titulus* to deviate from it, in relation to that case where the circumstances are such as to enable him to form a prudent judgment that the legislator did not include the case at hand in his law (that is, the ruler or “creditor” would not exact his strict right). It is this presumed exercise of the virtue of *aequitas* on the part of the ruler, which gives rise in the subject to the *quasi jus* or *quasi titulus*. Needless to say, there is no question of any strict right in justice to deviate from the words of the law; for here there is discussion of *epikeia* strictly understood; and hence, the supposition is that observance of the law as it stands would neither be evil, nor so unjustly difficult as to exceed the lawgiver’s power.

These notions are offered, not in any attempt definitely to locate *epikeia* in its ultimate and irremovable place in the scale of virtues. Indeed, until such time as the final word has been uttered as to the

¹⁵⁰ Cf. Mayol, *op. cit.*, in Migne, *Theol. Cursus Comp.*, XIV, 443 et sqq.; Sylvius, *op. cit.*, in II-II, q. 120, a. 1 and a. 2.

¹⁵¹ Speaking of *gnome*, Brennan states that it “confers aptitude for good judgment, but uses higher rules or principles as its standard. . . . Thus, it implies a quality of far-seeing discernment, resulting from the development of a certain perspicacity of mind.”—Sr. M. Rose Emmanuella Brennan of the Sisters of the Holy Names of Jesus and Mary, *The Intellectual Virtues According to the Philosophy of St. Thomas*, The Catholic University of America Philosophical Studies, Vol. LIX (Washington, D. C.: The Catholic University of America Press, 1941), p. 74.

exact nature, place, and dignity of legal justice, the place of *epikeia* will be indefinite. It is suggested, however, that if *epikeia* strictly so-called be considered as a species of the virtue of *aequitas*—which in turn, is a separate virtue, a potential part of justice—its proper dignity and function will more clearly be appreciated.

SCHOLION I. *Epikēia* and *Aequitas Canonica*

Brief mention may here be made of a problem about which much has been written since the Code of Canon Law went into effect. Since the question is primarily canonical, only a passing allusion is here called for. The problem may be thus concisely stated. What relationship exists between *epikeia* and *aequitas canonica* as found in Canon 20?

After a scholarly study, D'Angelo in *Periodica* offers the following conclusions: (1) that in the Code of Canon Law mention is made of a two-fold type of *aequitas*—natural and canonical; (2) that natural *aequitas* is a subjective element which corrects and mitigates the law in concrete cases; (3) that canonical *aequitas* is an objective and supplementary element touching directly the norm itself—not the persons for whom the rigor of the law is mitigated; (4) that *epikeia* specifically differs from each, is a moral and not a juridic element, and is not interpretation strictly so-called.¹⁵²

Regarding the relationship existing between *aequitas canonica* and *epikeia*, Cappello¹⁵³ contends that *aequitas canonica* has a "peculiar analogy" with *epikeia*, yet differs from it insofar as *aequitas* is a broader term, and does not always and necessarily refer to law, as does *epikeia*. Nor indeed is *aequitas canonica* identical with *aequitas naturalis*. It supposes the latter, and to it adds "a benign interpretation and application of the law from the precept of evangelical charity."

Del Giudice bluntly states that *epikeia* is precisely that *aequitas canonica* which is mentioned in Canon 20.¹⁵⁴ This strikes the key-

¹⁵² *Art. cit.*, *Periodica*, XVI, 224*.

¹⁵³ *Summa Iuris Canon.*, I, n. 89.

¹⁵⁴ *Art. cit.*, p. 274. Del Giudice's opinion is denied by Van Hove in a review of the work cited. Cf. *ETHL*, IV (1927), 677-678. So too, it is denied by the reviewer in *Jus Pont.*, VIII (1928), 126.

note of his entire discussion of *epikeia*. For throughout his treatment, it is constantly clear that he considers *epikeia* to be an institute more to be exercised by the judge or the Superior than by the subject of the law. Subscribing to the belief that it is a rebellious force against, and a violation of, positive law,¹⁵⁵ he points out that frequently such a violation is necessary; namely, when correction of the positive law is demanded by the exigencies of the divine or natural law. Moreover, *epikeia* differs from the equity of modern civil law,¹⁵⁶ but it remains among the most characteristic institutes of canon law for denoting the law's elasticity and adaptability to varied circumstances.¹⁵⁷

Roelker succinctly points out that "epikeia frequently is used to remove obligation while canonical equity is always used in Canon 20 to establish an obligation."¹⁵⁸

A very clear explanation of the relationship existing between *epikeia* and *aequitas* is outlined by Cicognani-Staffa.¹⁵⁹ According to these authors, *aequitas* is applied by public authority, *epikeia* by private individuals. *Aequitas* has reference to the external forum, *epikeia* to the internal. *Aequitas* is an objective judgment which directly touches the norm itself; *epikeia* is a subjective judgment of a private person. *Aequitas* is a criterion which creates a new law in a particular case—according to the prescription of the law if there is a question of *aequitas scripta*, in other cases according to the will of the legislator (or even contrary to it, if he has commanded what is in opposition to natural or divine law);¹⁶⁰ *epikeia* is not an

¹⁵⁵ *Ibid.*, p. 278.

¹⁵⁶ *Ibid.*, p. 274.

¹⁵⁷ *Ibid.*, p. 278.

¹⁵⁸ E. Roelker, "The Meaning of 'Aequitas,' 'Aequus' and 'Aequus' in the Code of Canon Law," *The Jurist*, VI (1946), 254.

¹⁵⁹ *Op. cit.*, I, p. 304, note.

¹⁶⁰ Van Hove (*De Legibus Ecc.*, n. 295) insists upon this point. He makes it clear that *aequitas*, because it is exercised by public power, is the creation in a particular case of a new law. *Epikēia*, on the other hand, because it is exercised by a private individual, is merely a subjective judgment by which one exempts himself from observing the law in a particular case, on account of motives similar to those by reason of which *aequitas* can be used by public authority.

act of jurisdiction. *Aequitas* in the external forum tempers the rights and obligations of subjects, and rules on the proper application of *epikeia*; *epikeia* is directly concerned only with the imputability of the violation of a law, and indirectly with the consequences in the internal forum, which flow from this absence of imputability. *Epikeia* does not change the objective obligation of the law, but only the imputability of its violation in the internal forum—although, even in the external forum, *epikeia* may be invoked to prove good faith, and to plead immunity from ecclesiastical punishment. Finally, *aequitas* is a juridic element; *epikeia* an ethical and moral element.

With the statement that *epikeia* concerns only the imputability of the violation of a law, Rodrigo disagrees. It is his opinion that when there is place for the licit use of *epikeia*, the objective obligation of the law disappears, in such a way that there is not even a material violation of the law.

The reason is because there is latent in the case, a certain *quasi* conflict of laws, in which the law of humaneness and of equitable benignity prevails, directing predominantly every legislative activity of a prudent human legislator; but in a conflict, he who obeys the law which prevails, does not even materially violate the contrary law.¹⁶¹

Intimately connected with this problem is the question of whether or not *epikeia* has any standing in the external forum. It would appear to be the rather general consensus of authorities today that it has not.

Writing in *Apollinaris*, D'Angelo¹⁶² points out that St. Thomas considers *epikeia* to be a merely moral element, and that modern

¹⁶¹ "Ratio est, quia latet in casu quidam quasi conflictus legum in quo praevallet lex humanitatis et aequae benignitatis, dirigens praevalenter omnem activitatem legislativam prudentis humani legislatoris; atqui in conflictu nec materialiter violat legem contrariam ille qui stat legi praevalenti."—*Op. cit.*, n. 393. Differing with Rodrigo on the point, Van Hove states that *epikeia* "non mutat obiectivam legis obligationem sed solam imputabilitatem violationis in foro interno."—*Commentarium Lovaniense in Codicem Iuris Canonici*, Vol. I, Tom. V, *De Privilegiis, De Dispensationibus* (Mechliniae-Romae: Dessain, 1939), n. 338.

¹⁶² *Art. cit.*, *Apollinaris*, I (1928), 377 et sqq.

writers believe it to have reference only to moral, and not to juridic matters. While he believes that for the most part modern moralists and canonists are silent on the point as to whether *epikeia* has any standing in the external forum, Van Hove¹⁶³ himself contends that, since *epikeia* is not an act of jurisdiction, it has value only in the internal forum. Sägmüller¹⁶⁴ states clearly that *epikeia* is not recognized by law as such. Koeniger¹⁶⁵ likewise maintains that ecclesiastical law does not recognize *epikeia* which, being merely a subjective attitude on the part of the subject of the law, is valid only for the internal, and not for the external forum. Haring¹⁶⁶ believes that modern teaching on law leaves no place for *epikeia*. Its function is, to a great extent, taken over by "logical interpretation," a corrective of grammatical interpretation, which results when the investigation of the basis of a law shows that the lawgiver wished to say more or less than he actually did. Hilling¹⁶⁷ seems almost unwilling to give any standing to *epikeia* at all. Believing that it practically amounts to self-dispensation, which is in contradiction to law as a binding norm, he concedes at the most that it may be recognized in the internal forum, where one's conscience is the highest subjective obligating force. Of course, if *epikeia* be understood as interpretation made according to canonical equity, then it occupies a prominent place in law, concludes Hilling, but its use and treatment, in that hypothesis, belong to ecclesiastical authority alone—not to any subject of the law. Von Scherer¹⁶⁸ not only dismisses *epikeia* as being without value in the external forum, but he also seems to be of the

¹⁶³ *De Legibus Ecc.*, nn. 279, 295.

¹⁶⁴ J. Sägmüller, *Lehrbuch des Katholischen Kirchenrechts* (ed. 4; Freiburg i. Breisgau, 1925—), I, p. 188.

¹⁶⁵ A. Koeniger, *Katholisches Kirchenrecht mit Berücksichtigung des Deutschen Staatskirchenrechts* (Freiburg i. Breisgau, 1926), p. 89.

¹⁶⁶ *Art. cit.*, *ThQS*, LII, 806, note 26.

¹⁶⁷ N. Hilling, *Die Allgemeinen Normen des Codex Juris Canonici* (Freiburgi. Breisgau, 1926), pp. 87-88.

¹⁶⁸ R. Von Scherer, *Handbuch des Kirchenrechts* (Graz, 1886-1898), I, § 40, note 2. Wernz terms Von Scherer's reasoning ineffective. Cf. F. Wernz, *Ius Decretalium* (ed. 2; Romae, 1905-1912), I, n. 48.

opinion that it has no standing even in the internal forum, for its basis—a supposed dispensation—is unsubstantial, unimportant, and foreign to law.

On the other hand, there are some authors who believe that *epikeia* does have place, though very rarely, in the external forum. D'Annibale's concession is meagre; he states that it "scarcely ever has place today in the external forum."¹⁶⁹ Maroto¹⁷⁰ alludes to this statement, apparently with approval. Rodrigo¹⁷¹ calls *epikeia* a juridic and a moral institute. However, it is clear that in so doing he refers actually both to *epikeia* and to *aequitas*. For immediately afterwards he points out¹⁷² that, while *epikeia* exists primarily in the Superior or the judge (and is valid in the external forum), and secondarily in a private subject of the law (and in this sense is valid only in the internal forum), actually most authors—and Rodrigo, for the most part, accepts their opinion—call the former *aequitas* and the latter *epikeia*.

Del Giudice also obviously accords to *epikeia* a standing in the external forum. Even more—for "the judicial decision based on *epikeia* constitutes . . . an act materially legislative and formally jurisdictional (in a strict sense)."¹⁷³ However, it must not be forgotten that, since for Del Giudice *epikeia* and *aequitas canonica* are one, the *epikeia* which is valid in the external forum is really a manifestation of equity on the part of the ruler or judge.

Loiano¹⁷⁴ quoting Coronata makes the statement that the use of *epikeia* for the external forum is generally admitted. Chelodi¹⁷⁵

¹⁶⁹ *Op. cit.*, I, n. 187. Cocchi makes the same observation. Cf. G. Cocchi, *Commentarium in Codicem Iuris Canonici* (Taurinorum Augustae: Marietti, 1922-1930), I, n. 125. Loiano (*op. cit.*, I, n. 140) interprets D'Annibale to mean that *epikeia* has no standing at all in the external forum.

¹⁷⁰ *Op. cit.*, I, n. 242.

¹⁷¹ *Op. cit.*, p. 292.

¹⁷² *Ibid.*, n. 390.

¹⁷³ ". . . la decisione giudiziale epicheietica costituisce . . . un atto materialmente legislativo e formalmente giurisdizionale (in senso stretto)."—*Art. cit.*, p. 280.

¹⁷⁴ *Op. cit.*, I, n. 140. The reference to Coronata is *op. cit.*, I, n. 29.

¹⁷⁵ *Op. cit.*, I, n. 69. In commenting on this statement, D'Angelo asks whether it is not to be hoped "ut *technicismus* plene servetur et in *scientia*

believes that the difference of opinion on the point among writers is merely one of words. For where some authors speak of *epikeia*, others say that the obligation of the law ceases because observance of it is impossible, or because a higher law prevails, or because the mind of the legislator counsels a restrictive interpretation.

It is obviously impossible to evaluate the stand of D'Annibale, Maroto and Coronata on this matter, inasmuch as they offer no arguments to substantiate their position. On the other hand, it cannot be denied that the whole history of the concept of *epikeia* in Moral Theology points to the fact that it has always been considered an institute which has reference to the internal forum only. In point of fact, no aspect of *epikeia* is more characteristic than its subjectivity. The subject of the law, finding himself involved in a most difficult situation, confronted by a written law which seems to demand immediate observance, realizing that recourse to a Superior is impossible, yet believing that the legislator benignly excluded from the law the case at hand, invokes *epikeia* on his own authority, in order to deviate from the clear words of the law. Thus to insist upon the importance of the subjective element in *epikeia*, however, is not to deny that there is, and indeed must be, an objective justification for it. Sufficient has already been said of the presumed intention of the legislator. But the point here is that, in spite of the existence and necessity of this objective element, the effects of *epikeia* are confined to the internal forum. The lack of imputability and lack of guilt for transgressing the letter of the law have standing only in that forum. Yet, in the external forum *epikeia* may well have an indirect effect, at least insofar as ecclesiastical authority is concerned. For the plea that *epikeia* was used by the subject of the law in good faith will often be taken into consideration by an equitable Superior in evaluating the subjective guilt or innocence of him who has transgressed the words of the law.¹⁷⁶

canonica, ne iustae evadant censurae seu criticae civilistarum."—*Art. cit., Apollinaris*, I, 381.

¹⁷⁶ Cf. Can. 2199 and Can. 2202, § 1 for a kindred case, involving the judgment that a subject is inculpable by reason of his having an erroneous conscience.

SCHOLION II. *Epikēia* and Civil Law

Only a few words need be said of *epikēia* and its relation to civil law. Over five hundred years ago, Gerson, writing of the position of *epikēia* in the external forum, pointed out that the subject of the law who has made use of this institute, must furnish proof of the lawfulness of his conduct if he is to be judged guiltless, for "before him [i.e., a human judge] there is no distinction between what is not and what appears not."¹⁷⁷ It can with truth be said that this observation is particularly true of civil law, for civil law does not recognize *epikēia*—even though there is a realization that laws are sometimes deficient by reason of the universality of their expression.¹⁷⁸

Civil law does not admit any title or *quasi* title on the part of the subject to correct the law. At most, a judge, taking into consideration the mitigating circumstances of the case, may by reason of them render a more lenient decision. We may conclude with McHugh-Callan that, "insofar as civil law is concerned, action on individual responsibility makes one guilty of technical violation."¹⁷⁹

Nor can it be said that there is in civil law any general agreement as to the exact nature of, and precise place to be accorded to, equity. Van Hove¹⁸⁰ well sums up the vagueness which exists, by pointing out that some jurists maintain that civil law must be rigorously applied, and that equity may exist in the legislator, but not in the judge. Others adhere to the adage: *Ius legislatori, aequitas iudici magis convenit*. In passing, Van Hove observes that it is dangerous,

¹⁷⁷ ". . . apud illum [i.e., iudicem humanum] idem est de iis quae non sunt & quae non apparent."—*De Potest. Ecc.*, Con. X. LeBuffe-Hayes state: "Law Courts are to take into account external actions alone, and internal actions only insofar as external behavior gives evidence of such internal actions."—F. LeBuffe-J. Hayes, *Jurisprudence* (ed. 3 rev.; New York: Fordham University Press, 1938), p. 17.

¹⁷⁸ On this latter point, cf. Salmond, *op. cit.*, pp. 45, 49; also pp. 147 et sqq., and Chap. IV, note 2 *supra*.

¹⁷⁹ *Op. cit.*, I, n. 417.

¹⁸⁰ *De Legibus Ecc.*, n. 285, note 1. Attention should be called to the fact that historically jurists with an Anglo-American background (e.g., Story) were inclined to consider equity as distinct from law; those with a continental background (e.g., Crespo) were not apt to make such a separation.

in regard to matters which concern the rights of private individuals, to acknowledge in a judge such a power as will enable him to enact a *ius aequum seu praetorianum*.

Nevertheless, most civil jurists recognize the need for equity in any judicial system, much though they disagree among themselves as to its exact nature and extent. Story teaches that

. . . Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance. It is impossible that any code, however minute and particular, should embrace or provide for the infinite variety of human affairs, or should furnish rules applicable to all of them.¹⁸¹

Crespo clearly describes the need for equity:

A legal system, a code, regardless of how complete it may be, can neither foresee nor determine the solution of all the juridic conflicts which can arise in the life of a collectivity: the law is nothing more than static right crystallized at a given moment of the life of a people. It is not by itself sufficient to give all the practical solutions, for right, being essentially dynamic is subject to modifications . . .¹⁸²

As to the function of equity, he teaches first that it may be considered as a norm to be exercised in the application of every abstract and positive law to a concrete case.¹⁸³ Secondly, it is a most apt medium for the interpretation of law,¹⁸⁴ a light emanating from the law itself, and clarifying the law in its relations, both with the existing legal system and with the circumstances of human life.

¹⁸¹ J. Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (ed. 14; Boston, 1918), I, § 7, pp. 7-8.

¹⁸² "Un sistema legale, un codice, per quanto completo sia, non può prevedere nè determinare la soluzione di tutti i conflitti giuridici che nella vita di una collettività possono prodursi: la legge non è altro che il diritto statico, cristallizzato ad uno dato momento della vita d'un popolo. Ora essa non può bastare da sola a dare tutte le soluzioni pratiche, poiche, il diritto, essenzialmente dinamico è soggetto alle modificazioni . . ."—C. Crespo, "L'Equità e la Sua Funzione nel Diritto," *RIFD*, VII (1927), 427.

¹⁸³ *Ibid.*, p. 422.

¹⁸⁴ *Ibid.*, p. 423.

Maggiore¹⁸⁵ points out that law, in order to be just, must lose its generality, its abstractness, its rigidity—and these results are effected by the use of equity. Equity he describes as the ethical force which renders law concrete and particular.¹⁸⁶ When it is invoked as a corrective against an unjust law, it is already immanent within the law.¹⁸⁷ Indeed to consider it as functioning only in abnormal situations would be to take a superficial view of it. Equity, he concludes, “is not a font but *the* font of right, *par excellence*.”¹⁸⁸

With the theory that equity is immanent in positive law Miceli disagrees in no uncertain terms. He teaches that equity is not a norm, but rather a directing principle (“*principio direttivo*”) which operates on positive law, “precisely because it is outside of it and cannot be juridically formulated.”¹⁸⁹ Moreover, it can inspire legislator, ruler or judge.

Giannini, after a long discussion of *epikeia* and equity, concludes: “Equity is therefore the morally just, and hence the relation of equity to law is the relation of the morally just to the legally just.”¹⁹⁰

Lorimer, pointing out that by the use of equity a judge modifies the letter of the law by applying its spirit, cautions against “the error of supposing that in dispensing equity a judge dispenses justice of a different kind from that on which law reposes. There is but one kind of justice; and legal justice and equity . . . are identical.”¹⁹¹ This doctrine of the basic identification of equity with justice is likewise taught by Geny.¹⁹²

¹⁸⁵ *Art. cit.*, *RIFD*, III, 261.

¹⁸⁶ *Ibid.*, p. 264.

¹⁸⁷ *Ibid.*, p. 265.

¹⁸⁸ *Ibid.*, p. 273.

¹⁸⁹ “. . . appunto perche è fuori di esso e non può essere giuridicamente formulato.”—V. Miceli, *Principii di Filosofia del Diritto* (ed. 2; Milano: Società editrice libraria, 1928), Parte III, § 128.

¹⁹⁰ “L’equità è dunque il giusto morale, e quindi la relazione dell’equità e del diritto sono le relazioni del giusto morale e del giusto legale.”—*Art. cit.*, *Archiv. Giurid.*, XXII, 84.

¹⁹¹ J. Lorimer, *The Institutes of Law* (Edinburgh, 1872), pp. 218-219.

¹⁹² *Op. cit.*, I, pp. 109-110.

On the other hand, Ricca-Barberis¹⁹³ contends that nothing is more perilous to a legal system than equity, for when judicial decisions are ruled by sentiment, they are not to be trusted as a basis for social life. Pound,¹⁹⁴ having in mind more particularly Anglo-American Courts of Equity, believes that, since the discretionary power of equity judges has vanished, because of the evolution of a system and rules of equity, there is no longer any place for equity as such, and hence it will eventually disappear altogether. Walsh, however, maintains in reply that "modern equity, instead of being decadent, has tremendously extended its effectiveness as the spiritual principle or soul of the law. . . ." ¹⁹⁵ Cook believes that "although equity has hardened into a system of principles and rules, it must not be imagined that all power for growth has disappeared." ¹⁹⁶

ARTICLE 2. THE RELATION OF *Epikēia* TO INTERPRETATION,
DISPENSATION, PRESUMED PERMISSION, EXCUSING CAUSE,
POPULAR ACCEPTANCE OF HUMAN LAW

I. *Interpretation*

One of the most common definitions of *epikēia* in the works of moral theologians refers to this concept as a benign and reasonable interpretation of a law *ex aequo et bono*.¹⁹⁷ Some theologians classify

¹⁹³ *Op. cit.*, p. 336.

¹⁹⁴ *Art. cit.*, *CLR*, V, 20-35.

¹⁹⁵ *Art. cit.*, *MLR*, XXII, 496.

¹⁹⁶ *Art. cit.*, *Encyclopaedia of the Social Sciences*, V, 587.

¹⁹⁷ In substance, at least, this definition is found in Antoine, *op. cit.*, Vol. II, Tract. *De Legibus*, Sect. III, Cap. V, Quaest. III; Müller, *op. cit.*, Vol. I, § 65; H. Prevost, *Tractatus de Legibus Compendium* (Brugis, 1873), n. 160; H. Van den Berghe, *Tractatus De Legibus* (Brugis, 1893), n. 124; Gury-Ballerini-Palmieri, *op. cit.*, I, n. 113; T. Meyer, *Institutiones Iuris Naturalis seu Philosophiae Moralis Universae* (ed. 2; Friburgi Brisgoviae, 1906), I, n. 301; J. Ubach, *Theologia Moralis* (ed. 2; Bonis Auris: apud "Sociedad San Miguel," 1935), I, n. 116. Of course, some of these authors make it plain that when each term—*epikēia* and interpretation—is taken in a strict sense, there exists a difference between them.

it as "a restrictive interpretation of law,"¹⁹⁸ while sometimes it is called "a broad interpretation."¹⁹⁹ Among some authors "interpretation" is held to be a general term including both interpretation "strictly" or "simply" or "verbally" understood, and *epikeia*.²⁰⁰ *Epikeia* is often asserted to approximate interpretation,²⁰¹ or to be reducible to "private" or "special" interpretation.²⁰² Or again, *epikeia* is said to have a two-fold meaning—one which coincides with interpretation, and the other which signifies emendation of the law.²⁰³ Yet, it seems clear that most of these authors, in associating *epikeia* and interpretation, understand these terms only in a loose sense.²⁰⁴ The mere fact that, for the most part, they subscribe to the teaching of St. Thomas that *epikeia* as a virtue is part of justice, precludes the possibility of their considering *epikeia* as merely interpretation. For justice primarily involves the will, whereas interpretation is an intellectual process.

¹⁹⁸ Cf. V. Costantini, *Institutiones Theologiae Moralis* (Viterbii, 1896), I, pp. 117-118; C. Thomasius, *Institutiones Jurisprudentiae Divinae* (ed. 7; Halae Magdeburgicae, 1730), Lib. II, Cap. XII, n. 112; Schmalzgrueber, *op. cit.*, Vol. I, Pars I, Tit. II, § VII, n. 49; Antonius a S. Joseph, *Compendium Salamanticense*, accomodatum a Nicolao a Pmo. Corde Mariae (ed. 8; Burgis: "El Monte Carmelo," 1931), I, n. 345; Noldin-Schmitt, *op. cit.*, I, n. 160.

¹⁹⁹ Cf. A. Martinet, *Theologia Moralis* (Parisiis, 1867), Vol. I, Art. XIV, § 4.

²⁰⁰ Cf. P. Scavini, *Theologia Moralis Universa* (ed. 12; Mediolani, 1874), I, n. 231.

²⁰¹ Cf. Patuzzi, *op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. V, n. 1.

²⁰² Cf. Ballerini-Palmieri, *op. cit.*, I, n. 469.

²⁰³ Cf. Bouquillon, *op. cit.*, Tract. III, n. 159.

²⁰⁴ "F. Suarez interpretationem vocat etiam abrogationem et mutationem legis per legem subsequentem, exceptionem et excusationem a lege, epikeiam et varios modos cessationis legis."—Van Hove, *De Legibus Ecc.*, n. 239. However, Suarez distinguishes these concepts from interpretation strictly understood. Cf. *De Legibus*, Lib. VI, Cap. II, n. 1. Cicognani who considers *epikeia* to be a benign *application* of law, points out that at most it can be called *interpretatio practica*.—*Prolegomena*, n. 8. Hugon expresses the belief that *epikeia* is not doctrinal interpretation ("qua quis iudicaret legem esse male positam"), but casuistical ("qua quis dicit verba legis non esse *in hoc casu servanda*"), not juridical, but executive, i.e., it solves no doubt, but carries out the evident intention of the lawgiver.—*Art. cit.*, *Angelicum*, V, 362.

Interpretation may be defined as "an explanation of the meaning contained in a law."²⁰⁵ It is "an investigation into, and a manifestation of, the will which the legislator actually had in enacting the law, which he attached to the words and expressed in the formula of the enacted law."²⁰⁶ One should note that it is not exact to say that interpretation is "a determination of the mind or words of the legislator,"²⁰⁷ for, in point of fact, interpretation seeks to discover the "mind of the law" as it is contained in the words of the law. Strictly understood, interpretation is concerned with the mind of the legislator, only insofar as it is expressed in the words of the law.²⁰⁸

Interpretation considered from the point of view of its author, is four-fold: authentic, usual, judicial and doctrinal. Authentic interpretation is that which is made authoritatively by the ruler of a community as such, or by an official interpretative body.²⁰⁹ Thus, it may be made by the legislator, or by his successor, or by one to whom the legislator has given the power of interpreting, or by the legislator's Superior, or by some group or body empowered by statute or by the general Constitution to interpret the law officially.

Usual interpretation is that which arises from the general mode of observance of the law by the community, that is, from custom which is called *optima legum interpretres*.²¹⁰

Judicial interpretation is that which is made authoritatively by the Court in applying a law to the particular case before it.²¹¹

²⁰⁵ S. Sipos, *Enchiridion Iuris Canonici* (ed. 3; Pecs: "Haladas R. T.," 1936), p. 23; Vermeersch, *Theol. Mor.*, I, n. 187. For a detailed discussion of the concept of interpretation, cf. A. Quinn, *Doctrinal Interpretation of Law According to the Canonical Tradition and According to Canon 18 of the Code of Canon Law*, extract from a Canon Law Doctorate Thesis at the Pontifical Gregorian University (Romae: Tip. Pont. Università Gregoriana, 1938), pp. 12 et sqq.

²⁰⁶ ". . . indagatio et manifestatio (*ex-plicatio*) voluntatis, quam legislator in actu formationis legis de facto habuit, verbis suis alligavit et in formula legis conditae protulit."—Beste, *op. cit.*, p. 74.

²⁰⁷ Merkelbach, *Summa Theol. Mor.*, I, n. 294.

²⁰⁸ Cf. Noldin-Schmitt, *op. cit.*, I, n. 157.

²⁰⁹ Cf. Merkelbach, *loc. cit.*

²¹⁰ Can. 29. Cf. Merkelbach, *loc. cit.*

²¹¹ Cf. Merkelbach, *loc. cit.*

Finally, doctrinal interpretation is that which is made by those skilled in the field to which the law pertains. It is neither authoritative nor obligatory. Its value is conditioned upon the evidence which supports the interpretation, and upon the ability and capacity of the individual interpreter, together with the support which his opinion receives from other authorities.²¹²

By reason of the manner in which it is made, interpretation is further divided. Unfortunately, authors do not agree as to the meaning of the terms used in this connection.²¹³

According to some, comprehensive interpretation is that which is made according to the mind of the legislator, whether it merely explains more clearly the already clear words of a law (this is sometimes called "merely declarative"), or clarifies obscure words (this is sometimes called "properly interpretative"), or extends or restricts the proper sense of the words—but according to the mind and will of the legislator. This is extensive or restrictive interpretation loosely understood; for, strictly understood, extensive or restrictive interpretation these authors consider to be that by which a law is extended to cases not contained in the words of the law reasonably understood, or by which a law is limited, in that there are withdrawn from it cases contained in the words of the law. Thus strictly understood, extensive or restrictive "interpretation" is really a new law.²¹⁴

According to others, comprehensive interpretation declares the meaning of doubtful and obscure words. Extensive or restrictive interpretation is made by going beyond or by restricting the proper meaning of the words—but keeping within the legislator's intention.²¹⁵

To enter into this controversy is unnecessary. Suffice it to state that as used in the following paragraphs, the term "interpretation" refers to an explanation of the meaning of a law insofar as that law expresses in some way the mind of the legislator. Consequently to

²¹² Cf. Merkelbach, *loc. cit.*

²¹³ For an explanation of this matter, cf. Van Hove, *De Legibus Ecc.*, nn. 239-242, upon whose teaching the explanation here given is dependent.

²¹⁴ Cf. Van Hove, *ibid.*, n. 240; Rodrigo, *op. cit.*, n. 373.

²¹⁵ Cf. Van Hove, *loc. cit.*; Rodrigo, *loc. cit.*

speak of ascertaining the intention of the legislator contained outside the law is not to speak of interpretation.²¹⁶ We may note the words of Van Hove:

About the *matter itself* writers seem to agree. Those who reject extensive or restrictive interpretation as being interpretation properly understood, understand it as being *ultra aut infra mentem legislatoris*: those who admit it understand it according to the mind of the legislator manifested in some way.²¹⁷

Now, it is clear from the foregoing brief outline that *epikeia* cannot with exactitude be called interpretation. Interpretation in every case is concerned primarily with the words of the law. Its ordinary purpose is to clarify words or phrases that are obscure and ambiguous (or at least to make them more clear than they are) or to discover in precisely what sense the words are to be understood.²¹⁸ On the other hand, in a case involving *epikeia*, it is presupposed that the words of the law are clear and that there is a clear interpretation of the law itself as it stands. The case in question is most certainly included in the law, if only the words of the law are considered. But it is the function of *epikeia* to go beyond the words of the law, and having determined the intention of the legislator (not the intention which is expressed in the words of the law, but rather that which constitutes an exception or a contradiction to those words), to deviate from the course clearly prescribed by the words of the law, on the basis of the belief that the lawmaker in enacting the law benignly excluded from it the case at hand. And even if interpretation, strictly understood, cannot clarify obscure terms other than by resorting to an investigation of the lawmaker's purpose, even then interpretation

²¹⁶ Cf. Rodrigo, *op. cit.*, n. 372.

²¹⁷ *De Legibus Ecc.*, n. 241. Van Hove further points out that "broad" and "strict" interpretation are not to be confused with "extensive" and "restrictive" interpretation. "*Stricta* intelligit verba sensu proprio sed magis coarctato, *lata*, sensu proprio sed magis extenso et generalissimo, dum *restrictiva* verba interpretatur infra sensum proprium, *extensiva* ultra hunc sensum."—*Ibid.*, n. 242.

²¹⁸ Cf. B. Mastrius, *Theologia Moralís* (ed. 6; Venetiis, 1723), Disp. II, Art. V, n. 214.

will differ from *epikeia*, for it will be concerned with the lawmaker's immediate purpose and intention as manifested in the law.

Here, then, is the first difference which exists between *epikeia* and interpretation. The former, on the basis of the presumed intention of the legislator, puts to one side an entirely clear and obvious law—it corrects the law; it justifies the violation of the legal formula. The latter, whether in an authentic or merely private manner, sheds light upon a law which is obscure and ambiguous, or more completely clarifies a law that may in some degree be clear—it explains the law.²¹⁹

Moreover, there exists a second difference. Once a law has been authentically interpreted, that interpretation remains universally valid. It is effective for all cases under the law regardless of time, place or circumstances. But such is not true where *epikeia* is involved.²²⁰ *Epikēia* is concerned only with the particular case at hand. It is quite possible, then, that a case allowing the use of *epikeia* today may tomorrow, due to fluctuating circumstances, forbid its use. Or again, although extrinsic circumstances may be identical, nevertheless because of personal factors involved, to resort to *epikeia* may be licit for one individual and illicit for another. From these considerations it may be concluded that although *epikeia* approximates interpretation (if both terms be taken in a broad sense),²²¹ there is between the two concepts an essential difference.

Finally, interpretation, especially authentic interpretation, has standing in both the internal forum and the external forum. *Epikēia*

²¹⁹ "Certissime considerari non potest [epikeia] ut vera legis intellige *formulae legalis, interpretatio* doctrinalis restrictiva; per epikeiam enim non inquiritur de sensu verborum legis (an hos vel alios casus universaliter et quasi abstracte comprehendant), sed supposito sensum formulae legalis esse certe universalem, ideoque vi suae significationis universalis, prout in lege usurpatur, hunc quoque actum particularem comprehendere, iudicatur nihilominus eam in hoc particulari eventu applicari non posse propter circumstantias speciales, ipsi legi alienas, sed ex ipsa concreta eventus natura exsurgentes."—Michiels, *op. cit.*, I, p. 436.

²²⁰ Cf. Maroto, *op. cit.*, I, n. 241.

²²¹ Rodrigo points out that interpretation properly so-called seeks out the mind of the lawgiver as *positively* contained and manifested in the law. *Epikēia* approximates interpretation in that it determines *negatively* the ambit of the law. Cf. Rodrigo, *op. cit.*, n. 392.

is concerned, according to most theologians, exclusively with the forum of conscience.

It should be noted that sometimes what appears to be an instance of the use of *epikeia* may, in point of fact, be a course of action sanctioned by an official law interpreter as being in accord with the law. The United States Supreme Court, for example, adheres to the principle that fundamentally, when the words of a law are clear and unambiguous, there is no room for interpretation.²²² Yet, it recognizes the possibility that strict adherence to the words, clear and unambiguous though they may be, may result in action which is contrary to the spirit of the law. In other words, while adhering basically to *literal* interpretation, it does not exclude *sensible* interpretation. If in certain particular cases literal interpretation would result in unjust or absurd consequences, the Court interprets that it was not the mind of the legislator (and this would seem to involve either the power or the will of the legislator, for the consequences may be either unjust or absurd) to extend his law to those cases.²²³ Should similar cases arise subsequent to such authentic interpretation, deviation by a subject from the words of the law would not be an instance of *epikeia*, for it would be in accord with the law as interpreted authentically. Furthermore, it would be of greater advantage than would be *epikeia*, inasmuch as it would be sustained not only in the internal, but also in the external forum.

The foregoing considerations lead one to believe that frequently what the older writers called *epikeia* is only interpretation. They seemed too prone to consider only the *corpus* of the law without its *anima*. *Epikeia* actually has place, however, only if one deviates from the law considered in its entirety, that is, composed of *corpus* and *anima*.

II. Dispensation

Just as *epikeia* differs from interpretation, so too it differs from dispensation. Dispensation may be defined as "the relaxation of a law in a particular case by a competent Superior acting on the basis of a

²²² U. S. vs. Wiltberger, 5 Wheat., 76.

²²³ Church of the Holy Trinity vs. U. S., 143 U. S., 457; U. S. vs. Kirby, 7 Wall., 482.

just and reasonable cause.”²²⁴ While it is true that in times past the term was used to signify any exception from the law,²²⁵ nevertheless, today it has reference only to that act of an authority endowed with jurisdiction, by which he removes the obligation of a law from a particular person or group in a particular case. It should be noted that dispensation does not abolish the law. Actually the law remains in force; it is not even suspended generally. But, owing to the dispensation, the obligation ceases in a particular case involving those to whom the dispensation is granted.

The act of dispensing is an exercise of jurisdiction. For just as jurisdiction is required in order that a legislator enact the law, so too it is required in order that he exempt certain subjects from obeying it in a particular case. The law itself is binding upon the subjects only insofar as it is the enactment of a legislator possessed of the proper authority to make a law for the community. Likewise, “it is an act of jurisdiction where the legislator breaks the bond of the law in a special case to which the law would otherwise be applied.”²²⁶ Actually, of course, it is not necessary that the legislator himself directly grant the dispensation, for “it is immaterial whether the grantor acts by reason of competent jurisdiction proper to himself or his office, or merely by virtue of authority and power which have properly been communicated to him.”²²⁷ Furthermore, it is important to note that the possession of competent jurisdiction involves also the concept of dispensable *materia*. For there are certain matters over which no human authority has power, and hence concerning which he can grant no dispensation regardless of the scope or extent of his jurisdiction.

It is one of the proper or peculiar characteristics of *epikeia* that it is made use of, not on the basis of the jurisdiction of any competent Superior, but rather on the basis of the subject’s own private initia-

²²⁴ “Dispensatio est relaxatio legis in casu particulari a competente Superiore ex iusta et rationabili causa.”—Sipos, *op. cit.*, p. 27.

²²⁵ Cf. Reilly, *op. cit.*, p. 1.

²²⁶ Leroux, “De Epikeia,” *REL*, VII, 257.

²²⁷ Reilly, *op. cit.*, p. 2.

tive. And it is due primarily to this fact that *epikeia* and dispensation differ essentially.²²⁸ Thus, Suarez states emphatically that dispensation is

altogether different from the interpretation which is made by *epikeia* whether in an evident case, or a probable case, or a doubtful case, in which the authority of a superior is required. For although these names are wont to be confused, nonetheless they must be distinguished. . . . For *epikeia* is not an act of jurisdiction . . . whereas dispensation is an act of jurisdiction.²²⁹

Attention has already been called to the fact that *epikeia* has standing only in the internal forum. Herein exists another point of difference between *epikeia* and dispensation. For the latter is valid in the external forum as well.

Again, an act which is posited by reason of a dispensation that has been granted, is performed *ex voluntate Superioris superveniente*, in the sense that the Superior has relaxed the law for the case at hand. But an act which is posited by reason of the use of *epikeia*, is performed *ex voluntate Superioris antecedente*, in the sense that the legislator is presumed in his benignity and equity to have excluded from his law originally the case in question. In fact, it may be said that such an act is performed *ex voluntate concomitante*, insofar as

²²⁸ It is also to be noted that in using *epikeia*, one acts on the basis of the presumed intention of the legislator. However, "nullus potest excusari a praecepto ob moralem certitudinem supervenientis dispensationis, quia non spes dispensationis sed dispensatio ipsa obligationem praecepti tollere potest . . ."—Castropalao, *op. cit.*, Vol. I, Tract. III, Disp. I, Punct. XXIV, § 5. Cf. also Leurenus, *op. cit.*, Vol. I, Lib. I, Tit. II, Quaest. 116, n. 2.

²²⁹ ". . . diversam omnino esse ab interpretatione quae per epikiam fit, sive in casu evidente aut probabili, sive in casu dubio, in quo auctoritas superioris postulatur. Licet enim haec nomina soleant confundi, distingui nihilominus debent. . . . Epikia enim non est actus jurisdictionis . . . dispensatio autem est actus jurisdictionis."—*De Legibus*, Lib. VI, Cap. X, n. 1. It is on this basis that Elbel-Bierbaum reply to the question as to whether a confessor can dispense a man from the law of fasting. They give a negative answer, but add "confessarius per epikiam possit prudenter declare mentem Pontificis aut Ecclesiae velut piae matris non esse ut taliter infirmatus jejunium servet."—B. Elbel, *Theologia Moralis per Modum Conferentiarum*, ed. I. Bierbaum (Paderbornae, 1891-1892), Vol. I, Conf. 16, n. 450.

the legislator's benign intention as regards the law under consideration still exists virtually.²³⁰ In other words, when an individual is dispensed from a certain law, the Superior does not declare that the case at hand was not, or is not, included in the law. Actually, the opposite is true. Even yet the law itself remains; its general obligation is intact; and its inclusion of the present case is not denied. Dispensation simply signifies that in this particular instance at hand—not even in other identical instances where the persons and circumstances involved are exactly the same—an individual who is truly subject to the law is exempted from obeying it although this case certainly was, and still is, included in the law, even to the extent that exemption requires an act of real jurisdiction. On the other hand, *epikeia* implies that the law does not oblige in regard to the case at hand, precisely because the case was never willed to be included in the law, despite the words of the law which seem to indicate the contrary.²³¹ For he who makes use of *epikeia* prudently judges that the legislator benignly excluded from his law this particular case, and hence there is no obligation to follow the words of the law.

Nor may we say that *epikeia* is an act of self-dispensation. For a subject without jurisdiction cannot perform an act (the act of dispensing) which of its very essence requires the exercise of jurisdiction. Moreover, the statement "*epikeia* is self-dispensation" involves a contradiction, in that *epikeia*, as was pointed out above, implies that the case at hand is not included in the law, whereas dispensation implies the opposite.

This distinction between *epikeia* and dispensation should be kept clearly in mind when one refers to St. Thomas' discussion of dispensation. For it seems apparent that the Angelic Doctor does not consider dispensation in the strictly technical sense in which it is today

²³⁰ Cf. Rodrigo, *op. cit.*, n. 392.

²³¹ This point is insisted upon by Soto. Cf. *op. cit.*, Lib. I, q. VII, a. 3. In fact, Wohlhaupter believes that the great contribution of Soto to the development of the concept of *epikeia* lies in his clear distinction between *epikeia* and dispensation. Cf. Wohlhaupter, *op. cit.*, p. 92. All modern moralists and canonists hold to this distinction. Cf. e.g., F. Claeys-Bouuaert, G. Simenon, *Manuale Iuris Canonici* (Gandae et Leodii: Dessain; Vol. I, et III, ed. 3, 1930; Vol. II, 1931), I, n. 228.

understood, and hence does not draw a sharp distinction between *epikeia* and dispensation, as must now be done.²³² But the failure to differentiate sharply between the two concepts need not cause surprise, for the determination of the precise significance of the term "dispensation," which arose only during the time of Rufinus, did not begin to exert any appreciable influence for many years.²³³

III. *Presumed Permission*

It should also be noted that *epikeia* and the presumed permission of a Superior, though in some ways akin, are not identical. The basis for the distinction has already been insinuated. Presumed permission (and presumed dispensation) presupposes that the case at hand actually is included in the law as such.²³⁴ However, one judges that here and now, subsequent to the enactment of the law, the legislator or Superior allows him to disregard it. Or it may be that a law explicitly states that certain actions may not be performed except with the permission of a Superior. Here obviously the acts in question are explicitly, though only conditionally, included in the prohibition of the law. And when it can be reasonably presumed that such permission is given, then the law, insofar as it conditionally prohibits certain acts, is no longer effective, precisely because the condition is considered to have been fulfilled. But in the case of *epikeia*, the instance in question is presumed not to fall within the law at all. The individual who uses *epikeia* makes the judgment that to impose obligation in the present case was not the intention of the lawmaker, despite the wording of the precept itself.

²³² Cf., e.g., St. Thomas, *Sum. Theol.*, I-II, q. 97, a. 4.

²³³ ". . . the Decretist Rufinus ([wrote] 1157-1159) formulated a definition of dispensation which approximated the restrictions of the definition expressed in the Code of Canon Law. His definition exercised a comparatively great influence on the subsequent restriction of the term to its modern limitations, but it did not effect this restriction immediately."—Reilly, *op. cit.*, p. 20.

²³⁴ Cf. Soto, *op. cit.*, Lib. I, q. VII, a. 3; Roncaglia, *op. cit.*, Vol. I, Tract. III, Quaest. IV, Cap. III; Wouters, *op. cit.*, I, n. 144. Wouters cautions that in order that *licentia* be used licitly it is required: (1) that there be no question of a law whose validity depends upon the actual concession of permission—e.g., the hearing of confession; (2) that there exist a prudent presumption that the Superior would grant the permission were he requested to do so; (3) that the petitioning for permission be not conveniently possible.

IV. *Excusing Cause*

It is extremely difficult to determine the relationship which exists between *epikeia* and deviation from the law based on the existence of "excusing causes," precisely because there is no general agreement as to the meaning or ambit of "excusing causes."

Tanquerey defines excusing causes as those "on account of which an individual, although he remains a subject of the law, is nevertheless not bound to observe it . . ." ²³⁵ This is probably the most widely accepted definition of the term.

There is a vast divergence of opinion, however, on the question as to what constitutes an excusing cause.²³⁶ Tanquerey,²³⁷ Noldin-Schmitt,²³⁸ Arregui,²³⁹ and Merkelbach²⁴⁰ consider excusing causes to be invincible ignorance and impossibility (physical and moral). Lehmkuhl²⁴¹ and Sabetti-Barrett-Creedon²⁴² make no mention of ignorance as an excusing cause. Rodrigo²⁴³ lists doubt as a cause excusing from the obligation of law. Gury-Ballerini-Palmieri,²⁴⁴ Konings,²⁴⁵ and Ferreres²⁴⁶ seem at first sight to consider excusing causes to be subdivided into exempting causes (departure from the territory in which the law binds) and impeding causes (ignorance and physical and moral impossibility). Davis²⁴⁷ believes departure from

²³⁵ *Op. cit.*, II, n. 342.

²³⁶ Cf. Van Hove, *De Legibus Ecc.*, n. 225; Rodrigo, *op. cit.*, p. 301.

²³⁷ *Loc. cit.*

²³⁸ *Op. cit.*, I, n. 175 et sqq.

²³⁹ *Op. cit.*, n. 68.

²⁴⁰ *Summa Theol. Mor.*, I, nn. 372 et sqq. Merkelbach's division of impossibility differs somewhat from that of other theologians. In his view, impossibility may be absolute or moral. Absolute impossibility may be corporal (physical) or spiritual (the work prescribed cannot be performed without sin).

²⁴¹ *Op. cit.*, I, nn. 249 et sqq.

²⁴² *Op. cit.*, nn. 91-92.

²⁴³ *Op. cit.*, nn. 400 et sqq.

²⁴⁴ *Op. cit.*, I, nn. 108 et sqq.

²⁴⁵ *Op. cit.*, I, nn. 137 et sqq.

²⁴⁶ *Op. cit.*, I, nn. 177 et sqq.

²⁴⁷ *Op. cit.*, I, pp. 168 et sqq.

the territory and moral impossibility to be excusing causes, as also the fact of a law's becoming harmful, unreasonable, or useless in general. Genicot-Salsmans²⁴⁸ mention only grave inconvenience.

Suffice it, then, to make the following observations in regard to whatever relationship there may exist between *epikeia* and excusing causes.

First, it would seem to be true that an excusing cause in regard to an individual, presupposes that the law originally obligated him. "No one who was not previously bound by the law can be said in a proper sense to be excused or exempted from it."²⁴⁹ On the other hand, basic to the concept of *epikeia* is the fact that the subject prudently judges that the case in question, by reason of the benign will of the legislator, was never intended to be included in the law at all. It cannot be denied, however, that in practice reference is often made to being excused from law, when more accurately the use of *epikeia* is being contemplated.

In the second place, as can be seen from the foregoing brief survey of modern authors, excusing causes may concern cases in which the power of the legislator to demand obedience to his law is lacking, as well as his intention to do so. This is obviously true in cases of physical impossibility and, in regard to some theologians, of moral impossibility also.²⁵⁰ On the other hand, *epikeia* strictly so-called is invoked only in cases where it is prudently judged that the legislator, though able to demand observance of his law, is unwilling to do so. From this point of view "excusing causes" seems to be a broad term which includes the reasons on account of which *epikeia* may be used. However, one must not lose sight of the fact that although the reasons may be called excusing causes in either instance, actually in the case of *epikeia* the judgment is that the case was never intended to be included in the law.

Thirdly, as Chelodi points out,²⁵¹ excuse practically always has immediate reference to the subject—he is not aware of the law, or he is doubtful about it, or he is unable to comply with it, etc. But the

²⁴⁸ *Op. cit.*, I, nn. 134 et sqq.

²⁴⁹ Van Hove, *De Legibus Ecc.*, n. 225.

²⁵⁰ Cf. pp. 157 et sqq. *supra*.

²⁵¹ *Op. cit.*, n. 69.

basis of *epikeia* is found, in the final analysis, not in the subject but rather in the law itself, or, more precisely, in the lawmaker. That is to say, the law by reason of its universality of expression is deficient, in that it does not adequately represent the intention of the lawmaker.

Finally, reference may be made to the opinion of Van Hove in the matter. The point has already been alluded to²⁵² and need only be mentioned here. Van Hove points out²⁵³ that the third class of cases mentioned by Suarez²⁵⁴ is based upon the existence of causes today commonly called excusing causes. Such is true, of course—provided that Van Hove understands by excusing causes those which refer to the will and not to the power of the legislator. However, Van Hove goes on to say that not a few modern authors—D’Annibale, for example—

restrict the use of *epikeia* to that sole case in which by reason of an altogether extraordinary circumstance the legislator is presumed to have been unwilling to include that case in his law. Hence, they do not call it *epikeia* whenever obligation is lacking on account of the lack of power in the legislator or even on account of the lack of intention in the legislator or on account of the commonly admitted causes excusing from law.²⁵⁵

Van Hove repeats this opinion in a later passage and attributes it to “most authors of today.”²⁵⁶ As has been pointed out above,²⁵⁷ this interpretation of D’Annibale’s words seems hardly justified, nor is the statement warranted that most modern theologians follow this view. Far more correct is the opinion of Leroux:

²⁵² Cf. Chap. III, note 4 *supra*.

²⁵³ *De Legibus Ecc.*, n. 278.

²⁵⁴ Cf. Suarez, *De Legibus*, Lib. VI, Cap. VII, n. 11.

²⁵⁵ “. . . usum epikeiae *restringunt* ad solum casum quo, ob circumstantiam quandam omnino specialem, legislator praesumitur noluisse illum casum sub lege comprehendere. Proinde non vocant epikeiam, quoties deficit obligatio ob defectum potestatis in legislatore aut etiam ob defectum voluntatis, seu ob causas communiter admissas excusationis a lege.”—*Loc. cit.*

²⁵⁶ *Ibid.*, n. 287. It is difficult to determine whether Van Hove himself subscribes to the view which he believes to be that of D’Annibale.

²⁵⁷ Cf. Chap. III, note 4 *supra*.

Some modern authors (Card. D'Annibale expressly . . .) contend that *epikeia* is not to be invoked except in the third case [i.e., of the Suarezian classification] because the preceding cases according to the natural law itself exceed the power of the legislator, nor is there any need of recurring to his equity and ordinary moderation.²⁵⁸

Van Hove makes no reference to the greatest weakness in his interpretation of D'Annibale's opinion—on what basis may an individual deviate from the words of the law, when to demand observance of it does not exceed the legislator's power. The question seems unanswerable if one excludes the use of *epikeia* from this sphere. To invoke "excusing causes" is pointless, inasmuch as all "excusing causes" are reducible to one or other of two categories: to demand observance of the written law in the case either exceeds the power of the legislator, or is contrary to his intention.

V. Popular Acceptance of Human Law

Popular acceptance²⁵⁹ of human laws²⁶⁰ may be constitutive, approbative, or executive.²⁶¹ Constitutive acceptance consists in the true and formal consent of the people which is a concurrent efficient and immediate cause, strictly understood, of the enactment of the law. Such is the popular referendum—a measure proposed as a law becomes such only with the causal consent of the people. Approbative acceptance is likewise a true and formal consent of the people with regard to the admitting or rejecting, insofar as

²⁵⁸ "Nonnulli autem auctores moderni (ita nominatim Card. D'Annibale . . .) contendunt epikeiam non esse invocandam nisi in tertio casu, quia casus praecedentes, juxta ipsum jus *naturale* superant potestatem legislatoris, neque opus est ut recurratur ad ejus aequitatem et ordinariam moderationem."—"De Epikeia," *REL*, VII, 258, footnote.

²⁵⁹ Discussion is limited to the acceptance of laws by the people for whom they were enacted. We are not concerned with the *Regium Placet* or the *Regium Exsequatur*, the acceptance by the civil power of episcopal or papal laws.

²⁶⁰ It is evident that divine laws are in no way conditioned upon the will of creatures.

²⁶¹ Cf. Rodrigo, *op. cit.*, n. 221.

binding force is concerned, of a law already enacted. Here the consent of the people is not a true cause of the law, but rather a *conditio sine qua non*. This acceptance renders effective *in actu secundo* a law already constituted. It is, as Rodrigo points out,²⁶² in some way akin to the presidential veto power. Executive acceptance is that which is implicitly contained in the observance of a law by the greater part of the citizenry.

The teaching of theologians on the popular acceptance of law may be considered insofar as it concerns first, ecclesiastical laws, and secondly, civil laws. In reference to ecclesiastical laws, neither constitutive nor approbative acceptance by the people is necessary in order that a precept exist and have binding force. The Church has been founded by Christ as a hierarchical and monarchical society; hence, to admit the need of such acceptance would be repugnant to the divine constitution of the Church. The power which she possesses by divine bestowal is exercised independently of her subjects.²⁶³

With regard to executive acceptance, historically the matter has been controverted. Some authors, while assuredly admitting the legislative power of the Church, were of the opinion—"which never was common"²⁶⁴—that "ecclesiastical laws receive their complete and definitive force through executive acceptance of the law on the part of the community."²⁶⁵ These authors, for the most part, argued that, although the Church could assuredly impose absolute obligation upon her subjects, nevertheless, in point of fact, her laws are enacted only on condition of their acceptance by the people.²⁶⁶ St. Alphonsus²⁶⁷ adheres to the opposite opinion. The common doctrine today is that laws oblige without acceptance of the people,

²⁶² *Loc. cit.*

²⁶³ Cf. Suarez, *De Legibus*, Lib. IV, Cap. XVI, nn. 1-4; Merkelbach, *Summa Theol. Mor.*, I, n. 334; Rodrigo, *op. cit.*, n. 222. Noldin-Schmitt (*op. cit.*, I, n. 156) believe that the contrary opinion "savours of heresy."

²⁶⁴ Van Hove, *De Legibus Ecc.*, n. 108.

²⁶⁵ Van Hove, *loc. cit.*

²⁶⁶ It is unnecessary to consider the various arguments offered in support of the position requiring popular acceptance of law. For a detailed analysis cf. Suarez, *De Legibus*, Lib. III, Cap. XIX, and Lib. IV, Cap. XVI.

²⁶⁷ *Theol. Mor.*, Lib. I, n. 136.

unless it is established with certainty that the legislator enacted his law with such a condition attached—an occurrence which would be “exceptional,” Rodrigo believes.²⁶⁸

However, the Church herself provides for the abrogation of law through desuetude.²⁶⁹ It should be pointed out, however, that a law ceases in this manner, not because it has not been popularly accepted, but rather because of the fulfillment of conditions specifically laid down by the Church allowing its abrogation.²⁷⁰

It is possible in this connection, however, that *epikeia* may be introduced. Theologians teach that, if prior to the elapsing of the time required for the abrogation of the law by desuetude, the greater part of the people do not observe the precept, and the lawmaker though aware of the situation, takes no steps to enforce this law, his benign will of not urging the law may be presumed—provided, of course, that lack of observance is not contrary to divine or natural law, nor has not been previously reprobated by the law itself, nor is not the result of contempt for the legislator. On the other hand, if the benign will of the legislator cannot be presumed, the act of transgressing the law is sinful, at least materially.²⁷¹

It should be very clearly noted, however, that there is an essential difference between this use of *epikeia* and the non-acceptance of the law. It is not supposed that the law itself, from the fact that it is not being observed by the great part of the subjects, does not exist or does not have binding power. The use of *epikeia* is based upon the presumed intention of the legislator to exclude from his law the case at hand.

It may further be pointed out that in regard to ecclesiastical law there exists a *jus supplicationis*, whereby Bishops recurring to the Holy See, may place before the Pope the reasons for their belief

²⁶⁸ *Op. cit.*, n. 223.

²⁶⁹ Cf. *Codex Iuris Canonici*, Lib. I, Tit. II.

²⁷⁰ Cf. Ballerini-Palmieri, *op. cit.*, I, n. 291.

²⁷¹ Cf. Ballerini-Palmieri, *ibid.*, n. 292; Van Hove, *De Legibus Ecc.*, n. 108; Rodrigo, *op. cit.*, n. 223. Rodrigo points out that the same doctrine is taught by some, even with regard to cases where the legislator is not aware of the lack of observance of his law.

that a particular law should not be executed.²⁷² It is the opinion of many theologians²⁷³ that during the continuance of this process, the law is considered not to obligate—not by reason of any non-acceptance by the subjects, but rather because of the presumption that it is the intention of the Holy See not to bind while the matter is under consideration. Consequently, it is clear that this use of *epikeia* is in no way based upon the theory that laws do not bind except after their acceptance by the subjects.

There exists likewise in ecclesiastical law a *jus recursus*, enabling a subject to appeal to the Superior of the legislator.²⁷⁴ Meanwhile, if the law in question is believed by prudent individuals to be very difficult and discommodious, its binding force, theologians teach, is presumed to be suspended during the period of recourse—provided that from the non-observance of the law no scandal ensues.²⁷⁵ Here again there is no identity between non-observance of the law on the basis of the presumed benign will of the legislator and the non-observance on the basis of the theory that a law not popularly accepted has no binding force.²⁷⁶

With regard to civil law, “constitutive or approbative acceptance is not necessary *ex natura rei* in order that the law bind.”²⁷⁷ It should be kept in mind, however, that both constitutive and approbative acceptance may be provided for specifically in the constitution of some nations or some states. For although authority is bestowed upon rulers ultimately by God, nevertheless, according to what seems the more probable view, it is bestowed only mediately—that is, through the people. And it is juridically pos-

²⁷² Cf. Rodrigo, *op. cit.*, n. 224; Noldin-Schmitt, *op. cit.*, I, n. 156; Vermeersch, *Theol. Mor.*, I, n. 233.

²⁷³ Cf. Rodrigo, *loc. cit.*; Vermeersch, *loc. cit.*; Ballerini-Palmieri, *op. cit.*, I, n. 293. Van Hove notes: “Huic supplicationi cum effectu suspensivo hodie raro erit locus ob inductam vacationem per tres menses legum ecclesiasticarum (can. 9) qua tempus suppetit recurrenti ad Sanctam Sedem.”—*De Legibus Ecc.*, n. 109.

²⁷⁴ Cf. Rodrigo, *loc. cit.*; Vermeersch, *loc. cit.*

²⁷⁵ Cf. Ballerini-Palmieri, *loc. cit.*; Rodrigo, *loc. cit.*

²⁷⁶ “*Per se . . . appellatio qua subditi ab episcopo ad Romanum Pontificem provocent, eorum obligationem parendi non suspendit.*”—Vermeersch, *loc. cit.*

²⁷⁷ Rodrigo, *op. cit.*, n. 225.

sible that they should retain in a particular case, for example, the power of concurring with their civil rulers in the enactment of a law.²⁷⁸

But once a law has been fully constituted by competent authority and unconditionally imposed upon the subjects, executive acceptance by the people is not required.²⁷⁹ To maintain otherwise would be to subscribe to a view condemned by the Church,²⁸⁰ a view which is "philosophically and juridically absurd,"²⁸¹ which would render authority illusory, render law mere counsel, and result in the collapse of social order.²⁸²

In conclusion, it may be pointed out that, according to the doctrine which teaches the necessity of popular acceptance of law, subjects may deviate from the precepts of Superiors against the will of the latter. But in cases involving *epikeia*, one transgresses the words of the law, precisely on the basis that he is acting according to, and not contrary to, the intention of the lawgiver.

²⁷⁸ Cf. Rodrigo, *loc. cit.*

²⁷⁹ However, according to theologians, if the great majority of people do not observe the law, the others are not bound by it, provided that they have a basis for believing that it is not the intention of the legislator to obligate them under such circumstances. "Nam licet forte illi peccaverint qui incoeperunt et qui primum secuti sunt, tamen postquam res ad eum statum pervenit, ut de facto a majori parte non servetur, tunc alii sine peccato poterunt majori parti conformari et excusari, licet foret lex nondum plene revocata sit . . . quia observantia privata talis legis jam non pertinet ad commune bonum nec videtur velle principes obligare unum vel alium, quando communitas non observat legem. Verumtamen hoc etiam indiget magna moderatione . . ."—Suarez, *De Legibus*, Lib. III, Cap. XIX, n. 13.

²⁸⁰ Pope Alexander VII condemned the proposition: "Populus non peccat, etiamsi absque ulla causa non recipiat legem a principe promulgatam" (*DB* 1128).

²⁸¹ Thus, Rodrigo, *op. cit.*, n. 226.

²⁸² Cf. Merkelbach, *Summa Theol. Mor.*, I, nn. 275-276. Senglar states: ". . . the unanimous teaching of theologians since the time of Suarez [is that] generally and *per se* popular acceptance is not necessary for the obligatory force of a civil law."—J. Senglar, *The General Obligation of Civil Law* (an unpublished S.T.L. dissertation, School of Sacred Theology, The Catholic University of America, Washington, D. C., 1934), p. 44. Among the authors cited to substantiate this view are Ballerini, Billuart, Bouquillon, Ferreres, Genicot, Kenrick, Konings, St. Alphonsus, McHugh-Callan, Noldin, Prümmer, Sabetti-Barrett, Scavini, Tanquerey, and Vermeersch.

CHAPTER VI

EPIKEIA AND THE NATURAL LAW

ARTICLE 1. INTRODUCTORY NOTIONS

SAINT THOMAS¹ defines the natural law as a participation by rational creatures in the eternal law,² according to which they discern good or evil. Moreover, the good they are commanded to do, and the evil they are commanded to avoid; for the natural law is "an ordering of a rational creature towards his ultimate end, an ordering founded on nature itself, and made known by the natural light of reason."³ It is, then, both promulgated by the light of reason enabling man to discern, and prescribed by the dictate of reason commanding, what is the good to be done and the evil to be avoided.⁴

By the eternal law existing in the divine mind, God plans the motion of all creatures toward their final end in a manner proper

¹ *Sum. Theol.*, I-II, q. 91, a. 2.

² The eternal law is defined as "ratio gubernativa totius universi in mente divina existens."—*Ibid.*, a. 1.

³ Merkelbach, *Summa Theol. Mor.*, I, n. 244. Noldin-Schmitt point out: "*Lex naturalis subjective* est obligatio hominibus necessario imposita per actus convenientes tendendi in proprium finem. . . . *Lex naturalis obiectiva* est ordo moralis a Deo constitutus, consistens in operationibus, quae considerata hominis relatione ad Deum, semetipsum et proximos necessario faciendae vel omittendae sunt."—*Op. cit.*, I, n. 112. Cf. the definition of St. Augustine: "Lex vero aeterna est ratio vel voluntas dei ordinem naturalem conservari iubens, perturbari vetans."—*Contra Faustum* 22, 27 (*CSEL* 25, 621 Zycha). With regard to the definition of St. Augustine, Suarez points out that "*vel*" must be taken as "*et*."—*De Legibus*, Lib. II, Cap. VI, n. 13.

⁴ This is slightly different from the view of Merkelbach who says that the natural law is the light of reason, and is the dictate of reason. Cf. *Summa Theol. Mor.*, I, n. 246. Ferreres notes that the dominion of the natural law is both habitual and actual: "Hinc lex naturalis nihil aliud est quam lex aeterna naturae rationali per lumen naturale intimata, sive habitualiter per rectam rationem, sive actualiter per ejus dictamen."—*Op. cit.*, I, n. 192.

to them.⁵ In the case of rational creatures, this direction toward their final end is effected by a cognition, on the part of men, of the good to be done and the evil to be avoided, a cognition which is impressed on the human intellect.⁶ Its promulgation consists in the bestowal by God upon men of the light of reason, enabling them to perceive what is in conformity with the eternal law in human actions—and hence with their own final end—and what is not.⁷

The natural law has a two-fold basis or constitutive norm. The proximate basis is human nature itself, considered in all its essential relations, and with respect both to its ultimate end and to the means necessary for the attaining of that end. The ultimate basis is the divine essence, which is the root of the eternal law, of which the natural law is a participation by creatures. From the existence of this two-fold basis, it follows that a thing is good according to the natural law, if it is in conformity with human nature, looked at in its relation to its proper ordination to its last end, namely God, Who is one day to be possessed by the soul.⁸

⁵ “. . . etiam animalia irrationalia participant rationem aeternam suo modo, sicut et rationalis creatura. Sed quia rationalis creatura participat eam intellectualiter et rationaliter, ideo participatio legis aeternae in creatura rationali proprie lex vocatur . . . in creatura autem irrationali non participatur rationaliter; unde non potest dici lex nisi per similitudinem.”—St. Thomas, *Sum. Theol.*, I-II, q. 91, a. 2, ad 3.

⁶ Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 244. Gilson states: “If reason is the rule whereby the goodness or the malice of our will is measured, it owes it to this supreme rule which is itself but a ray of the divine reason, shining in us by way of participation.”—E. Gilson (A. H. C. Downes, trans.), *The Spirit of Medieval Philosophy* (New York: C. Scribner's Sons, 1940), p. 335.

⁷ “Est praeterea observandum, hanc promulgationem aliter in naturali lege, aliter vero in positiva requiri: nam in priori invenitur certus modus promulgationis a natura definitus, quia sicut illa lex naturalis est, ita ex se determinat conditiones legis. Promulgatur ergo eo ipso quod ex natura ipsa manat. Oritur enim ex specifica ratione talis naturae, et ideo licet promulgatio fiat in singulis, non censetur esse propositio particularis, sed communis vox totius naturae, vel potius auctoris ejus, qui licet loquatur ad singulos, loquitur ut persona publica, quia loquitur ut auctor ipsius naturae . . .”—Suarez, *De Legibus*, Lib. I, Cap. XI, n. 4.

⁸ Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 247.

It is not to the point to treat here of the various classifications of natural precepts.⁹ But one division—that based upon the relation of the precepts toward man's ultimate end—is important for our purpose. Looked at from this point of view,¹⁰ some precepts of the natural law are primarily intended; that is, they are necessary for the attainment of the end which nature principally intends, or are prohibitive of those things that tend to destroy the order established for creatures by God. In other words, these precepts concern matters that are necessary for the conservation of the moral order. On the other hand, there are some precepts which are required in order that man's end be more fittingly and more easily achieved. These latter are not absolutely necessary, but only useful, for the conservation of the moral order—for example, the prohibition of divorce *ab extrinseco*, that is, divorce granted by human public authority.¹¹

⁹ Actually, in a strict sense there is fundamentally only one precept of the natural law. "Licet multa in seipsis sint legis naturae praecepta, ad unum tamen primum praeceptum quo bonum prosequendum, et malum vitandum esse decernitur, referri singula possunt."—St. Thomas, *Sum. Theol.*, I-II, q. 94, a. 2. Cf. also *ibid.*, ad 1. Says the civil jurist Austin on the same point: ". . . the natural law is but one, as its author is one; nevertheless it may be divided into as many laws and distinct precepts as the actions to be performed are specifically distinct in themselves, and as diverse as the proximate end for which these actions are commanded. . . ."—J. B. Austin, *The Duties and the Rights of Man* (London, 1887), n. 47.

¹⁰ This division is not to be confused with that based upon the cognition of, or the logical nexus existing between, various precepts of the natural law. From this latter point of view, some precepts of the natural law are universal (e.g., good is to be done); some are immediately deduced from universal principles (e.g., theft is to be avoided); and some are remote precepts only mediately deduced from universal principles (e.g., articles that are found must be returned). ". . . constat non eadem esse praecepta primaria vel secundaria cognitu, et primaria vel secundaria necessitate et intentione naturae; multa enim secundaria cognitu quae a primis principiis deducuntur per conclusionem (etiam remotam) sunt a natura primario intenta, ut prohibitio homicidii, adulterii, furti; unde bene inspicendum est quonam sensu illi termini apud auctores usurpantur."—Merkelbach, *Summa Theol. Mor.*, I, n. 251.

¹¹ Cf. S. Bertke, *The Possibility of Invincible Ignorance of the Natural Law*, The Catholic University of America Studies in Sacred Theology, No. 58 (Washington, D. C.: The Catholic University of America Press, 1941), p. 35. St.

With regard to the former class of precepts—those primarily intended, and hence necessary for man's final end—one may distinguish first, those which are necessary to conserve the direct order of creatures to God (for example, the precept that God is to be adored), or prohibit what is directly repugnant to God (for example, the prohibition of blasphemy), and secondly, those which are necessary to conserve the order of creatures among themselves (for example, the prohibition of divorce *ab intrinseco*, that is, divorce by the mutual agreement of the parties without the intervention of public authority).

The foregoing notions on the essence of the natural law are fundamental to the Catholic concept of law in general, and essential to an understanding of any problems which arise in connection with the natural law. Moreover, they represent the Church's teaching through the ages.¹² But civil jurists too recognize the truth of these basic considerations. Among the earlier writers Grotius makes the following significant statement:

The natural law is a dictate of right reason, indicating that in a certain act, by reason of its conformity or lack of conformity with rational nature, there is inherent moral baseness or moral necessity, and consequently that that act is either forbidden or commanded by God, the Author of nature.¹³

Thomas states: "Si ergo actio sit inconveniens fini quasi omnino prohibens finem principalem, directe per legem naturae prohibetur primis praeceptis legis naturae. . . . Si autem sit incompetens fini secundario quocumque modo, aut etiam principali ut faciens difficilem vel minus congruam perventionem ad ipsum, prohibetur non quidem primis praeceptis legis naturae, sed secundis, quae ex primis derivantur. . . ."—*Sent.* IV, dist. 33, q. 1, a. 1. It should be noted, however, that some modern authors disapprove of this division. Thus, Van Hove states: "Quod ipsa *praecepta* attinet, seu actus qui sub legem naturalem cadunt, vocantur *prima* et *secunda* prouti exiguntur vel suadentur, prohibentur vel dissuadentur a natura humana. In his ergo quae iure naturae praecipuntur, praecepta primaria et secundaria non sunt distinguenda, cum omnia aequae sint imposita iure naturae; quae iure naturae suadentur, nullo modo cadunt ne secundario quidem sub praeceptum legis naturalis."—*Prolegomena*, n. 45.

¹² Subsequent pages will concern the teaching on the natural law, and its relation to *epikeia*, as enunciated by moralists after St. Thomas. For a detailed study of the natural law in the predecessors of St. Thomas, cf. O. Lottin, "Le Droit Naturel chez Saint Thomas et Ses Prédécesseurs," *EThL*, I (1924), 369 et sqq.; II (1925), 32 et sqq., 345 et sqq.; III (1926), 155 et sqq.

¹³ *De Jure Belli ac Pacis*, Lib. I, Cap. I, n. 10.

Among later writers Rutherford adheres to a position on the matter which is quite orthodox:

The law of nature enjoyns all those actions which are morally good, and forbids all those which are morally bad. . . . When any actions which are indifferent in themselves are commanded or forbidden by any express revelation of God's Will, those actions likewise which God thus commands become duties, and those actions which He forbids become crimes: however, as the actions in themselves or in their own nature, affect the common good of mankind neither one way or other, as they have nothing in them neither morally good nor morally bad, this sort of duties is called positive duties.¹⁴

Even those who are opposed to these views (Korkunov, for example calls the natural law "a seductive hypothesis"¹⁵ and asserts that "the belief in natural law owes its origin to the logical error of wrongly recognizing as evident and necessary, institutions which in fact are not so"¹⁶) must admit that

the hypothesis of the natural law becomes the only possible explanation for that character of necessity and generality which belongs to law. Despite the sure manifestation of variable elements, which seemed to contradict its necessary character, every reflective mind was compelled to recognize in law an objective necessity, and not a purely human creation only.¹⁷

¹⁴ T. Rutherford, *Institutes of Natural Law* (ed. 2; Cambridge, 1779), I, pp. 17-18.

¹⁵ N. M. Korkunov (W. G. Hastings, trans.), *General Theory of Law* (Boston, 1909), p. 117.

¹⁶ *Ibid.*, p. 137.

¹⁷ *Ibid.*, p. 117. Unfortunately many contemporary jurists reject the Catholic concept of the natural law. Robinson, e.g., states: "Legal philosophers have generally recognized that the natural law is a set of values struggling for recognition, and that it represents a movement of social adjustment rather than an assertion of fundamental principles."—E. S. Robinson, *Law and the Lawyers* (New York: The Macmillan Co., 1935), p. 220. For a brief exposition of the Catholic concept of law by a present-day lawyer, cf. Walter B. Kennedy in J. Bingham, *et al.*, *My Philosophy of Law: Credos of Sixteen American Scholars* (Boston: Boston Lawbook Co., 1941), pp. 145-160.

ARTICLE 2. OPINIONS

Almost all theologians who discuss *epikeia* are concerned with the question of its applicability to precepts of the natural law. The opinions to be considered presently may be deemed more or less characteristic of the views of moralists on the point, as expressed during the past several centuries. But no attempt is made to present here an exhaustive historical study. Moreover, attention should be called to an important fact which is pertinent not only to the present chapter, but also to the two subsequent chapters. It seems necessary for purposes of conciseness, simply to state the belief of the theologians considered, on the point under discussion, and briefly to indicate the reasons upon which they base their view. To enter into further detail as to precisely what they understand the nature of *epikeia* to be—whether it involves the legislator's power, or his will, or both—would be out of place here. In regard to most of the theologians to be studied, reference may be made to Part I of this dissertation to determine their understanding of the nature of *epikeia*.

I. *Affirmative*

Cajetan. Cajetan, maintaining that *epikeia* may licitly be used in any case whatsoever where the law is deficient by reason of the universality of its expression, states explicitly that this is true whether there be question of positive law or of the natural law.¹⁸ However, an analysis of his teaching reveals an important qualification. He expresses the belief that precepts which have reference to the natural law are of two classes. Those in the first class are so universally true that there can be no case in which the law is deficient. Hence, such precepts—for example the prohibition of lying and adultery—are always binding, and in their regard *epikeia* may never be used. On the other hand, there are certain natural precepts, obedience to which is necessary in most instances, but observance of which in certain particular cases would result in harm. Thus, for example, although the natural law demands that objects which have been deposited be returned, it is conceivable that in certain cases

compliance with this law would be injurious and dangerous—as, for instance, if it should demand the return of a sword to its owner who is insane. In such cases *epikeia* may be used.¹⁹

Navarrus. Mention may be made, in passing, of the opinion of Navarrus to which Suarez frequently alludes. Navarrus²⁰ states simply that *epikeia* may be used both in regard to the civil and in regard to the natural law—as, for instance, in reference to the command “Thou shalt not kill.”

Lessius. It is the view of Lessius²¹ that *epikeia* is sometimes permissible in matters involving the natural law—when, for example, the law is expressed in such general terms as “Thou shalt not kill.” On the other hand, if the natural law be considered in a strict sense, with all those circumstances which constitute the essence of the law (“*cum illis circumstantiis cum quibus habet legis naturalis rationem*”), the use of *epikeia* is not licit. Rather, the law must be observed in every case since it is *per se* just and right.

Salmanticenses. It is with important reservations that the Salmanticenses²² advance the opinion that *epikeia* may be used in matters concerning the natural law. They maintain that, although the natural law is expressed *universaliter*, it sometimes can have this universality not only *in communi* but also *in particulari*. That is to say, sometimes the universal law is valid not merely in a general way, but it also touches each individual case. This latter is true when there is question of a natural precept which is negative, forbidding something that is intrinsically evil, as lying or fornication or blasphemy. On the other hand, some precepts of the natural law are universal only *in communi*, and are not meant to extend to each and every particular instance. Where this is true, cases may arise which one will interpret as actually not being included in the general law—if the lawgiver’s intention be analyzed.

The Salmanticenses are careful to point out that *epikeia* is not necessarily founded upon the inability of the legislator to foresee all cases that may arise. This basis is verifiable only when there is

¹⁹ *Loc. cit.*

²⁰ *Comm. in Rub. de Judiciis*, n. 71.

²¹ *Op. cit.*, Lib. II, Cap. XLVII, dub. IX.

²² *Op. cit.*, Vol. III, Tract. XI, Cap. IV, Punct. III, nn. 41-43.

question of a human lawgiver. But *epikeia*, they maintain, may also involve laws whose author has no limitations on his knowledge. While wishing to exempt certain cases from the provisions of his law, he is unwilling to express these exemptions in the statute, both because he desires to avoid the confusion and profuseness in the law which would inevitably result, and because he knows that his subjects can make use of the virtue of *epikeia*, and interpret his will in accordance with circumstances as they arise. Thus, although the natural law forbids one to kill another, for example, the right of justifiable self-defense cannot be denied. So also, the obligation to keep a secret and the duty to aid one in extreme need are derived from the natural law, and yet in some cases may not bind the subject to their observance.

St. Alphonsus. The position of the Salmanticenses is closely adhered to by St. Alphonsus.²³ *Epikieia* may be used in relation to the natural law, when the action in question by reason of circumstances can be, as he himself expresses it, "denuded of its malice."

In the previously cited article which appeared in the periodical *L'Ami du Clergé* almost half a century ago, an interesting and slightly different approach to the problem is to be found.²⁴ The author commences his discussion of the point by stating that it is the common teaching that negative precepts of the natural law are not susceptible of *epikeia*. He goes on to point out, however, that some moralists distinguish between negative precepts that prohibit something absolutely evil, such as blasphemy and negative precepts which are conditional, in the sense that they prohibit something which is not essentially evil, such as the taking of objects belonging to another. The author admits that the application of this teaching of theologians is difficult, mainly because of the fact that the complete and exact meaning of the term "intrinsically evil" is not without obscurity.

As a possible solution to the many problems that arise on this score, he suggests that one keep in mind that negative precepts are of two kinds: purely negative (that forbidding blasphemy, for example), and mixed—that is, a combination of a negative and an affirmative precept. Thus, for example, to take the goods of another involves

²³ *Theol. Mor.*, Lib. I, n. 201.

²⁴ "L'Epikie," *L'Ami du Clergé*, XXV, 166-167.

the violation of a mixed precept—one element being negative (“Thou shalt not steal”), and the other being affirmative (“Render to another his due”). With regard to a purely negative precept, *epikeia* is never allowed. On the other hand, *epikeia* may sometimes be licit when there is question of a mixed precept. Thus, for example, *epikeia* can authorize an individual temporarily to keep an object belonging to another, by delaying its restitution.

In view of these latter considerations the author lays down the following rule. Whenever the use of *epikeia* would lead to an act or to an omission which could not exist apart from sin, *epikeia* is absolutely illicit. But if the use of *epikeia* would not lead to an act or to an omission that is necessarily sinful *a priori* and *in se*, then *epikeia*, in the presence of a proportionately grave reason, is legitimate—regardless of the derivation of the law, or of its affirmative or negative character.

II. *Negative*

There can be no doubt that the majority of theologians reject entirely and explicitly any possibility of the licit use of *epikeia* in matters involving the natural law. A study of a few such theologians will serve to indicate their general trend of thought.

Vasquez. Vasquez²⁵ states definitely that *epikeia* has no place in reference to the natural law. For, whereas a positive law is enunciated *in universum*, the natural law, as applied in each individual case, takes into consideration the circumstances which affect the morality of the act in question. Moreover, since the natural law is based on natural reason itself, and since it is apprehended by an exercise of natural reason, it can never be deficient, and hence cannot admit of *epikeia*.

Suarez. That there is no place for *epikeia* in reference to the natural law, is the firm opinion of Suarez. His reasons may best be set forth in his own words:

. . . the same reason which proves that there is no dispensation in the natural law, proves that there is no interpretation of this kind [i.e., through *epikeia*]. . . In such precepts dispensation has

²⁵ *Op. cit.*, in I-II, Disp. 176, Cap. I, n. 3.

no place because they contain an intrinsic justice or moral goodness: or . . . because the precepts of this law are certain necessary propositions which by necessary consequence are deduced from natural principles. But propositions of this type cannot be defective or false in a particular case. Therefore, it cannot happen that by interpretation it would become licit to do what is forbidden by them, for such is intrinsically evil; nor would it become licit to omit what is commanded by them, because what they command is *per se* necessary for moral goodness, and because otherwise, what the natural law dictates would be false in that case in which such an interpretation would be made—which is impossible. . . .²⁶

With regard to the reasons adduced by those who hold the opposite view, Suarez makes several important observations. These observations he prefaces²⁷ by insisting on two very necessary distinctions: first, *epikeia* strictly understood²⁸ and interpretation of law are not to be confused; secondly, the natural law may be considered *secundum se*, or it may be considered insofar as it is expressed in positive legislation—positive legislation which either constitutes a new law entirely, based radically on the natural law, or merely declares and repeats the provisions of the natural law itself.

²⁶ “. . . qua ratione non potest in legem cadere dispensatio, eadem neque hujusmodi interpretatio. . . . In talia praecepta non cadit dispensatio, quia continent intrinsicam rationem justitiae, seu debiti honestatis: vel . . . quia praecepta hujus legis sunt quaedam propositiones necessariae, quae per necessariam consequentiam ex principiis naturalibus inferuntur; sed hujusmodi propositiones in nullo individuo possunt deficere, aut esse falsae; ergo non potest per aliquam interpretationem fieri, ut liceat facere quod per illa prohibetur, quia est intrinsece malum; neque ut liceat omittere quod per illa praecipitur, quia est per se necessarium ad honestatem. Et quia alias pro illo casu, in quo fieret talis interpretatio, inveniretur falsum esse id quod lex naturalis dicat, quod impossibile est. . . .”—*De Legibus*, Lib. II, Cap. XVI, n. 3.

²⁷ *Ibid.*, n. 4.

²⁸ Many of the earlier theologians use the phrases “strictly understood,” “properly so-called,” “in a strict sense,” etc., to distinguish *epikeia* from simple interpretation. It is important to note that among such theologians, at least ordinarily, the expression “*epikeia* strictly understood” does not signify *epikeia* as concerning only the will of the legislator—a meaning common among moralists today.

Suarez readily admits²⁹ that many natural precepts are in need of interpretation, and this is true both of natural precepts *secundum se* and of natural precepts as expressed in positive law. Thus, for example, the proper understanding of the precept “Thou shalt not kill” necessarily demands interpretation. For in order that one may comprehend what precisely is forbidden by this law, it must be realized that not every act of killing a person is homicide, but only that which is done on one’s private authority and *per se*, or in the form of aggression. Hence, a killing executed by legitimate authority, or done in self-defense, is in no way illicit.

Moreover, the natural law *secundum se* does not command the performance of an act unless that act is good, nor does it forbid its performance unless it is intrinsically evil. Now, for the exact understanding of the true meaning of any natural precept, it is necessary to inquire into the conditions and circumstances in the presence of which the act *secundum se* is good or evil. This process is simple interpretation—interpretation which is essential if men would understand clearly what exactly is commanded and what forbidden by the natural law.

Suarez next enters into a discussion of the example adduced by Cajetan and Navarrus in support of their view.³⁰ The former³¹ illustrates his opinion on the point, by stating that *epikeia* may be used in regard to that material precept which demands the return of articles that have been deposited. When such a return would be contrary to justice or charity (as in the case where the owner is insane), to make use of *epikeia* would be licit. Suarez points out with clarity and force that, in the strict sense of the term, there is in this instance no *epikeia* at all. For every natural precept is based upon right reason, and right reason does not unqualifiedly demand the return of deposited articles. Rather, it demands such return only under those conditions which are consonant with justice and charity. In the example adduced, there is no emendation of the law necessitated by the law’s universal scope, and hence no *epikeia*. Instead, there is a simple interpretation or declaration of the real

²⁹ *De Legibus*, Lib. II, Cap. XVI, n. 6.

³⁰ *Ibid.*, nn. 7-8.

³¹ *Op. cit.*, in II-II, q. 120, a. 1.

meaning of the precept itself, and an application of that precept to the case at hand in the light of that interpretation.

A similar criticism may be given of Navarrus' example of *epikeia*, involving the natural precept "Thou shalt not kill." It is the opinion of Navarrus³² that in regard to this law *epikeia* may be used, so as to allow killing, if necessary, in the act of self-defense. But here likewise there is no *epikeia* at all, Suarez maintains, but a simple interpretation of the true sense of the law.

Continuing his discussion of the impossibility of using *epikeia* licitly in relation to the natural law, Suarez points out³³ that the precepts of the natural law are either affirmative or negative. The former oblige *semper* but not *pro semper*. With regard to the first term (*semper*), there is neither need nor possibility for *epikeia*—nor indeed for simple interpretation. Affirmative precepts always oblige, although the execution of the act commanded *in actu secundo* is dependent upon various circumstances. But the phrase *pro semper* must also be considered. When actually the command must be executed, may be determined by positive law, or by right reason itself. If in the case of some natural precept it has been determined by positive law, then on some occasions there may be place for *epikeia*—but *epikeia* in these instances will involve, not the natural law, but rather the positive law. If, on the other hand, the determination is expressed in a judgment of natural reason itself, to the effect that here and now the command must be executed, then to use *epikeia* would be to act contrary to the dictates of natural reason—which, of course, can never be licit. Finally, if natural reason judges that, under a given set of circumstances, it is not necessary here and now to carry out *in actu secundo* the provisions of the law, such a judgment is not an example of *epikeia*. Rather, it is a simple interpretation of an affirmative natural law which of its nature obliges *semper* but not *pro semper*. Thus, for example, with regard to the precept of fraternal correction, insofar as it is a natural precept, natural reason judges that it does not oblige *in actu secundo* when there is no hope of reforming the person to be corrected. But this is not *epikeia*;

³² *Comm. in Rub. de Judiciis*, n. 71.

³³ *De Legibus*, Lib. II, Cap. XVI, n. 10.

for, in the light of the circumstances existing in the case at hand, natural reason merely interprets that this precept, which of its nature does not bind *pro semper*, does not now oblige in the present situation. So too, the natural precept to return deposited articles, insofar as it is an affirmative precept, does not bind *pro semper*. Hence, an individual by simple interpretation—not by *epikeia*—may judge that the law is not to be observed when to do so would cause harm or injury.

Suarez next considers precepts of the natural law which are negative in character.³⁴ These precepts bind *semper* and *pro semper*. They prohibit the performance of acts which are intrinsically evil, and for this reason *epikeia* may not be used in their regard. For it is impossible that what is *per se* and intrinsically evil should on any occasion become good or indifferent. And what is intrinsically evil and cannot but be evil, is always forbidden without reservation. Moreover, even if there should be a change in the object or essential circumstances, by reason of which change the act is no longer intrinsically evil, even then *epikeia* would not be involved; for in such a case, there would be no question of emending the natural law, but simply of interpreting it in the light of the new *materia*. Thus, for example, when one judges that the natural precept “Thou shalt not steal” does not prohibit the taking of those goods of another which are necessary for one’s own life in a situation of extreme necessity, there is no question of *epikeia*. Rather, there is a simple interpretation that in such a situation what normally belongs to another is no longer his, maintains Suarez, but becomes common property. And hence, the normal owner cannot be said reasonably to oppose the taking of what is necessary by one in such extreme peril. The same is true of the command not to keep the possessions of another that have been deposited. This precept, insofar as it is a negative precept, means, when properly interpreted, that one must not keep such possessions unreasonably, that is, without sufficient cause. These considerations when duly weighed, lead Suarez to the conclusion that in negative precepts of the natural law—as well as in affirmative precepts—there can be no place for *epikeia* strictly understood.

³⁴ *Ibid.*, n. 11.

As possible objections to his thesis, Suarez discusses two cases.³⁵ The natural law, he says, prohibits the marriage of a man with his sister; likewise it prohibits any individual from contracting a second marriage, if the first spouse of a marriage—"especially if it is consummated"—still survives. Yet, it is quite possible that, on account of what appears to be extrinsic necessity, neither prohibition in certain particular cases should bind—as, for example, if such marriages were necessary for the preservation of the human species. Would not these constitute examples of *epikeia* in reference to the natural law?

Supposing these to be precepts of the natural law,³⁶ one must reply, states Suarez, that such marriages are not simply or unqualifiedly forbidden; rather, they are forbidden only insofar as they are harmful to human nature, and hence contrary to that natural moral goodness which is consonant with right reason. But in an evident case of extreme necessity for the human race, such as that mentioned above, such marriages are no longer harmful to the human race. Instead, they are of the highest benefit, and hence are not evil, because they are entered into for the purpose of preserving the human species—a purpose which actually is not extrinsic but intrinsic. In point of fact, then, here again there is no question of *epikeia* in reference to the natural law, but rather a change in the *materia* of the negative precept. And so, concludes Suarez, the obligation of the natural precept ceases, not because the precept as such with its own *materia* does not bind *semper et pro semper* without exception, but because, when the *materia* is changed, the precept, as a natural precept, no longer has place in regard to the new *materia*.

Suarez brings to a close his treatment of this point with an observation both with regard to natural precepts which are merely repeated in positive law, and with regard to those which form the basis

³⁵ *Ibid.*, nn. 14-15.

³⁶ In considering the objection concerning the marriage of brother and sister, Wiggers, e.g., expresses the belief that the prohibition is not absolutely a natural precept but "*proxima naturalibus.*" Cf. J. Wiggers, *Commentaria in Primam Secundae D. Thomae* (Lovanii, 1651), Quaest. 94, art. 6, n. 62.

of entirely new positive laws.³⁷ If the positive laws with their rigid and general formulae be considered, *epikeia* may be permissible. Furthermore, Suarez believes that the opinions of many moralists, especially Cajetan, who seem to allow *epikeia* in reference to the natural law, must be understood as actually referring to positive laws of this type. And so, from this point of view again, there is no question of *epikeia* as regards the natural law; rather, *epikeia* is used in relation to the positive law which, although it substantially embodies the natural law, nevertheless, due to circumstances, may admit of an exception (from the formula) when it becomes deficient because of the universality of its expression.

Malderus. For the theologian Malderus,³⁸ the impossibility of using *epikeia* in regard to the natural law arises from the fact that the essential function of *epikeia* is to emend or correct laws which are deficient. But the natural law can never be deficient, maintains Malderus, and hence *epikeia* can never be allowed in regard to it. For, where the natural law is concerned, the application or promulgation is not made through something extrinsic to man, so that the precept is necessarily general and universal—as is true in the case of positive laws; rather, it is made through something which is intrinsic, namely, through the natural light of human reason. And human reason always considers particular circumstances and conditions before it commands or forbids the performance of an act.³⁹

Malderus is concerned with the frequently used example *de reddendo deposito*, which is alleged as an argument that the natural law admits of *epikeia*. He believes that this command *de reddendo deposito* may be understood from two points of view. In the first

³⁷ *De Legibus*, Lib. II, Cap. XVI, n. 16.

³⁸ *Op. cit.*, q. 94, a. 5, dub. 2.

³⁹ Bolognetus argues similarly. To admit *aequitas* (*epikeia*) against the natural law would be to confess that nature sins and needs correction, he points out. But such is impossible, he continues, inasmuch as nature in its entirety is directed by God. A natural precept considered in itself needs no emendation, although it may be necessary to correct it insofar as it has been reduced to a written formula. But in such a case it is not the natural law itself which is corrected. Cf. *op. cit.*, Cap. XXXI, nn. 5, 6, 9. Cf. also M. Becanus, *Summa Theologiae Scholasticae* (Rothomagi, 1657), Vol. I, Pars II, Tract. III, Cap. VI, Quaest. XIV, n. 2.

place, it may be considered as a purely natural law, apart from, and independent of, any positive law to the same effect. Thus understood, there is never any need for *epikeia*, for the natural law obviously does not, for example, command the return of a sword to a madman. Right reason prescribes the exact opposite—that as long as such circumstances continue, the sword is not to be returned.

In the second place, the command *de reddendo deposito* may be considered insofar as it is expressed in a positive law, either divine or human. Here, as regards the words of the law, there may be place for *epikeia*; for, being contained in a positive law, the command is expressed universally, and by reason of its universality the positive precept may in some instances be deficient. But it is to be emphasized that *epikeia* in these cases is concerned with the positive aspect of the law, not with the natural law in itself. And hence, it still remains true that *epikeia* may not be resorted to in reference to the natural law as such.⁴⁰

Tournely. Mention may here be made of the discussion of *epikeia* in relation to the natural law, as offered by Tournely,⁴¹ insofar as his

⁴⁰ Schmalzgrueber repeats the argument that a natural precept cannot be deficient, and hence cannot admit of *epikeia*. His observations concerning an objection raised against his position are noteworthy. It is objected that, just as in regard to positive law certain circumstances may arise, on account of which a prudent presumption may be formed that the legislator was not willing to bind a subject, so too similar circumstances may arise in connection with the observance of a precept of the natural law; e.g., mutilation, which is forbidden by the natural law, is permissible for the preservation of one's own body. By way of refutation Schmalzgrueber points out that this *a pari* argument is invalid. For the basis and force of positive law consist solely in the will of the legislator who, being only human, cannot foresee all cases. (Schmalzgrueber considers only human positive law.) On the other hand, the natural law derives its obligation, not from the will of a legislator, but rather, as it were, "ex necessitate naturae et exigentia materiae." As to the example proffered, Schmalzgrueber dismisses it with the remark that since mutilation is not prohibited except insofar as it is harmful to the body, in the case mentioned "non lex sed materia deficit."—F. Schmalzgrueber, *op. cit.*, Vol. I, Dissert. Proem., § 2, nn. 83 et sqq. Schmier insists that the natural law is not distinct from the eternal law, and hence cannot be defective.—F. Schmier, *Jurisprudentia Canonico-Civilis seu Jus Canonicum Universum* (Venetiis, 1754), Vol. I, Lib. I, Tract. I, Cap. II, n. 195.

⁴¹ *Op. cit.*, Vol. III, Tract. *De Legibus*, Cap. III, Art. III, Sect. II, Concl. II.

treatment involves consideration of an objection to his position which may frequently arise. The objection may thus be stated: "If *epikeia* may not be applied to the natural law, it may not be applied to a human law. But since the consequent is false, so also the antecedent." As to the proof of the initial statement, it is explained that the basis for the view that *epikeia* may not be used in regard to the natural law is the fact that that law can in no case be deficient; for the Divine Legislator, foreseeing all cases, willed that that which generally is prohibited (for example, the killing of a man), would not be forbidden in certain circumstances (for example, in self-defense). But similarly, the argument continues, the human legislator was unwilling that his law should bind in all circumstances. If a ruler, for example, forbids the carrying of weapons at night, obviously his law has the meaning that arms must not be carried, unless perchance an enemy invading the city must be repelled by the use of weapons—otherwise the law would be manifestly unjust.

The substance of Tournely's reply to this objection is as follows. If a human law explicitly excludes those cases, in regard to which it could not be observed without harm, then to such a law *epikeia* is not applicable insofar as those cases are concerned.⁴² The fact is, however, that human laws are enacted *in universali*, that a human legislator does not foresee all circumstances. Therefore, subjects who, because of a change of circumstances, are unable and are not obliged to observe a law, although they do not act contrary to the legislator's intention, do, however, transgress the words of the law. Such a situation never occurs in regard to the natural law, precisely because the natural law in itself does not prescribe acts or forbid them in such a general way. It does not, for example, state unqualifiedly: "Thou shalt not kill." Rather, properly interpreted, it provides for certain exceptions to this defective positive formula. The law of a human legislator, on the other hand, concludes Tournely, expressing an un-

⁴² "Optime dici potest ad sensum objectionis, nec ipsam legem humanam epicheiae subijci, quia non fuit lata ut obligaret in iis circumstantiis, in quibus sine detrimento observari non posset. Si autem lex illa non sit pro talibus circumstantiis, ergo in iis non subjacet epicheiae, quia quod nihil est, pro eo tempore quo nihil est, epicheiam non capit."—*Loc. cit.*

qualified command in general terms (for example, "Thou shalt not carry arms at night"), provides for no exceptions.

Billuart. In his discussion of the matter, Billuart⁴³ introduces a point which apparently is not elsewhere to be found—at least in the form in which he proposes it. After setting forth the argument that the natural law can never truly be said to be deficient by reason of the universality of its expression, since it issues its commands not *in universali*, but descends to particular cases, he submits the following line of reasoning: One may not licitly use *epikeia* if the legislator is present and can be consulted. But in regard to the natural law, the legislator is never absent, for "everywhere and always reason as a legislator is present"—referring, no doubt, to the fact that it is human reason which promulgates the natural law.

Other Authors. Little is added by other writers to the arguments already adduced. They merely state that *epikeia* may be used licitly only in regard to a positive law, or they repeat the reasons outlined above to establish that it has no place in matters involving the natural law. Among the many authors who take this position the following may be mentioned: Cuniliati,⁴⁴ Stephen of St. Paul,⁴⁵ Viva,⁴⁶ Antoine,⁴⁷ Concina,⁴⁸ Patuzzi,⁴⁹ Boranga,⁵⁰ Cocaleo,⁵¹ Simon-

⁴³ *Op. cit.*, Tract. *De Legibus*, Dissert. II, Art. IV.

⁴⁴ F. Cuniliati, *Theologia Moralis Universa* (Venetiis, 1796), Vol. I, Tract. I, Cap. II, § X.

⁴⁵ Stephanus a S. Paulo, *Theologia Moralis* (Coloniae Agrippinae, 1669), Tract. II, Disp. V, Dub. 1.

⁴⁶ *Opus. Theol.-Mor.*, Opus. II, Quaest. IV, Art. II, n. III.

⁴⁷ *Op. cit.*, Vol. II, Tract. *De Legibus*, Sect. III, Cap. V, Quaest. III.

⁴⁸ *Op. cit.*, Vol. VI, Dissert. II, Cap. XIV, Quaest. V, n. 31.

⁴⁹ *Op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. VI, n. 6.

⁵⁰ A. Boranga, *Institutiones Theologico-Dogmatico-Canonico-Historico-Morales* (Venetiis, 1766), Vol. I, Tract. *De Legibus*, § 51.

⁵¹ V. Cocaleo, *Tentamina Theologico-Moralia* (Lucae, 1778-1780), Vol. I, Dissert. I, Cap. V, Prop. II.

net,⁵² Van Roy,⁵³ Bouvier,⁵⁴ Antonius a Goritia,⁵⁵ Ballerini-Palmieri,⁵⁶ Voit,⁵⁷ Bouquillon,⁵⁸ Cathrein,⁵⁹ Koch-Preuss,⁶⁰ Vermeersch,⁶¹ Godefroy,⁶² Arregui,⁶³ Genicot-Salsmans,⁶⁴ Loiano,⁶⁵ Davis,⁶⁶ Wouters,⁶⁷ Plöchl,⁶⁸ Noguer,⁶⁹ and Schilling.⁷⁰

ARTICLE 3. THESIS: *Epikēia* MAY NOT BE APPLIED TO PRECEPTS OF THE NATURAL LAW

A careful study of the problem at hand seems clearly to lead to the conclusion that *epikēia*, understood as a correction of law where it is deficient due to the universality of its expression, may never be applied to the natural law. With regard to the arguments that may be adduced, the following appear to be the most important in sustaining this thesis.

⁵² E. Simonnet, *Institutiones Theologicae de Legibus, Peccatis et Peccatorum Poenis* (Tyrnaviae, 1772), Disp. II, Art. V.

⁵³ L. Van Roy, *Theologia Moralis* (ed. 2; Antverpiae, 1707), Vol. I, Pars I, Tract. III, Cap. III, Quaest. IV.

⁵⁴ *Op. cit.*, Vol. I, Tract. *De Legibus*, Pars II, Cap. VI, Art. II.

⁵⁵ Antonius a Goritia, *Epitome Theologiae Canonico-Moralis* (Venetiis, 1805), Tab. VII.

⁵⁶ *Op. cit.*, I, n. 469.

⁵⁷ *Op. cit.*, Pars I, n. 274.

⁵⁸ *Op. cit.*, Tract. III, n. 159.

⁵⁹ *Phil. Mor.*, n. 304.

⁶⁰ A. Koch, *A Handbook of Moral Theology*, adapted and edited by A. Preuss (ed. 2; St. Louis, 1919-1924), I, p. 181.

⁶¹ *Quaest. de Iust.*, n. 492.

⁶² *Art. cit.*, DTC, V, 359.

⁶³ *Op. cit.*, n. 75.

⁶⁴ *Op. cit.*, I, n. 133.

⁶⁵ *Op. cit.*, I, n. 142.

⁶⁶ *Op. cit.*, I, p. 189.

⁶⁷ *Op. cit.*, I, n. 143.

⁶⁸ W. Plöchl, "The Fundamental Principles of the Philosophy of Canon Law," *The Jurist*, IV (1944), 88.

⁶⁹ N. Noguer, "Una justicia sui generis: 'la epiqueya,'" *Razon y Fe*, XCIX (1932), 468.

⁷⁰ O. Schilling, *Theologia Moralis Fundamentalibus* (Monachii: M. Hueber, 1935), n. 58.

In the first place, the precepts of the natural law strictly understood are certain necessary propositions which themselves express, and conformity with which guarantees, the right ordering of a rational creature toward his ultimate end. As such, they command the performance of acts which human nature itself, in the light of its ultimate end, exacts as necessary; or they prohibit acts which are intrinsically repugnant to human nature. In other words, the acts prescribed by the natural law are intrinsically good, and those forbidden are intrinsically evil. Such being true, it can never happen, regardless of extrinsic circumstances, that an individual is legitimately excused from executing the actions prescribed, or avoiding the actions prohibited, by such a law. A denial of this statement would be tantamount to a contention that man is free of all moral obligation to use those means which are essential and necessary for the attainment of his end, or to avoid what is essentially repugnant both to that end and to human nature itself.

The essential relations which an individual bears toward God, neighbor and self remain forever immutable, being founded on the order of created nature. Hence, the law which regulates those relations is likewise immutable, and therefore admits of no exception by dispensation, *epikeia* or any other institute. For the content of that law is precisely what is exacted by the very nature of man according to his three-fold relation toward God, neighbor and self.⁷¹ One must conclude, then, that when there is question of a command or a prohibition arising from such a law, no individual, for any reason whatsoever, may ever consider the use of *epikeia* licit.

Can this position be reconciled with the apparent granting of dispensations from the natural law by God in the Old Testament?⁷² It would be beyond the scope of this dissertation to enter into a detailed discussion of the question of the non-dispensability of the natural law. Let it suffice for our purpose to set forth the following summary.

By reason of the fact that the natural law has as its ultimate

⁷¹ Leroux gives a very clear exposition of this point. Cf. "De Legis Naturalis Immutabilitate ac Indispensabilitate," *REL*, VII (1911-1912), 110.

⁷² Cf., e.g., Gen. 22; Exod. 12; Osee 1; Deut. 24, 1-3.

basis the divine essence, the natural law is immutable.⁷³ Any change which occurs or has occurred is only apparent—upon investigation it becomes clear that the change involves a mutation not in the natural law itself,⁷⁴ but rather in the conditions or circumstances or *materia* in regard to which the natural law operates.⁷⁵

Dealing more specifically with the matter at hand, theologians generally⁷⁶ explain the problem in the following way. With regard to the precepts primarily intended which concern a creature's direct relation to God, no mutation or exception can ever be admitted. Thus, for example, there never can be any dispensation from the obligation of adoration of God or of avoidance of blasphemy. With regard to those precepts which concern matters necessary for conserving order among creatures, there can be a mutation of the law by the extraordinary intervention of God changing the *materia* of the precept. Thus, God can give permission for one private individual to take away the life of another, or even order him to do so. For God has dominion over the lives of all, and the right of an individual to his life is dependent upon God's pleasure. Or again, under certain conditions whereby the due order is no longer conserved by the

⁷³ "La necessità della legge naturale dipende . . . dalla necessità dell' essere divino, il non poterla Dio cangiare dipende solo dal non potere egli smentar sè stesso."—L. Taparelli, *Saggio Teoretico di Dritto Naturale* (Roma, 1855), Vol. I, Cap. V, n. 116.

⁷⁴ "Lex *proprie* mutari dicitur, si obligatio legis cessat manente eadem materia legis; *improprie* autem lex mutari dicitur si obligatio cessat ubi materia legis evasit alia."—Noldin-Schmitt, *op. cit.*, I, n. 116.

⁷⁵ Cf. Suarez, *De Legibus*, Lib. II, Cap. XIII, n. 6.

⁷⁶ It should be noted that much of the controversy on the point is due to the lack of precision in the use of terms. "De hac re a primordiis scholasticæ viguit *controversia*, quæ nondum plene est sopita. Haud pauci inter scholasticos opinati sunt *Deum posse dispensare* in præceptis moralibus *secundæ tabulæ* decalogi . . . non tantum in casu particulari, sed etiam lege generali. Rem alibi alio modo explicat S. Thomas, favet tamen indispensabilitati præceptorum et prohibitionum iuris naturalis, dispensabilitati in principiis secundis quæ lege naturæ suadentur tantum. Opinio quam Suarez propugnat, recte *reüicit* omnem veram dispensationem in iure naturæ a parte Dei."—Van Hove, *Prolegomena*, n. 47.

observance of the precept, a secret could be revealed in order to avoid great harm to the common welfare.⁷⁷

With regard to precepts secondarily intended, they can, by reason of special circumstances, be abrogated by God, at least for a time, because these precepts concern not what is necessary for man's ultimate end, but what facilitates its attainment.⁷⁸ Thus, for example, God could dispense from the unity of Matrimony, because basically this property is not absolutely necessary for attaining the primary end of marriage, but rather renders more easy the achievement of that purpose.⁷⁹

But in regard to these "dispensations," it is important to note that in the strict sense of the term, there can be no dispensation from the natural law. For, as has been pointed out, the basis of the natural law is proximately human nature and ultimately the divine essence. And it can never happen that one is permitted to act in a manner at variance with human nature looked at in its relation to its ultimate end, the possession of God. True, it is possible for God to ordain that certain acts ordinarily not in conformity with man's end, in special circumstances become so—for example, the taking away from Isaac of his right to life and ordaining his death for a supernatural end as a symbol of the death of Christ. Again, God can authentically

⁷⁷ On this point Lehmkuhl has the following explanation: ". . . si qua exempla quandam dispensationem prae se ferre videntur, prorsus alia explicatio danda est, nimirum *mutationem obiecti* legis esse factam. Quod ut magis intelligatur, attende, tria esse genera obiectorum quae legis naturalis prohibitioni subsunt: 1. Sunt obiecta, quae in se et propter se mala sunt;—haec igitur numquam evadere possunt non-mala, nec licita. 2. Sunt obiecta, quae in se quidem, at non propter se, sed propter periculum coniunctum mala sunt atque illicita; haec si periculum auferri vel diminui potest, evadere *possunt* non-mala. 3. Sunt obiecta, quae in se et propter se quidem mala sunt, at non absolute et immediate, sed propter connexum ius alienum;—quare qui in illud ius potestatem habet, eandem actionem materialem, quae alias illicita esset, licitam reddere potest; immutata manente lege naturali, quae solum prohibet alienum ius, quamdiu ius manet, ¹laedere."—*Op. cit.*, I, nn. 285-286. Cf. also D. Viva, *Trutina Theologica Thesium Quesnellianarum* (ed. 4; Beneventi, 1721), Vol. I, Pars IV, Prop. 71.

⁷⁸ ". . . nihil impedit quominus Deus ad altiore finem obtinendum ad tempus exceptionem permittat."—Noldin-Schmitt, *op. cit.*, I, n. 116.

⁷⁹ Cf. Bouquillon, *op. cit.*, n. 69.

declare that, in a given set of circumstances, the end of some action is better obtained in a manner different from the ordinary one, and thus, for example, accord temporary permission for polygamy. But, in the final analysis, it remains that every instance of a "dispensation" from the natural law reduces itself to a mutation of *materia* or to an interpretation of the true meaning of some precept of the natural law.

To approach the problem from a slightly different viewpoint, it may be pointed out that the licit use of *epikeia* in any and every case is conditioned upon the existence of the fact that the law is deficient.⁸⁰ Now, any law concerning which there can be no defect on the part of the legislator, or on the part of the promulgator, or on the part of the *materia*, excludes all possibility of correction and hence of *epikeia*.⁸¹ For a defect in the law could be traced to no source other than to one or more of the three named.

The fact is that the natural law admits of no defect on the part of the Legislator. For the natural law, being based on the very essence of God, has been, so to speak, enacted by Him Who is infinitely wise, just, holy and good.

Moreover, there can be no defect on the part of the promulgator of the natural law as such, that is, on the part of right reason.⁸² This statement does not involve a denial of the fact that about some precepts of the natural law, especially remote precepts, there can be error (and here the individual would be bound *per accidens*), or ignorance or uncertainty.⁸³ But if an individual, through moral immaturity, or lack of understanding, or a habit of sin, or for some other reason, does not recognize the existence of a natural precept as it commands or prohibits some act, then right reason is not promulgating the natural law. In such an instance there is functioning an intellect which, morally speaking, one may term subnormal

⁸⁰ For *epikeia* is "a correction of law where it is defective owing to its universality."—Aristotle, *Nicomachean Ethics*, V, 10.

⁸¹ Cf. B. Tepe, *Institutiones Theologiae Moralis* (Parisiis, 1898), I, n. 213.

⁸² Cf. Noldin-Schmitt, *op. cit.*, I, n. 112.

⁸³ Attention should be called to the fact, however, that the Church has the power authentically and infallibly to interpret the natural law. Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 259.

or abnormal. Moreover, in such cases the individual is promulgating for himself what possibly he considers to be the natural law; but he is not promulgating the natural law itself. Hence, it is his erroneous impression of what is the natural law, and not the natural law itself, which stands in need of correction.⁸⁴

In this connection another important fact should be noted. There can be no denial of the possibility of a development of knowledge with regard to the application of some of the principles of the natural law. And frequently this development is occasioned by the occurrence of situations which present moral problems that clamor for solution.⁸⁵

⁸⁴ On the other hand, one must be careful not to exaggerate the probability of error and ignorance and uncertainty in matters pertaining to the natural law, to such an extent that he finds himself defending a doctrine akin to scepticism regarding knowledge of the precepts of the natural law. There must be kept in mind the distinction between precepts which are "*generalialia, universalissima, communissima, indeterminata, per se evidentia*"—good is to be done, evil avoided—and those which are "*magis propria et determinata, particularia*." The latter may be "*immediate, proxime et evidenter ex primis deducta*" (the precepts of the decalogue), or may be more remote, and only mediately deduced, as, e.g., the precept that usury is unjust. Cf. Merkelbach, *ibid.*, n. 251. Moreover, it is well to note that it may frequently happen that an individual who knows in the case at hand what the natural law dictates, may be unable to express the precept with all its precise qualifications. Cf. Suarez, *De Legibus*, Lib. II, Cap. XIII, n. 6. On the question of invincible ignorance in reference to the natural law, Bertke rightly remarks: "Invincible ignorance of the natural moral law in relation to: (a) The first principles in the psychological order—this is impossible for any normal and mature person, though deep-rooted contrary habits may sometimes take them out of consideration in practical action in particular instances. (b) The evident deductions from first principles—concerning the essence of these precepts no invincible ignorance is to be admitted for the majority of men. Such ignorance concerning certain applications of these principles is easily conceivable among primitive peoples; also when an action is surrounded by many circumstances of apparent justification. (c) Remote conclusions—because of the intrinsic difficulty of knowing these conclusions, invincible ignorance is very easily admissible in their regard." "Complete moral immaturity is impossible; no person of normal intelligence can be invincibly ignorant of all moral principles."—Bertke, *op. cit.*, p. 122.

⁸⁵ Cf. M. Cronin, *The Science of Ethics* (Vol. I, Dublin, 1909; Vol. II, New York, 1917), I, p. 486; J. A. Ryan, *The Norm of Morality Defined and Applied to Particular Actions* (Washington, 1944 [Lithographed, Edwards Bros.,

Finally, just as there can be no defect on the part of the Legislator, or on the part of the promulgator of the natural law, so too there can be no defect on the part of its *materia*. For the commands and prohibitions of the natural law have reference to what is intrinsically good or intrinsically evil. Now, it is obvious that what is intrinsically good cannot become intrinsically evil, nor can anything which is intrinsically evil become intrinsically good. Nor do the apparent "changes" in the natural law refute this truth. For such "changes" when closely studied, reveal the fact that in every instance there is no change in the law itself, insofar as it pertains to the *materia* originally commanded or originally forbidden. Rather, the object of the act in the case of a supposed change in the natural law, is different from that which was commanded or forbidden. Hence, logically it cannot be said that what is absolutely forbidden now by the natural law may later become licit, and what is now commanded may in the future become intrinsically evil.⁸⁶

It is to be admitted, of course, that the universal formulae in which certain natural precepts are expressed, frequently become

Ann Arbor, Mich.]), p. 25. In illustration of this truth mention may be made of the many moral problems presented by the recent war, problems which occasioned a deeper study of, and a consequent development in the knowledge of, the precepts of the natural law in their application to present-day methods of warfare. Undoubtedly from theological study of these problems there has ensued a more profound realization of the meaning and implications of the natural precepts themselves. Moral Theology is deeply indebted to the American theologians, Rev. Francis J. Connell, C.S.S.R. and Rev. John C. Ford, S.J. for their brilliant contributions along these lines. Cf., e.g., F. Connell, "Bombing of Civilians," *AER*, CX (1944), 146; "The Morality of Robot Bombing," *ibid.*, CXII (1945), 67; "The Morality of Universal Conscription," *ibid.*, CXII (1945), 139-140. Cf. J. Ford, "The Morality of Obliteration Bombing," *ThS*, V (1944), 261-309.

⁸⁶ Speaking of returning a deposited sword to an insane person who is its owner, Suarez has the following: ". . . licet in hoc casu reddendum non sit, non propterea naturale praeceptum mutatur; nam a principio non fuit positum pro illo casu, sed pro aliis, quos recta ratio dictat, sicut qui non implet promissionem, quia res notabiliter mutatae sunt, non mutatur ipse, nec lex fidelitatis servandae mutatur, sed mutata est materia; tamen a principio illa mutatio fuit virtute excepta per conditionem in ipsa promissione subintellectam, et ita non est vera, vel intrinseca mutatio sed apparens, et per extrinsecam denominationem."—*De Legibus*, Lib. II, Cap. XIII, n. 8.

defective precisely by reason of their universal and inadequate statements of the law.⁸⁷ But it must be emphasized that in such instances it is the formulae which are deficient. The law itself is never deficient, for it is, in the final analysis, the dictate of natural reason based proximately on human reason and ultimately on the divine essence, as to what must be done and what must be avoided in each set of circumstances with which an individual is confronted. As Suarez expresses it:

It must further be considered that, since the natural law *per se* is not written on tablets or on parchment, but in human minds, it is not always dictated in the mind in those general or indefinite words by which it is orally expressed or written by us. . . .⁸⁸

In further support of the thesis to which this chapter is devoted, the following argument may be considered. The history of Moral Theology gives evidence of the existence of many differences of opinion concerning *epikeia*. But upon one point at least, all authors agree—that he who uses *epikeia* acts contrary to the words of the law but in accordance with the intention of the lawgiver. The possibility of licitly using *epikeia*, then, in any given instance is conditioned upon the presumed existence of a discrepancy, in regard to the particular case at hand, between the words of the law and the intention of the lawmaker. It follows that where such a discrepancy can exist, use of *epikeia* may be possible; but where such

⁸⁷ "Formulae utique universales et inadaequatae quibus, brevitatis causa, exprimere solemus praecepta naturalia, aliquando in particularibus adjunctis deficiunt propter universale. Nunquam autem deficit ipsa lex naturalis, quae est ipsum dictamen rationis quod, perpensis omnibus circumstantiis, est ferendum de singulis actionibus."—E. Leroux, "De Epikeia," *REL*, VII, 259.

⁸⁸ "Ulterius considerandum est legem naturalem, cum per se non sit scripta in tabulis, vel membranis, sed in mentibus, non semper dictari in mente illis verbis generalibus vel indefinitis quibus a nobis ore profertur, vel scribitur. . . ."—*De Legibus*, Lib. II, Cap. XIII, n. 6. It would seem that this distinction between the natural law itself and the various rigid and general formulae in which it may be expressed, must be taken into consideration when one endeavors to explain certain passages of the theologians that appear to be contrary to the teaching that the natural law is immutable. Cf., e.g., St. Thomas, *Sum. Theol.*, I-II, q. 94, a. 5.

a discrepancy cannot exist, *epikeia* is never licit. Now, in point of fact no such discrepancy between the natural law and its Creator can possibly exist. For the natural law is simply the eternal law imposed upon men⁸⁹—and the eternal law is the intellect and will of God providing and commanding that the natural order be conserved and forbidding that it be disturbed.⁹⁰ Hence, to contend that there is a discrepancy between the natural law—a participation in the eternal law⁹¹—and God would be to maintain that such a discrepancy likewise exists between the eternal law and God, and thus ultimately to imply that there is a contradiction in God.

Again, to consider the matter under a different aspect, any discussion of the question of the use of *epikeia* in reference to the natural law, should take into consideration the weighty arguments adduced by Suarez, and mentioned above,⁹² in relation to the natural precepts from the point of view of their affirmative or negative character. These arguments seem to establish conclusively that, whether there be involved affirmative or negative precepts of the natural law, *epikeia* never has place. For the negative precepts bind *semper* and *pro semper*, and hence their obligation can never cease.⁹³ The affirmative precepts bind *semper* but not *pro semper*. Natural reason or positive law dictates when precisely they must be put into execution. Not to fulfill them *in actu secundo* when, in the judgment of natural reason such is not demanded, is certainly no example of *epikeia*—it is simply an instance of interpretation. On the other hand, there can be no licit use of *epikeia* when reason dictates that the affirmative precepts of the natural law must be put into execution. For to allow *epikeia* in such an instance would be to permit an action admittedly contrary to right reason and ulti-

⁸⁹ “. . . est ergo [i.e., lex naturalis] ipsa lex aeterna per imperium voluntatis divinae hominibus imposita.”—Noldin-Schmitt, *op. cit.*, I, n. 112.

⁹⁰ For a further explanation of the relation between the eternal law and the natural law, cf. Prümmer, *op. cit.*, I, n. 151.

⁹¹ Cf. St. Thomas, *Sum. Theol.*, I-II, q. 91, a. 2.

⁹² Cf. pp. 269, 270 *supra*.

⁹³ “A praecepto naturali negatio nihil excusat, nec periculum mortis, quia prohibet id quod est intrinsece malum.”—Merkelbach, *Summa Theol. Mor.*, I, n. 261.

mately to the Divine essence. Finally, in regard to a positive law which determines when, and under what circumstances, an affirmative precept of the natural law is to be fulfilled, it is possible that *epikeia* may sometimes be used. But it should be clearly understood that in such a case the *epikeia* has reference to the positive aspect of the law, and not to the natural law itself.

Further to corroborate the thesis held, attention may be called to the fact that *epikeia* by its very nature may licitly be used in any given case only by reason of the fact that the law in question is constituted *in universum* or *per verba generalia*. Reference to this point is made by practically all authors who treat of *epikeia*. Now, the fact is that, although the natural law is sometimes expressed by the use of formulae which are universal, nevertheless the natural law itself is never constituted merely *in universum* or merely *per verba generalia*, and hence never admits of *epikeia*.

That the natural law itself is never constituted merely *in universum* or merely *per verba generalia* is evident from a consideration of its essence. For the natural law as imposed upon, and known by, any individual is precisely the judgment of natural reason as to what must be done or what avoided both in general and in the case as it stands, surrounded by its circumstances.⁹⁴ It follows, then, that in relation to the natural law the use of *epikeia* is never licit.⁹⁵

⁹⁴ “. . . dictamen rectae rationis secundum se spectatum et ut practice verum non fertur in universali prout potest deficere, sed prout his circumstantiis affectum, cum quibus nunquam deficit; alias non esset dictamen verum, et consequenter nec necessarium, nec rectum, nec praeceptum naturale continens.”—Suarez, *De Legibus*, Lib. II, Cap. XVI, n. 9.

⁹⁵ “. . . epikeia locum non habet in lege, quae non fertur per verba generalia, sed excipit omnes casus excipiendos; atqui lex naturalis non praecipit tantum in generali, sed ad singulos casus descendit . . . unde non eget emendari; ergo in lege naturali locum non habere potest *epikeia*.”—J. Boyer, *Theologia Dogmatica et Moralís* (ed. 4; Parisiis, 1886), Vol. V, Tract. *De Legibus*, Cap. I, Art. II, § III, n. 23. Two other possible arguments may be mentioned in passing. The first concerns the traditional acceptance of *epikeia* as *emendatio iusti legalis* (cf. Suarez, *De Legibus*, Lib. II, Cap. XVI, n. 9)—*justum legale* referring to positive law as distinguished from the natural law. The second argument is founded upon the Thomistic doctrine that the basis of the natural law is not the *will* or the intention of its Lawmaker commanding that an act be performed or omitted, but rather the divine essence itself.

ARTICLE 4. PRACTICAL POINTS

One might here set down a lengthy and detailed list of cases involving the natural law, in regard to which *epikeia* may not be used. But such a list would serve no purpose. Once the general principle has been established—that *epikeia* may not be applied to precepts of the natural law—it is obvious that it holds good for all cases in which the natural law is concerned, regardless of circumstances.

The fact is, however, that there does exist a tendency among many persons, whereby they deem themselves excused, by reason of some personal circumstance, from certain precepts of the natural law. How many there are, for example, who freely admit that in general contraception is opposed to the natural law,⁹⁶ and yet maintain that in their case God will overlook their transgression of the law, because of certain extraneous circumstances which render observance of the precept difficult. Actually such an attitude frequently represents an attempt to apply *epikeia* to the natural law—even though few if any of these people would express the matter in such technical language.⁹⁷ The grave duty of priests to correct such erroneous beliefs is sternly enunciated by Pope Pius XI:

That is to say, the precepts of the natural law would bind, even if *per impossibile* the Divine Lawmaker's intention could be construed as unwilling to urge obligation in a particular case. (" . . . nihil potest esse justum nisi volitum a Deo; tamen id quod est volitum a Deo habet primam causam justitiae ex ordine sapientiae divinae."—St. Thomas, *De Veritate*, Quaest. XXIII, Art VI.) And hence, *epikeia* has no place in reference to the natural law, since the use of *epikeia* is always based upon the presumed *will* of the legislator. This Thomistic doctrine, upon which the argument is based, is not universally held among theologians (cf. Merkelbach, *Summa Theol. Mor.*, I, n. 246, note 2). Hence, the argument is not insisted upon here.

⁹⁶ That contraception is intrinsically wrong and opposed to the natural law is clearly taught by Pope Pius XI. Cf. Encyclical "*Casti connubii*," Pius XI, 31 December 1930, *AAS*, XXII (1930), 559. For a scholarly analysis of the reasons why contraception is intrinsically sinful, cf. T. Riley, "Artificial Family Limitation—Its Intrinsic Sinfulness," *The Family Faces Forward* (Washington, D. C.: Family Life Bureau, N.C.W.C., 1944—), II, 22-29.

⁹⁷ Cf. Bertke (*op. cit.*, p. 98) who points out that, according to the Institute of Public Opinion reporting in the *New York Times* of January 24, 1940, 77% of the American people favor "distribution of birth control information to married persons by government health clinics."

We admonish, therefore, priests who hear confessions and others who have the care of souls, in virtue of Our supreme authority and in Our solicitude for the salvation of souls, not to allow the faithful entrusted to them to err regarding this most grave law of God; much more, that they keep themselves immune from such false opinions, in no way conniving in them. If any confessor or pastor of souls, which may God forbid, lead the faithful entrusted to him into these errors or should at least confirm them by approval or by guilty silence, let him be mindful of the fact that he must render a strict account to God, the Supreme Judge, for the betrayal of his sacred trust, and let him take to himself the words of Christ: "They are blind and leaders of the blind: and if the blind lead the blind, both fall into the pit." (Mt. 15, 14.)⁹⁸

A similar situation exists, at least in some cases, with regard to euthanasia. Most individuals would unhesitatingly admit the grave sinfulness of deliberately taking the life of an innocent person directly on human authority. Nevertheless, many seem to be of the belief that, because of the circumstances of age or pain or suffering on the part of the victim, they may contravene the natural law of God in this matter.

The same observation may be made with regard to abortion. "It is a matter of common practice, though morally indefensible," states Davis, "to sacrifice the life of the *infans in utero* in order to save the life of the mother, when this sacrifice is judged to be the only means of doing so."⁹⁹ In this connection, implicitly at least, there is

⁹⁸ "Sacerdotes igitur, qui confessionibus audiendis dant operam, aliosque qui curam animarum habent, pro suprema Nostra auctoritate et omnium animarum salutis cura, admonemus, ne circa gravissimam hanc Dei legem fideles sibi commissos errare sinant, et multo magis, ut ipsi se ab huiusmodi falsis opinionibus immunes custodiant, neve in iis ullo modo conniveant. Si quis vero Confessarius aut animarum Pastor, quod Deus avertat, fideles sibi creditos aut in hos errores ipsemet induxerit, aut saltem sive approbando sive dolose tacendo in iis confirmarit, sciat se Supremo Iudici Deo de muneris proditione severam reddendum esse rationem, sibique dicta existimet Christi verba: 'Caeci sunt, et duces caecorum; caecus autem, si caeco ducatum praestet, ambo in foveam cadunt.' (Mt. 15, 14)."—"*Casti connubii*," AAS, XXII (1930), 560. (Eng. trans.: *Four Great Encyclicals*, p. 92.)

⁹⁹ *Op. cit.*, II, p. 166.

frequently an attempt on the part of those concerned to apply *epikeia* to the natural law. For it is not rarely argued that when a case arises in which the circumstances are such that without an abortion the mother cannot continue to live, it may prudently be judged that it was not the intention of the Divine Legislator to include such a case in His law.

The teaching of the Catholic Church on the indissolubility of a consummated Sacramental marriage is, of course, unhesitatingly accepted by Catholics. Moreover, that the indissolubility of marriage is based upon the natural law is the common teaching of theologians.¹⁰⁰ Yet, unfortunately, it is not uncommon to find some persons subscribing to the opinion that because of peculiar circumstances surrounding their particular case, especially if the culpability of the other party is involved, they may set aside this natural precept and contract a new marriage, even while the lawful spouse still survives.

Examples such as the above might easily be multiplied. But those already suggested seem sufficient to indicate that the question of the relation of *epikeia* to the natural law is by no means merely abstract and theoretical. It is a question with grave and profound practical consequences. Surely this is not to allege, of course, that those theologians who apparently admit the licit use of *epikeia* in reference to the natural law would go so far as to allow contraception, euthanasia, etc. But from a practical point of view one may logically hold that to allow *epikeia* in any case involving the natural law is to open the door to the possibility of grave abuses; and from a theoretical point of view, it would seem to be true that the arguments adduced

¹⁰⁰ “. . . at least in more recent times, the answer of the great majority [of Catholic theologians] is an unhesitating declaration that natural law prohibits any exception whatever to the rule of indissolubility. And though there has been no dogmatic pronouncement on the subject, more than one Pope has given support to this view.” (Reference is made to the letter of Pope Pius VII to the Bishop of Agrigona on 11 July, 1789, to the error of J. N. Nuytz condemned in the *Syllabus*—prop. 67—by Pope Pius IX, and to a pertinent passage in the Encyclical “*Arcanum divinae sapientiae*” of Pope Leo XIII.)—G. Joyce, *Christian Marriage* (London and New York: Sheed & Ward, 1933), p. 28.

above demonstrate that in no precept of the natural law—whether it be negative or positive, whether it involve *materia gravis* or *materia levis*—may *epikeia* ever licitly be used.

In opposition to the view that *epikeia* may never be used in reference to matters involving the natural law, it may be objected that mutilation under certain circumstances is licit. Moreover, its lawfulness, it is argued, is based upon the use of *epikeia*, for man “cannot amputate the members of his body except by permission of God reasonably presumed.”¹⁰¹ It follows, then, that at least in this case, *epikeia* may be applied licitly to a precept of the natural law.

In reply, it may be conceded that mutilation under certain circumstances is licit. But it is not correct to state that its lawfulness is based upon the application of *epikeia* to a precept of the natural law.

That mutilation is *per se* illicit is derived from the fact that man has full dominion neither of his life nor of his body. To assume such control would be a gravely illicit (*ex genere suo*) usurpation of rights which belong to God alone; for man is merely the guardian or the administrator of his life and members. Just as the destruction of a thing is an act of dominion, so too is its mutilation. And it is for this reason that it can be said that mutilation partakes of the malice of suicide and is opposed to the fifth commandment. Nor can it be argued that man has no dominion over his body as a whole, but does possess such dominion over the individual members. Such a position is not, valid. For, as Cathrein points out,¹⁰² man is constituted of parts taken all together; and if, therefore, he had dominion over the parts, he would have dominion over himself. Furthermore, it may be added that by mutilation man acts contrary to the precept of love of self. In short, as Pope Pius XI points out:

Christian doctrine establishes and the light of human reason makes it most clear, that private individuals have no other power over the members of their bodies than that which pertains to their natural ends; and they are not free to destroy or mutilate their

¹⁰¹ “. . . membra sua abscindere nequit, nisi ex concessione Dei rationabiliter praesumpta.”—Tanqueray, *op. cit.*, III, n. 275.

¹⁰² *Phil. Moral.*, n. 346.

members, or in any other way render themselves unfit for their natural functions, except when no other provisions can be made for the good of the whole body.¹⁰³

This final clause of the Pope's statement indicates that for the good of the whole body mutilation is permitted. *Per accidens* mutilation is licit. Man is the guardian or the administrator of his own body and its members. Now, it is the part of a good administrator to save the substance of the thing of which he has charge, even at the cost of destroying part of it, if such is necessary. For *pars est propter totum*, and hence must defer to the good of the whole. Moreover, for the lawful use of mutilation it is not necessary that one's life be at stake. Pope Pius XI speaks explicitly of the "good of the whole body" and thus does not restrict the lawful use of mutilation to those cases in which life is endangered.¹⁰⁴

In fine, direct mutilation even of a healthy organ is permissible if necessary for the good of the whole body.¹⁰⁵ Now, in view of these facts, to state without qualification that there exists a precept of

¹⁰³ "Ceterum, quod ipsi privati homines in sui corporis membra dominatum alium non habeant quam qui ad eorum naturales fines pertineat, nec possint ea destruere aut mutilare aut alia via ad naturales functiones se ineptos reddere, nisi quando bono totius corporis aliter provideri nequeat, id christiana doctrina statuit, atque ex ipso humanae rationis lumine omnino constat."—"Casti connubii," *AAS*, XXII (1930), 565. (Eng. trans.: *Four Great Encyclicals*, p. 96.) It is to be noted that there is no condemnation of the opinion that the state possesses the right of mutilation of a criminal for punitive purposes.

¹⁰⁴ It is important to note that the justification of mutilation is not based upon the application of the principle of the double effect. For mutilation is directly intended as a means to an end. The good effect and the evil effect do not flow with equal immediacy from the act; rather, the good effect flows from the evil effect (the loss of a member). Moreover, it is not necessary that the member which is amputated or mutilated be diseased. A perfectly healthy member may be sacrificed for the good of the whole body—e.g., an arm caught in a trap. Cf. T. V. Moore, "The Morality of a Sterilizing Operation," *ER*, CVI (1942), 444.

¹⁰⁵ For a comprehensive study of the problem of mutilation for the good of another, cf. B. Cunningham, *The Morality of Organic Transplantation*, The Catholic University of America Studies in Sacred Theology, No. 86 (Washington, D. C.: The Catholic University of America Press, 1944).

the natural law such as "Mutilation is forbidden" is not altogether accurate. The formula is too rigid, too universal. In short, it must sedulously be noted that, although *epikeia* may sometimes be used in regard to such a formula, it is not applied to the natural precept itself which is insufficiently and inadequately expressed in such a statement of the law.

CHAPTER VII

EPIKEIA AND DIVINE POSITIVE LAW

ARTICLE 1. INTRODUCTORY NOTIONS

THE divine positive law may be defined as "that law imposed by God upon men through revelation to direct them fittingly toward their supernatural end."¹ It is an *ordinatio rationis divinae* immediately enacted and promulgated by the free and positive will of God.² Hence, it consists of obligations which do not of their very essence flow from man's rational nature, and which cannot be known by reason alone.

This is not to deny, of course, that precepts which of their nature pertain to the natural law may in addition be imposed by a positive act of God's Will. Precisely, then, the divine positive law embraces only revealed precepts super-added to the natural law; whereas revealed law embraces not only divine positive precepts but likewise those natural precepts revealed by God.³

Although both the natural law and the divine positive law have God as their Author, they are by no means identical. In the first place, the *materia* of the natural law consists of precepts which are necessary by reason of the natural exigencies of rational creatures, while the *materia* of divine positive law consists of certain precepts freely imposed by God, and not demanded by nature. Again, the natural law is promulgated to men by the natural light of human reason, whereas divine positive law is made known to men through the entirely gratuitous gift of divine revelation. A final difference arises from the fact that the goal toward which divine positive law

¹ ". . . illa lex a Deo hominibus intimata per revelationem pro eorumdem convenienti directione in finem supernaturalem."—Rodrigo, *op. cit.*, n. 585.

² Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 300.

³ "Revelata sunt insuper iura et officia ordinis naturalis, quae etsi voluntate positiva Dei imposita, spectant ad ius divinum naturale, cuius indolem retinent, licet ad finem supernaturalem hominum sint dirigenda."—Van Hove, *Prolegomena*, n. 40.

directs man is strictly supernatural. It is the Beatific Vision, the term toward which man, elevated to the supernatural order by the free gift of God, is striving.⁴

The divine positive law is three-fold: the Primitive Law, the Old or Mosaic Law, and the New or Christian or Evangelical Law. However, although theologians speak of a Primitive Law, "before Moses there was not given by God a positive law embracing many divine precepts by which men or any group of men constituted in a special state by God were directed in a special way toward a certain end."⁵ That is, primitive revelation had no integral code, but only a few precepts, such as that of circumcision imposed upon the family of Abraham,⁶ certain commands given to Noe⁷ and perhaps some rules concerning the choice of animals for sacrifice, and so forth.⁸

Moreover, it is more correct to refer to stages in the divine positive law, than to different laws. For the Old and the New Law are not distinguished as two different species. Rather, one is the completion of the other, as St. Paul points out.⁹

⁴ Cf. Merkelbach, *loc. cit.* On the necessity of divine positive law, cf. St. Thomas, *Sum. Theol.*, I-II, q. 91, a. 4.

⁵ "Dico ante Moysem non fuisse a Deo datam positivam legem, plura divina praecepta continentem, per quam homines, vel aliqua hominum congregatio in peculiari statu a Deo instituta, et peculiari modo ad aliquem finem ordinata fuerit."—Suarez, *De Legibus*, Lib. IX, Cap. I, n. 3. Cf. Merkelbach, *ibid.*, I, n. 301; Rodrigo, *op. cit.*, n. 586.

⁶ Gen. 17, 10-12.

⁷ Gen. 7 and 9.

⁸ Cf. Rodrigo, *loc. cit.*; Merkelbach, *loc. cit.* This *lex primitiva* is sometimes called *lex naturae*. It extended from the beginning of the human race up to the Mosaic Law for the sons of Abraham, and for others up to the promulgation of the Evangelical Law. It should be noted, however, that this *lex naturae* was not merely the *lex naturalis*. For inasmuch as the human race was always destined for a supernatural end, it was always bound by supernatural obligations. It is called *lex naturae* because it was not written, but its precepts were promulgated through tradition in a natural way. Attention should also be called to the fact that once a supernatural end was destined for man and a divine revelation given him, by divine precept it was necessary that he believe what was revealed, and strive for the attainment of the supernatural end.

⁹ Gal. 4. Cf. St. Thomas, *Sum. Theol.*, I-II, q. 91, a. 5.

The principal¹⁰ Author of the Mosaic Law was God Himself, as is evident from the testimony of Holy Scripture.¹¹ It was promulgated by Moses,¹² and was imposed with all the force of divine obligation upon the Israelite people—and upon them alone.¹³

The Old Law contained moral, ceremonial and judicial precepts.¹⁴ The moral precepts, contained in the Decalogue, regulated man's relations toward God and toward his neighbor. The ceremonial precepts regulated the worship which was to be given to God. The judicial precepts regulated the social, political and international relationships of the Israelite people.

With the accomplishment of the redemption of Christ,¹⁵ the Mosaic Law was abrogated; for then its purpose—to prepare for Christ and for the New Law—ceased. Vermeersch points out¹⁶ that the entire Old Law was abrogated—not even the moral precepts are to be excepted. For although most of these latter remained and still remain in force, nevertheless their obligation now arises, not

¹⁰ Angels are called the ministerial authors. Cf. St. Thomas, *Sum. Theol.*, I-II, q. 98, a. 3; Suarez, *De Legibus*, Lib. IX, Cap. II, n. 4. This is based upon the testimony of Holy Scripture: cf. Acts 7, 53; Gal. 3, 19.

¹¹ Ex. 19; 21; 25.

¹² Hence, it is sometimes referred to as the Law of Moses. Cf., e.g., Luke 2, 22; John 1, 17; 7, 19; 7, 23.

¹³ Deut. 4, 8; Ps. 147, 8 [19]; Rom. 3, 2. Of course, those moral precepts which were merely the expression of the natural law, were binding upon all men. But whatever was contained in the Old Law over and above the natural law, *per se* obliged only the Jews, and *per accidens* the Gentiles who had become circumcised. Cf. Ex. 12, 48.

¹⁴ However, St. Thomas points out that despite the multiplicity of its precepts, the Mosaic law was really one. “. . . omnia praecepta legis veteris sunt unum secundum ordinem ad unum finem; sunt tamen multa secundum diversitatem eorum quae ordinantur ad illum finem.”—*Sum. Theol.*, I-II, q. 99, a. 1.

¹⁵ “Certum est legem mosaicam non cessasse ante mortem Christi, sed utrum abrogata sit tempore mortis Christi, ut volunt Thomistae, an die pentecostes, quando facta est sollemnis novae legis promulgatio, ut docent scotistae, certo dirimi nequit. Ex Apostolo constat legem veterem ante Christi mortem non cessasse; ex eodem Apostolo confirmari videtur sententia, quae tenet in ipsa morte Christi Domini legem veterem abrogatam esse.”—Noldin-Schmitt, *op. cit.*, I, n. 119.

¹⁶ *Theol. Mor.*, I, n. 153.

from the Mosaic promulgation of them, but because of their initial promulgation by reason (being immediately deduced from the universal principles of the natural law), and their later promulgation in the New Testament by Christ Himself.¹⁷ It is to be noted, however, that the Church introduced by her own positive legislation some ceremonial and judicial precepts that had been in force in the Old Testament.¹⁸ But precepts regarding matters that were figures of the coming of Christ obviously could not be admitted.

The Author of the New Law is Christ Our Lord.¹⁹ He Himself promulgated the Law before His Ascension, and at His Ascension ordered that it be promulgated to all nations through His Apostles. It began to be promulgated by them solemnly on Pentecost; in places other than Jerusalem the command of Christ was fulfilled gradually. Many theologians hold that by the time of the destruction of Jerusalem it had been preached to the entire then-known world.²⁰

¹⁷ Van Hove (*Prolegomena*, n. 41) and Soto (*op. cit.*, Lib. II, q. 5, a. 4) express the same idea. St. Robert Bellarmine, however, holds the opposite view as "more true," viz., that the moral precepts still oblige because of the Mosaic promulgation: "Caeterum nos verius putamus, legem morale, etiam ut est data per Moysen, ut per prophetas, atque ut est in libris veteris Testamenti scripta, vere obligare Christianos."—*De Justificatione Impii (Opera Omnia* [Neapoli, 1858-1861], IV), Lib. IV, Cap. VI.

¹⁸ Van Hove (*loc. cit.*) gives as examples, the dedication of churches, the consecration of altars, the burning of incense, the chanting of the Psalms, some penal precepts, etc.

¹⁹ Cf. Is. 33, 22; Ps. 2, 6; Mt. 5, 21-22. Cf. also Encyclical "*Quas primas*," Pius XI, 11 December 1925, *AAS*, XVII (1925), 593-610.

²⁰ There is no general agreement as to the time when the promulgation of the New Law was completed. Perhaps the best view is that it was promulgated gradually—in Jerusalem on Pentecost, in Athens when St. Paul preached there, etc. Some theologians, however, having in mind uncivilized regions, hold that the promulgation of the Gospel is not yet complete. But the more common view holds that the promulgation was completed when that time elapsed which was *per se* sufficient for the preaching of Christ's doctrine to all nations—even though *per accidens* it did not come to the attention of many. According to this opinion the time for the promulgation did not extend beyond the end of the first century. For the former theory cf. J. Bellamy, "Baptême dans L'Église Latine Depuis Le VIII Siècle," *DTC*, II, 278-289. For the latter theory cf. F. Connell, *De Sacramentis Ecclesiae* (Brugis: Beyaert, 1933—), I, n. 115.

The New Law²¹ differs in many ways from the Old Law.²² The contrast between God's manner of dealing with men in the New Dispensation and His method in the Old Law is more clearly understood in the realization that

in much the same way as children are frequently enticed to virtue by the tempting bait of a longed-for toy, or by the dread of the birch rod alternative, were men induced to the observance of the Old Law by means of temporal rewards or threats. Not yet had virtue become Incarnate. Man's faltering steps toward God had to be given a directed impetus along the labyrinthine ways of life if he was to move surely to reason's goal. Otherwise he would never have found his way back to God.²³

The New Law contains precepts²⁴ which may be classified as moral, judicial and ceremonial.²⁵ Actually, however, with regard to the moral precepts, as Lehmkuhl points out:

²¹ Attention should be called to the broad use of this term (signifying the whole new order of salvation instituted by Christ after the abrogation of the Old Law) as distinguished from its strict and proper acceptance (signifying the precepts enacted by Christ). Cf. Noldin-Schmitt, *op. cit.*, I, n. 120.

²² Merkelbach points out: "Lex nova itaque a vetere lege differt: (1) ratione *causae efficientis*, quia est a Christo non solum ut Deus est sed etiam ut homo (Hebr. I, 1); (2) ratione *causae formalis*, quia principaliter est gratia et charitas quam dat ex opere operato, dum lex vetus cognitionem praecepti dabat ac peccati, non vero auxilium; (3) ratione *materialis causae*, quia lata est pro omnibus et in perpetuum, ac praecepta perfecte declarat, addit consilia, pauca imponit externa, sed multa interna quae tamen impletu facilia sunt ex gratia; (4) ratione *causae finalis*, quia felicitatem aeternam immediate procurat."—*Summa Theol. Mor.*, I, n. 322.

²³ Sister Mary Agnes Barry, Daughter of Charity of St. Vincent de Paul, *Treatise De Legibus in the Summa Theologica of St. Thomas: Principles of Social Philosophy Involved* (an unpublished M.A. dissertation, School of Philosophy, The Catholic University of America, Washington, D. C., 1943), p. 17.

²⁴ Theologians go on to state that it contains counsels as well as precepts. Obviously, however, these do not have the same binding force as laws, for they are not necessary for the attainment of man's end, but are given that he may more expeditiously reach it. Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 321.

²⁵ This terminology is by no means universal. Noldin-Schmitt (*op. cit.*, I, n. 120) use the terms "theological," "moral," and "sacramental." Davis (*op. cit.*, I, p. 133) doing likewise, states: "These precepts of the New Law are

In addition to the natural moral laws the Christian law does not immediately contain other divine positive moral precepts, except those which of their nature flow from revelation and the supernatural end [of man] and the institution of the Church *in concreto*. Certainly from the supernatural revelation that has been more clearly made there arises the obligation of believing explicitly more truths now than previously; and also the precepts of hope and charity have become more clear.²⁶

The judicial precepts concern the hierarchico-monarchical constitution of the Church. The ceremonial or sacramental precepts have reference to the Holy Sacrifice of the Mass and to the Sacraments. Regarding all other matters which concern the governing of the Christian people, Christ Himself did not personally and in particular make disposition, but He gave this power to His Church.²⁷ Vermeersch concisely states the point: "The New Law does not impose precepts other than the precept of faith, and the precept of the Sacraments. For the Lord, the Author and Promulgator of the law of love, left all other matters to the Church to be defined."²⁸

theological, as referring to Faith, Hope, Charity; they are moral as contained in the Decalogue and confirmed and perfected by Our Lord. . . . Thirdly, these precepts are sacramental, as referring to the Sacraments and the Sacrifice, and these may be called new moral precepts in a wide sense."

²⁶ "Praeter leges morales naturales lex Christiana alia *praecepta* divinitiva *immediate* moralia non continet, nisi quae ipsa natura duce ex revelatione ac fine supernaturali et Ecclesiae in concreto institutione consequuntur. Nimirum ex revelatione supernaturali enucleatius facta obligatio oritur plura nunc explicitè credendi quam antea; atque etiam spei et caritatis praecepta clariora evaserunt."—*Op. cit.*, I, n. 295.

²⁷ Regarding the unity of marriage, Christ did not make a new law, but "matrimonium primaevae integritati restituit."—Noldin-Schmitt, *op. cit.*, III, n. 517. Cf. the proposition condemned by Pope Pius IX in the *Syllabus* (n. 67): "Iure naturae matrimonii vinculum non est indissolubile, et in variis casibus divortium proprie dictum auctoritate civili sanciri potest" (*DB* 1767).

²⁸ "Lex autem nova non alia praecepta imponit nisi fidei et sacramentorum. Dominus enim, auctor et promulgator legis amoris, reliqua omnia Ecclesiae definienda reliquit."—*Theol. Mor.*, I, n. 153. Cf. St. Thomas, *Quodlibet*. (*Opera Omnia*, XV), IV, a. 13; Suarez, *De Legibus*, Lib. X, Cap. VI, n. 11. On the other hand, Sporer teaches: "Loco diei Sabbati in Nova Lege ad Deum colendum instituta dies Dominica, idque ipso jure divino . . ."—P. Sporer, *Theologia Moralís* (Salisburgi, 1711), Tract. III, Cap. IV, n. 3.

It is to be noted that the New Law is universal—with regard both to subject and to duration. It is imposed upon all men,²⁹ and hence obliges them either immediately (as in the case of the precept to believe and to be baptized) or mediately (as in the case, for example, of the precept—for those Christians who have fallen into mortal sin—to receive Penance, and the precept of Holy Communion; for to fulfill these latter commands is possible only after Baptism has been received).

Moreover, the New Law is universal with regard to duration.³⁰ Its precepts, instituted as they were by Christ Himself, can never become valueless or harmful to men's salvation;³¹ nor can they be abrogated or added to, for the deposit of divine revelation, the source of divine positive law, was closed at the death of the last Apostle.³²

ARTICLE 2. OPINIONS ³³

I. *Affirmative*

Cajetan. Although Cajetan does not explicitly state that the use of *epikeia* in a matter concerning divine positive law is licit, nevertheless, one may easily derive this conclusion from his statement that *epikeia* is the direction of law—any law, natural or positive—when such law becomes deficient by reason of its universality.³⁴ He points out that positive laws are of two types: first, those whose *materia* is in itself entirely indifferent, and secondly, those which merely express the precepts of the natural law. The opinion of Cajetan in regard to *epikeia* and the natural law has already been

²⁹ Cf. Mt. 28, 20; Mark, 16, 16. Our statement has reference to the entire New Law as a system, and does not imply a denial of the fact that there are certain divine precepts imposed upon individuals in a particular state of life which do not bind those who are not members of such a state.

³⁰ Cf. Mt. 16, 18; 28, 20.

³¹ Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 322.

³² “. . . in Apostolis revelatio publica consummata et completa est.”—*Ibid.*, n. 683.

³³ Cf. p. 263 *supra*.

³⁴ *Op. cit.*, in II-II, q. 120, a. 1. The earlier writer, Henry of Hesse, subscribes to a similar view in a more explicit way. Cf. *op. cit.*, Cap. XV.

alluded to,³⁵ and so it remains only to call attention to his belief that in enactments of purely positive law—and no qualification as to divine or human law is given—a direction by *aequitas* is sometimes needed.

Henno. The theologian Henno asserts unhesitatingly that the use of *epikeia* in reference to divine law is lawful.³⁶ In substantiation of this opinion he presents three arguments. First, he points to the fact that the Machabees believed themselves excused from the observance of the Sabbath when their lives were in danger,³⁷ and he alleges this incident as an example of *epikeia*. Secondly, he contends that one is not bound to integrity of confession, when from such integrity there would accrue to the penitent or to the confessor or to a third party, a notable injury in goods of life, reputation or fortune. And the reason is to be found, so he maintains, in the interpretation by *epikeia* that the law requiring integrity of confession does not include such a case.³⁸ Finally, he declares that God, Whose “yoke is sweet and burden light”³⁹ is not to be deemed desirous of binding us to the fulfillment of any precept which is morally im-

³⁵ Cf. pp. 263, 264 *supra*.

³⁶ *Op. cit.*, Vol. III, Tract. III, Disp. II, Quaest. V, Concl. III.

³⁷ 1 Mach. 2, 41. In support of the belief that *epikeia* is permissible in regard to divine positive law, few arguments are adduced more frequently than this. Cf., e.g., A. Michel, *Theologia Canonico-Moralis* (Augustae Vindel., 1707-1712), Vol. I, Tract. IV, Quaest. VI, § V, n. 3; Roncaglia, *op. cit.*, Vol. I, Tract. III, Quaest. IV, Cap. III; H. Van den Berghe, “Quaenam Leges Epikiam Admittant,” *Coll. Brug.*, VII (1902), 363. Van den Berghe believes that when God promulgated positive law, He used a general formula, and although He foresaw all possible cases which could be held worthy of exception, He was neither bound, nor did He wish, to express all of them. But if, he continues, one defines *epikeia* in such an excessively strict and narrow way as does Billuart, as if it were merely an explanation of the intention of the legislator—not that which he actually had when he made the law, but rather that which he would have had if he considered the particular case at hand—then the use of *epikeia* in reference to divine positive law cannot be admitted.

³⁸ Several theologians agree with Henno in seeing here an example of the use of *epikeia*. Cf., e.g., Van den Berghe, *loc. cit.*; Viva, *Opus. Theol.-Mor.*, Opus. II, Quaest. IV, Art. II, n. V.

³⁹ Mt. 11, 30.

possible. Hence, when there arises a grave difficulty in observing a law, we can assume that it is not God's intention to urge obligation in such a case.

Salmanticenses. According to the opinion of the Salmanticenses,⁴⁰ *epikeia* may be used, with regard not only to human law, but also to divine positive law. The basic reason for their view arises from the fact that they believe that divine positive law, like human law, may be deficient owing to the universality of its expression, and hence require correction by *epikeia*.⁴¹ Furthermore, it is not necessary to suppose, as a basis for *epikeia*, the lawgiver's limitation of knowledge which prevented his foreseeing all possible cases.⁴² This condition obviously can apply only to human legislators. But it is quite possible—and for this statement the Salmanticenses cite the Angelic Doctor⁴³—that in order to avoid prolixity and confusion in his law, the legislator was unwilling to express in particular all the cases he wished to exempt, even though actually he foresaw them. That this is the situation which is verified in the case of divine positive laws, the Salmanticenses strongly maintain. For God well understood that by making use of the virtue of *epikeia*, men could correct a universal or general law when the occasion presented itself, and could interpret His Will in accordance with circumstances as they arose. In support of this position, the Salmanticenses allege the instances of David's partaking of the loaves of proposition,⁴⁴

⁴⁰ *Op. cit.*, Vol. III, Tract. XI, Cap. IV, Punct. III, nn. 41-42.

⁴¹ This argument is adduced also by Viva, *loc. cit.*; Wouters, *op. cit.*, I, n. 143, and others.

⁴² This view of the nature of *epikeia* must obviously be taken by all who admit the applicability of *epikeia* to divine positive law. Cf., e.g., Wouters, *loc. cit.*; Van den Berghe, *art. cit.*, *Coll. Brug.*, VII, 363; Leroux, "De Epikieia," *REL*, 259, 260.

⁴³ Reference is made to *Summa Theologica*, I-II, q. 96, a. 6, ad 3. Roncaglia likewise appeals to this passage to support his position. Cf. Roncaglia, *op. cit.*, Vol. I, Tract. III, Quaest. IV, Cap. III.

⁴⁴ 1 Kings 21, 6. Of all the incidents referred to as examples of the use of *epikeia* in regard to divine positive law, this is the most frequent. Cf., e.g., Henry of Hesse, *op. cit.*, Cap. XV; Roncaglia, *loc. cit.*; Simonnet, *op. cit.*, pp. 71-72; Van den Berghe, *art. cit.*, *Coll. Brug.*, VII, 363; Antonius-Nicolaus,

and the Machabees' interpretation that they were not obliged to observe the Sabbath by abstaining in all circumstances from the shedding of blood.⁴⁵ And as a final confirmation of their view on the point in question, they invoke the authority of several theologians, the most noteworthy being Cajetan.

Viva. It is the contention of Viva that *epikeia* (as distinguished from interpretation) may be used in reference to the divine law, not insofar as the mind of God is concerned, but only in relation to the words of the law.⁴⁶ As a clarification of this final clause, Viva explains that a universal divine positive law may be deficient in a particular case, not because God cannot foresee such a case (as might be verified if there were question of a merely human legislator), but rather owing to the fact that it would be incongruous to express in His law the countless particular cases liable to arise. Consequently, the divine law may be corrected, not in relation to the divine mind, but rather in relation to the words of the law. As examples of divine positive laws in reference to which *epikeia* is permissible, Viva mentions the precept requiring material integrity of confession, and the law demanding the confession of mortal sins before the receiving of Holy Communion.

op. cit., I, n. 346; Noldin-Schmitt, *op. cit.*, I, n. 160; Cicognani, *Comment. ad Lib. I Cod.*, p. 131. Cicognani-Staffa (*op. cit.*, p. 305), however, state that there is no place for *epikeia* in the divine natural or positive law.

⁴⁵ 1 Mach. 2, 41.

⁴⁶ *Opus. Theol.-Mor.*, Opus. II, Quaest. IV, Art. II, n. V. This is substantially the same explanation as that given by La Croix (*op. cit.*, Vol. I, Lib. I, n. 830) who distinguishes divine positive law *quoad legem ipsam* (in regard to which *epikeia* is never permissible) and *quoad nos* (in regard to which *epikeia* is sometimes permissible). Because God foresaw all cases and circumstances and excepted from the beginning all the cases that are to be excepted, it cannot be said that divine positive law in itself is defective. However, human beings may have come to know from some source that from the beginning God did not will to include the case in question. Consequently the law *quoad nos* (i.e., its expression as known to us) will admit of exception. Haring discusses at some length the controversy among authors on the point, insisting on the fact that God is omniscient, and hence foresees all cases, that He is omnipotent, and hence can find an expression of His law which is entirely clear. In point of fact, however, God makes use of human language in expressing His law, and hence His commands bear with them the defects of human language. Cf. Haring, *art. cit.*, *ThQS*, LII, 808.

Simonnet. Although maintaining that *epikeia* in matters which concern divine positive law is licit, Simonnet⁴⁷ is very careful to insist that his opinion does not presuppose that the case in which *epikeia* may be used was not foreseen by God. Neither does his teaching involve any restriction of divine law contrary to the sense which God intended. For there can be no legitimate basis for any fear that possibly in some particular circumstances divine laws may be unjust, should the sense which God intended in enacting them, be retained. The moderation or correction which may be used in regard to divine laws, has reference precisely and exclusively to the words, of their nature general, in which the precepts are expressed. By the use of *epikeia* no defect in the divine law is implied; the defect consists in the verbal formula in which the divine command is vested. Moreover, continues Simonnet, it is not contrary to the perfection of divine law that it be expressed in words which are general and universal. For it was fitting that God in enacting His laws should make use of such language, in order to accommodate Himself to man's manner of speaking and to avoid the countless inconveniences which would result from an inopportune multiplicity of words. Nor indeed is recurrence to the Church necessary when it is clear from evidence or from necessity that God is unwilling to urge obligation in a particular case. In brief, just as it is not repugnant to the perfection of divine laws that God in enacting them should not express those cases which are to be excepted and which He Himself foresees and wishes to except, so too, it is not repugnant to the perfection of divine laws that they be formulated in such a way as to require a certain moderation and correction to be made in accordance with the will of God.

In the article on *epikeia* referred to above,⁴⁸ which appeared in *L'Ami du Clergé*, the author, admitting that many moralists prohibit the use of *epikeia* in reference to any divine law, whether it be natural or positive, takes the stand that such a view is excessively strict.⁴⁹ His own opinion is that *epikeia* in matters involving divine

⁴⁷ *Op. cit.*, pp. 71-72.

⁴⁸ Cf. pp. 190, 265; also Chap. I, note 20; Chap. IV, note 35 *supra*.

⁴⁹ "L'Epikie," *L'Ami du Clergé*, XXV, 166.

positive law is permissible—but much more rarely and only for reasons much more grave than would be required if a merely human law were in question. He concludes: “In point of fact, *epikeia* in divine natural and divine positive law is difficult to use, is very dangerous, and is relatively very rare.”⁵⁰

II. Negative

Vasquez. *Vasquez* states plainly⁵¹ that although divine positive law may be prudently interpreted (as an instance he refers to the oft-cited example of the decision of the Machabees to defend themselves by taking up arms on the Sabbath⁵²), there can be no place for *epikeia* strictly so-called in its regard. The reason is to be found in the fact that *epikeia* is the correction of an error which occurs in some law as applied to a particular case. Now, in point of fact, although divine positive law may appear to err in a particular case if merely the letter of the law be considered, nevertheless, the law itself in relation to the mind of its Author does not err. For it cannot be denied that the case in question actually occurred to His mind, in spite of the fact that He was unwilling expressly to except it⁵³—precisely because He realized that the problem could be settled by prudent judgment. The matter is entirely different, however, in regard to human law. For when, in connection with a human law some particular case arises which is *praeter mentem legislatoris humani*, then actually his law in relation to his mind is

⁵⁰ “En fait, l’epikie *in jure positivo naturali et divino* est d’usage difficile, tres perilleux et relativement fort rare.”—*Loc. cit.*

⁵¹ *Op. cit.*, in I-II, Disp. 176, Cap. I, n. 4.

⁵² 1 Mach. 2, 41. This explanation of the incident is given by Becanus also. Cf. *op. cit.*, Pars II, Tract. III, Cap. VI, Quaest. XIV, n. 3. On the same basis Becanus explains Our Lord’s action in healing the sick on the Sabbath—e.g., Mt. 12, 13; Mark 3, 5; Luke 6, 10; John 7, 23.

⁵³ Using substantially the same argument *Viva* concludes that *epikeia* is applicable to divine positive law. As is true in regard to many authors who treat the problem, *Vasquez* and *Viva* differ on the point because there is no common agreement as to the meaning of *epikeia*. *Vasquez* considers *epikeia* to be based solely on the legislator’s inability to foresee future cases; *Viva* considers it to be based either on his inability to foresee the future or on his unwillingness to mention in the law all the exceptions which he wishes to make.

in error, and hence is to be corrected by the use of *epikeia*. Obviously such a situation could never be verified when there is question of divine positive law.

Vasquez has already declared that the action of the Machabees was the result of prudent interpretation, and does not exemplify the use of *epikeia*. Now he goes further. He implies that reference to this scriptural incident is not at all pertinent to the problem under discussion; for he denies that the act of self-defense can in any way be considered a servile work, and hence forbidden on the Sabbath.

Suarez. The discussion by Suarez of the point in question is so complete and so valuable that it merits a detailed analysis. In the first place, it may be stated that he very definitely forbids the use of *epikeia* in cases involving divine positive law, at least of the New Testament.⁵⁴ At the outset of his argumentation, he insists upon the importance of distinguishing clearly between dispensation and interpretation.⁵⁵ The former supposes the existence of an obligation even in the individual case in question; the granting of the dispensation removes the obligation. The latter supposes some doubt about the existence of the obligation in the particular case at hand; it removes, not the obligation, but the doubt, by declaring that it was not⁵⁶ the intention of the legislator to impose obligation in such a case. A further distinction of importance is made by Suarez.⁵⁷ Speaking of divine positive legislation of the New Testament, he differentiates between those institutions which were established by Christ (the monarchico-hierarchical order of the Church, the Sacraments and the Holy Sacrifice of the Mass) and the positive precepts which concern their use.

In the opinion of Suarez, doctrinal *interpretation* may be employed in reference to divine positive precepts which concern the

⁵⁴ "Praecepta positiva legis gratiae nullam dispensationem nec interpretationem per modum epiikiae admittunt."—*De Legibus*, Lib. X, Cap. VI, n. 11.

⁵⁵ *Ibid.*, n. 10.

⁵⁶ Suarez has in mind only an interpretation that the law does not bind. With interpretation which results in the judgment that the law does bind he is not here concerned.

⁵⁷ *Loc. cit.*

use of institutions established by Christ, but to resort to *epikeia* is not licit.⁵⁸ The reason which he adduces in support of his position may be outlined as follows. Inasmuch as these precepts of the divine positive law are affirmative⁵⁹ and without qualification as to the specific time for their execution, the occurrence of accidental circumstances cannot give rise to any excuse against their verbal formulae. In other words, there can be no exception based on the universality of expression of these positive affirmative precepts. Therefore, there can be no room for emendation of the law, that is, for *epikeia*—but only for interpretation as to its true meaning. For when a divine precept embodies some command devoid of qualification, setting no definite time for its execution, and when no determination as to the moment for its fulfillment is made by human law, then it is left to natural intelligence and to natural reasoning to decide whether or not, in the light of all the circumstances involved in the particular case at hand, the obligation here and now urges—and should a negative decision be forthcoming, it would be based, not upon *epikeia*, but upon interpretation, understood in its proper sense.

Suarez⁶⁰ turns to a consideration of *epikeia* in reference to the institutions themselves which were established by Christ in the New Testament (as distinguished from precepts regarding their use). He denies categorically that there exists any possibility of lawfully applying *epikeia* here. Thus, for example, even in case of necessity a liquid other than wine could not be used in the Holy Sacrifice of the Mass. The reason is to be found in the fact that any amplification or restriction through *epikeia* has absolutely no place in matters which are essentially dependent for their signification and their efficacy (their conferring of some virtue or power) upon the very act instituting them. The act of institution must be definite; it is an indivisible unit; it pertains to the very essence of the thing instituted; hence, no extension or contraction outside or beyond the sense of the words of institution themselves can ever be permitted.⁶¹

⁵⁸ *Ibid.*, n. 13.

⁵⁹ *Ibid.*, nn. 17, 20.

⁶⁰ *Ibid.*, n. 16.

⁶¹ “. . . institutio debet esse omnino definita, et quasi in indivisibili consistens, quia in illo ordine constituit essentiam rei institutae, et ideo non potest ampliari vel restringi ultra vel citra verba institutionis.”—*Loc. cit.*

The intention of the person instituting is *de facto* confined to the words of institution in such a way that, if there be any deviation from the sense expressed in the words, there is no act of instituting the matter in question at all. Consequently it is pointless to endeavor to appeal to some interpretation of the supposed intention of the person who established the institution, as beyond or contrary to the words which were used in the act of establishing it—such an intention does not exist. Granted that there can be interpretation understood in the strict sense, to determine precisely what is the nature and character of the institution, but such interpretation has reference exclusively to the words themselves; it resorts to no presumed intention outside the words, and it is entirely independent of that extrinsic necessity which so often gives rise to the employment of *epikeia* in human legislation. In the final analysis, “an interpretation through *epikeia* which on account of accidental cases, would add something to, or subtract something from, the institution would be a corruption and would have countless evil results.”⁶²

Suarez advances a step further. He insists⁶³ upon the unlawfulness of *epikeia* in regard to precepts which, though not of divine positive legislation, of their very nature flow from the divinely established institutions that have been under consideration. He thus states the basis for his opinion on this point. Once the establishment of these institutions by Christ has been proved, the precepts in question are really precepts of the natural law. And *epikeia* cannot be applied to the natural law. Thus, for example, once it has been clearly demonstrated that Christ instituted the Sacraments, there arises the obligation that they be received with proper dispositions, in order that holy things be holily treated. In reference to this obligation there can never be any lawful employment of *epikeia*. Of course, the Church has the power to interpret whether such or such a disposition is sufficient; but there can never be an interpretation that in some particular case, by reason of necessity, there suffices a dis-

⁶² “. . . interpretatio autem addens vel minuens institutionem per epikiam, propter accidentales casus, esset potius corruptio, et infinita haberet incommoda.”—*Loc. cit.*

⁶³ *Ibid.*, n. 17.

position which in itself is not adequate in order that holy things be holily treated.

The truth of this opinion is further substantiated by a consideration of the fact that in the New Law there are no special negative precepts. And, as Suarez has pointed out before, in affirmative precepts, especially natural precepts, interpretation is possible in regard to the time for the fulfillment of their demands, and in regard to the problem as to whether they oblige under such and such circumstances. There is, however, no room for *epikeia* strictly understood.

Suarez realizes that his opinion forbidding that *epikeia* be applied to divine positive law is by no means the unanimous teaching of theologians. And so he proceeds to a consideration of some of the arguments advanced in favor of the opposite position. His first point has reference to the basis underlying one of his own proofs, namely, that in the New Law no special negative precepts have been imposed.

Is not the precept which prohibits the administration of a Sacrament to the unworthy, negative in character? And is not the precept which forbids one to approach some of the Sacraments in mortal sin, likewise negative of its nature? Suarez replies ⁶⁴ that in the New Law there are no prohibiting laws *per se* primarily and directly imposed. He admits, however, that there are negative precepts which are consequent upon some affirmative laws, precepts which are intimately connected, for example, with the affirmative institution, so to speak, of a Sacrament or of the Holy Sacrifice. In such cases the negative precept must be regulated by the affirmative law upon which it is founded.

Suarez divides these negative precepts into two classes. In the first category are to be found those which concern matters so intrinsically evil that in reference to these precepts there can be neither *epikeia* nor dispensation. Such, for example, is the precept of not divulging a secret of confession. Whether the precept be considered as having been joined specially to the Sacrament by the will of Christ Himself, or whether it be considered as something intrinsically consequent upon its institution and upon the obligation

⁶⁴ *Ibid.*, n. 18.

of confession (an opinion which Suarez deems "most probable"⁶⁵), the fact is that in regard to this precept *epikeia* can never be lawful. Suarez makes much of this point. For, he argues, once there is admitted the possibility of *epikeia* in reference to precepts of the New Law at all, then it is easy to extend *epikeia* even to this precept, because in its regard it is quite possible that there may arise most urgent reasons for breaking the seal, reasons which may even pertain to the common good. Yet, it is absolutely certain that this precept admits of no exception—and the same must be said to be true of other positive precepts of the New Law. In like manner, from the institution of a Sacrament there follows the precept of not placing an *obex* to Sacramental grace—a precept so intrinsically necessary, that to it no exception by way of dispensation or *epikeia* can ever be licit.

It can sometimes happen, continues Suarez,⁶⁶ that an affirmative precept, joined to, or consequent upon, some divine institution, is of such a character that the negative precept founded upon it, is not altogether absolute and universal, for it does not concern a matter intrinsically evil. In such cases, doctrinal interpretation of the affirmative precept upon which the negative is founded, is possible; but this is not *epikeia* strictly understood. Thus, for example, there exists the precept prohibiting one conscious of mortal sin to receive Holy Communion without a previous confession—directly an affirmative precept (and only indirectly negative). Likewise, the precept of forbidding the administration of Holy Communion to an unworthy or an insane person is founded upon the affirmative precept that the Sacrament must be reverently treated. Now, if it is possible in some individual cases to observe this affirmative precept, and at the same time to disregard the negative, then the negative precept no longer binds. For ultimately the negative precept is of obligation, only insofar as it is necessary for the observance of the affirmative law. And this interpretation which would be made in such a case—it is not *epikeia*—in point of fact directly touches the affirmative, not the negative, precept.

⁶⁵ *Loc. cit.*

⁶⁶ *Ibid.*, n. 19.

Suarez now proceeds to the examination of another objection. Is it not possible for cases to arise in which observance of some divine law would be harmful or would impede a greater good? Considering first the precepts which concern the use of the divine institutions of the New Law, he replies⁶⁷ by restating once more the opinion that the precepts of the divine positive law of the New Testament are affirmative in character without any precise determination as to the time for their fulfillment. From this it follows that in cases where some harm would be consequent upon the immediate fulfilling of the divine positive law, it is the function of doctrinal interpretation, and not of *epikeia*, to dictate that in the circumstances the affirmative law does not bind *in actu secundo*. Suarez next considers the institutions themselves, and maintains that neither a dispensation nor an exception through *epikeia* can ever be permitted in order to eliminate some private inconvenience, not only because such a dispensation or exception would be harmful to the common good, but also because any alteration of the institution in question would be contrary to its very nature and stability.

Suarez is next confronted with this objection. The Holy Eucharist cannot be confected nor can there be a Sacrifice except through the consecration of the two species. Nevertheless, by reason of necessity, dispensations have been granted, according to some, in order that the Sacrament might be confected even when wine was lacking.

The answer of Suarez⁶⁸ is not especially forceful. In the first place, he replies that in this matter it is more probable that an exception is not to be admitted at all. He acknowledges in the second place, however, the probability of the opposite view, and on this basis proceeds to reply to the objection. He denies that dispensation or *epikeia* strictly understood could here come into play, inasmuch as there is in question a divine law. Actually this would be but an example of doctrinal interpretation. For the precept of offering the Sacrifice under two species is *per se* an affirmative

⁶⁷ *Ibid.*, n. 20.

⁶⁸ *Ibid.*, n. 22. The objection is raised primarily in regard to the granting of a dispensation. However, the point is pertinent to our problem, inasmuch as Suarez' answer touches both dispensation and *epikeia*. Regarding the granting of such a dispensation, cf. note 249 *infra*.

precept which is intrinsically connected with the institution of the Sacrifice. The prohibition of confecting the Sacrament with only one species is not a special negative precept of the Divine Law. Rather, the institution of the Sacrifice being established, this precept follows, by reason of the general principle that the Sacrifice to be offered to God must be integral and perfect. Now, this general principle is affirmative in character, and hence binds *semper* but not *pro semper*. It admits, therefore, of the interpretation that it is to be observed insofar as occasion and possibility warrant. Consequently, in a case of impossibility the interpretation can be made that the affirmative command does not here and now oblige *in actu secundo*, or—what is the same—the negative precept founded upon it ceases. And because in such a case there is no essential but only an integral defect in the institution, the consecration of but one species is valid. Indeed, to consecrate in this way would seem to be more pleasing to God and more useful to men than not to consecrate at all.

In regard to this answer, it is apparent that the argumentation of Suarez is weak. However, it must be remembered that his is but an attempted explanation of a view to which he himself does not subscribe, and which he deems less probable than his own opinion on the matter. And so, he is not inconsistent in concluding with the warning that “because the matter is extremely grave and very doubtful, and contrary to the universal custom of the Church, it is not to be permitted without a decree of the Pontiff . . .”⁶⁹

It will be noted that thus far consideration has been given the views of Suarez only in relation to *epikeia* as concerned with the New Law. What of his opinion as to the use of *epikeia* in matters involving divine positive precepts of the Old Law?

At the outset of his discussion on this point⁷⁰ Suarez lays down the general principle that the Old Law could not be changed in any way,⁷¹ or abrogated,⁷² or dispensed from,⁷³ except by God Him-

⁶⁹ “. . . quia res est gravissima, et valde dubia, et contra universalem Ecclesiae morem, permittenda non est sine decreto Pontificis . . .”—*Loc. cit.*

⁷⁰ *Ibid.*, Lib. IX, Cap. IX.

⁷¹ *Ibid.*, n. 2.

⁷² *Ibid.*, n. 3.

⁷³ *Ibid.*, n. 4.

self, or in accordance with His decree.⁷⁴ This doctrine is true, he contends, not only with regard to the moral precepts of the Old Testament, but also with regard to the ceremonial and judicial precepts; for the entire Old Law, being of divine origin, could in no way permit of dispensation by man.⁷⁵

On the other hand, man could and did interpret the precepts of the Old Law.⁷⁶ Thus, for example, Achimelech offered the loaves of proposition to David because of the latter's necessity,⁷⁷ although according to the law it was not licit for David to partake of them.⁷⁸ Moreover, not only did Christ explicitly teach that in the case the law was properly interpreted and the action permissible,⁷⁹ but He likewise excused His own disciples whom the Pharisees had criticized for their plucking and eating the ears of corn on the Sabbath.⁸⁰ Again, according to Suarez, it was by making use of the proper interpretation of the law that the Machabees reached the decision to take up arms on the Sabbath to defend themselves.⁸¹ And finally Christ Himself taught⁸² that the law of the Sabbath was not violated by the performance on that day of a work of mercy or piety or religion, even though it was laborious.

But strangely enough, when he presents the basic reason underlying the lawfulness of the above mentioned acts, Suarez, without explicitly referring to the term *epikeia*, makes use of language which accurately and precisely describes that concept as he himself had previously explained it.⁸³

The reason is that interpretation of law, especially of positive law even though it be divine, is necessary in the human administering of things, by reason of the variety of occasions and necessities

⁷⁴ "Nemo enim facere potest, ut verbum praeceptum Dei non obliget pro eo tempore et modo, quo a Deo prolatum est . . ."—*Loc. cit.*

⁷⁵ *Ibid.*, n. 5.

⁷⁶ *Ibid.*, n. 6.

⁷⁷ 1 Kings 21, 6.

⁷⁸ Cf. Lev. 24, 9.

⁷⁹ Mt. 12, 3-4.

⁸⁰ Mt. 12, 1-3.

⁸¹ 1 Mach. 2, 41.

⁸² Mt. 12, 12.

⁸³ Cf. pp. 67 et sqq. *supra*.

that frequently arise; in which it happens either that two conflicting precepts clash, and hence it becomes necessary to explain that one does not oblige, or it happens that such a change in conditions has occurred that it may prudently be presumed that it was not the will of the legislator to bind in such a case—which necessity could often occur even in regard to that law.⁸⁴

But by what right might one undertake to himself the function of making an interpretation about God's intention? Suarez replies that such interpretation could be licit in any of three ways. First of all, the authority might be granted by God Himself, and this would be especially necessary for cases of doubt.⁸⁵

In the second place, when there was a concurrence of two laws, one might be interpreted through the other. Thus, for example, Christ explained that it was permissible for the Jews to perform the rite of circumcision even on the Sabbath⁸⁶ in order that the law be observed which prescribed that a male infant be circumcised on the eighth day after birth.⁸⁷ Again, Our Lord questioned the Pharisees: "Or have you not read in the Law, that on the Sabbath days the priests in the temple break the Sabbath and are guiltless?"⁸⁸ That is, explains Suarez, externally and materially they broke the Sabbath, but actually they committed no crime, precisely because their priestly tasks were performed in accordance with another law.⁸⁹

Thirdly, such interpretation of God's intention could be made, according to Suarez, "*per evidentiam facti et necessitatis*,"⁹⁰ as in

⁸⁴ "Ratio autem est, quia interpretatio legis, praesertim positivae etiamsi divina sit, est necessaria ad gubernationem humanam propter varietatem occasionum et necessitatum saepe occurrentium, in quibus contingit, vel duo praecpta sibi obviantia occurrere, ac propterea necessarium esse exponere, alterum non obligare, vel etiam contingit talem esse rerum mutationem, ut prudenter praesumatur non fuisse voluntatem legislatoris in tali casu obligare, quae necessitas etiam potuit in usu illius legis saepe occurrere."—*De Legibus*, Lib. IX, Cap. IX, n. 6.

⁸⁵ *Ibid.*, n. 7.

⁸⁶ John 7, 23.

⁸⁷ Cf. Lev. 12, 3.

⁸⁸ Mt. 12, 5.

⁸⁹ Cf. Lev. 24.

⁹⁰ *De Legibus*, Lib. IX, Cap. IX, n. 7.

the case of the Machabees.⁹¹ Nor indeed was it required that the necessity be so extreme as it appears to have been in their case. It would have been sufficient that the necessity be moral, and proportioned to the gravity of the law in question, as Suarez believes was true in the case of David.⁹²

It may be remarked in passing that Suarez' treatment of the problem of the use of *epikeia* in reference to the divine positive law of the Old Testament is unsatisfactory and inconclusive. That he excludes *de facto* human dispensation strictly understood, there is no doubt. Nor need there be any hesitancy in stating that he admits the possibility of interpretation. But whether he here understands "interpretation" in a strict sense, or whether he wishes to include in the ambit of this term the concept of *epikeia*, is by no means clear. And so, two observations should be made: first, Suarez' description of what he means by the term "interpretation" in these passages leaves ample room for the notion of *epikeia*; secondly, in spite of this fact, practically no subsequent theologian cites Suarez as favoring the belief that *epikeia* might be used in regard to divine positive precepts, even of the Old Law.⁹³

Tournely,⁹⁴ *Schmier*,⁹⁵ and *Patuzzi*⁹⁶ deny that *epikeia* may be applied to divine positive law. Their reasons basically can be reduced to this—the impossibility of the existence of any defect in that law. It must be admitted, however, that Tournely's reasoning is not altogether convincing; in fact, it seems to partake of the nature of a *petitio principii*. For he states: ". . . the law of Christ binds in

⁹¹ Cf. 1 Mach. 2, 41.

⁹² Cf. 1 Kings 21, 6.

⁹³ Van den Berghe is an exception. He maintains that Suarez allows *epikeia* to be used in matters involving divine positive law. Cf. *art. cit.*, *Coll. Brug.*, VII, 363.

⁹⁴ *Op. cit.*, Vol. III, Tract. *De Legibus*, Cap. IV, Art. I. Actually, insofar as this passage is concerned, Tournely's position on the matter seems to approximate that of La Croix. Cf. note 46 *supra*. But later there is a categorical denial of the possibility of applying *epikeia* to the law of the Gospel. Cf. *ibid.*, Art. III, Sect. III.

⁹⁵ *Op. cit.*, Vol. I, Tract. I, Cap. III, n. 79.

⁹⁶ *Op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. VI, n. 6.

all cases in which Christ wished it to bind; and there is no man who would dare to withdraw from obligation those cases in which Christ wished to bind.”⁹⁷

McHugh-Callan. Among modern moralists⁹⁸ McHugh-Callan may be mentioned as subscribing to the view that *epikeia* is not permissible in matters involving divine positive law, for “God foresees things not only universally but also in particular.”⁹⁹ The cases of apparent *epikeia*¹⁰⁰ can be explained as instances involving the cessation of law or as examples of divine dispensation. “One may not excuse certain modern forms of cheating,” assert these authors, “on the plea that they were not thought of when the Decalogue was given. One may not omit Baptism on the ground that Christ Himself would have excused from it had He foreseen the circumstances.”¹⁰¹

Rodrigo. Rodrigo’s discussion of the problem¹⁰² is restricted to divine positive law of the New Testament. This law, he points out, embraces three classes of commands. In the first category he places those matters which are necessary by necessity of means. In connection with these, no *epikeia*, the author contends, is permissible. For Christ Himself sufficiently determined when the *votum* may be substituted for the *res*, and when the *res* itself is unconditionally

⁹⁷ “. . . lex Christi in omnibus obligat casibus in quibus eam Christus obligare voluit; nec ullus est hominum qui casus in quibus Christus obligare voluit ab obligatione eximere ausit.”—*Op. cit.*, Vol. III, Tract. *De Legibus*, Cap. IV, Art. III, Sect. III.

⁹⁸ Many, if not most, modern theologians maintain that the use of *epikeia* is restricted to human law. Cf., e.g., Genicot-Salsmans, *op. cit.*, I, n. 133; Arregui, *op. cit.*, n. 75; Loiano, *op. cit.*, I, n. 142; Davis, *op. cit.*, I, p. 188.

⁹⁹ *Op. cit.*, I, n. 358.

¹⁰⁰ E.g., 1 Kings 21, 6.

¹⁰¹ *Op. cit.*, I, n. 414. Attention should be called to the opinion of Van der Velden who maintains that *epikeia* is not applicable to divine positive law. Cf. P. Van der Velden, *Principia Theologiae Moralis* (ed. 2; Parisiis, 1875), Vol. I, Tract. III, n. 48. However, he goes on to state that divine positive law does not bind with grave inconvenience or detriment, and from this point of view explains the incident related in 1 Mach. 2, 41. It is difficult to reconcile this opinion with the explicit statement the *epikeia* may not be used in regard to divine positive laws—unless “grave inconvenience” signifies impossibility.

¹⁰² *Op. cit.*, n. 397.

required. It is His to make available in His own way for each individual the possibility of doing what He established as necessary for salvation. If he had intended to admit some excuse, He would have established these matters as being necessary only by necessity of precept.

In the second category he considers those things which are necessary for the validity of the Sacraments. Here no *epikeia* is possible. For these are matters of positive institution; exclusively upon those things determined by Christ did He confer the power to cause what they signify. Consequently (and in support of this conclusion Rodrigo invokes the authority of the Council of Trent,¹⁰³) human substitution is never to be admitted. Either the Sacrament is administered as Christ instituted it, or it is not administered at all—because the power to cause sanctifying grace is conferred exclusively upon what Christ Himself instituted.¹⁰⁴

In the third category Rodrigo places positive divine precepts—all of which, he believes, may be reduced to the use of the Holy Sacrifice and of the Sacraments. These precepts bind, he states, only insofar as it is morally possible to fulfill them. Moreover, for the most part they are not qualified in the sense that any definite time for their execution is explicitly prescribed. Hence, as they come from Christ, they lack any limited and restricted formulae—and, in the final analysis, it is only by reason of the universality of the words in such restricted formulae that *epikeia* ever comes into play. Therefore, in reference to these positive precepts coming from Christ, there may be need for interpretation strictly understood; but the use of *epikeia* is not licit. There is a vast distinction between clarifying the formula or the sense of a law when it is obscure, and excepting, on the basis of the benign antecedent will of a Superior, some particular case which is certainly contained in the words of the law.

¹⁰³ Sess. XXI, Cap. 2 (DB 931).

¹⁰⁴ This point, of course, must be held even by those theologians who believe that Christ determined the matter and form of some Sacraments only generically, leaving the specific determination to the Church.

Rodrigo's caution in regard to this question is quite discernible in his conclusion: "In divine positive law, *epikeia* properly understood, seems not to be admitted, at least *de facto*."¹⁰⁵

SCHOLION. The opinion of St. Thomas

The position of St. Thomas on the question as to whether *epikeia* may be used in reference to divine positive law is not entirely clear. In the first place, he nowhere specifically deals with the problem. Secondly, it is difficult to reconcile several of the passages in his works which have some bearing on the matter. And thirdly, the fact that some of those theologians¹⁰⁶ favoring the applicability of *epikeia* to divine positive law have been satisfied to allude merely to one passage of St. Thomas without explaining it carefully and collating it with other passages, has certainly not resulted in clarifying an already obscure situation.

In one article in the *Summa Theologica* St. Thomas seems to establish the foundation of *epikeia* on the fact that "because the legislator cannot foresee all cases, he proposes the law according to what happens in most cases . . ."¹⁰⁷ It would seem logical to conclude from such a statement that, inasmuch as the Divine Lawgiver is omniscient and hence foresees all cases, there can be no basis for the use of *epikeia* in reference to divine law.

Nor is this an isolated passage. In his *Commentum in Quattuor Libros Sententiarum* St. Thomas expresses the following view:

If in some cases, the law which has been enacted deviates from the intention of the legislator, because the legislator in passing the law was not able to consider all cases but only those that occur most of the time, then it is licit to pass over the law and to follow the intention of the lawmaker . . . and to accomplish this there is a certain virtue which is called *epikeia* by the Philosopher, by which a man, passing over the law, follows the intention of the lawgiver.¹⁰⁸

¹⁰⁵ "In lege divino-positiva nec videtur quoque admittenda, saltem de facto, *propria* epiqueia."—*Loc. cit.*

¹⁰⁶ Thus, e.g., the Salmanticenses (cf. p. 300 *supra*).

¹⁰⁷ *Sum. Theol.*, I-II, q. 96, a. 6.

¹⁰⁸ "Si vero in aliquibus casibus lex posita ab intentione legislatoris

Obviously, since the above described situation can exist only in regard to a human legislator, the possibility of using *epikeia* in reference to divine law would seem to be excluded by the Angelic Doctor.

Moreover, it would appear that no objection to this conclusion (that St. Thomas seems to imply that *epikeia* in reference to divine positive law is not licit) would be valid, if such an objection were founded merely on the argument of silence—namely, that St. Thomas, though he mentions only one basis for *epikeia* (the inability of the legislator to foresee the future) does not, in point of fact, exclude other bases. To such an objection it must be replied that while subsequent theologians may feel justified in offering another basis, they are not justified in ascribing this to St. Thomas—at least insofar as the passages under consideration express his opinion.

These observations, however, are made not in any endeavor to prove that St. Thomas clearly puts forward the view that *epikeia* in regard to divine positive law is not permissible. As has already been stated, and as will be explained presently, the opinion of St. Thomas on the point is obscure. But by reason of this very fact there seems to be no justification for the action of those theologians who categorically state that their view allowing *epikeia* to be applied to divine positive law is based upon the teaching of St. Thomas.

This teaching, they maintain, is to be found in the answer of the Angelic Doctor to an objection raised in the same article mentioned above:

. . . no man has wisdom so great that he can take into consideration all individual cases; and therefore he cannot adequately express in words all those things that are fitting for the end which he has in mind. And if the legislator were able to consider

discedat, quia non potuit legislator ad omnes casus intendere, legem statuens, sed ad ea quae pluries accidunt; tunc etiam licitum est legem positam praeterire, et intentionem legislatoris sequi . . . et ad hoc perficit quaedam virtus quae vocatur a Philosopho epieikeia, per quam homo praetermissa lege, legislatoris intentionem sequitur.”—*Sent.* III, dist. 37, q. 1, a. 4. Statements of like tenor are to be found in *Sum. Theol.*, II-II, q. 60, a. 5, ad 2; *In Ethica*, Lib. V, Lect. XVI.

all cases, it would not be fitting that he mention all, in order to avoid confusion; but he should formulate the law according to what is of most usual occurrence.¹⁰⁹

It is to be conceded that here St. Thomas appears to offer another basis for the lawfulness of *epikeia*—not only the inability of the legislator to foresee future cases, but likewise his unwillingness explicitly to mention all the exceptions which he has in mind. Yet, it must not be overlooked that St. Thomas is here treating of a human lawmaker. The “legislator” of the second sentence refers to a human being, no less than the “wisdom” of the first. For if “legislator” were to refer to God, then it could not be explained why St. Thomas uses a contrary-to-fact condition—“if the legislator were able to consider all cases . . .”

At the very most it can be said that this statement of St. Thomas might possibly by analogy be applied to God. In any event, this passage—and it is the only passage referred to by those writers who maintain that St. Thomas allows *epikeia* in regard to divine positive law—does not warrant the unqualified assertion that the Angelic Doctor teaches the applicability of *epikeia* to divine positive law.

Moreover—and this is a point of great importance which will be developed in some detail in the *thesis* to follow these historical notes—even if it be granted that St. Thomas conceives of a two-fold basis for the use of *epikeia*, it does not therefrom follow that he believes that *epikeia* may, in point of fact, be applied to divine positive law. It simply follows that theoretically and in the abstract there is nothing intrinsically wrong in the concept of correcting the formulae of divine positive precepts as they exist, *if the condition necessary for such correction by the subject of the law* (a sound judgment that the Legislator intended to exclude from His law the case at hand) *be present*. There is a vast difference between the belief that God *could* have refrained from expressing explicitly in His law the exceptions He intended to make, and the belief that *de facto* He *did* thus refrain.

¹⁰⁹ *Sum. Theol.*, I-II, q. 96, a. 6, ad 3. For the Latin text cf. Chap. II, note 32 *supra*.

In connection with the problem of the lawfulness of applying *epikeia* to divine positive law, it may be helpful to mention the opinion of St. Thomas regarding custom in relation to divine positive law. As to the view of St. Thomas on this point there can be no doubt. It is clear and incontrovertible.

The natural and divine law proceed from the divine will . . . and hence cannot be changed by a custom which proceeds from the will of man; but it could be changed only by divine authority; and hence no custom can attain the force of law against the divine law or the natural law . . .¹¹⁰

. . . custom does not prevail over natural or divine law.¹¹¹

It would seem that the opinion of St. Thomas alluded to, regarding custom and its relation to divine positive law, might establish that he forbids the application of *epikeia* to that law. In any event, it should engender a cautious and questioning attitude in assessing the value of general statements that St. Thomas allows *epikeia* to be used in reference to divine law. This caution should be increased by the realization that nowhere does the Angelic Doctor state explicitly that its use in regard to such law is permissible. In the final analysis, it seems that one must conclude: first, that any apodictical statements concerning the precise opinion of St. Thomas on the matter are to be discounted; secondly, that at most his opinion might be that there is no *a priori* reason which would render the use

¹¹⁰ "Lex naturalis et divina procedit a voluntate divina . . . unde non potest mutari per consuetudinem procedentem a voluntate hominis; sed solum per auctoritatem divinam mutari posset; et inde est quod nulla consuetudo vim legis obtinere potest contra legem divinam vel legem naturalem . . ."—*Sum. Theol.*, I-II, q. 97, a. 3, ad 1.

¹¹¹ ". . . consuetudo non praedjudicat juri naturali vel divino."—*Ibid.*, II-II, q. 100, a. 2. These statements regarding custom are of special importance in view of the close relationship which St. Thomas believes to exist between custom and *epikeia*. The following passage is particularly worthy of study: ". . . sicut supra dictum est (the reference is to the article which deals with *epikeia*), leges humanae in aliquibus casibus deficiunt. Unde possibile est quandoque praeter legem agere, in casu scilicet in quo deficit lex; et tamen actus non erit malus; et cum tales casus multiplicantur propter aliquam mutationem hominum, tunc manifestatur per consuetudinem quod lex ulterius non est utilis . . ."—*Ibid.*, I-II, q. 97, a. 3, ad 2.

of *epikeia* in regard to divine positive law intrinsically wrong; and thirdly, that his explicit views on a concept more or less cognate might induce one to believe that had he treated the matter expressly, he might be found among those opposing the opinion that *epikeia* in matters involving divine positive law is licit.

ARTICLE 3. THESIS: *Epikeia* PROPERLY SO-CALLED MAY NOT BE APPLIED TO PRECEPTS OF THE DIVINE POSITIVE LAW OF THE NEW TESTAMENT

I. *Preliminary Concepts*

Any demonstration of the truth of this assertion necessitates a clear understanding of all its implications. Hence the importance of prefacing the discussion with certain essential considerations before any endeavor is made to examine the truth of the statement itself.

At the outset, it should be noted that the term *epikeia* is here understood in a strict and proper sense. That the expression historically was applied to exceptions based not only on the presumed unwillingness of the legislator to include in his law a particular case, but likewise on his lack of power to do so, has been explained in numerous places in the earlier part of this dissertation. The reasons which seem to justify the restriction of the term to matters involving only the will of the legislator have been discussed in a previous chapter.¹¹² Suffice it, then, to point out again that the observations in this section will concern *epikeia* only in its strict sense.

The problem with which this chapter is concerned may be resolved into this question. Is it ever permissible for a private individual, by reason of certain peculiar circumstances in a particular case, to act contrary to the words of a precept imposed over and above the natural law by God Himself in the New Testament, simply in the belief that God, although He could justly bind in this case, does not wish to do so? To express it somewhat more concisely, can such a belief ever be prudent and sound, and hence constitute a justifiable basis for so acting?

¹¹² Cf. Chapter IV *supra*.

Attention should here be called to the fact that we are concerned with the divine positive law of the New Testament. Certain observations dealing with the precepts of the Mosaic Law will be made toward the close of this chapter.

It cannot be denied that the divine positive law, even as the natural law, admits of interpretation. Sedulous attention, however, should be accorded to the distinction between *epikeia* and interpretation strictly so-called. It is one thing to clarify language that is obscure, to inspect carefully the statute itself and to seek *contained therein*, by logical reasoning and by means of certain specific aids proper to interpretation, the mind of the lawgiver; it is quite another thing to seek the will of the legislator not only outside his legal formula but even contrary to it. Moreover, one must not lose sight of the fact that interpretation can make use of aids extrinsic to the law itself which is being interpreted. It may happen that the real sense of the law cannot be understood from a consideration merely of the etymological and literal meaning of the words nor even from the context of the precept. Recourse, for example, to an examination of laws by the same legislator dealing with the same or kindred matters may become helpful or even necessary. But, in any event it remains interpretation strictly understood, as long as it concerns the mind of the lawgiver *as contained in his law*. Thus, for example, properly interpreted, the precept "Thou shalt not kill" (if, abstracting for the moment from the fact that it pertains to the natural law, we consider it solely as a positive precept) forbids the direct killing of the innocent except by divine authorization. It is not to be supposed, of course, that such interpretation will always be easy. One might at first sight, for example, be inclined to the belief that in view of this precept against killing, all killing under all circumstances is forbidden. Yet, he would be obliged to relinquish such an opinion in the light of another statement, for example, by the same Divine Legislator: "Whosoever shall shed man's blood, his blood shall be shed; for man was made to the image of God."¹¹³

Again, in view of the words of Our Lord spoken on several occasions,¹¹⁴ one might conclude that the actual reception of the

¹¹³ Gen. 9, 6.

¹¹⁴ Cf. Mt. 18, 18; 16, 19; John 20, 22-23.

Sacrament of Penance is unqualifiedly necessary for the justification of a person who, subsequent to his Baptism, fell into serious sin. Yet, from the words of Christ as spoken at other times,¹¹⁵ from other revealed sources,¹¹⁶ and from the teaching of the Church¹¹⁷ it is clear that the Sacrament of Penance is necessary for the justification of such a person only in some way. That is to say, justification is possible through an act of perfect contrition *cum voto Sacramenti*, even without the actual reception of Penance. For the Sacrament of Penance is necessary not in order that sins be *simply* forgiven, but rather that they be *judicially* forgiven.

It is evident, then, that interpretation of precepts is not always easy. In fact, in some instances the meaning of a precept may be so doubtful as to demand recurrence to an individual or to an agency possessed of the power authentically to interpret laws. But it always remains true that whether clarification be easy or difficult, whether parallel places, or precedent, or authentic interpretation be resorted to, interpretation concerns the mind of the legislator as manifested in some way in the law under consideration; while *epikeia* has reference to the intention of the lawmaker outside the law and contrary to its words.

We should further note that cessation of the obligation of divine positive law sometimes occurs. For example, if it is absolutely impossible, either physically or spiritually,¹¹⁸ for one to observe a

¹¹⁵ Cf., e.g., John 14, 23; Luke 7, 47-48.

¹¹⁶ Cf., e.g., John 4, 16; 1 John 4, 7; Ezechiel 33, 14-16; 18, 21; Joel 2, 12-13; Job 11, 14-15; 42, 6; Deut. 4, 28-31. For a brief outline of the Patristic argument, cf. R. Tensing, *Extra-Sacramental Justification*, The Catholic University of America Studies in Sacred Theology, No. 77 (Washington, D. C.: The Catholic University of America Press, 1944), p. 10.

¹¹⁷ Cf. Conc. Trid. Sess. XIV, Cap. 4 (*DB* 898).

¹¹⁸ According to Merkelbach's terminology, *impotentia* is the incapacity of a subject to fulfill the law. It is absolute when the work prescribed cannot be performed at all. This absolute incapacity is physical or corporal when the physical power to perform the act is lacking, by reason of the defect of strength, or of the means necessary for the act, or of liberty from violence and external coercion. It is spiritual when the work cannot be performed without sin, due to the existence of some higher law. Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 376.

divine positive law in a particular case, then for that individual in such a case the divine positive law ceases to bind.¹¹⁹ It would be repugnant for God to insist on the obligation.

Thus, for instance, it is physically impossible for a dying man to receive Baptism of water when no one is present to administer the Sacrament. Again, according to some, it is spiritually impossible to comply with the divine precept concerning the seal of confession if such observance would necessitate the transgression of the natural law.¹²⁰ In connection with this latter point, Gury-Ferreres¹²¹ give the following example. A man, overhearing the confession of his wife, learns that his marriage to her is invalid. These authors believe that, although he must continue to live with her (because to separate from her would be to reveal externally the knowledge which he received from confession), nevertheless it is "more probable" that he is not obliged to fulfill the obligations of marriage as if he were her valid husband. In point of fact, their argumentation seems to establish not only that he is not bound, but also that it would be illicit for him to do so. They point out that it is never licit to perform any act which is intrinsically evil. But for an individual to have relations with a woman not his wife is intrinsically evil, and hence can never be licit even if the information as to the invalidity of the marriage is obtained from confession. Gury-Ferreres add, however, that some authors believe that

¹¹⁹ Cf. Merkelbach, *ibid.*, n. 377; Noldin-Schmitt, *op. cit.*, I, n. 177; Prümmer, *op. cit.*, I, n. 236; Jone, *op. cit.*, n. 69. In the words of the Council of Trent, quoting St. Augustine: "Deus impossibilia non iubet . . ."—Sess. VI, Cap. 11 (*DB* 804). Cf. St. Augustine, *De Natura et Gratia*, Cap. XLIII, n. 50 (*MPL*, XLIV, 271).

¹²⁰ "Præcepta legis naturæ præferenda sunt præceptis legis positivæ . . ."—Noldin-Schmitt, *op. cit.*, I, n. 207. It is to be noted that the phrase "seal of confession" is here taken in a wide sense to include use of knowledge obtained in confession. Merkelbach points out: "Aliud est sigillum seu secretum servandum; aliud obligatio non utendi notitia in confessione acquisita etiam sine læsione secreti."—*Summa Theol. Mor.*, III, n. 621, note. This point also should be noted. Those theologians who deny the force of the example, would hold that in the case the precept regarding the seal of confession would prevail over the other precept. Therefore, it would be spiritually impossible to observe this other divine precept.

¹²¹ *Casus Conscientiæ*, Vol. II, *De Sigillo Confessionis*, cas. 8.

in such a case God would give to the man the right to the body of the woman for the sake of the reverence due the seal. LaCroix, considering the obligation of the seal from the point of view of the confessor, states:

When, by not using the knowledge gained in confession, a confessor would be obliged to do something intrinsically wrong, the use of that knowledge is licit and necessary. . . . God cannot, through the obligation of the seal, will what is intrinsically wrong.¹²²

But it should be carefully noted that in such cases—where divine positive law ceases to bind, due to physical or spiritual impossibility—there is no exercise of *epikeia* properly so-called. The law ceases to bind of itself, and the subject is freed of the obligation to observe it because it has ceased to bind. On the other hand, when *epikeia* strictly understood is applied to a law, there is no question of the law's having ceased previously. It is still in force objectively, but it is presumed not to bind the individual in the particular case because, according to his prudent judgment, he believes that the legislator intended to exclude from his law the case at hand.

One of the most important points connected with the discussion of our problem—and yet one which is very frequently overlooked, at least insofar as divine positive law is concerned—is this: the judgment of *epikeia* must always be based ultimately on the fact that if the lawgiver were now present he would not, according to the prudent estimation of the individual, urge obligation in the case at hand precisely because he excluded the case from the law at the outset. This point is of major import. It is not sufficient to state that *epikeia* is based only on the fact that laws are enacted *in univ ersum*. For the classical definition of the concept makes it clear that *the law must be deficient* on account of the universality of its expression, if one is to be allowed to act contrary to its words. The mere fact of the universality of the law does not *ipso facto* signify

¹²² "Quando ex non usu scientiae Confessionis deberet confessarius facere aliquid intrinsece malum, usus illius scientiae est licitus et necessarius. . . . Deus autem per obligationem sigilli non potest velle id quod est intrinsece malum."—*Op. cit.*, Vol. II, n. 1978.

that the law is deficient. To take an example from the natural law—it is a universal precept that God must be adored. Now, surely it cannot be maintained that this precept is deficient because it is universal. Or, if an objection be raised to the choice of an illustration from the natural law, an example from human law may be considered. If the Church or the state should impose a law, and give every evidence from the *materia* of the law, the manner of its enactment, the language used, and other circumstances, that it intends this law to be obeyed in every case without exception (not, of course, including cases where the power to bind is lacking, for our problem is concerned only with the will to bind), then the mere fact that the precept is universal would never justify one in acting contrary to it.¹²³ For in regard to such a law, since the words of the precept and the intention of the legislator would coincide, in reference to a matter entirely within his power, it would be utterly meaningless to speak of an appeal from the words of the law to the intention of the lawmaker. To put the point positively—before *epikeia* may be resorted to, there must always be a prudent and sound judgment that the legislator in enacting the law, willed to exclude the case at hand and hence would not now urge obligation.

This same matter may be considered from a slightly different viewpoint. To assert that the concept of *epikeia* is founded, not merely upon the basis of the legislator's inability to foresee future cases, but likewise upon his unwillingness, for the sake of avoiding confusion, to express the intended exceptions in his law, does not prove that *epikeia* may be used in reference to divine positive law. This assertion merely affirms that there is nothing inherently wrong in conceiving of God as imposing a precept, as foreseeing a case which would constitute a lawful exception, and yet as deciding not to express this exception in the law. In other words, it is not repugnant for God to act in such a way. But if due reflection be given to this point, it will become evident that this fact—namely, the intrinsic possibility of God's making a law in this way—does not in itself justify one in acting contrary to the clear words of the divine

¹²³ Thus, the state might impose a precept that a certain type of salute is the only one to be used in saluting the flag.

precept. The problem to be decided is not whether God could act in this way, but rather did He *de facto* do so. For unless the subject of the law prudently judges that God, foreseeing this case now at hand, actually did allow an exception, though did not express it, he cannot licitly deviate from the manifest and unmistakable language of the law. From the mere fact that God *could* foresee the case in question and *could* permit an exception without expressing it in His precept, it does not logically follow that, in point of fact, He *did* act in this way. *A posse ad esse non valet illatio*. The argument of the Salmanticenses¹²⁴ merely would prove, then, that there is nothing intrinsically repugnant in God's allowing unexpressed exceptions to a positive law which He enacts. It does not prove that *de facto* it is the intention of God, with regard to this particular case at hand, not to urge obligation, and that hence the subject may justifiably disregard the words of the law.

In our consideration of the question of the lawfulness of applying *epikeia* to divine positive law there is still another circumstance which demands attention. The mere fact that a law as it stands does not contain *ad verbum* such expressions as "except in this case," "that instance not included," etc., does not prove that the lawmaker has not, in point of fact, made provision in his law, by an explicit act, for all the exceptions that he wishes and intends. He may well have qualified the precept to such an extent that it includes only those cases and those persons whom he intends to include. The law in its details may be so comprehensive that it expresses precisely and accurately a benign legislator's intention. Thus, if the state enacts a law providing that all men over the age of twenty-one, receiving an income of one thousand dollars annually, shall be taxed one per cent of their net salary, that law immediately, even though not expressly, excepts all women, all men under the age of twenty-one, all men over twenty-one whose yearly salary is less than one thousand dollars, etc. The resultant law is universal only in the sense that it includes all the members of that class not exempted after all the implied exceptions have been considered. And it is not impossible that the legislator intends (his

¹²⁴ Cf. pp. 300, 301 *supra*.

power is here presupposed, for our discussion concerns only the will of the lawmaker) that no further exceptions are to be made. Therefore, it would not be licit for a subject to deviate from such a law, merely on the basis that, no express verbal exceptions being contained in the law, it is therefore so universal that it does not adequately represent the mind of the lawgiver in the case at hand. And so, it is true that, although there can be no denial of the principle that appeal to the presumed benignity of the legislator is very often lawful, nevertheless, in instances where the gravity of the law, the importance of its effects, and other circumstances indicate that the legislator, by the insertion of various clauses which result equivalently in exceptions, has already exercised all the benignity that is fitting, then one may not by the use of *epikeia* act contrary to these indications and disregard the law. And, in the final analysis, the underlying basis for this position, as emphasized above, is the fact that the lawful use of *epikeia* demands on the part of the subject a prudent judgment that the legislator excluded from his law the case in question.

There remains one final observation to be made before a more specific consideration of *epikeia* in reference to divine positive law is undertaken. The justification for the notion of *epikeia* is found in the fact that laws are sometimes defective because of the universality of their expression. In the concrete, this often signifies simply that the written formula in embodying the law is deficient. But it should not be thought that a written formula pertains to the essence of law. In the vast majority of instances it is helpful, but it is by no means essential.¹²⁵ Now, it is a fact which merits careful attention that there exist divine positive precepts which are not definitive, written formulae found in Sacred Scripture or Tradition. Very frequently the formulae which are employed to represent divine commands are simply concise expressions based on divine revelation, as interpreted in the doctrine and practice of the Church. And surely no denial of the divine origin of these precepts is im-

¹²⁵ “. . . dicendum est licet optimus modus ferendi legem sit in scripto, non esse tamen hoc de substantia et valore legis.”—Suarez, *De Legibus*, Lib. III, Cap. XV, n. 6. To this statement it may be added that it is likewise not essential to law that it be expressed even in an oral formula.

plied in the statement that the formulae which embody them were not used as such by Our Lord. Thus, for example, the precept of integrity of confession is of divine origin.¹²⁶ Nevertheless, this command as such, that is, *ad verbum*, is not found in Holy Scripture. This fact in no way militates against the truth that it is a divine positive law. For the necessity of confession for the remission of sins is a matter of divine precept, as is also the requirement that in this Sacrament the priest function as a judge—both of which commands logically imply the necessity of integrity of confession.¹²⁷ Hence, that too is a divine precept. Nevertheless, the fact remains that in spite of its being certainly a divine positive precept, it is nowhere uttered by Christ in an explicit, literal, definitive formula. From which it follows—and this point is of major importance—that frequently what appears to be a correction or emendation of divine positive law is either simple interpretation or an emendation of the humanly devised formula which embodies the divine precept in question.

Whether or not the divine positive law of the New Testament admits of *epikeia* is, as has been pointed out above, ultimately a question of fact. It would seem to be of little value, therefore, to discuss this question *in abstracto*. Hence, in endeavoring to obtain a solution to our problem, we must consider *epikeia* in relation to divine positive legislation as it actually exists. Is it ever licit to use *epikeia* strictly so-called in matters involving existing divine positive precepts? Moreover, as has already been indicated, all the divine positive laws of the New Testament may be reduced to one of

¹²⁶ "Si quis dixerit, in sacramento poenitentiae ad remissionem peccatorum necessarium non esse iure divino confiteri omnia et singula peccata mortalia, quorum memoria cum debita et diligenti praemeditatione habeatur, etiam occulta, et quae sunt contra duo ultima decalogi praecepta, et circumstantias quae peccati speciem mutant; sed eam confessionem tantum esse utilem ad erudiendum et consolandum poenitentem, et olim observatam fuisse tantum ad satisfactionem canonicam imponendam; aut dixerit, eos, qui omnia peccata confiteri student, nihil relinquere velle divinae misericordiae ignoscendum; aut demum non licere confiteri peccata venialia: A.S."—Conc. Trid., Sess. XIV, *Can. de Sac. Poenit.* can. 7 (*DB* 917). Cf. also *DB* 899.

¹²⁷ This entire matter, especially insofar as the distinction between material and formal integrity is concerned, will be discussed later in the chapter.

these three categories: (1) the hierarchico-monarchical constitution of the Church; (2) faith; (3) the Sacraments and the Holy Sacrifice of the Mass. To examine the lawfulness of *epikeia* in relation to each of these three classifications will be to our purpose.

II. The Church

A. The Constitution of the Church

Insofar as the constitution of the Church is concerned, we may assume as having been proved in Ecclesiology the following facts: (1) Christ established His Church as a true and juridically perfect society,¹²⁸ a hierarchical society, promising and conferring upon the Apostles power to be exercised for the salvation of souls;¹²⁹ (2) the hierarchical authority was to be perpetual—it was to be passed on to the successors of the Apostles;¹³⁰ (3) St. Peter directly and immediately received from Christ the primacy of universal jurisdiction over the whole Church;¹³¹ (4) The primacy of St. Peter, by divine disposition, was to be perpetual, that is, until the end of time it was to be transmitted to his successors.¹³²

¹²⁸ Cf. R. Garrigou-Lagrange, *De Revelatione per Ecclesiam Catholicam Proposita* (ed. 3; Romae: Lib. ed. Religiosa F. Ferrari, 1929-1931), II, pp. 202 et sqq.; F. Cappello, *Summa Iuris Publici Ecclesiastici* (ed. 4; Romae: Pont. Universitas Gregoriana), nn. 115 et sqq., nn. 139 et sqq.; D. Palmieri, *Tractatus de Romano Pontifice cum Prolegomeno de Ecclesia* (ed. 2; Prati, 1891), pp. 6 et sqq.; F. De Brouwer, *Tractatus de Ecclesia Christi* (Brugis, 1881), nn. 186 et sqq.

¹²⁹ Cf. Conc. Vat., Sess. IV, Constitutio dogmatica I de Ecclesia Christi (DB 1821). Cf. also L. Billot, *Tractatus de Ecclesia Christi* (ed. 3; Prati, 1909), pp. 569 et sqq.; De Brouwer, *ibid.*, nn. 61 et sqq.; Garrigou-Lagrange, *loc. cit.*; T. Zapelena, *De Ecclesia Christi* (Romae: Universitas Gregoriana, 1940), I, pp. 116 et sqq.

¹³⁰ Cf. Conc. Trid., Sess. XXIII, Cap. 1 (DB 957). Cf. also De Brouwer, *ibid.*, nn. 66 et sqq.; Garrigou-Lagrange, *loc. cit.*

¹³¹ Cf. Conc. Vat., Sess. IV, Cap. 1 (DB 1822). Cf. also Billot, *op. cit.*, pp. 524 et sqq.; Palmieri, *op. cit.*, pp. 296 et sqq.; De Brouwer, *ibid.*, nn. 106 et sqq.; Garrigou-Lagrange, *loc. cit.*; Zapelena, *op. cit.*, I, pp. 148 et sqq.

¹³² Cf. Conc. Vat., Sess. IV, Cap. 2 (DB 1824). Cf. also Billot, *ibid.*, pp. 574 et sqq.; Palmieri, *ibid.*, pp. 391 et sqq.; De Brouwer, *ibid.*, nn. 175 et sqq.; Zapelena, *ibid.*, pp. 201 et sqq.

In view of these facts we may conclude that

by force of its very institution the Church is a society divinely *hierarchical* and at the same time *monarchical*, to be ruled perpetually by the Apostles and their successors, but under Peter, the prince of the Apostles and his successors, and dependently on them. . . . Moreover, this true Church *immediately* and for all time received from Christ alone its form of government and its entire power, and it can and must exercise it entirely independently of any other authority which is not of Christ . . .¹³³

A consideration of the foregoing truths will lead to the conclusion that it was the manifest and unmistakable intention of Jesus Christ, the Divine Founder of the Church, to establish it forever as a hierarchico-monarchical society. Nowhere in revelation is there any evidence of any intention to permit exceptions to, or changes in, this constitution in future history, by the use of *epikeia* or on any other basis.¹³⁴ Men are physically free, of course, to found other churches, differing in constitution and nature from that established by Christ. But such churches are not Christ's, and their very existence is opposed to the will of the Son of God. For by reason of the positively expressed will of its Divine Founder, the Church in its essence is to remain unchanged until the end of time. To

¹³³ “. . . vi ipsius suae institutionis, Ecclesia est societas divinitus *hierarchica* simul et *monarchica*, ab Apostolis quidem et eorum successoribus perpetuo regenda, sed sub Petro principe et ejus successoribus et dependenter ab illis. . . . Insuper haec vera Ecclesia pro semper regiminis sui formam totamque suam potestatem a Christo tantum *immediate* accepit, remque suam gerere potest et debet prorsus independentem a quacumque alia auctoritate quae non sit Christi . . .”—J. Hervé, *Manuale Theologiae Dogmaticae* (Vols. I, II, III, ed. 17; Vol. IV, ed. 16; Parisiis: apud Berche et Pagis, 1934-1936), I, n. 322. It is to be noted that we do not here enter into the controversy as to whether the jurisdiction of the Bishops is derived immediately from God, or immediately from the Roman Pontiff. Billot, though himself subscribing to the latter opinion, asserts that in practice it is a matter of indifference which opinion is held, for even those theologians who maintain that episcopal jurisdiction is derived immediately from God, still say that it is undoubtedly conferred with real and complete dependence on the Sovereign Pontiff. Cf. Billot, *ibid.*, p. 691.

¹³⁴ “. . . institutio Reipublicae Ecclesiasticae nullam recipiat vel mutationem vel Epykiam; quia ex toto est juris divini.”—J. Prickartz, *Theologia Moralis Universa* (Coloniae Agrippinae, 1763-1765), Vol. I, Tract. III, n. 147.

maintain that Christ had some intention for the future, contrary to that made manifest in the actual establishment of His Church, is to utter a purely gratuitous assertion. More than that—it is a refusal to believe in the efficacy of the divine promise to be with the Church until the consummation of the world;¹³⁵ it is a denial of the stability, the unity, the apostolicity and the indefectibility of this divinely established institution.¹³⁶

B. Membership in the Church

Having concluded the foregoing brief discussion of the nature and constitution of the Church as founded by Christ, we may now proceed to examine a kindred question, in regard to which it may possibly be alleged that *epikeia* may licitly be used—the necessity of membership in the one true Church of Christ.¹³⁷

That God has enjoined upon all men the obligation of becoming members of His Church, it is not within the scope of this dissertation to prove. We assume as having already been established in Ecclesiology that for all men membership in the Church of Christ is necessary for salvation.¹³⁸ In this connection, careful attention

¹³⁵ Mt. 28, 20.

¹³⁶ Such is the clear teaching of the Church. Cf. Schema Vaticanum, Cap. VIII, in J. Mansi, *Sacrorum Conciliorum Nova et Amplissima Collectio* (Parisiis, Arnhem, Lipsiae, 1901-1927), LI, 542; also Decr. S. Off. "*Lamentabili*," 3 July 1907, Prop. 53, ASS, XL (1907), 477 (DB 2053). The matter is concisely summarized in the words of Pope Pius XI: "Not only must the Church still exist today and continue always to exist, but it must ever be exactly the same as it was in the days of the Apostles."—Encyclical "*Mortalium Animos*," Pius XI, 6 Jan. 1928, AAS, XX (1928), 9. (Eng. trans.: *True Religious Unity* [London: Catholic Truth Society, 1933], pp. 13-14.)

¹³⁷ It should be noted that when one speaks of the necessity of the Church or of the necessity of membership in it, he does not intend to imply that the founding of the Church was necessary. God might have made provision for the salvation of men in other ways. But now that *de facto* Christ has established His Church, the question arises as to whether there can be any exception, by reason of the exercise of *epikeia*, to the divine precept enjoining membership upon all men.

¹³⁸ "Una vero est fidelium universalis Ecclesia, extra quam nullus omnino salvatur . . ."—Conc. Lateran. IV, Cap. 1 (DB 430). Cf. De Brouwer, *op. cit.*, nn. 39 et sqq.; Billot, *op. cit.*, pp. 101 et sqq.; Palmieri, *op. cit.*, p. 12.

must be paid to the distinction which exists between necessity of precept and necessity of means.¹³⁹ Necessity of precept is that which arises solely from the command of a legitimate superior. In the thing which is prescribed there is nothing which of itself positively conduces to the attainment of the end. Hence, inculpable omission of what is commanded by necessity of precept will not impede the attaining of the end. Necessity of means arises from a positive connection between the means and the end. This necessity may be intrinsic, in the sense that of its very nature the means is necessary for the attainment of the end. In this way sanctifying grace, for example, is necessary for salvation. Necessity of means may be extrinsic; that is, the necessary connection of the means with the end may exist only because a legitimate superior has so ordained it. In this way Baptism of water is necessary for salvation. The inculpable omission of what is necessary by necessity of means *per se* prevents the attainment of the end. However, in the case of something which is only extrinsically necessary, he who imposed the obligation may dispense from it, and permit that extraordinary means suffice in some circumstances. Thus, for example, Baptism of desire or Baptism of blood can in some circumstances supply for Baptism of water for the sanctification of a soul. This Baptism of desire may be explicit (for example, a catechumen intends to receive Baptism) or implicit (for example, an individual who does not know of Baptism, implicitly intends to receive it if he purposes to do all that is necessary for salvation).

Ex natura rei it is absolutely and without qualification a *conditio sine qua non* for salvation, that one belong to the Church in the sense that he participate in the vital influx of the Holy Spirit.¹⁴⁰ Such a statement signifies that without sanctifying grace one cannot attain to the enjoyment of the Beatific Vision. Obviously *epikeia* can never find place here. For *ex natura rei*, by intrinsic necessity of means, the possession of sanctifying grace is necessary for entrance

¹³⁹ Cf. Connell, *De Sacramentis Ecclesiae*, I, n. 112.

¹⁴⁰ “. . . docemus ecclesiam . . . esse omnino necessariam, et quidem necessitate non tantum praecepti . . . verum etiam medii, quia . . . communicatio sancti Spiritus, participatio veritatis et vitae non obtinetur, nisi in ecclesia et per ecclesiam . . .”—Schema Vaticanum, Cap. VI (Mansi, *op. cit.*, LI, 541).

into heaven. To attain a supernatural end the soul must be supernaturalized. It is incapable of the intuitive vision of God unless it be raised to the supernatural order. This truth is so fundamental to the entire supernatural life and so basic to theology that one need no longer dwell upon it here.

Furthermore, as is proved in Ecclesiology,¹⁴¹ it is necessary for salvation by necessity of means that every individual belong to the Church, in the sense that he be a member of the visible organization which Christ founded. This necessity, however, is extrinsic. *Per accidens*, as supplying for membership in the Church *in re*, when such is impossible, God has decreed to accept membership *in voto* or martyrdom. Now, the question arises as to whether there may be any exceptions by way of *epikeia* to the divine law in this matter.

In the first place, it must be remembered that membership in the Church *in re* is *per se* necessary. Now, although membership in the one true Church of Christ is not *ex natura rei* necessary for salvation, nevertheless God has ordained it as necessary by necessity of means. On the basis of the universal teaching and practice of the Church, it may be said that no human authority has the power to change what Christ Himself has established for the attaining of salvation. It is divinely revealed and publicly taught by an infallible, divinely founded institution that no one can be saved without membership in the Church—and that *in re*, if such membership is possible. To attempt to use *epikeia* by appealing from this divine command, as taught by the infallible Church of Christ, to a supposedly existing intention of Christ contrary to that command, would be to accuse Him of deception, to impugn the infallibility of the divinely designated interpreter of His laws, to run counter to the universal tradition of the Church, and to go contrary to the whole supernatural economy established by Christ in which membership in His Church is so essential an element.¹⁴²

¹⁴¹ Cf. note 138 of this chapter.

¹⁴² Cf. Decretum pro Iacobitis (DB 714); Professio fidei Waldensibus praescripta (DB 423); Bulla "Unam Sanctam" (DB 468).

In the second place, the possibility of fulfilling *in voto*¹⁴³ the obligation of membership in Christ's Church, when fulfillment *in re* is impossible, cannot be construed as an example of the use of *epikeia* in regard to the divinely imposed duty of belonging to the Church. Here is simply an instance of interpreting the injunction of Christ Himself, a seeking out of His meaning as contained in His command.¹⁴⁴ This interpretation has been made by the Church herself to whom has been given the right and the duty of infallibly interpreting divine revelation. It cannot be said that the Church has ever considered that her doctrine of the sufficiency of membership *in voto* as an extraordinary means of justification and salvation, constitutes an exception to a divinely imposed injunction.

Precisely the same observation may be made in regard to the salvific force of martyrdom. This matter will be treated in greater detail in connection with necessity of Baptism. Suffice it to state here that when it is indicated in the tradition and practice of the Church, and in the general teaching of her theologians,¹⁴⁵ that by reason of the divine disposition martyrdom may supply *per*

¹⁴³ Cf. Allocution "*Singulari quadam*," Pius IX, 9 Dec. 1854, *Codicis Iuris Canonici Fontes cura Emi. Petri Card. Gasparri editi* (Romae, postea Civ. Vat.: Typis Polyglottis Vaticanis, 1923-1939), II, pp. 891-897; Encyclical Letter "*Quanto conficiamur moerore*," Pius IX, 10 Aug. 1863, *Cod. Iur. Fontes*, II, pp. 970-976.

¹⁴⁴ To follow this command, it must be noted, is not necessary by mere necessity of precept, but by necessity of means. The justification for considering, in a discussion of *epikeia*, commands imposed by Christ as necessary by necessity of means, lies in the fact that because the necessity is only extrinsic, an objection might be raised that *epikeia* is sometimes permissible.

¹⁴⁵ Cf., e.g., Tertullian, *De Baptismo*, 16 (CSEL 20, 214 Reifferscheid et Wissowa); Cyprian, *Epistula LXXIII Iubaiano*, 22 (CSEL 3.2, 795 Hartel); Cyril of Jerusalem, *Catecheses*, III, n. 10 (MPG, XXXIII, 439). In this regard the practice of the Church in honoring unbaptized martyrs (e.g., St. Emerentiana and St. Victor) is significant. Especially important is the cult of the Holy Innocents whom the Church honors "not as sanctified by circumcision, which perhaps some had not yet received, but as *martyrs of Christ*, and therefore holy on account of their *death* suffered for the sake of Christ."—Hervé, *op. cit.*, III, n. 573. Scriptural warrant for the teaching on martyrdom is found in Mt. 10, 32 and 39; John 12, 25. On this point cf. Connell, *De Sacramentis Ecclesiae*, I, nn. 117, 119.

accidens for membership in the Church *in re*, if such membership be impossible, the Church is simply explaining the Divine Will as contained in the deposit of revelation of which she is custodian and interpreter. There is no question of an exception to the divine law.

One question remains. God has made provision that where actual membership in His Church is impossible, membership *in voto* suffices (and this only implicit, if an explicit intention cannot be had). But is there any possibility that an adult who cannot become a member of the Church *in re*, may, by the use of *epikeia*, excuse himself from the necessity of including at least implicitly, in his determination to do everything that God commands, the desire to join the divinely established Church? The question, if analyzed, will be seen to involve a contradiction, and hence merits no further consideration.

III. Faith

Attention has already been called to the fact that theologians point out that one of the characteristic obligations of the New Law is that "of believing explicitly more truths than previously."¹⁴⁶ This obligation follows logically, once it is realized that Christ revealed additional truths which it pleased God not to divulge to the people of the Old Testament. Certainly in both the Old and the New Law, it is of grave obligation that men accept in its entirety the whole revelation made by God "Who can neither deceive nor be deceived."¹⁴⁷

With regard to the observations that follow, this point should be noted. Although the increase in the content of divine revelation has provided a broader base, so to speak, for acts of the other infused theological virtues of hope and charity, nevertheless it seems unnecessary to enter into a detailed investigation as to whether *epikeia* may ever be used in reference to these two virtues. What will be said concerning *epikeia* in regard to the habit of faith, the eliciting of internal and external acts of faith, and the denial of faith will apply *cum proportione* to *epikeia* in regard to these other theological virtues.

¹⁴⁶ Lehmkühl, *op. cit.*, I, n. 295.

¹⁴⁷ Conc. Vat., Sess. III, Cap. 3 (DB 1789).

We may dispense with any discussion of the question of *epikeia* in reference to the habit of faith. By reason of the fact that this habit is infused in justification,¹⁴⁸ every soul in the state of grace in the present life is in possession of it. Since sanctifying grace is necessary *ex natura rei* for the attainment of the Beatific Vision, it is consequent that in the absence of the habit of faith no soul can be saved. These elements are essential to the intrinsic nature of the supernatural life in the present world; they cannot be changed; and hence it is inconceivable that an exception by the use of *epikeia* or on any other basis, is ever permissible.

With regard to actual faith,¹⁴⁹ the most important truths that Catholic theology teaches, based upon divine revelation, are as follows:¹⁵⁰

(1) Actual faith (a belief, at least implicit, in all that God has revealed, and because God Who has revealed it can neither deceive nor be deceived) is necessary by necessity of means for all adults. For those not yet justified it is required for justification; for those already justified it is necessary for salvation;¹⁵¹

(2) It is certain that for justification and salvation two truths must, by necessity of means, be believed explicitly by adults: that

¹⁴⁸ Cf. Conc. Trid., Sess. VI, Decretum de Justificatione, Cap. 7 (DB 800).

¹⁴⁹ The term is taken in its strict and proper sense, signifying belief based on the authority of God revealing. It does not refer to the so-called *fides late dicta* which is not based on this motive. In this connection Hervé states: “. . . ut melius salvarent universalem voluntatem Dei salvificam, quidem theologî docuerunt ad salutem sufficere fidem *late dictam*, scilicet vel notitiam de Deo existente et remuneratore e principiis naturalibus deductam, vel notitiam huiusmodi *naturalem* ex parte objecti, *supernaturalem* ex parte principii, id est, cum auxilio gratiæ productam. At sententia *communissima* et *omnino certa* tenet actum fidei proprie dictæ adultis esse necessariam necessitate mediî ad salutem et quidem *absolute* et *in re*.”—*Op. cit.*, III, n. 336. Cf. Decr. S. Off., 4 Mar. 1679, wherein Pope Innocent XI condemned the following proposition: “Fides late dicta ex testimonio creaturarum similive motivo ad iustificationem sufficit” (DB 1173).

¹⁵⁰ It is outside the ambit of this dissertation to establish the truth of these assertions. We take them as having already been proved elsewhere.

¹⁵¹ Cf. Mark 16, 15-16; Heb. 11, 6; Gal. 2, 16; Rom. 3, 22. Cf. also Conc. Vat., Sess. III, Cap 3 (DB 1789); Conc. Trid., Sess. VI, Decretum de Justificatione, Cap. 6 (DB 798).

God exists, that He is the rewarder.¹⁵² It is "practically probable"¹⁵³ that after the promulgation of the Gospel the mysteries of the Trinity and the Incarnation must, by necessity of means, be explicitly believed;¹⁵⁴

(3) By a precept of Christ which gravely binds all the faithful who have come to the use of reason, there must, in addition, be explicitly believed the principal mysteries of the Christian faith and certain other truths;¹⁵⁵

(4) There exists a grave divine precept of sometimes eliciting the act of faith,¹⁵⁶ and of sometimes externally professing one's faith;¹⁵⁷

¹⁵² Cf. Heb. 11, 6. The proposition that explicit faith in God as a rewarder is not necessary by necessity of means, was condemned by Pope Innocent XI (*DB* 1172).

¹⁵³ This is the term used by Noldin-Schmitt, *op. cit.*, II, n. 10.

¹⁵⁴ Noldin-Schmitt (*loc. cit.*) term the negative opinion "theoretically more probable." Merkelbach (*Summa Theol. Mor.*, I, n. 707) considers the affirmative opinion more probable. St. Thomas (*Sum. Theol.*, II-II, q. 2, a. 7 and a. 8) seems to hold the affirmative opinion. Scriptural support for the affirmative view is found in Acts 4, 12; Mt. 28, 19; John 3, 18; 8, 24; 17, 3; Rom. 3, 22; Gal. 2, 16. Because in regard to things objectively necessary for the attaining of some end (here of salvation), it is illicit to choose any opinion except the safest, in practice explicit belief in these two mysteries must be considered necessary by necessity of means for salvation.

¹⁵⁵ Cf. Mark 16, 15-16; Mt. 28, 19-20. Davis (*op. cit.*, I, p. 277) states: "It is the common opinion of divines that every Christian must know and believe the substance of the Apostles' Creed, the necessary Sacraments, namely Baptism, Penance, the Holy Eucharist and the other Sacraments when there is need of receiving them, the Commandments of God and those of the Church which affect all men. The knowledge of these truths need not, in every case, be clear knowledge, but should be proportionate to the intelligence of the person. Some knowledge of how to make acts of Faith, Hope, Charity and Contrition is necessary.

¹⁵⁶ Cf. Mark 16, 16; John 3, 18; 1 John 3, 23. Theologians point out that this divine precept must be fulfilled *per se* frequently in life, especially when a man comes to a knowledge of divine revelation and of his obligation to believe, when a temptation against faith can be overcome only by an act of faith, when a new definition or a new article of faith is proposed, after a lapse into heresy or denial of faith, etc. *Per accidens* it must be fulfilled when other obligations that require faith must be fulfilled, when a grave temptation against another virtue cannot be overcome except by the eliciting of an act of faith, etc. Cf. Noldin-Schmitt, *op. cit.*, II, n. 14; Prümmer, *op. cit.*, I, n. 502. The proposition that the obligation of faith is not a special precept was condemned

(5) It is never licit to deny or to doubt one's faith.¹⁵⁸

To consider the first two points immediately preceding: Christ stated explicitly: ". . . he who does not believe shall be condemned."¹⁵⁹ And St. Paul wrote: ". . . without faith it is impossible to please God. For he who comes to God must believe that God exists and is a rewarder to those who seek Him."¹⁶⁰ By reason of the Church's teaching and practice regarding the emphatic pronouncements of divine revelation in this matter, it is clear that no exception or no *epikeia* is permissible. So true is it, that even in the most extraordinary and pressing circumstances it is, for example, "never lawful to administer a Sacrament to an adult who has certainly never made an act of explicit faith in the first two, at least, of the four essential truths."¹⁶¹

The congruity of the Church's teaching on this point may be seen from the fact that man should know of his supernatural end in order to attain it.¹⁶² That end, which consists in the enjoyment of the Beatific Vision, cannot be known except by faith. Such congruity is further manifested in the fact that man cannot be converted to God and direct the actions of his life toward his supernatural end, unless he believes explicitly that God exists, and that

by Pope Innocent XI (*DB* 1166); Pope Alexander VII condemned the proposition that the acts of faith, hope and charity are never in life demanded by a divine precept (*DB* 1101); Pope Innocent XI condemned the proposition that one act of faith in life is sufficient (*DB* 1167). As to how frequently must be fulfilled the precept requiring an act of faith, theologians are not in agreement. Cf. St. Alphonsus, *Theol. Mor.*, Lib. II, n. 7.

¹⁵⁷ Cf. Rom. 10, 9 et sqq.; Mt. 10, 32 et sqq. This obligation must be fulfilled, at least when non-profession would result in an implicit denial of faith, contempt of religion, injury to God or scandal to one's neighbor. Cf. *Codex Iur. Can.*, Can. 1325, § 1.

¹⁵⁸ Cf. Mt. 10, 33; Luke 9, 26; 12, 8-9; 2 Tim. 2, 12.

¹⁵⁹ Mark 16, 16.

¹⁶⁰ Heb. 11, 6.

¹⁶¹ F. Connell, "Priestly Ministry of the Essentials of Faith," *ER*, LXXVI (1927), 575.

¹⁶² ". . . ad hoc quod homo perveniat ad perfectam visionem beatitudinis, praexigitur quod credat Deo, tanquam discipulus magistro docenti."—St. Thomas, *Sum. Theol.*, II-II, q. 2, a. 3.

in His mercy He will confer upon him eternal happiness, if he is worthy of it. In view of these considerations, then, one is justified in maintaining that with regard to the points here treated, the use of *epikeia* is never licit.

May we allege as an example of *epikeia* the practice whereby in extreme necessity Baptism is sometimes administered to those who certainly have no explicit faith in the mysteries of the Trinity and the Incarnation—when time for instruction is lacking? The answer must be in the negative. For this practice is justified by reason of the fact that explicit belief in these two mysteries is only probably necessary. And in extreme necessity where the eternal salvation of a dying person is at stake, it is licit to administer Baptism, even if there be lacking explicit faith in these two mysteries—on the supposition that it is impossible to teach them to the dying person. No endeavor has ever been made by an reputable authority to justify this practice as an exception by way of *epikeia*.¹⁶³

In regard to the third point mentioned above,¹⁶⁴ the use of *epikeia* involving matters therein alluded to is illicit. It is of extreme importance, however, that the term *epikeia* be understood in its strict sense. For there is no attempt made here to maintain that the obligation to believe explicitly the truths in question binds in cases of impossibility. As has been pointed out above, even where the divine law is concerned, when the fulfillment of some precept becomes impossible, the subject is not bound—not because he uses *epikeia*, but because the obligation itself ceases.¹⁶⁵ This would be true in the case of a person who never had any opportunity to learn more than the four basic truths mentioned before, or even in reference to an individual who because of mental dullness could not, after sincere effort, grasp the truths in question. For the necessity of believing these truths explicitly is one of precept and not of means. It applies only insofar as it is possible.¹⁶⁶

¹⁶³ Cf. Can. 752, § 2 and § 3.

¹⁶⁴ Cf. p. 337 *supra*.

¹⁶⁵ "Nam Deus impossibilia non iubet . . ."—Conc. Trid., Sess. VI, Cap. 11 (DB 804).

¹⁶⁶ This is undoubtedly what Davis intends by the observation: "The knowledge of these truths need not, in every case, be clear knowledge, but should be proportionate to the intelligence of the person."—*Op. cit.*, I, p. 277.

Attention should likewise be called to the fact that, although the precept in question is without doubt a precept of divine law, nevertheless the formulae in which theologians are wont to express it, are of human origin. Thus, for example, the statement “. . . every Christian must know and believe the substance of the Apostles' Creed”¹⁶⁷ is, as a formula, purely human. Even if one were to admit that *epikeia* may licitly be used in regard to it, in no way would this imply that the use of *epikeia* is lawful in reference to the divine law as such.

Nor can there be any denial of the fact that interpretation of this precept, as of all precepts, is licit. An adult under instruction, for example, does not learn immediately all those truths, explicit belief in which is imposed by divine law. He may realize that the course of instruction will deal with the Apostles' Creed, the Commandments and the Sacraments. He may be aware likewise that an explicit belief on his part in many of the doctrines to be explained will be necessary by divine law. But surely it cannot be maintained that prior to the time he learns each doctrine individually, he exercises *epikeia* with regard to belief in those not yet reached in the course. Actually this is not an instance of *epikeia*, but rather a reasonable interpretation, in the proper meaning of this latter term.¹⁶⁸

As all theologians admit, the obligation explicitly to believe these truths in question, in substance at least, is serious. It has been imposed by Christ with severity, for His strict commission to His Apostles to preach the Gospel to every creature gives rise to a correlative obligation on the part of men to accept and to believe what is taught—an obligation enjoined under threat of condemnation.¹⁶⁹ The truths which, according to the teaching and practice of the Church, must by necessity of divine precept be explicitly believed, are such as direct the steps of a Christian, enabling him to live a virtuous life and to attain his supernatural end.¹⁷⁰ Conversely,

¹⁶⁷ Davis, *loc. cit.*

¹⁶⁸ Attention should be called to the fact also that the precept, being affirmative, binds *semper* but not *pro semper*.

¹⁶⁹ Cf. Mark 16, 16.

¹⁷⁰ Cf. Encyclical Letter “*Acerbo nimis*,” Pius X, 15 Apr. 1905, ASS, XXXVII (1904-1905), 613-625.

without explicit knowledge of and belief in them, a Christian will find the road to his eternal destiny extremely difficult. In the light of these facts, therefore, coupled with the consideration that there is lacking the slightest indication on the part of Christ that He willed to permit any exceptions to this precept, it would appear logical to conclude that an individual may not presume to disregard the command of Christ by an appeal to the principle of *epikeia* strictly so-called. When it is possible to fulfill a grave and serious precept which God has solemnly imposed, no man has any basis for a judgment that God's command is not literally intended.

That the use of *epikeia* is not licit in regard to the precepts mentioned in the fourth and fifth points above, requires no lengthy demonstration—that is, there exists a grave divine precept of sometimes eliciting the act of faith, and sometimes externally professing one's faith; it is never licit to deny or to doubt one's faith. By reason of the strictness of the language employed by Christ Himself, the severity of the sanction threatened, the gravity of the *materia* involved, the circumstances of enactment, the teaching of the Church and of theologians on these points, there can be no question but that the laws referred to are extremely serious. Consequently, precisely for the same reasons one would almost be led to suspect *a priori* any opinion which would allow disregard of these precepts for any reason short of the impossibility (and such impossibility can, strictly speaking, never exist in regard to the fifth point) of fulfilling them.

Moreover, it is pertinent to the very crux of the problem to realize that these precepts are affirmative and negative respectively. Of their very nature affirmative precepts bind *semper* but not *pro semper*. Consequently, if in a given situation an individual should make an objectively and subjectively true decision that here and now he is not bound to fulfill *in actu secundo* the divine positive precept of making an internal act of faith or of professing his faith exteriorly, then he is not using *epikeia*. Rather, he is making a reasonable interpretation that, all things considered, this precept which of its nature binds *semper* but not *pro semper*, does not now demand execution. Theologians in interpreting these divine precepts have pointed out when precisely fulfillment seems to be required. Now, it would be entirely incorrect to assume that because an indi-

vidual does not seem to be bound to execute *in actu secundo* these divine positive precepts in other situations, he is consequently making use of *epikeia* in matters involving divine law. The fact is that this is but simple interpretation of an affirmative law.

There remains the negative divine precept forbidding denial and doubt of one's faith, a precept which of its nature binds *semper* and *pro semper*. In reference to it *epikeia* is never licit. For since the denial of one's faith is a grave irreverence toward God and a scandal to one's fellow man, is not only tantamount to the denial of the veracity of God and of His right to impose the obligation of belief, but is ultimately a denial of God Himself, the precept forbidding it pertains, in the final analysis, to the natural law.¹⁷¹ Denial of one's faith, therefore, is intrinsically evil; hence, it can never become lawful either by reason of the use of *epikeia* or for any other cause. The arguments adduced in the previous chapter, which concerned negative precepts of the natural law, are equally applicable here.

IV. *The Sacraments and the Holy Sacrifice of the Mass*

Theologians point out that most of the precepts proper to the New Law have reference to the Sacraments and to the Holy Sacrifice of the Mass.¹⁷² In the discussion of the question as to whether *epikeia* is applicable to these precepts, it will be convenient to reduce them to three categories—those which pertain to the essence of the Sacraments, those which pertain to their use, and those which have reference to other obligations concerning the Sacraments.

A. Matters Pertaining to the Essence of the Sacraments

With regard to the precepts concerning the essence of the Sacraments,¹⁷³ it is not to our purpose to enter into the controversy

¹⁷¹ "Hinc praeceptum fidei merito vocari potest praeceptum *iuris naturalis*, eo sensu quod sequitur necessario et naturaliter ex ipsa relatione inter Deum et hominem."—Prümmer, *op. cit.*, I, n. 500. This statement, although made by the author in reference to the precept of internal faith, is equally applicable to the point here in question.

¹⁷² Cf., e.g., Rodrigo, *op. cit.*, n. 397.

¹⁷³ ". . . Haec omnia sacramenta tribus perficiuntur, videlicet rebus tan-

as to whether Christ Himself determined the matter and form *in specie*, or—at least in the case of some of the Sacraments—only *in genere*.¹⁷⁴ Nor is it within the scope of this dissertation to discuss whether or not the Pope has the power to change, at least in the case of Confirmation and Holy Orders, what now constitutes the matter and form. We accept what *de facto*, according to the teaching and practice of the Church, are the matter and form of each Sacrament. And then inquiry is made as to whether in reference to them, *epikeia* may ever be lawfully used.

This question should not be confused with what would at first glance appear to be a somewhat kindred point—namely, whether it is ever lawful to employ doubtful matter in confecting a Sacrament. Theologians are agreed that “in cases of urgent necessity or great utility . . . it is licit to use matter or form which is doubtful, at least for a Sacrament of necessity,” when constituent elements that are certainly valid cannot be obtained.¹⁷⁵ The Sacrament is in such cases to be administered conditionally. But this is not precisely the question which concerns us now. Our interest turns rather to the problem of whether a Sacrament can ever be given validly with matter or form that is certainly substantially different from that prescribed for ordinary use.

It would be difficult to find any theologian who would ever allow *epikeia* under such circumstances. As the Council of Florence has declared,¹⁷⁶ a Sacrament is constituted by its matter, its form, and

quam materia, verbis tanquam forma, et persona ministri conferentis sacramentum cum intentione faciendi, quod facit Ecclesia: quorum si aliquod desit, non perficitur sacramentum.”—Bull “*Exultate Deo*,” Eugene IV, Conc. Flor., 22 Nov. 1439 (DB 695).

¹⁷⁴ Cf. Merkelbach, *Summa Theol. Mor.*, III, n. 18. It must be held, of course, that the substance of the Sacraments cannot be changed. Cf. Conc. Trid., Sess. XXI, Cap. 2 (DB 931). As this dissertation goes to press, the latest issue of the *Acta Apostolicae Sedis* carries the recent Apostolic Constitution concerning the matter and form of Major Orders. Cf. Apost. Const. “*Sacramentum Ordinis*,” Pius XII, 30 Nov. 1947, *AAS*, XL (1948), 5-7.

¹⁷⁵ Merkelbach, *ibid.*, III, n. 23. Cf. Davis, *op. cit.*, III, n. 13; Noldin-Schmitt, *op. cit.*, III, n. 12. Noldin-Schmitt note that it is never licit to use doubtful matter in confecting the Holy Eucharist, because of the danger of idolatry.

¹⁷⁶ Cf. DB 695.

its necessary minister. For each Sacrament Christ has determined, at least *generatim et in confuso*, what its matter and form should be. And no individual ever has the right to assume on his own authority to alter them. In the words of Suarez: “. . . these are the *quasi* foundations of the visible Church of Christ; if they be altered, then in that Church there would result a substantial mutation contrary to the manifest intention of its founder.”¹⁷⁷

Moreover, Christ as God imparted to the Sacraments the power to cause grace, to effect what they signify. But unless they are administered according to His institution of them, they cannot contain grace nor cause it. To hold the opposite view would be tantamount to maintaining that a mere man on his own authority can attach to some action and some words of his own choice a power peculiarly divine—the power to give grace. This power Christ conferred upon certain sensible signs consisting of things and of words which He Himself designated either *in genere* or *in specie*. Regardless of what extrinsic circumstance may seem to dictate the need for using other materials or acts or words, the fact remains that they cannot produce grace *ex opere operato*. This is true even when the substituted matter and form would not be entirely alien to the signification of the Sacrament. It is true *a fortiori* where the signification would be entirely lost.

There seems to be no need of treating other factors which pertain to the essence of the Sacraments—the proper minister, the necessary intention, etc. The general principles enunciated above are likewise valid here. Those elements which are necessary for the validity of a Sacrament remain so, even in the face of extreme difficulty or impossibility—much more so in the presence of a situation where the difficulty is not so grave. The Sacraments exist according to the institution of Christ, or they do not exist at all.

In short, it may be concluded that in regard to matters which touch the essence of the Sacraments, the use of *epikeia*, is always excluded. To attempt to administer a Sacrament when certainly

¹⁷⁷ “. . . haec sunt quasi fundamenta Ecclesiae visibilis Christi, quibus mutatis fieret in ea magna substantialis mutatio contra manifestam intentionem instituentis.”—*De Legibus*, Lib. X, Cap. VI, n. 14.

there is lacking something commonly recognized as necessary for its validity is always a most grave sin of irreverence toward God.

In connection with the discussion relating to the validity of the Sacraments, a question may arise as to whether *epikeia* may ever be used in regard to matters which touch only their liceity. What is to be said, for example, of making use of hosts not recently made, or of broken hosts or hosts which are not circular (for the Latin Church), or of water for Baptism other than that blessed for the purpose, or of old oil for Extreme Unction, etc? It will be seen upon reflection that these matters do not involve divine positive law in the proper sense of the term. Ordinarily they are regulations enacted by the Church, and hence are to be judged according to the same norms as other serious ecclesiastical laws. In some instances, however, use of illicit matter (for example, very old or mutilated hosts) might be gravely irreverent toward the Sacrament, or cause serious scandal to the people. In such cases, these actions would then be contrary to the natural law, and, therefore, in reference to them, the use of *epikeia* would be illicit.

B. Matters Pertaining to the Use of the Sacraments and of the Mass

The most important divine positive precepts of the New Law which pertain to the use of the Sacraments may be conveniently summarized as follows:¹⁷⁸

(1) By extrinsic necessity of means Baptism of water is *per se* necessary for salvation. (With regard to the soul's sanctification and the attaining of salvation an act of divine charity or martyrdom may supply *per accidens* for the Sacrament of Baptism);¹⁷⁹

(2) Although Confirmation is not necessary for salvation, it is not permissible to neglect it, if the opportunity to receive it is given;¹⁸⁰

¹⁷⁸ No attempt is made here to prove the divine origin of these precepts. We assume as having been proved elsewhere that they have been divinely imposed.

¹⁷⁹ Cf. Conc. Trid., Sess. VI, Cap. 4; Sess. VII, Canones de Bap., n. 5 (*DB* 796, 861). Cf. also Noldin-Schmitt, *op. cit.*, III, n. 57; Merkelbach, *Summa Theol. Mor.*, III, nn. 133-134; Davis, *op. cit.*, III, pp. 39-40; Cappello, *De Sacrament.*, I, n. 126.

¹⁸⁰ *Cod. Iur. Can.*, Can. 787. St. Alphonsus (*Theol. Mor.*, Lib. VI, n. 181)

(3) Reception of the Holy Eucharist is not necessary by necessity of means to receive sanctifying grace. According to some theologians, it is morally necessary for adults for remaining in the state of grace. The divine positive precept of receiving Holy Communion binds sometimes in life, especially when the Holy Eucharist is necessary in order to overcome a grave and long-continued temptation.¹⁸¹ By divine-ecclesiastical precept Holy Communion must be received once a year at least;¹⁸²

(4) It is probable that by divine law a priest is bound sometimes to celebrate Mass, and a pastor to offer Mass for his flock;¹⁸³

(5) The Sacrament of Penance is not absolutely necessary for all for salvation; for those who have sinned seriously after Baptism it is necessary *in re* or *in voto* (at least implicitly);¹⁸⁴

believes that the obligation to receive Confirmation is grave. Many moralists hold that the obligation is not strict. Cf. Noldin-Schmitt, *op. cit.*, III, n. 93; Davis, *op. cit.*, III, pp. 74-76; Gury-Ballerini-Palmieri, *op. cit.*, II, n. 181; Merkelbach, *ibid.*, III, n. 191. It should be noted that the mention of Confirmation in this section of the dissertation is not meant to imply that the obligation to receive Confirmation certainly arises from divine law. The point is disputed. Cf. Connell, *De Sacramentis Ecclesiae*, I, n. 155. We discuss the matter on the basis of the opinion, probable at least, that there is a divine obligation to receive Confirmation.

¹⁸¹ Thus, Noldin-Schmitt, *op. cit.*, nn. 136, 137. Cf. also St. Alphonsus, *Theol. Mor.*, Lib. VI, n. 295; Cappello, *De Sacrament.*, I, nn. 470, 471; Merkelbach, *ibid.*, III, nn. 291-294; Konings, *op. cit.*, II, n. 1305. As to whether the precept to receive Holy Viaticum is divinely imposed, theologians are not agreed. For the affirmative opinion, cf. Davis, *op. cit.*, III, p. 218; for the negative, cf. Vermeersch, *Theol. Mor.*, III, n. 369.

¹⁸² "Praeceptum communionis paschalis . . . est partim divinum, partim ecclesiasticum. . . Duplicem obligationem importat: (1) communicandi saltem semel in anno; (2) communicandi in Paschate seu tempore paschali. Prima obligatio est divino-ecclesiastica, et principalis; altera est mere ecclesiastica, et secundaria. Utraque est gravis, sed prima est certe gravior . . ."—Cappello, *ibid.*, n. 475. Cf. Merkelbach, *ibid.*, III, n. 295; C. Connell, *The Paschal Precept*, The Catholic University of America Canon Law Studies, No. 73 (Washington, D. C.: The Catholic University of America Press, 1932), p. 6.

¹⁸³ Cf. Noldin-Schmitt, *op. cit.*, III, nn. 182, 183; Cappello, *ibid.*, I, nn. 631, 636; St. Thomas, *Sum. Theol.*, III, q. 82, a. 10.

¹⁸⁴ Cf. Merkelbach, *Summa Theol. Mor.*, III, n. 449; St. Thomas, *ibid.*, q. 84, a. 5 and a. 6.

(6) *Per se* there is no certain grave divine obligation to receive Extreme Unction; but to neglect it without good reason would be sinful.¹⁸⁵

An analysis of these precepts¹⁸⁶ will reveal that they may be reduced to two categories—those which prescribe some act that is necessary by necessity of means, and those in regard to which the act required is necessary only by necessity of precept.

It is unnecessary to enter again into a detailed discussion as to the reasons why, in regard to divine positive law involving matters that are necessary by necessity of means, the use of *epikeia* is never licit. What has been stated above in the treatment concerning the necessity of membership in the Church and the necessity of faith, is equally applicable at this point. The teaching and practice of the Church interpreting divine revelation make it clear that no exception or no *epikeia* is ever possible here.

According to divine command Baptism of water is *per se* necessary that a soul be saved. However, it is theologically certain that an act of divine charity may *per accidens* supply for Baptism of water. This act, of course, must have accompanying it, or included in it, the intention to receive the Sacrament of Baptism.

In other words, God Who established the sacrament of Baptism as a necessary means of salvation, at the same time established that in the unbaptized *the will may be reputed for the fact*, that is, that the intention of Baptism, even implicit, together with

¹⁸⁵ Cf. Merkelbach, *ibid.*, III, n. 706. St. Alphonsus (*Theol. Mor.*, Lib. VI, n. 733) asking whether there exists a grave obligation to receive Extreme Unction, calls the negative opinion "*satis probabilis*"; the affirmative view he terms "*probabilis et omnino suadenda*."

¹⁸⁶ It will be noted that no mention is made here of the Sacraments of Holy Orders and of Matrimony. In regard to the essence of these Sacraments, what has been explained above of all the Sacraments is applicable to them—viz., that *epikeia* is never licit. Insofar as the use of these Sacraments is concerned, there appears to be no special divine positive precept. "In Matrimonio autem et Ordine non invenitur obligatio, nisi ex causis extrinsecis in particularibus casibus oriatur, et tunc magis erit ex jure naturae, vel ex praecepto humano quam ex jure divino positivo."—Suarez, *De Legibus*, Lib. X, Cap. VI, n. 12.

charity *positively* produces *ex opere operantis* certain effects which, in the ordinary course of events, are produced *ex opere operato* by the sacrament itself.¹⁸⁷

So too, it is a certain and common doctrine that martyrdom *per accidens* supplies for the Sacrament of Baptism. That is,

Martyrdom is said to justify *quasi ex opere operato*, or to be *the occasion of the infallible conferring of grace*. . . . God decrees *on the occasion* of any martyrdom, whether it be of an adult or of an infant, infallibly to confer sanctifying grace on the martyr.¹⁸⁸

In brief, the foregoing truths are found in the teaching and practice of the Church. Specifically, as to the efficacy of Baptism of blood and Baptism of desire, these truths are not put forward by her as humanly devised exceptions to a divinely imposed command. Rather, she interprets them as having been revealed by Christ. She uses no *epikeia*. And since, on the basis of her teaching and practice as the interpreter of divine revelation, one must believe that no individual can be saved *per se* without Baptism of water or, *per accidens* as substitutes, Baptism of blood or of desire, it is obvious that *epikeia*, insofar as it concerns the divinely imposed command regarding Baptism, is never permissible.

In our discussion of the divinely imposed command to receive those Sacraments not necessary by necessity of means, certain factors are worthy of special note. It must be emphasized that this obligation is in every case affirmative, and hence binds *semper* but not *pro semper*. Moreover, no precept among those listed above, as it comes from the Divine Legislator, is confined to any limited verbal formula. Finally, with the exception of that precept prescribing the reception of Holy Communion during the year, none of the above

¹⁸⁷ "Aliis verbis, Deus qui Sacramentum Baptismi medium necessarium salutis constituit, simul statuit ut in non-baptizatis *voluntas reputetur pro facto*, seu ut votum etiam implicitum Baptismi una cum caritate *positive* producat *ex opere operantis* quosdam effectus qui in cursu ordinario ipso sacramento *ex opere operato* producantur."—Connell, *De Sacramentis Ecclesiae*, I, n. 118.

¹⁸⁸ "Dicitur igitur martyrium justificare *quasi ex opere operato*, seu esse *occasionem infallibilis collationis gratiae*. . . . Deus decernit *occasione* cuiusvis martyrii, sive adulti sive infantis, martyri gratiam sanctificantem infallibiliter conferre."—*Ibid.*, n. 119.

precepts concerning the use of the Sacraments specifies any definite and particular time for its fulfillment.

The principles which were laid down in the treatment of the problem of *epikeia* in reference to the divine positive precepts of eliciting acts of faith and of professing faith,¹⁸⁹ may with appropriateness be applied here. By reason of the facts that there is no specified time for the fulfillment of the precepts here in question (with the exception of the one already noted), and that all of them, being affirmative, bind *semper* but not *pro semper*, it follows that when, after reasonable reflection and possibly counsel, a subject interprets that he is not bound to receive any of the Sacraments in the circumstances at hand, there is no exercise of *epikeia*. There is merely a simple interpretation that in the given situation the law does not demand execution.¹⁹⁰ On the other hand, if, all the circumstances being duly weighed, there is a reasonable conclusion that in the case at hand the obligation must be fulfilled, then it would be illogical to maintain that anything short of disproportionate inconvenience could excuse the subject from so doing. For to disregard a law precisely in those circumstances where, according to prudent judgment, its fulfillment is required, is to act contrary to reason and to transgress the will of the legislator. In the light of these considerations it would seem that the logical conclusion is that with regard to the precepts in question, the use of *epikeia* strictly so-called is never licit.

This view is further substantiated by the fact that these divine positive precepts as coming from God, are not confined to any limited formulae. As a consequence, it cannot be stated that the law by reason of its mode of formulation is deficient. And where the statement of a law is not deficient by reason of the universality of its expression, there is no occasion for emending it or correcting it. In short, the use of *epikeia* cannot be permitted.

¹⁸⁹ Cf. pp. 338 et sqq.

¹⁹⁰ "Cum enim praecepta haec sint affirmativa sine ulla temporis determinatione, nulla excusatio ex accidentalibus circumstantiis vel occasionibus proveniens est contra formam verborum praecepti, neque est exceptio a generalitate illius, et ita non est epikia neque emendatio legis, sed potius est interpretatio de vero sensu legis . . ."—Suarez, *De Legibus*, Lib. X, Cap. VI, n. 13.

C. Other Obligations Concerning the Sacraments and the Mass

There remain to be considered certain precepts relative to the Sacraments, other than those pertaining to their essence or prescribing their reception. Many of these obligations are so fundamental that they pertain to the natural law rather than to the divine positive law.¹⁹¹ Such, for example, is the precept that the Sacraments must be received worthily. This obligation is founded ultimately upon the natural precept that due homage and adoration are to be accorded to Almighty God. To act in such a way as to show dishonor and irreverence to Him is intrinsically wrong, and hence is never for any reason admissible. Since to presume to receive the Sacraments sacramentally without the necessary dispositions¹⁹² constitutes an act of the gravest irreverence toward the Infinite God, such can never under any circumstances be allowed. Consequently, in reference to such an obligation the use of *epikeia* could never be licit.¹⁹³

With regard to other precepts involving the Sacraments which are not of the natural law but have been divinely imposed, the principles laid down above are applicable. These precepts are not in themselves confined or limited to any verbal formulae. Hence, there never arises any occasion to emend or correct the precepts as such. Moreover, although some of them may appear to be negative, nevertheless, fundamentally and directly they are affirmative in character, and therefore bind *semper* but not *pro semper*. Consequently in their regard interpretation is possible. But because they are not confined to definitive formulae, because they are affirmative in character, because they involve matters of the highest import, and have with the strictest severity been imposed by the Divine Legislator, because there is no basis for a prudent judgment that He is willing to allow His subjects to deviate from them, it must be concluded that in reference to these precepts, the use of *epikeia* strictly so-called is not permissible.

¹⁹¹ “. . . ex institutione sacramentorum legis novae intrinsece sequuntur aliquae obligationes, quae ex hypothesis pertinent ad jus naturale.”—*Ibid.*, n. 11.

¹⁹² There is no question here of regulations which are solely ecclesiastical, such as that concerning the fast before Holy Communion.

¹⁹³ For a more complete explanation, the preceding chapter, where *epikeia* in relation to the natural law is treated, should be consulted.

There are several precepts, however, which deserve special consideration by reason of the fact that in regard to them certain circumstances may arise which appear to permit the use of *epikeia*. Now, although in many instances the natural law is involved, nevertheless, inasmuch as these precepts pertain to the Sacraments, it would appear to be appropriate to treat them at this juncture.

There is a grave obligation on the part of a priest to deny the Sacraments to the unworthy.¹⁹⁴ May he ever licitly make use of *epikeia* in regard to this precept?

At the outset it should be noted that there is no question here of administering the Sacraments to those who are incapable of receiving them validly—for example, conferring Baptism on one who is known certainly to have been baptized validly, or conferring Holy Orders on a woman. Because in such a case there would be an intrinsically evil abuse of a sacred thing, thus to confer the Sacraments is always and under all circumstances forbidden, even if death should result from the refusal so to act.¹⁹⁵ In this connection, then, the use of *epikeia* is inconceivable.

Theologians point out that there are certain cases in which a Sacrament may for a most grave reason be administered to one who seeks it, and although capable of receiving it, is unworthy to do so. That such should under any circumstances ever be permitted is based upon a two-fold consideration. First, the co-operation on the part of the priest is not formal but material, and hence in the face of a proportionately grave reason it may be allowed, scandal apart. Secondly, the fidelity of the minister does not demand that he deny the Sacraments to those who seek them when greater evils would result from such a refusal.¹⁹⁶

¹⁹⁴ "Indigni sunt imprimis haeretici et schismatici (Can. 731, § 2) . . . dein qui cognoscuntur esse in *statu peccati mortalis* absque voluntate sese emendandi."—Noldin-Schmitt, *op. cit.*, III, n. 36. The grave prohibition of administering the Sacraments to those who are unworthy is based upon considerations concerning the dignity of the Sacraments, the virtue of religion, the virtue of fidelity and the law of charity.

¹⁹⁵ Cf. Cappello, *De Sacrament.*, I, n. 70; Merkelbach, *Summa Theol. Mor.*, III, n. 89; Noldin-Schmitt, *loc. cit.*

¹⁹⁶ Cf. Lehmkühl, *op. cit.*, II, n. 52; Cappello, *De Sacrament.*, I, n. 70; Noldin-Schmitt, *op. cit.*, III, n. 36.

Theologians generally sum up in the following rules the principles involved: to a public sinner, whether he seeks the Sacraments secretly or publicly, they are to be denied; to an occult sinner who seeks the Sacraments occultly, they are to be denied; to an occult sinner who seeks them publicly, they are not to be denied, if the sinner cannot be passed over without scandal.¹⁹⁷

Concretely, the reasons which would justify a priest in administering a Sacrament to the unworthy are usually reduced by theologians to four.¹⁹⁸ Such an action may be permitted: (1) in order that the Sacramental seal may not be broken; (2) in order that grave scandal may not arise; (3) in order that the faithful may not be disturbed, for, seeing others denied the Sacraments and being unaware of the reason, they themselves in the fear that they too may be refused, may cease to receive them; (4) in order that the reputation of him who is denied the Sacraments by reason of an occult crime may not be damaged, thus giving rise to grave evils.¹⁹⁹

Whether or not a priest is permitted to confer the Sacraments on an unworthy individual because he fears that a refusal would lead to his own death is disputed. St. Alphonsus²⁰⁰ and Lehmkühl²⁰¹ are among those favoring the negative view. The latter advances among other reasons the argument that the good effect—escape from death—follows only mediately from the conferring of the Sacrament in this case, and hence the priest must refuse. On the basis of this latter reason Merkelbach²⁰² believes the negative opinion to be more probable. On the other hand, many moralists²⁰³ believe that under

¹⁹⁷ Cf. Noldin-Schmitt, *ibid.*, n. 37; Merkelbach, *Summa Theol. Mor.*, III, n. 89.

¹⁹⁸ Cf. Cappello, *De Sacrament.*, I, n. 70; Noldin-Schmitt, *ibid.*, n. 36; Davis, *op. cit.*, III, p. 33.

¹⁹⁹ Cappello (*loc. cit.*) insists that the major consideration in this last case is not the reputation of the sinner himself, but rather the serious general results which would be consequent upon a refusal to administer the Sacraments to him. Hence, in his opinion this last case may always be reduced to one of the other three.

²⁰⁰ *Theol. Mor.*, Lib. VI, n. 49.

²⁰¹ *Op. cit.*, II, n. 59.

²⁰² *Summa Theol. Mor.*, III, n. 90.

²⁰³ E.g., Davis, *op. cit.*, III, p. 34; Genicot-Salsmans, *op. cit.*, II, n. 122; D'Annibale, *op. cit.*, III, n. 264.

such circumstances conferring of the Sacraments would be at least probably permissible. They base their opinion on the belief that the co-operation involved is only material, and hence may be allowed in order to avoid death.

Regarding the administration of a Sacrament to one who seeks it in hatred of faith or contempt of religion, this observation may be made. Although some theologians²⁰⁴ teach that such administration is never permitted, this statement is perhaps excessively universal—theoretically at least. For the action of the minister in conferring the Sacrament would constitute only material co-operation. Perhaps it would be more accurate to state that *in praxi* there seems to be no reason so important as to allow the material co-operation involved in thus administering a Sacrament.

Pertinent to our purpose is the question whether in any of those instances mentioned in the foregoing discussion, where it is permitted to confer the Sacraments upon the unworthy, the minister makes use of *epikeia*. An analysis of the cases outlined above will lead to the conclusion that *epikeia* strictly understood is not called into use. For in each instance a natural law of greater import prevails. When there occurs an apparent conflict between laws, in this conflict the inferior must yield.²⁰⁵

Moreover, even if one subscribes to the view that a priest in order to avoid death may administer the Sacraments to an unworthy person, in such a case there is no appeal to *epikeia*. For ultimately the proponents of this opinion base their view upon this belief: since the action of the priest in the case is not intrinsically evil and consequently not forbidden by the natural law, and since, on the other hand, he has a basic natural right to his life, of which, apart from relatively rare instances involving the common good, he cannot lawfully be deprived, it follows that he is not bound to suffer death in order to avoid the material co-operation concerned in the case. And,

²⁰⁴ Cf., e.g., Noldin-Schmitt, *op. cit.*, III, n. 36; Cappello, *De Sacrament.*, I, n. 72

²⁰⁵ One should be careful to keep his attention centered on the point in question. It is not asked whether one may receive a Sacrament unworthily in order to avoid giving scandal, for example. The problem is whether a priest may co-operate materially in the sin of another, in order that grave scandal may not arise, or for some other similarly serious reason.

as has been pointed out above, in the strict and proper sense of the term, *epikeia* is not involved in matters in relation to which observance of a law would be disproportionately difficult.

The foregoing observations seem, then, to demand a negative reply to the question proposed at the start of this discussion. *Epikēia* strictly so-called may not licitly be used in reference to the precept that the Sacraments are not to be conferred upon the unworthy.

Integrity of confession is demanded by divine positive law.²⁰⁶ Some theologians²⁰⁷ maintain that in regard to this divine positive precept the use of *epikeia* is sometimes licit. What is to be thought of this opinion?

Any discussion of the question must be prefaced by a note as to the meaning of integrity of confession. Material or objective integrity embraces all the mortal sins committed after Baptism and not yet directly remitted by the power of the keys, together with their number, species, and circumstances changing the species. Formal or subjective integrity consists in the accusation by the penitent of all the mortal sins (together with their number, species, and circumstances changing the species) which here and now, in the light of all the circumstances, after a diligent examination, morally, in conformity with his capacity, he can and must confess, according to the practical dictates of his conscience, even though for a just cause he may omit some.²⁰⁸

With regard to integrity of confession theologians lay down the following principles: (1) *per se* confession must be materially integral; *per accidens* merely formal integrity suffices;²⁰⁹ (2) a just cause arising from ignorance or from physical or moral impos-

²⁰⁶ This precept is implied in the words of Christ bestowing on the Apostles the power of the keys: John 20, 22-23. Cf. Conc. Trid., Sess. XIV, Cap. 5 and can. 7 de Poen. (DB 899 and 917).

²⁰⁷ Cf., e.g., Henno, *op. cit.*, Vol. III, Tract. III, Disp. II, Quaest. V, Concl. III; Viva, *Opus. Theol.-Mor.*, Opus. II, Quaest. IV, Art. II, n. V; Van den Berghe, *art. cit.*, *Coll. Brug.*, VII, 363.

²⁰⁸ Cf. Merkelbach, *Quaestiones Pastorales*, Vol. V, *Quaestiones de Partibus Poenitentiae et Dispositionibus Poenitentis* (ed. 2; Liège: La Pensée Catholique, 1937), p. 81; Noldin-Schmitt, *op. cit.*, III, n. 274; Cappello, *De Sacrament.*, Vol. II, Pars I, n. 174.

²⁰⁹ Cf. Merkelbach, *ibid.*, p. 82.

sibility may excuse a penitent from a materially integral confession, and render adequate a confession which is only formally integral.²¹⁰ The obligation later to confess the sins licitly omitted still remains.²¹¹

Ignorance will excuse from material integrity of confession, if the penitent after a diligent examination cannot remember some mortal sin, or if he, having remembered it when he examined his conscience, omits it through inadvertence in confession, or if he, because of an error which is not gravely culpable, fails to confess a mortal sin believing it to be venial.²¹²

Physical impossibility will excuse one from making a materially integral confession should he lack the power to do so (for example, if the penitent is gravely ill and cannot continue his confession, or even if the priest himself is suddenly stricken and will probably die before he can hear the entire confession), or the time (for example, if the penitent is in a shipwreck or is on the point of entering battle) or the speech (for example, if an individual is afflicted with dumbness and cannot by signs or writing reveal his sins, or if the penitent being unable to express himself in a language which the confessor understands, cannot confess to one who knows his own language).²¹³

“Moral impossibility generally excuses those who cannot integrally confess without grave inconvenience extrinsic to confession, an inconvenience either to themselves or to the confessor or to a third party—whether such inconvenience be spiritual or temporal.”²¹⁴ Three conditions are necessary: (1) that another confessor cannot be

²¹⁰ Cf. Merkelbach, *ibid.*, pp. 87 et sqq.; Davis, *op. cit.*, III, pp. 378 et sqq.; Gury-Ballerini-Palmieri, *op. cit.*, II, n. 309; Cappello, *De Sacrament.*, Vol. II, Pars I, n. 205.

²¹¹ The following proposition was condemned by Pope Alexander VII: “Peccata in confessione ommissa seu oblita ob instans periculum vitae aut ob aliam causam, non tenemur in sequenti confessione exprimere” (*DB* 1111).

²¹² Cf. Merkelbach, *Quaest. de Part. Poen.*, p. 88; Lehmkühl, *op. cit.*, II, n. 427; Cappello, *De Sacrament.*, Vol. II, Pars I, n. 210.

²¹³ Cf. Merkelbach, *ibid.*, pp. 88 et sqq.; Cappello, *ibid.*, n. 206; Noldin-Schmitt, *op. cit.*, III, n. 285; Gury-Ballerini-Palmieri, *op. cit.*, II, n. 310.

²¹⁴ “Impotentia moralis excusat generatim eos qui non possunt integre confiteri sine gravi incommodo confessioni extrinseco, vel sui, vel confessarii, vel alterius tertii, sive sit temporale sive spirituale.”—Merkelbach, *ibid.*, p. 90.

found to whom the confession could be made without grave inconvenience; (2) that confession is here and now necessary or very useful, and cannot be deferred;²¹⁵ (3) that only those sins or circumstances are omitted which cannot be confessed without grave inconvenience. The grave inconvenience in question may be danger to one's life or reputation, or to the inviolability of the seal, or danger of scandal, or of a lapse into sin, or of grave spiritual or temporal harm.²¹⁶ It is to be noted, however, that a difficulty which is intrinsic to confession itself such as great repugnance or shame, is not sufficient to excuse from the requisite integrity.²¹⁷

In the light of the foregoing, the following conclusion seems logical. Integrity of confession, though commanded by divine positive law, is not embodied in any rigid formula which has, as a formula, been revealed. This is not to deny that the law in question is, in the full meaning of the term, divinely imposed. However, any statement of this precept such as "Material integrity of confession is required," is, as a statement, purely human. Moreover, as a statement of the divinely imposed obligation, it inadequately represents

²¹⁵ "Necessaria censetur confessio propter Communionem Paschalem vel confessionem annuam, ob necessitate celebrandi aut communicandi, si haec praetermitti non possunt sine nota aut scandalo; praeterea si quis alias diutius—per hebdomadam, triduum, imo per unum diem aut forte etiam brevius—cum periculo mortis et ideo aeternae salutis in statu peccati manere debet; item, ut ait Suarez, magna utilitas quam per se affert sacramentum et augetur ob frequentiam eius."—Cappello, *De Sacrament.*, Vol. II, Pars I, n. 211.

²¹⁶ Cf Merkelbach, *Quaest. de Part. Poen.*, pp. 90-91; Noldin-Schmitt, *op. cit.*, III, n. 286; Lehmkuhl, *op. cit.*, II, n. 431; Gury-Ballerini-Palmieri, *op. cit.*, II, n. 310.

²¹⁷ Davis (*op. cit.*, III, p. 381) notes, however, that "the unusual shame that a penitent would feel in confessing to a particular confessor, owing to some accidental or external relation towards him, is considered by several modern authors to be an extrinsic inconvenience and therefore to excuse from material integrity." Cappello (*De Sacrament.*, Vol. II, Pars I, n. 216) believes that, generally speaking, this view is not to be admitted; however, if in a particular case there is certainly extraordinary shame by reason of causes entirely special "this opinion does not seem improbable." Noldin-Schmitt (*op. cit.*, III, n. 142) and Arregui (*op. cit.*, n. 545) take a similar stand. For a comprehensive treatment of the question, cf. H. Werts, "Insuperable Embarrassment and Confession," *ThS*, IV (1943), 511-524. For a stricter view than that held by Father Werts, cf. F. Connell, "Recent Moral Theology," *AER*, CXI (1944), 109 et sqq.

the command of Christ. It would be far more accurate to express the divine law by stating that that integrity is required which includes all the sins that must, according to the demand of Christ, be revealed in this Sacramental confession.²¹⁸ It will be seen that to this latter statement of the law exceptions need never be made, though admittedly interpretation is required. What precisely Christ exacts in this matter must, in the final analysis, be left to the Church as the custodian and interpreter of divine revelation to decide.²¹⁹ The confession of each individual, then, must be characterized by that integrity which the Church in her teaching and practice interprets that Christ demands—and from what is the divine law in this matter, correctly interpreted, no individual may ever deviate. That is to say, the use of *epikeia* properly understood, in reference to the divine positive precept requiring integrity of confession, is not licit.

Canon Law prescribes²²⁰ that no one conscious of mortal sin on his soul may celebrate Mass or receive Holy Communion without previous Sacramental confession, even though he deems himself contrite. Whether this precept is divine or simply ecclesiastical, is a matter of doubt;²²¹ but that it is grave is certain. For purposes of discussion, let us adhere for the moment to the probable view that the law is of divine origin. In reference to this precept is the use of *epikeia* strictly so-called ever lawful?

The Council of Trent which specifically mentions this precept, also indicates that if no confessor is available and there is an urgent necessity to celebrate Mass or to receive Holy Communion, the obliga-

²¹⁸ Thus, Noldin-Schmitt, *ibid.*, n. 274. Suarez states the point precisely when he says that by divine law formal integrity is of necessity for the Sacrament of Penance, and material integrity only insofar as it is necessary for formal. Cf. *In III Part. S. Thomae (Opera Omnia, XVII-XXII)*, Disp. XLIII, sect. 4, n. 17.

²¹⁹ It is clear, of course, that if the Church makes an infallible statement of divine law on some point there can be no *epikeia*, though the statement is embodied in a human formula.

²²⁰ Cann. 807, 856.

²²¹ Cappello (*De Sacrament.*, I, n. 488) believes that the opinion more likely true is that the precept is divine. Merkelbach (*Summa Theol. Mor.*, III, n. 271) inclines to the view that it is simply ecclesiastical.

tion of Sacramental confession does not bind.²²² (Of course, by divine law there exists the grave obligation of making an act of perfect contrition.²²³)

Commenting upon this conciliar legislation, theologians teach that the two conditions required for celebrating Mass or receiving Holy Communion without previous confession—namely, that no confessor is accessible and that there is a necessity of offering Mass or receiving Holy Communion—must exist simultaneously. It would be entirely outside the scope of our problem to rehearse in detail the interpretation of these conditions as found in the writing of moralists and canonists.²²⁴ Rather it is to our purpose to determine whether an individual, conscious of mortal sin, who licitly receives Holy Communion or celebrates Mass without Sacramental confession after an act of perfect contrition, actually does so by invoking the principle of *epikeia*.

It appears that a negative answer to the question raised must be forthcoming. The following reasons seem to demand such a reply. According to the teaching of the Council of Trent, reception of Holy Communion or celebration of Mass without a previous confession is forbidden for those conscious of mortal sin, *except when necessity urges and a confessor is not available*. In other words, the formula which arises immediately out of the specific provisions of the Council of Trent (and also of the Code of Canon Law) expressly includes mention of the exception to the general requirement. Consequently, if an individual should receive Holy Communion or celebrate Mass without a previous confession when the conditions mentioned are

²²² Sess. XIII, Cap. 7 and can. 11 (*DB* 880, 893).

²²³ In this connection the following observation of Merkelbach is to be noted: "In hisce casibus tamen praecipitur actus contritionis perfectae cum morali diligentia eliciendus, nisi tempus desit, uti accidere potest dum quis sedens ad mensam communionis peccati recordatur, vel dum hostes irruptionem faciunt: quo ultimo casu non sumatur hostia sacramentaliter ex intentione communicandi sed mere materialiter ad illam in corpore abscondendam."—*Summa Theol. Mor.*, III, n. 272.

²²⁴ Cf., e.g., Cappello, *De Sacrament.*, I, nn. 490 et sqq., nn. 728 et sqq.; Merkelbach, *loc. cit.*; Noldin-Schmitt, *op. cit.*, III, nn. 141 et sqq.; P. Durieux (O. Dolphin, trans.), *The Eucharist: Law and Practice* (Faribault, Minn., 1926), nn. 92 et sqq., nn. 294 et sqq.

fulfilled, in the belief that in his case the explicit requisites concerning a well-defined exception laid down by the Council of Trent are satisfied, it is obvious that he is not acting contrary to the law or even to the words of the law. There is no *epikeia*, for there is no deviation from the words of the law, no appeal from the formula itself to the presumed will of the legislator, no correction or emendation of the statement of the law, for that statement is adequate. Surely there exists a vast difference between (1) a judgment, based on the presumed will of the legislator, that to deviate from the clear words of the law is licit (which is *epikeia*), and (2) the application to the case at hand of a clause clearly and definitely expressed in the law itself (which is the procedure followed in the case in question here).

Nor would there be any validity to the objection that because the foregoing argumentation pertains primarily to the human formula of the law as devised by the Council of Trent, it is not applicable at the same time to the divine precept itself. For the Council either expressed the divine law on this point or it enacted a purely ecclesiastical law. If the former is true, then it must have interpreted Christ's law authentically and unerringly. In other words, it conceived of this divine precept as including the exception which it itself reduced to words.²²⁵

In the supposition that the alternative is true—namely, that this law of the Council is simply ecclesiastical—then, even if in reference to this precept, the use of *epikeia* should be licit,²²⁶ this fact would have no bearing on the problem as to whether *epikeia* is applicable to divine positive law.

The obvious purpose of the precept in question, whether it be divine or ecclesiastical, is to insure reverence toward the Holy Eucharist. It goes without saying, therefore, that the obligation of the

²²⁵ Furthermore, attention should be called to the fact that there exists no divinely given rigid, inflexible formula embodying this law. Consequently, the argument may be adduced, as above, that precisely on this basis again, *epikeia*—which is the correction of a law that is deficient by reason of the universality of its expression—is inapplicable here.

²²⁶ In point of fact, because the only exception possible is explicitly expressed in the law, *epikeia* strictly so-called would not be involved.

law is serious. Nevertheless, there is no inherent evil in celebrating Mass or receiving Holy Communion when the state of grace has been procured by a means other than by Sacramental confession. In other words, the reverence due to the Sacrament can *per se* be protected even if there be no Sacramental confession.²²⁷ Moreover, it is quite possible that between this positive precept and some higher law or right there may arise an apparent conflict—as in the case, for example, when Holy Communion could not be omitted without grave scandal or infamy, or when Holy Viaticum for a dying person could be obtained only from the Mass of a priest who cannot now confess his sins sacramentally, or when a priest at Mass realizes suddenly that he is in mortal sin.²²⁸ In such a situation, the law requiring confession will lose its obligation. For no positive law is imposed with the obligation of observing it when it is in conflict with a higher law. And, as has been frequently stated throughout this dissertation, there is no identity between cessation of obligation on the one hand, and, on the other, *epikeia* strictly understood.

As this discussion is brought to a close, attention is called to the existence of the obligation that a priest in such a situation (that is, if he has celebrated Mass after making an act of perfect contrition) must afterwards confess his sins “as soon as possible.”²²⁹ This is usually interpreted to signify a period of not more than three days.²³⁰ Moreover, moralists point out that this precept must be fulfilled immediately without any delay at all, if a confessor is available, and it is foreseen that no other will be accessible within the three day period.²³¹ This law is purely ecclesiastical, and hence to discuss it here in relation to *epikeia* would be inappropriate.

²²⁷ “. . . sine ipsa [i.e., confessione] sola contritione perfecta, reverentiae Sacramenti consuli possit.”—Merkelbach, *Summa Theol. Mor.*, III, n. 271.

²²⁸ Cf. Merkelbach, *ibid.*, n. 272.

²²⁹ This obligation is imposed by the Council of Trent (Sess. XIII, Cap. 7, *DB* 880) and by the Code of Canon Law (Can. 807). Pope Alexander VII condemned the propositions that it is a mere counsel (*DB* 1138), and that it is left to the priest to confess in his own good time (*DB* 1139).

²³⁰ Cf. St. Alphonsus, *Theol. Mor.*, Lib. VI, n. 226; Merkelbach, *Summa Theol. Mor.*, III, n. 273; Noldin-Schmitt, *op. cit.*, III, n. 143.

²³¹ Cf. de Lugo, *De Eucharistia (Disp. Scholast. et Moral., III)*, Disp. XIV, nn. 162, 163.

Reference has been made above ²³² to the discussion by Suarez as to whether it is ever licit knowingly and deliberately to consecrate only one species. Although Suarez views the problem primarily in relation not to *epikeia*, but rather to the papal power of dispensing, it may well be asked whether under any circumstances *epikeia* strictly so-called may lawfully be used in such a connection. The purpose of the present discussion is to inquire into such a possibility.

Although a few of the older theologians deemed it probable that the consecration of only one species suffices for the essence of the Sacrifice of the Mass,²³³ the morally universal view of theologians today is that the two-fold consecration is so necessary that without it the Holy Sacrifice cannot exist.²³⁴ Whether or not the real Body and Blood of Christ are present if only one species be consecrated, is, however, an entirely different question. It is certain, of course, that the consecration of one species is valid if there is an intention to consecrate the other. This is verified daily at Mass after the consecration of the Sacred Host. But the question arises as to whether the consecration of one species is valid, if the priest positively intends to consecrate it alone. Cappello ²³⁵ states that it is the common opinion that the consecration is valid, although most gravely illicit. For the requisite matter, form and minister are present, and the priest has, by supposition, the intention of consecrating the matter at hand. St. Alphonsus,²³⁶ however, holds that the validity is only probable. De la Taille mentions the following case:

Would a priest validly consecrate if, sacrilegiously as he walks through a bakery, he speaks these words over the bread that is

²³² Cf. pp. 309, 310 *supra*.

²³³ Cappello (*De Sacramento*, I, n. 560) mentions Tournely, Adrianus, Bonacina and Henriquez as subscribing to this view.

²³⁴ Cf. Vermeersch, *Theol. Mor.*, III, n. 255; Noldin-Schmitt, *op. cit.*, III, n. 166; Cappello, *ibid.*, n. 561; Merkelbach, *Summa Theol. Mor.*, III, n. 315; Lehmkühl, II, n. 229. The Code does not enter the controversy as to the validity of the Sacrifice when only one species is consecrated. It simply forbids that one species be consecrated without the other, even in case of extreme necessity, and forbids likewise that they be consecrated outside Mass. Cf. Can. 817.

²³⁵ *Ibid.*, n. 265.

²³⁶ *Theol. Mor.*, Lib. VI, n. 196, dub. 3.

displayed: *Hoc est corpus meum*: In addition to the reason for the invalidity just now discussed [the author has argued that for the validity of the substantial form in the Holy Eucharist there must be a preceding historical narration, in the sense that the priest must externally manifest his intention to speak in the person of Christ], there exists another: that, not intending to do anything with wine, he does not intend to sacrifice: since sacrificing consists in a symbolical immolation, which is not done except through the separate consecration of the body and blood. But since he does not intend to sacrifice, he does not consecrate . . .²³⁷

Davis states:

The Church makes no pronouncement on the validity or invalidity of a single Consecration in cases where a priest deliberately intended not to consecrate the twofold matter, bread and wine. . . . But it is held by some divines as highly probable that a deliberate intention of consecrating one species only would have no effect, since such intention is contrary to the intention of doing what the Church does.²³⁸

From the foregoing considerations it would seem to be logical to conclude that it is morally certain that if only one species be consecrated, there is no Sacrifice; it is only probable that the consecration is valid if the priest has the intention of consecrating but one species. Moreover, it is obvious that from the very fact of the institution of the Holy Eucharist, there exists a divine positive precept of offering the Holy Sacrifice as Christ did, namely by the consecration of two species. This precept is based upon the explicit words of Christ: "Do this in remembrance of Me."²³⁹ Now, the problem to be considered is whether or not *epikeia* may ever be used to allow one consecration only. Two cases are envisioned. First, for some

²³⁷ "Consecrctne valide sacerdos, dum per pistrinam transiens, super expositos panes dicit sacrilegus: *Hoc est corpus meum*: praeter causam modo disputatam invaliditatis adest altera: quod NON INTENDENS circa vinum quicquam agere, non intendit sacrificare: siquidem sacrificatio consistit in immolatione symbolica, quae non absolvitur nisi separata consecratione et corporis et sanguinis. Non intendens autem sacrificare, non consecrat . . ."—M. De la Taille, *Mysterium Fidei* (Parisii, 1924), Elucid. XXXV, a. 2 in fine, note.

²³⁸ *Op. cit.*, III, p. 82.

²³⁹ Luke 22, 19; 1 Cor. 11, 24.

grave reason a priest desires to celebrate Mass, but only one species is available. May he consecrate this species? Secondly, a priest has already consecrated the Sacred Host. While he is on the point of consecrating the wine, some extraordinary circumstance intervenes to prevent the second consecration. Must he strive to continue, or may he use *epikeia* strictly so-called, in reference to the divine positive law here under consideration?

With regard to the first point, a negative reply is demanded. In substantiation of this view theologians offer the following considerations. Deliberately to intend to consecrate only one species and thus, according to the morally universal opinion of theologians, to render null the Holy Sacrifice, is to propose a mutilation of the Mass—a thing which is intrinsically evil.²⁴⁰ For here there is involved a matter of the utmost gravity, touching vitally upon the worship due to God and the reverence owed to the sublimest of all the Sacraments.

Moreover, in commanding that this Sacrifice which He instituted be continued in His Church, Christ did not merely impose a precept. He established the rite itself. This rite must be performed, then, as Christ Himself performed it—"Do this in remembrance of Me"²⁴¹—or it must not be performed at all.

Furthermore, this Sacrifice has been instituted by Christ as a representation of the Sacrifice of the Cross—the passion and death of Christ, the shedding of His blood and the complete separation of His blood from His body. Likewise, as St. Thomas beautifully points out,²⁴² the Holy Eucharist was meant to signify a complete banquet of food and drink. Now, when a priest positively intends to consecrate only one species, that intention is equivalent to the determination to exclude the representation of the drama of Calvary, which representation consists in the two-fold consecration. Certainly it would be the very acme of disrespect for a priest, in the name of the Eternal High Priest, deliberately to commence, with the positive intention of not completing, the Sacrifice which Christ Himself instituted as a memorial and representation of His death on the Cross.

²⁴⁰ Cf. Suarez, *In III Part. D. Thomae*, Disp. XLIII, sect. 4, nn. 6, 13.

²⁴¹ Luke 22, 19; 1 Cor. 11, 24.

²⁴² *Sum. Theol.*, III, q. 74, a. 1.

And, of course, likewise the whole signification of a complete spiritual banquet is lost. Indeed, as Suarez points out,²⁴³ this latter signification would at least in some way be better preserved by the consecration of some liquid other than wine, than by only one consecration. And yet, no reason could ever be adduced in favor of the use of any liquid other than that positively determined by Christ, namely, wine.

Nor can it be argued that because there is here involved a positive law which is affirmative, it binds *semper* but not *pro semper*. For it must be carefully kept in mind that the point of this discussion has reference to the very essence of the Holy Sacrifice and not merely to its use. It is true that if no wine is available for Mass then the obligation to offer Mass—whether it arises by reason of the pastoral office, or of a stipend, or of a benefice or of obedience—ceases, because to fulfill it is impossible. But it is vastly and essentially different, fallacious as well, to state that the obligation to intend to offer Mass *as Christ instituted it* ceases. Surely it is better to have no attempt at a sacrifice at all, than to have a sacrifice which is null, which is a deliberately intended mutilation, and which does not exist according to the manner of Christ's institution. Add to that the fact that, in any event, it is very highly improbable that a priest consecrating only one species satisfies whatever obligation induced him to offer Mass.²⁴⁴

But may not the principle be here applied that resort to a probable opinion regarding the validity of a Sacrament is permissible in case of extreme necessity or great spiritual need—in view of the fact that there is at least some probability to the opinion that the Sacrament is valid in the case in question, even though there is no Sacrifice? In reply it must be pointed out that it is not pertinent to invoke this principle here—for three reasons.

²⁴³ *In III Part. D. Thomae*, Disp. XLIII, sect. 4, n. 15.

²⁴⁴ "Juxta communissimam sententiam, quam unice veram, speculative, habemus . . . sacerdos suae obligationi non satisfacit [i.e., in tali casu]; proinde aliam Missam celebrare, aut stipendium offerenti restituere, aut, si de pluribus Missis agatur, a Sede Apostolica condonationem obtinere debet."—Cappello, *De Sacrament.*, I, n. 561.

First of all, in reference to no other Sacrament would the use of a probable opinion result in the danger of idolatry. It would seem that no reason howsoever grave would justify the performing of an act from which would accrue such a peril.²⁴⁵ Even the case which some theologians admit²⁴⁶—use of doubtful wine in the absence of certainly valid wine to complete the Holy Sacrifice, after the Sacred Host has been validly consecrated—offers no parallel. For it is presupposed in such a case that the priest had the intention to consecrate both species, and became aware of the situation only after the first consecration. Hence, there can be no doubt that the real Body and Blood of Christ actually are present on the altar.²⁴⁷

Secondly, whether or not it be admitted that the Sacrament is invalid due to the intention of the minister which seems to exclude the Sacrifice, it cannot be denied that there is no Sacrifice, that there is a most grave mutilation of the most sacred thing imaginable. All the points adduced above,²⁴⁸ touching upon the matter of irreverence may be here invoked in this connection. To what extent theologians will go in order that the Sacrifice be completed, even when there has been a certainly valid consecration of one species and a certainly adequate intention to consecrate both, is shown from the example mentioned in the paragraph immediately preceding. How gravely illicit, then, would it be under any circumstances to act with an intention which is not only certainly invalid as far as the Sacrifice is concerned, but even probably so as far as the Sacrament is concerned.

Thirdly, no necessity can be so grave as to warrant the intention to consecrate only one species. The example usually adduced is that involving the obligation to receive Holy Viaticum. But surely the obligation to receive Holy Communion at the time of death, even if the precept be assumed to be divine (which is not certain), is not necessary by necessity of means, nor does it bind the dying person if it is impossible to observe it. It becomes clear upon reflection

²⁴⁵ Cf. Merkelbach, *Summa Theol. Mor.*, III, n. 215.

²⁴⁶ Cf. Merkelbach, *loc. cit.*; Lehmkühl, *op. cit.*, II, n. 163.

²⁴⁷ The chalice would not, of course, be raised for adoration.

²⁴⁸ Cf. pp. 363, 364 *supra*.

that in the case at hand the obligation, insofar as it concerns the dying person, ceases by reason of the impossibility of fulfilling it. But what of the obligation of the priest who may be bound in justice or charity to administer Holy Viaticum to the individual in the case? It must be said that for him too the obligation ceases, for the precept is in apparent conflict with the higher natural law which forbids grave irreverence to sacred things.²⁴⁹

The second problem posed above²⁵⁰ may be concisely embodied in the following question: May the celebrant at Mass ever lawfully use *epikeia* strictly understood, after the certainly valid consecration of one species, and thus refrain from consecrating the wine which, in point of fact, he had intended to consecrate?

Theologians²⁵¹ generally teach that the celebrant at Mass who had intended to consecrate both species and has consecrated the Sacred Host, may lawfully refrain from the second consecration in cases such as the following:

(1) The priest, due to invincible ignorance or inculpable inadvertence, has placed water in the chalice rather than wine. This error is not realized until such time has passed as renders impossible the completion of the Sacrifice;

(2) After the priest has consecrated one species, he realizes that the chalice contains not wine, but water or some other liquid. However, no wine is available;

(3) The celebrant, immediately after the consecration of the Sacred Host, loses the power of speech or his sanity or his life; no other priest is available to complete the Sacrifice;

(4) Although wine is available at the time when the priest,

²⁴⁹ There is no necessity of entering into any discussion concerning the alleged cases of the granting of dispensations by several Popes to consecrate only one species. In the words of Cappello: "Exempla vero dispensationis a RR. PP. concessae . . . inter fabellas sunt recensenda, ut historici omnes fatentur."—*De Sacrament.*, I, n. 264.

²⁵⁰ Cf. p. 363 *supra*.

²⁵¹ Cf., e.g., Suarez, *In III Part. D. Thomae*, Disp. XLIII, sect. 4, n. 6; Merkelbach, *Summa Theol. Mor.*, III, n. 214; Cappello, *De Sacrament.*, I, n. 266.

after the consecration of the Sacred Host, detects that the chalice contains water, nevertheless it cannot be used without grave scandal or irreverence or danger of death;

(5) After the consecration of the first species a sudden danger of death arises, as, for example, peril from fire or from an attack of the enemy or from the imminent collapse of the Church. (If, however, by refraining from the second consecration, the priest would cause scandal or contempt of religion, the priest is bound to complete the Sacrifice—not, however, by reason of the precept of integrity, but rather because of the obligation to profess one's faith and to avoid giving scandal.)

Relative to the first three cases immediately preceding, there can, of course, be no question; for obviously it is absolutely impossible to complete the Sacrifice due to the passage of time or the lack of wine or the loss of life or sanity or speech.

In reference to the other two examples, however, several observations are in order. It will, at the outset, become clear upon reflection, that these cases differ essentially and totally from that previously discussed, wherein the priest from the very beginning lacked the intention to consecrate both species. In that instance there existed an intention to mutilate the Sacrifice, an intention which, at least objectively considered, is most gravely sinful. In the cases now under consideration, however, no such intention exists. Moreover, it will, after careful analysis, become clear that it is not precisely accurate merely to say that the celebrant consecrates only one species. Rather, he permits one species to remain consecrated and he omits the consecration of the other. As Suarez expresses it, "the priest does not consecrate in one species but he permits that one species alone remain consecrated."²⁵² Now, from this fact it follows that the grave irreverence which in the prior case arises from the *active intention* not to consecrate, is entirely absent in the other two cases where the priest *passively permits* the Sacred Host alone to remain consecrated. Nor should one be forgetful of the serious irreverence caused in the first instance by the fact that the

²⁵² ". . . sacerdos non consecrat in una specie, sed permittit unam speciem solam manere consecratam . . ."—*Loc. cit.*

consecration of the host is only probably valid, an irreverence which cannot at all exist in the present instances, for of the validity of the first consecration there is absolutely no doubt.

It is unquestionably true that one is bound to offer the Holy Sacrifice as Christ intended, or not to offer it at all. But in reference to the problem immediately at hand, a statement of that obligation is not really pertinent. The first species having been consecrated, it is of little value to state that it would be better had the priest not consecrated at all. The precise point is this: Now that the Sacred Host has actually and validly been consecrated, which obligation binds more seriously? One the one hand is the divine precept to complete the Sacrifice, a duty which by reason of the tremendous importance of the matter involved and the strictly exacting command of Christ is of the utmost gravity. On the other are the serious and solemn precepts to refrain from giving scandal, to refrain from causing irreverence to the Blessed Sacrament, to preserve one's life. Obviously there is an apparent conflict of laws. In such a conflict the superior must prevail. And, according to the view of most theologians who explicitly treat the problem,²⁵³ the lesser precept in the cases at hand is that which requires the completion of the Sacrifice. Consequently it becomes licit for the priest to tolerate or to permit that the Consecrated Species remain, and that no further consecration be performed.

The foregoing discussion of this problem presupposes that in the case there is a conflict of laws. Now, in view of the seriousness of the matter at issue, the severity of the divine commands in this regard, and the gravity with which theologians discuss the point, it would be rash, at the very least, to maintain that any reason short of the existence of a conflict of laws would justify the priest in permitting one species alone to remain consecrated. In other words, in view of the fact that *epikeia* properly understood is not involved in cases where the obligation of a law has already ceased, it is evident that in the cases at hand it would be incorrect to say that the celebrant may use *epikeia* strictly so-called.

²⁵³ Thus, e.g., Suarez, Merkelbach, Cappello, *loc. cit.*

SCHOLION. *Epikēia* and the Divine Positive Law of the Old Testament

In bringing this chapter to a close we may with appropriateness make a few brief observations with regard to the divine positive law of the Old Testament. It would appear to be adequate for our purpose that specific reference be made only to the two incidents²⁵⁴ most frequently adduced by those moralists who endeavor, on the strength of them, to establish the truth of their opinion that *epikēia* is applicable to divine positive law in general.

If one studies attentively the circumstances surrounding the incident recorded in the First Book of Machabees and cited by several of the above mentioned theologians,²⁵⁵ it will become manifest that there is there exemplified an instance of an apparent conflict involving two laws. On one side stood the basic natural law and right of self-preservation, a right of which the Machabees were unjustly to be deprived by their enemies. On the other stood the divine positive law commanding that the Sabbath be observed. On a previous occasion the Machabees had judged that this positive law was of such rigor and severity that even in the face of an apparent conflict between it and the more basic law and right of self-preservation, it should prevail.²⁵⁶ But when a similar danger of attack from the enemy again arose, wiser counsel won mastery. It was realized that on the previous occasion the decision not to resist the enemy merely because of the fact that the attack had been launched on the Sabbath, had robbed the thousand who were slain²⁵⁷ both of their just rights and of their lives. "And every man said to his neighbor: If we shall all do as our brethren have done, and not fight against the heathens for our lives, and our justification: they will now quickly root us out of the earth."²⁵⁸ And so, with greater wisdom "they determined in that day, saying: Whosoever shall come

²⁵⁴ 1 Mach. 2, 41; 1 Kings 21, 6.

²⁵⁵ Cf. note 37 *supra*.

²⁵⁶ 1 Mach. 2, 34.

²⁵⁷ 1 Mach. 2, 38.

²⁵⁸ 1 Mach. 2, 40.

up against us to fight on the Sabbath day, we will fight against him: and we will not all die, as our brethren that were slain in the secret places.”²⁵⁹

If *epikeia* be understood in its strict and proper sense, obviously the Machabees did not here resort to its use—precisely for the reason indicated above, namely, that due to the apparent conflict of a merely positive law with a higher natural law and right, the obligation to observe the divine positive law of keeping the Sabbath in the circumstances related had already ceased.

The second example from the Old Testament, usually adduced by those who subscribe to the view that *epikeia* may lawfully be used in regard to divine positive law, refers to the incident related in the First Book of Kings.²⁶⁰ David, fleeing from Saul, came to Nob, and there begged the priest Achimelech “if thou have anything at hand, though it were but five loaves, give me, or whatsoever thou canst find.” But Achimelech, because he had “no common bread at hand, but only holy bread” finally “gave him hallowed bread: for there was no bread there, but only the loaves of proposition, which had been taken away from before the face of the Lord, that hot loaves might be set up.” Moreover, that David’s action in eating the loaves of proposition was lawful and justifiable may easily be deduced from the words of approval spoken by Our Lord in referring to this incident.²⁶¹

In the case under consideration all must admit, of course, that for David to have observed the precept which forbade the laity to partake of the loaves of proposition would have proved discommodious. Now, the problem arises as to precisely how grave was the difficulty involved in following the divine positive law in question. If the inconvenience was of such magnitude as to result in an apparent conflict between the divine positive law and a basic natural law and right, or if it was so excessive as to result in the cessation of the positive law, then for the reason already many times referred to, *epikeia* strictly so-called was not involved. But if, on the other hand, the inconvenience was not of such import, if it

²⁵⁹ 1 Mach. 2, 41.

²⁶⁰ 1 Kings 21, 1-6.

²⁶¹ Mt. 12, 3-4.

was merely such as would in no way justify the belief that the obligation of the law had already ceased, then it would appear that, in point of fact, David actually did resort to the use of *epikeia*. The crux of the problem, then, is this: Was the inconvenience involved so extreme as to bring about the cessation of the law in such wise as to preclude resort to *epikeia* strictly so-called?

It would be inappropriate to endeavor to enter into any detailed exegesis of the scriptural pericopæ in question. But the belief would seem to be not only justifiable but even imperative, that such grave necessity was involved, that *epikeia* strictly and properly understood was not invoked. In substantiation of this conclusion we may offer the explanation of several authorities who deal explicitly with the passage in question.

Cornelius a Lapide writes as follows:

David, a man according to the heart of God, because of necessity caused by hunger, took and ate the holy loaves of proposition which otherwise it was not licit for the laity to eat, but only for priests; because he prudently judged that the positive law forbidding the eating of the loaves by the laity had to yield to the natural law and right which dictates that in grave necessity caused by hunger, life must be preserved by eating any bread and any food even though it be consecrated to God.²⁶²

And in the same passage, speaking of the incident in the New Testament where the Pharisees reproached the disciples of Our Lord because they had plucked the ears of corn on the Sabbath in order to relieve their hunger, a Lapide conceives of Our Lord as saying:

. . . for the holiness of the Sabbath which forbids servile work . . . is a matter of divine positive law, which must yield to the law

²⁶² "David vir secundum cor Dei in necessitate famis usurpavit et comedit panes propositionis sanctos, quos alias laicis edere non licebat, sed solis sacerdotibus, quia prudenter judicavit legem positivam de non comedendis his panibus a laicis, cedere debere legi juriq̄e naturae quod dictat in gravi necessitate famis conservandam esse vitam comedendo quoslibet panes et cibos etiam Deo consecratos."—Cornelius a Lapide, *Commentarii in Sacram Scripturam* (Mediolani, 1870), XV, Comm. in Mt. XII.

of nature that dictates that in hunger, provision must be made for one's life by taking any food, even sacred food. . . . necessity excuses . . . David.²⁶³

Fillion's explanation is identical with that of a Lapid: "In human life there is sometimes a conflict of several distinct obligations, and then the positive law yields to the natural law. That took place legitimately for David . . ." ²⁶⁴

St. Thomas too, although he discerns a symbolical meaning ²⁶⁵ in the incident concerning David, speaks nevertheless of the cessation of a law by reason of necessity:

. . . it is to be noted, as Chrysostom says, that there are some precepts which are enjoined *propter se*, and these cannot be infringed upon regardless of the necessity; but there are others which are enjoined not *propter se* but *propter figuram*, and these in the proper place and time can be set aside just as fasting can now be set aside in a case of necessity. Now, that bread [i.e., the loaves of proposition] was a figure of this other Bread, the Bread of the altar which is partaken of not only by the priest, but also by other people; and so David there prefigures the people.²⁶⁶

²⁶³ ". . . sanctitas enim Sabbati prohibens opus servile . . . est juris divini positivi quod cedere debet juri naturae dictanti in fami vitae esse consulendum quolibet cibo etiam sacro. . . . Davidem necessitas . . . excusat."—*Loc. cit.*

²⁶⁴ ". . . il y a parfois collision, dans la vie humaine, entre plusieurs obligations distinctes, et alors le droit positif le cede au droit naturel. Celà avait eu lieu legitimentement pour David . . ."—L. Fillion, *La Sainte Bible avec Commentaires* (Paris, 1889), XV, p. 238.

²⁶⁵ St. Augustine likewise interprets the incident symbolically. He teaches that David, the king, in eating the holy bread set aside for priests, was a figure of a priest. Cf. *Ennaratio in Psalmum LI* (*MPL*, XXXVI, 601).

²⁶⁶ ". . . notandum est, quod dicit Chrysostomus, quod quaedam sunt praecepta quae praecipuntur propter se; et haec nulla necessitate frangi possunt; quaedam vero non propter se sed propter figuram; ideo talia loco et tempore possunt, sicut jejunium potest, modo dimitti in necessitate. Ille autem panis alterius panis erat figura, scilicet panis altaris; qui non solum a sacerdote sed etiam ab alio populo percipitur; ideo David figurat ibi populum."—*Commentum in Matthaeum (Opera Omnia, XIX)*, XII. Cf. also *Sum. Theol.*, III, q. 40, a. 4, ad 3.

CHAPTER VIII

EPIKEIA AND HUMAN INVALIDATING LAWS

ARTICLE 1. INTRODUCTORY NOTIONS

AN invalidating law is one that renders void certain acts which would otherwise be valid according to the natural law. It is important at the outset of this discussion to emphasize that the invalidating laws which are here to be considered presuppose that those acts which they void would be valid by natural law, had not the human positive law (or even divine positive law, in Roelker's opinion¹) intervened. It is true that sometimes a positive law expresses a provision of the natural law which not only prohibits but also invalidates certain acts.² But in the strict sense of the term, such laws are not invalidating laws as understood by most moralists and canonists.³

Canon 1083, § 2, 2°, for example, legislates that a marriage between a free person and a slave is invalid, provided that the former was of the belief that he was entering into the contract with an individual who was free. By reason of Canon 1067, § 1 a marriage entered into by a boy who has not completed his sixteenth year or by a girl under the age of fourteen completed is null and void. In these two latter cases the obstacles to validity have been established by positive human law; by natural law the aforesaid impediments do not exist. In the strict sense of the term, then, only such laws as the latter are invalidating laws; and only such concern us in this chapter.

¹ E. Roelker, "The Concept of Invalidating Laws," "The Power to Enact Invalidating Laws," "The Interpretation of Invalidating Laws," "The Effect and Obligation of Invalidating Laws," *The Jurist*, III (1943), 32-63, 231-257, 364-403, 550-566. Cf. p. 33. (Hereinafter referred to under the title "Invalidating Laws.")

² Cf., e.g., Cann. 1081, § 1; 1068, § 1.

³ Cf., e.g., Noldin-Schmitt, *op. cit.*, I, n. 166; Van Hove, *De Legibus Ecc.*, n. 157; Sipos, *op. cit.*, p. 22. Michiels (*op. cit.*, I, p. 267), however, would include in his concept any law referring to a defect in the essentials of an act.

Moreover, there are some positive laws which demand the fulfillment of certain conditions for the granting or exercise of particular faculties which they themselves confer. Should an individual fail to fulfill these conditions, or should he act beyond the scope of the faculties granted, his act would be invalid. For example, certain faculties are granted to a confessor by virtue of Canons 1044 and 1045. The Canons, however, mention certain specific exceptions to which these powers do not extend. If a confessor should attempt to use the faculties thus conferred in cases involving these exceptions, his act would be devoid of effect. Thus, for example, a priest acting on the basis of faculties which he possesses by virtue of Canon 1044 cannot dispense from the impediment of affinity in the direct line, when the marriage has been consummated. Nevertheless, it should be pointed out that the law under consideration in such a case is not an invalidating law in the strict sense of the term. For it does not place an obstacle to a power which an individual already possesses from natural law.⁴ The action of the confessor in the above example, should he attempt to dispense, would be invalid "not because a positive law disqualifies him . . . but because the positive law does not remove his natural disability."⁵

The purpose of an invalidating law is to protect and to promote the common good by warding off from society fraud, deception and other possible evils.

Like all law, invalidating law is established for the common good, but there is a special connection between this law and the common good, which is not found in other laws. There are certain public juridical institutions such as elections, vows, benefices, and contracts which can contribute greatly to the

⁴ "Idem [i.e., non sunt irritantes aut inhabilitantes] est dicendum de legibus quae sunt *iuris constitutivae*, seu quae determinant condiciones ad validitatem actus, cuius facultas non est ex iure divino naturali aut positivo, sed ex sola lege positiva humana, adeo ut actus ille non sit, nisi quatenus ius humanum facultatem concedat. . . . Sensu improprio tantum tales leges possunt irritantes vocari."—Van Hove, *loc. cit.* Cf. Rodrigo, *op. cit.*, n. 359.

⁵ H. Werts, "The Cessation of Invalidation in Grave Difficulty," *ThS*, IV (1943), 226.

good or harm of the community and which are essentially related to public order. The common good demands that there be uniformity and certainty about these institutions. Hence they must be regulated by law. Laws which merely prescribe or prohibit are not sufficient to safeguard these institutions against such dangers as fraud, coercion, secrecy or lack of proper decency and respect for their public and religious nature. The law, therefore, establishes certain conditions for their validity, certain formalities by which their validity is publicly demonstrable.⁶

. . . considering the necessity for maintaining public order or considering the propriety of preserving public decency, the need for invalidating laws is equally evident. Certain aspects of public order must be insisted upon for the common good, and certain natural or legal relationships must be respected. It is also to provide for these items that invalidating laws are necessary. . . . The need of invalidating laws is constant. Such laws, it is said again, are based on the danger of fraud, on public order and public decency. It is true that individual cases can and do occur where items can be sufficiently provided for without invalidating laws. But these are points of fact and in no way at all destroy the general presumption that fraud may exist, that public order must be maintained, or that public decency must be respected.⁷

The power of a human legislator⁸ to enact invalidating laws cannot be questioned. It follows, on the one hand, from his right and duty to protect the common welfare, and, on the other, from the value and necessity of invalidating laws. Both reasons are implied in the celebrated *Tametsi* of the Council of Trent.

Although it is not to be doubted that clandestine marriages made with the free consent of the contracting parties are valid and true marriages so long as the Church has not declared them invalid . . . nevertheless the holy Church of God has for very just reasons at all times detested and forbidden them. But while

⁶ *Ibid.*, p. 227.

⁷ Roelker, "Invalidating Laws," *The Jurist*, III, 236.

⁸ In regard to the power of the Church in this matter, cf. Conc. Trid., Sess. XXIV, can. 4 (*DB* 974). It is unnecessary here to inquire into the extent of the power as possessed by the State, or even by individual rulers in the Church—Bishops, for example.

the holy council recognizes that by reason of man's disobedience those prohibitions are no longer of any avail and considers the grave sins which arise from clandestine marriages, especially the sins of those who continue in the state of damnation when, having left the first wife with whom they contracted secretly, they publicly marry another and live with her in continual adultery, and since the Church which does not judge what is hidden cannot correct this evil unless more efficacious remedy is applied, therefore . . . it commands . . .⁹

In connection with this point, it should be emphasized that the power of a human legislator to enact invalidating laws strictly so-called is not in any way *per se* opposed to the inalienable natural rights of any individual. For public authority has the power to restrict private rights and private liberties when the common good demands it. In the exercise of this power it must use apt and efficacious means—even to the extent of rendering void an act which it prohibits.¹⁰ Nor does the existence of this power imply that the positive law sometimes prevails over the natural law. For the natural law itself demands, in view of the above described need of invalidating laws, that the social authority possess this power.¹¹ Moreover, in countless respects the natural law is undetermined. For the validity of certain acts it requires only the minimum, and leaves it to those in authority to legislate more in detail in order that the

⁹ Conc. Trid., Sess. XXIV, Cap. 1 (Mansi, *op. cit.*, XXXIII, 152). For a discussion of the reasons adduced by the Fathers of the Council, cf. S. Palavicinus, *Historia Concilii Tridentini* (Antverpiae, 1670), Lib. 22, Cap. 4.

¹⁰ Cf. Lehmkuhl, *op. cit.*, I, n. 314. Rodrigo (*op. cit.*, n. 363) argues that it is no more unseemly for a positive law to render invalid what by natural law would be valid, than it is for the positive law to render illicit what by the natural law would be licit.

¹¹ "Etsi vero dicatur, quod actus, lege positiva irritatus, foret vi naturalis legis validus, si abfuisset irritatio: id non perinde est ac dicere, quod lex irritans faciat esse nullum eum actum, quem lex naturae vult esse validum; ita ut lex positiva nitatur contra legem naturae, quod nefas. Sed res est hoc pacto concipienda. Cum ipsa lex naturae exigat auctoritatem socialem et penes eam exigat potestatem irritandi aliquos actus: ipsa, ante legem socialem, non vult absolute actus naturaliter positos esse validos, sed conditionate, hoc est nisi obstet auctoritas socialis."—Ballerini-Palmieri, *op. cit.*, I, n. 314.

common good may be fostered and protected.¹² As Suarez concisely expresses the point: "The reason why human law can do this [i. e., effect invalidity] is because it is not repugnant to the natural law, and besides, it is expedient for the common good of the state that such a power reside in the state or in its ruler."¹³

It must not be imagined, however, that the power of a human legislator to enact an invalidating law is conditioned upon the belief that in every case the evil which the law seeks to avert would actually ensue, if the invalidating law were not in existence. For an invalidating law, unless it be penal as well,¹⁴ is not based upon a presumption of fact. If it were, it would not bind in the absence of that fact. *Praesumptio cedit veritati*. Rather, it is founded upon a presumption of common danger, and hence is binding even if in a particular case the danger is, and would be, non-existent. "Laws enacted to forestall a general danger, are obligatory even if in a particular case the peril is not present."¹⁵ It is precisely in order to ward off such dangers in general that the invalidating law is enacted.

Up to this point reference has constantly been made to "invalidating laws." In a strict sense, a *lex irritans* directly and immediately refers to an *act*, in that it withdraws from it that validity

¹² Cf. Rodrigo, *op. cit.*, n. 363.

¹³ "Ratio autem cur hoc possit facere lex humana est quia non repugnat legi naturali, et alioqui expedit ad commune bonum reipublicae, ut talis potestas sit in republica, seu ejus principe."—*De Legibus*, Lib. V, Cap. XIX, n. 1.

¹⁴ "If, in invalidating laws . . . attention be centered on laws which penalize crime, it is obvious that such invalidating laws depend on a presumption of fact."—Roelker, "Invalidating Laws," *The Jurist*, III, 401. Consequently, if invincible ignorance excuses from culpability, it will likewise excuse from the invalidation which is its effect. Cf. Lehmkuhl, *op. cit.*, I, n. 316; Merkelbach, *Summa Theol. Mor.*, I, n. 353.

¹⁵ "Leges latae ad praevendendum periculum generale, urgent, etiamsi in casu peculiari periculum non adsit."—Can. 21. Roelker (*loc. cit.*) states: "Such laws may be introduced to protect the common welfare or to safeguard a state of life. They rest on the presumption that dangers exist which could harm the common welfare or reflect on the dignity of a state of life. These dangers are independent of actual deeds in particular instances. These dangers in the formation of an invalidating law are a presumption of law. Such invalidating laws are operative even if the danger described above is non-existent."

which, according to the natural law, it would possess had not a positive law intervened. On the other hand, a *lex inhabilitans* has reference immediately and directly to a *person*, rather than to an act; it renders him incapable of positing a particular act although, if the natural law alone were considered, he would possess the capacity so to act.

The effect of both laws—*lex irritans* and *lex inhabilitans*—is identical. The act in question is invalid. To translate precisely these two terms into English is difficult. Davis¹⁶ calls the former “voiding” and the latter “incapacitating.” Jone¹⁷ refers to “invalidating and incapacitating laws.” Trudel¹⁸ speaks of “invalidating and inhabilitating laws.” Augustine¹⁹ employs the term “nullifying” for each class. The translators of Cicognani²⁰ use the terms “invalidating law” and “disqualifying law.” McHugh-Callan²¹ refer to “irritant laws.” In point of fact, even authors writing in Latin do not distinguish clearly between the two terms. Thus, Merkelbach states: “To it [i. e., *lex irritans*] is reduced, as species to genus, *lex inhabilitans* . . .”²² And Rodrigo: “The generic denomination of *lex irritans* can include both.”²³ Because, then, of a lack of uniformity in the translation into English of the two terms under consideration, and because the effect of a *lex irritans* is the same as the effect of a *lex inhabilitans*, this study will employ the term “invalidating law” without differentiating between a *lex irritans* and a *lex inhabilitans*.

¹⁶ *Op. cit.*, I, p. 122.

¹⁷ *Op. cit.*, n. 57.

¹⁸ P. Trudel, *A Dictionary of Canon Law* (St. Louis, 1919), n. 294.

¹⁹ C. Augustine (Bachofen), *A Commentary on the New Code of Canon Law* (Vol. I, ed. 6, 1931; Vol. II, ed. 6, 1936; Vol. III, ed. 5, 1938; Vol. IV, ed. 3, 1925; Vol. V, ed. 5, 1935; Vol. VI, ed. 3, 1931; Vol. VII, ed. 3, 1930; Vol. VIII, ed. 2, 1924; St. Louis: Herder & Co.), I, p. 84.

²⁰ A. Cicognani (J. O'Hara, F. Brennan, trans.), *Canon Law* (Philadelphia: Dolphin Press, 1934), p. 559.

²¹ *Op. cit.*, I, n. 414.

²² “Ad eam reductur, tamquam species ad genus, *lex inhabilitans* . . .”—*Summa Theol. Mor.*, I, n. 352.

²³ “Denominatio generica legis irritantis utramque comprehendere possit.”—*Op. cit.*, n. 359.

It is of special importance to call attention to the fact that an invalidating law is not of its nature penal.²⁴ In point of fact, by far the majority of ecclesiastical invalidating laws are not such—although that an invalidating law may also be penal is not denied. Certainly the law which demands the observance of the requisite form for marriage is not meant to be a punishment. Nor is the law which forbids marriage between certain blood relatives. A penal law presupposes the existence of culpability for some crime.²⁵ In the instances mentioned, and in countless others as well, there has been no crime, no culpability. On the other hand, in some cases the consequent invalidity of an act is its punishment. For example, the holder of a benefice who culpably omits recitation of the Divine Office invalidly takes the fruits.²⁶ Suffice it to say, then, that an invalidating law is not necessarily and *per se* a penal law. "It is not demanded of an invalidating law as such that it be penal, nor is this intrinsic to it."²⁷

An invalidating law is not a simple prohibiting law. For the latter renders the act illicit only, not invalid.²⁸ However, an invalidating law may be both invalidating and prohibiting simultane-

²⁴ The term "penal law" here does not signify that class of laws which the subject is not bound in conscience to obey, although he is bound in conscience to accept the penalty for transgressing them if he is convicted. Some theologians deny that such laws exist. Cf. U. Lopez, "Theoria Legis Merc Poenalis et Hodiernae Leges Civiles," *Periodica*, XXVII (1938), 203-216; XXIX (1940), 23-33. But as used in this dissertation, the term signifies a law which establishes a penalty in punishment of some crime.

²⁵ Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 352.

²⁶ Cf. Can. 1475, § 2.

²⁷ "Lex irritans, ut talis est, non postulat quod sit poenalis, neque hoc est intrinsecum."—Suarez, *De Legibus*, Lib. V, Cap. XIX, n. 9.

²⁸ Cf. Merkelbach, *Summa Theol. Mor.*, I, n. 352. In this connection, Roelker states: ". . . a prohibitory law of itself can only prohibit. No further and necessary effect can be deduced from its fundamental meaning. . . . However, a law cannot well be studied outside of the legal system of which it is a part. . . . If then, a prohibitory law be studied in Roman law, it must be admitted that such a law also invalidated an act even without a specific invalidating clause. . . . For some time the common opinion of the force of a prohibitory law (in Canon Law) was that it did not invalidate an act unless this effect was expressly or equivalently stated in the law. This opinion is now the law of THE CODE OF CANON LAW."—"Invalidating Laws," *The Jurist*, III, 390.

ously. It is with such that we are concerned. For example, the marriage, without a dispensation, of a Catholic with an infidel is not only invalid but is likewise illicit. The Catholic is bound in conscience to refrain from such a marriage. "A law simultaneously prohibiting and invalidating binds one besides *to omit* the act."²⁹ On the other hand, "not all ecclesiastical invalidating laws prohibit contrary action. Canon 1017, § 1, invalidates betrothal which is not contracted with the prescribed formalities but does not forbid the informal betrothal which is almost universal in this country."³⁰

Certain other points regarding invalidating laws should be kept in mind. Moral invalidity is that by which an act is deprived of the natural validity which, by reason of the natural law, it would have in the forum of conscience.³¹ This invalidity may be incurred *ipso facto* or it may demand judicial sentence—which sentence may either declare the invalidity of the act or effect it. In the former case the act would be null from the beginning; in the latter case, it would be null only from the moment of sentence. Civil invalidity is that by which an act is deprived of its validity in the external forum alone by reason of the civil law.³² Thus, for example, a marriage rightly contracted between two Catholics aged seventeen would be valid morally (naturally), but would be invalid civilly in a State which requires for validity that the parties be at least eighteen years of age. Moreover, some laws absolutely invalidate an act, while others merely confer the right to institute action to rescind the act.³³ These last named are invalidating laws only in a wide sense of the term, and need not concern us here.

²⁹ "Lex prohibens simul et irritans obligat insuper ad actum *omittendum*."—Van Hove, *De Legibus Ecc.*, n. 164.

³⁰ Werts, "The Cessation, etc.," *ThS*, IV, 226.

³¹ Cf. Noldin-Schmitt, *op. cit.*, I, n. 166; Rodrigo, *op. cit.*, n. 360; Van Hove, *De Legibus Ecc.*, n. 159; Beste, *op. cit.*, p. 67.

³² Cf. Noldin-Schmitt, *loc. cit.*; Rodrigo, *loc. cit.*; Van Hove, *loc. cit.*; Beste, *loc. cit.*

³³ Cf. Noldin-Schmitt, *ibid.*, n. 167. "Notandum est etiam quod, praeter leges ipso facto *irritantes* actum aut *inhabilitantes* personam, adsunt leges recissionis tantum, nempe facientes actum *non irritum* sed *irritabilem*, aut personam, ut ita dicam, *inhabilitabilem* (per recissionem et restitutionem in integrum)."—F.S., Vic. gen., "De Sollemnitatibus Actuum Iuridicorum," *Periodica*, XVII (1928), 161*.

There is scarcely any point of greater consequence in connection with an invalidating law than the fact that it voids the act in question even though the subject is invincibly ignorant of the law or of its application. Thus Canon 16, § 1 states: "Ignorance of irritant or incapacitating laws does not excuse from them, unless it is expressly stated otherwise."³⁴ Theologians likewise point out that an invalidating law retains its effect even though the act be performed under the influence of grave fear.³⁵ The reason is to be found in the fact that the primary concern of an invalidating law is the common good—not simply an obligation in conscience. And the common good demands that the effect of an invalidating law persevere. The ignorance or fear of individuals cannot remove the danger of serious evils to the common good consequent upon the failure of the law to invalidate the act uniformly in every case. Furthermore, neither ignorance nor fear can supply the defect of what is essential to the validity of an act.³⁶

Whether or not an invalidating law ceases because of very grave difficulty will be discussed later.

ARTICLE 2. OPINIONS³⁷

I. *Affirmative*

Dens. It is not a little noteworthy that very few theologians definitely and explicitly state that *epikeia* may be applied to invalidating laws. Even those who appear to subscribe to this view, express themselves rather hesitantly and oftentimes evasively. The theologian Dens,³⁸ for example, points out that invalidating laws do not yield even in the face of a necessity which is attendant upon a particular case. He does concede, however, that *epikeia* may some-

³⁴ "Nulla ignorantia legum irritantium aut inhabilitantium ab eisdem excusat, nisi aliud expresse dicatur."—Can. 16, § 1. Cf. Noldin-Schmitt, *op. cit.*, I, n. 168; Rodrigo, *op. cit.*, n. 408.

³⁵ Cf. Noldin-Schmitt, *loc. cit.*; Konings, *op. cit.*, I, n. 182. Thus, a marriage contracted with a certain blood relative within the forbidden degree, even if entered into under fear of death, would be invalid without a dispensation.

³⁶ Cf. Konings, *loc. cit.*

³⁷ Cf. p. 263 *supra*.

³⁸ *Op. cit.*, II, n. 57.

times be used, though rarely. It is difficult to determine whether or not Dens is here hinting at a distinction that has become universal in the analysis of this problem—that is, the distinction between common necessity or difficulty (that pertaining to the whole community or to some region) and private necessity or difficulty (that pertaining only to the individuals concerned in the case at hand).

Ballerini. The significance of the opinion of Ballerini in the historical development of the problem will be alluded to later.³⁹ Suffice it here to call attention to his insistence⁴⁰ that the mere fact that a law is invalidating does not exclude the possibility of a subject's resorting to the use of *epikeia* in regard to it. For, precisely the same reason explained by St. Thomas⁴¹ as the underlying basis of *epikeia* as such—namely, that laws, being sometimes deficient by reason of the universality of their expression, cannot include each and every possible case—applies to invalidating laws no less than to other laws. And consequently, whenever the observance of an invalidating law would become “injurious or intolerable,” the use of *epikeia* in regard to it becomes lawful.

L'Ami du Clergé. The author of the article in *L'Ami du Clergé* referred to above, distinguishes between the internal and the external forum. Conceding that *epikeia* in reference to invalidating laws is inadmissible in the external forum, he eloquently defends the lawfulness of its use in the internal forum, provided that due caution be taken to avoid disturbance of public order.⁴²

³⁹ Cf. pp. 398, 399 *infra*.

⁴⁰ Ballerini-Palmieri, *op. cit.*, I, n. 321.

⁴¹ Cf. St. Thomas, *Sum. Theol.*, I-II, q. 96, a. 6; II-II, q. 120, a. 1 and a. 2.

⁴² “Au *for externe* social, là où il y a intérêt majeur à garantir les conditions de validité de certains actes, de certains contrats, que l'épikie soit inadmissible, cela va de soi. . . . Mais, au *for interne*, dans l'ordre privé et secret, là où fait défaut la raison fondamentale qui justifie seule l'universalité absolue des exigences du législateur, pourquoi en serait-il de même? Toute la théorie de l'épikie s'appuie sur un raisonnement inébranlable qui atteint toute loi humaine en général quelle qu'elle soit, parce qu'elle est 'loi,' *ordinatio rationis*, et donc aussi bien les lois irritantes que les autres. . . . Conclusion: l'épikie est admissible même *in lege irritante*, sous réserve toutefois des précautions à prendre au point de vue de l'ordre public. . . .”—“L'Épikie,” *L'Ami du Clergé*, XXV, 167.

Leroux. Leroux⁴³ terms as common the opinion that laws which are *ipso facto* invalidating very rarely admit of the use of *epikeia*. For the common good demands that these laws retain their effect, and thus accomplish their purpose of warding off from society in general the danger of fraud and other evils—even at the expense of some inconvenience in a particular case. He admits, however, that it is generally taught that an invalidating law can cease by the lawful use of *epikeia* on account of common necessity—when, for example, it was impossible for people in general living in some region to have access to a pastor for the celebration of marriage. Continuing, he observes that some authors maintain that even in a case of particular necessity which is most urgent, *epikeia* may be applied to an invalidating law—as, for example, in the classical *casus perplexus*.

Maroto. Maroto⁴⁴ admits that in general *epikeia* is not applicable to invalidating laws. However, he contends that in at least three cases the lawful use of *epikeia* in reference to these laws must be conceded: (1) If the invalidating law has been enacted merely *in favorem privatum*—of minors, for example. In a particular case a greater evil might ensue if the law retained its invalidating force. Moreover, the invalidation with which such a law is concerned is not absolute but conditional. (2) If the observance of the invalidating law would result in a *damnum commune* in some region. In such a case the suspension of the law in that region by reason of the benign interpretation of the mind of the legislator is to be presumed. (3) If the law is invalidating *ferendae sententiae*, or if the law refers to an act which is rescissible. In such cases where the act, although forbidden, is valid, at least before the sentence of the judge, there is a possibility of its becoming licit by reason of the use of *epikeia*. As to its validity, the sentence of the judge must be respected.

Wouters. It is the opinion of Wouters⁴⁵ that any human law will admit of *epikeia* in its regard. Extreme rigor on the part of the legislator is not to be presumed. The law must not be deemed to

⁴³ "De Epikcia," *REL*, VII, 260.

⁴⁴ *Op. cit.*, I, n. 243.

⁴⁵ *Op. cit.*, I, n. 143.

extend to each and every case which, if the matter be considered strictly, the lawmaker could justly include in his law. To these general principles invalidating laws form no exception. However, because of the exigencies of the common good *epikeia* may be admitted in regard to a law of this type only in a case which is altogether extraordinary.

Hilling. Hilling⁴⁶ permits *epikeia* to be used in regard to invalidating laws. He restricts the use of it, however, to the lawgiver and the judge. Actually Hilling has reference not to *epikeia* properly understood, but rather to the interpretation of laws according to canonical equity. It is for this reason that he sees a rich field for the use of *epikeia* in Canon 2223.

Van Hove. Van Hove⁴⁷ takes issue with the opinion of Suarez that *epikeia* is inapplicable to invalidating laws. Nowhere, he observes, does St. Thomas in his treatment of *epikeia* except invalidating laws from the general principles which he lays down. Turning to a more positive discussion, Van Hove considers two possibilities: cases where to insist upon the binding force of the law would be beyond the power of the legislator, and cases where to urge obligation would not be in conformity with his will. With respect to the first classification, he declares that the invalidating effect can cease whenever a law in a particular case would be beyond the power of the legislator. "And so, according to the common teaching, an invalidating law ceases in the common necessity of any province or region."⁴⁸ When he undertakes a consideration of the benign interpretation of the will of the legislator, however, Van Hove admits that the matter presents much greater difficulty. Yet, even here he permits the use of *epikeia* in some instances "for most serious reasons, and according to the doctrine of grave writers."⁴⁹ As an example, he states that some authors assert that the impediment of disparity of cult would cease for a Catholic who lives in

⁴⁶ *Op. cit.*, p. 88.

⁴⁷ *De Legibus Ecc.*, n. 294.

⁴⁸ "Ideo iuxta doctrinam communem, lex irritans cessat in communi necessitate alicuius provinciae vel regionis."—*Loc. cit.*

⁴⁹ ". . . ob gravissimas rationes et iuxta doctrinam gravium scriptorum."—*Loc. cit.*

the midst of infidels, and who cannot marry a Christian nor obtain a dispensation. Other authors, he remarks, defend the lawfulness of *epikeia* in the interpretation of the law regarding *absolutio complicis*, if only the priest involved is available for confession, and there is no hope that any other priest will be accessible for absolution. He makes note of the existence of a controversy as to whether in the *casus perplexus*—outside of the instances envisioned in Canon 1045—the canonical law concerning diriment impediments from which the Church is wont to dispense, ever ceases insofar as it is invalidating. But in any event all authors, he concludes, acknowledge that after *epikeia* has been used in reference to an invalidating law, a dispensation or sanation should be obtained in order to provide for the validity of the act.⁵⁰

Roelker. Analyzing Van Hove's opinion, Roelker⁵¹ concludes that that author's position practically amounts to a denial of the lawfulness of *epikeia* in regard to invalidating laws—that is, if *epikeia* be understood properly as referring to the will and not to the power of the legislator. Roelker's own view is strict, but does not deny entirely the possibility of using *epikeia* licitly in reference to invalidating laws. But he insists that the legislator's intention "should not lightly be interpreted as releasing from the obligation of an invalidating law."⁵²

Rodrigo. Rodrigo⁵³ commences his treatment of the point with the statement that more commonly *epikeia* is excluded from the realm of ecclesiastical invalidating laws. He does not deny the possibility of its use, however—for the bases upon which *epikeia* is founded can be verified in invalidating laws as well as in other classes of precepts, namely, "the defectibility of the legal formula and of the legislator himself."⁵⁴ *Epikēia*, then, is intrinsically possible. But by reason of the specific nature of invalidating laws its actual

⁵⁰ "Attamen omnes agnoscunt, post adhibitam epikeiam in lege irritante, si fieri possit, per dispensationem vel sanationem providendum esse validitati actus."—*Loc. cit.*

⁵¹ "Invalidating Laws," *The Jurist*, III, 402-403.

⁵² *Ibid.*, p. 403.

⁵³ *Op. cit.*, n. 399.

⁵⁴ ". . . defectibilitas tum formulæ legis tum ipsius legislatoris."—*Loc. cit.*

use is difficult—both because of the exceptional necessity of invalidating laws, and because the legislator is reasonably more hesitant to allow exceptions in regard to these laws than to others. As for cases of private necessity, *epikeia* can be applied to invalidating laws “most rarely” when the matter concerns the power of the legislator to urge obligation. But when the will, and not the power, of the Superior is involved, only a most grave cause—for example, serious peril to salvation—will ever allow the use of *epikeia*. Rodrigo draws a two-fold conclusion. First, insofar as the theoretical possibility of *epikeia* is concerned, it makes little difference whether the human law is merely preceptive or invalidating. Secondly, insofar as its prudent use is concerned, moral certitude that the case allows *epikeia* is necessary, in order that the peril of nullity may not rashly be risked. And yet, even solid probability will suffice, if a proportionate necessity for acting is instant and pressing, or if the Church would supply the defect should the probability that *epikeia* is lawful in the case at hand, be, in point of fact, unfounded.

II. *Negative*

Suarez. Suarez⁵⁵ offers a thorough treatment of the matter under consideration. An analysis of his study will be of no little assistance in appreciating the factors involved in the problem. There can be no doubt that in general he never allows *epikeia* in regard to invalidating laws. And yet, despite such a decisive stand on the part of Suarez, a certain note of hesitancy is perceptible in the following statement:

In those matters which depend on varying circumstances, scarcely any rule can be set down so universal as not to permit of some exception, if one be allowed to imagine and invent cases; and therefore, morally speaking of human matters as they happen according to the ordinary course of events, we say that an act which is invalidated simply and absolutely by law, can never by *epikeia* alone be validly performed contrary to the words of the law.⁵⁶

⁵⁵ *De Legibus*, Lib. V, Cap. XXIII.

⁵⁶ “In his enim rebus, quae ex variis circumstantiis pendent, vix potest tam universalis regula constitui, quae non patiatur aliquam exceptionem, si fingendi

To substantiate his belief that *epikeia* is not applicable to invalidating laws, Suarez proposes several arguments. In the first place, when a law establishes a substantial form for some act, then in no case can that act subsist without the form thus laid down. If that form be disregarded, then invalidity will result from the attempt to posit the action. For, as there can be no valid Sacrament without the form designated by Our Lord (nor in regard to it can there be any *epikeia* or dispensation by one other than by Christ Himself), the same must be said *cum proportione* of every act devoid of the substantial form designated for it by law.⁵⁷

In the second place, every invalidating law either disqualifies entirely the person involved from positing the act in question, or disqualifies him from making a contract except in accordance with the form designated by law. Now, this incapacity which has been effected by law cannot be removed by *epikeia*. At most, *epikeia* can excuse the individual from the precept, but it can never confer capacity to act. It cannot bestow upon him the power which he does not now possess, nor can it restore the power which the law has withdrawn. For such bestowal or restoration of power a positive act is required.⁵⁸ It is for this reason, states Suarez, that theologians commonly teach that a person who has not the capacity juridically to enter into the marriage contract, cannot for any reason, danger, or fear contract marriage and consummate it.⁵⁹

Suarez analyzes the objection⁶⁰ that natural equity would seem to demand that where some small circumstance had been omitted in good faith, the act should be deemed valid. His answer may be summarized as follows. If there is in question a contract already made, then *epikeia* used subsequently will not render valid what is already invalid. But if there is discussion of a contract about

et excogitandi casus detur licentia; et ideo moraliter loquimur de humanis rebus, prout secundum ordinarium cursum contingunt, et sic dicimus, actum irritum per legem simpliciter et absolute, non posse unquam valide fieri contra verba legis, per solam epikiam."—*Ibid.*, n. 2.

⁵⁷ *Loc. cit.*

⁵⁸ *Ibid.*, n. 3.

⁵⁹ *Ibid.*, n. 4.

⁶⁰ *Ibid.*, n. 5.

to be made which will have a permanent effect, then the case is always very grave and even in the face of extrinsic necessity cannot be attempted in opposition to an invalidating law—without the support of law. But if an exception is made in virtue of another law, *epikeia* is no longer involved, but *ius*.⁶¹ From these latter remarks it would seem that Suarez hints, in some slight way at least, that an invalidating law will cease if it is in conflict with a higher law.

To those who argue that *epikeia*, being based on the universality of law, may be resorted to whenever observance of the law becomes harmful—whether the law be merely prohibiting, or invalidating as well—Suarez replies⁶² that these two types of laws are not identical. For of its nature a prohibiting law admits excuses arising from ignorance or moral impossibility. “But invalidity is not founded on obligation, and requires neither the will nor the power of the subject, but effects in him, even against his will, a disqualification or incapacity which a mere excuse will not remove.”⁶³ Moreover, he points out that laws which merely command or prohibit acts, are not so necessary for the common good as are invalidating laws, nor is there need for such uniformity in regard to their observance.

Finally, insofar as a marriage without the formalities prescribed by the Council of Trent is concerned, Suarez is most insistent that it is not valid.⁶⁴ The words of the Council are explicit and precise; to allow deviation from them in one case would open the door to other exceptions, to the consequent detriment both to the force and to the intention of the law.

Laymann. Laymann⁶⁵ likewise teaches that a law which prescribes certain solemnities for the validity of an act thereby makes

⁶¹ *Loc. cit.*

⁶² *Ibid.*, n. 6.

⁶³ “Irritatio vero non fundatur in obligatione, nec requirit voluntatem, vel potestatem subditi, sed potius inducit impotentiam quamdam, vel inhabilitatem in illo, ipso etiam invito, quae per solam excusationem auferri non potest.”—*Loc. cit.*

⁶⁴ *Ibid.*, n. 7.

⁶⁵ *Op. cit.*, Lib. I, Tract. IV, Cap. XIX, n. 2.

those solemnities the substantial form. And since an act without a substantial form cannot subsist, invalidity follows upon the failure to fulfill the requisites of the law in this regard.⁶⁶ Moreover, even if *per accidens* some inconvenience results to a private individual, nevertheless the common good to which invalidating laws are so closely related, must receive preferential consideration.⁶⁷ While it is true that individuals who posit an act without the requisite formalities are guiltless when their conduct is consequent upon inculpable ignorance or grave fear, nevertheless the act itself remains null and void.

Herincx. It is the view of Herincx⁶⁸ that ordinarily, according to the accepted opinion of authors, *epikeia* is not applicable to invalidating laws. This belief is based upon a two-fold reason. First, no act without its substantial form can be valid; and secondly, the incapacity of an individual to perform a specified act cannot be removed by *epikeia*.⁶⁹

⁶⁶ This argument is very frequently adduced by those who believe that *epikeia* may not be applied to invalidating laws. Cf., e.g., Prickartz, *op. cit.*, Vol. I, Tract. III, n. 241; Henno, *op. cit.*, Vol. III, Tract. III, Disp. III, Quaest. XIV, Concl. I; J. Dettori, *Theologiae Moralis Institutiones* (Augustae Taurinorum, 1825), Vol. II, Tract. *De Legibus*, n. 164. Billuart (*op. cit.*, Tract. *De Legibus*, Dissert. V, Art. IV) mentions this argument and concludes that *epikeia* "most probably" may not be used in regard to invalidating laws. Engel adducing this argument concludes that *epikeia* is not permissible in reference to invalidating laws "nisi aliter mens legislatoris colligi possit." No explanation of this qualification is given. Cf. L. Engel, *Collegium Universi Iuris Canonici* (ed. 13; Salisburgi, 1751), Lib. I, Tit. II, § IV, n. 78.

⁶⁷ Substantially the same reason is mentioned by many subsequent theologians. Cf. Henno (*loc. cit.*) who warns of the danger of fraud and concubinage, should the need for constancy and uniformity resulting from invalidating laws, be disregarded; Schmalzgrueber, *op. cit.*, Vol. I, Pars I, Tit. II, § VII, n. 49; Billuart, *loc. cit.*; Reuter, *op. cit.*, Vol. I, Tract. III, n. 194; D'Annibale, *op. cit.*, I, n. 216; Chelodi, *op. cit.*, n. 69; Haine, *op. cit.*, Vol. I, Quaest. 77.

⁶⁸ *Op. cit.*, Pars II, Tract. III, Disp. III, Quaest. IV, n. 199.

⁶⁹ Among the subsequent theologians who make use of this argument are the following: Patuzzi, *op. cit.*, Vol. I, Tract. I, Dissert. IV, Cap. VI, n. 7; D'Annibale, *op. cit.*, I, n. 216.

Catalanus. Catalanus⁷⁰ offers an *a pari* argument. He contends that if ignorance, which is entirely invincible and inculpable, cannot render an act valid, surely no cause, just and urgent though it may be, can make valid an act which is otherwise null.

St. Alphonsus. In his discussion of *epikeia*⁷¹ St. Alphonsus makes no mention of invalidating laws. Nevertheless, in treating of clandestine marriages⁷² he appears to subscribe to the view which he terms "common," that even necessity will not render such a marriage valid. However, in the main his teaching on *epikeia* in relation to invalidating laws is not without obscurity. A more complete analysis of his opinion will be undertaken later.⁷³

Van den Berghe. Van den Berghe⁷⁴ is quite definite in his opinion that in reference to laws which *ipso facto* invalidate acts, *epikeia* may not be used. For with regard to such laws, he believes, there is lacking the *ratio aequitatis* on account of which it can sometimes be presumed that the legislator would be unwilling to urge the obligation of his law. A further substantiation is to be found in the fact that in a conflict between the private good and the common good, the former must yield. The views of Van den Berghe in reference to a case where it was impossible to observe the Tridentine regulation concerning clandestinity, and in reference to the *casus perplexus*, will be alluded to later.⁷⁵

Aertnys. Aertnys⁷⁶ aligns himself with those who contend that *epikeia* is not applicable to invalidating laws. For the common good demands uniformity and certitude regarding the validity or nullity of acts. Aertnys-Damen, however, qualify the teaching by stating that *epikeia* may not "generally" be used.⁷⁷ Damen explains the insertion of the word by admitting that *epikeia* of the first species (where observance of the law would be evil) may sometimes be ap-

⁷⁰ *Op. cit.*, Vol. I, Pars I, Quaest. II, Cap. XIII, n. 13.

⁷¹ *Theol. Mor.*, Lib. I, n. 201; *Homo Apostolicus*, Tract. II, n. 77.

⁷² *Theol. Mor.*, Lib. VI, n. 1079.

⁷³ Cf. pp. 395-396 *infra*.

⁷⁴ *Art. cit.*, *Coll. Brug.*, VII, 365-366.

⁷⁵ Cf. pp. 401-402 *infra*.

⁷⁶ *Op. cit.* (ed. 7), I, n. 175.

⁷⁷ *Op. cit.* (ed. 13), I, n. 176.

plied to invalidating laws—as, for example, when the law is enacted only *in favorem privatum*, or when from the invalidity of some act a *damnum commune* would result in some region.

McHugh-Callan. McHugh-Callan defending the position that *epikeia* may not be applied to invalidating laws, attack the problem in a way slightly different from preceding authors. Here, insistence is placed not so much upon the nature of invalidating laws, as upon the nature of *epikeia*. The whole basis of *epikeia*, it is maintained, is founded upon

the principle that the words of a law must be subordinated to the common good and justice. Hence it [i. e., *epikeia*] is not applicable to those laws whose universal observance is demanded by the common good—i. e., to *irritant laws*. Any hardship suffered by an individual through the effect of such laws is small in comparison with the injury that would be done to the common welfare if there were any cases not comprehended in such laws; for irritant laws are the norms for judging the validity of contracts and other acts, and public security demands that they be uniform and certain.⁷⁸

Other Writers. Schilling,⁷⁹ Loiano,⁸⁰ Antonius-Nicolaus,⁸¹ Jone,⁸² Prümmer⁸³ and Noldin-Schmitt⁸⁴ emphasize the need for certainty

⁷⁸ *Op. cit.* I, n. 414.

⁷⁹ *Op. cit.* n. 80, footnote.

⁸⁰ *Op. cit.*, I, n. 142.

⁸¹ *Op. cit.*, I, n. 346.

⁸² *Op. cit.*, n. 56.

⁸³ *Op. cit.*, I, n. 233. Prümmer asserts that “more probably” *epikeia* may not be applied to invalidating laws. He admits, however, that some moralists allow the use of *epikeia* on account of an urgent necessity involving public order. His criticism of Ballerini’s views will be discussed later.

⁸⁴ *Op. cit.*, I, nn. 160, 168. They mention that according to some moralists *epikeia* may be applied to invalidating laws for most grave reasons—even though these reasons refer only to private individuals. Among other writers who contend that *epikeia* is not permissible in reference to invalidating laws, may be mentioned the following: A. Verricelli, *Quaestiones Morales* (Venetiis, 1656), Tit. IX, Quaest. 145, n. 5; H. Klee, *Principes de Théologie Morale*, ed. a M. Himioben (Liège, 1854), Cap. 2, § 2; Van der Velden, *op. cit.*, I, n. 43; Z. Zitelli, *De Dispensationibus Matrimonialibus* (Romae, 1884), p. 9; Waffelaert, *De Dubio Solvendo*, p. 269; Haring, *art. cit.*, *ThQS*, 809; Koch-Preuss, *op. cit.*,

and uniformity in regard to invalidating laws. Inasmuch as legislators in enacting such laws desire to establish a firm and certain status with regard to the validity or invalidity of specified acts, lawmakers cannot reasonably be construed as willing to permit exceptions.

III. *Opinions Regarding "Tametsi" and the "Casus Perplexus"*⁸⁵

Perhaps the clearest insight into the minds of authors on the point in question is found in their discussions of two specific problems. Although due to present ecclesiastical legislation⁸⁶ neither problem is today of the same magnitude as it was previously, nevertheless, an analysis of the argumentation employed by earlier moralists and canonists will be of assistance in the matter at hand. Moreover, it cannot be denied that cases somewhat similar can occur today, although presumably with far less frequency than in pre-Code times.⁸⁷ The two cases alluded to are these. (1) In those regions where the Tridentine decree *Tametsi* had been promulgated, was it ever possible for those whom it bound, to contract marriage without the presence of the pastor and two witnesses? (2) If all the prepara-

I, p. 181. Merkelbach (*Summa Theol. Mor.*, I, nn. 297, 371) states that ordinarily *epikeia* may not be applied to invalidating laws; Coronata (*op. cit.*, I, n. 181) maintains that invalidating laws generally do not admit of *epikeia*—except, of course, such as are founded upon a presumption of fact; Cocchi (*op. cit.*, I, n. 125) denies the lawfulness of using *epikeia* in regard to an invalidating law in a case in which only a *damnum privatum* is involved; Busquet (*Thesaurus Confessarii* [ed. 4; Barcinone, 1909], n. 66) subscribes to the same opinion.

⁸⁵ Because most of the controversy on the question as to whether *epikeia* may be applied to invalidating laws arose in regard to the obligation of the Tridentine Decree *Tametsi* in extreme cases, and to the classical *casus perplexus*, it has been deemed expedient to treat of the opinions of several representative writers precisely in connection with these two cases.

⁸⁶ Cf. especially Cann. 1043, 1044, 1045 and 1098.

⁸⁷ Thus, e.g., may two Catholics ever, by resorting to the use of *epikeia*, contract marriage, not only without the presence of a priest, but even without the presence of witnesses? Or may a Catholic ever contract marriage with an infidel without a dispensation, in the belief that *epikeia* allows such an action? Or what is to be done if a diriment impediment exists in those circumstances envisioned by Canon 1098, 1°?

tions for a marriage had been completed, and the priest, on the point of performing the ceremony, learned of a diriment impediment, too late to seek a dispensation, was it permissible to proceed—in the supposition, of course, that to postpone the wedding would cause scandal or serious injury to the reputation of at least one of the parties (the so-called *casus perplexus*)? Because, insofar as the possibility of using *epikeia* is concerned, both cases are basically similar, and because they are often discussed without differentiation, it seems unnecessary here to institute a separate discussion for each. Suffice it, then, to consider without further distinction the opinions of several moralists and canonists which serve to indicate on what bases they endeavor to solve these knotty problems.

Sanchez. It is the contention of Sanchez⁸⁸ that a marriage contracted without pastor and witnesses⁸⁹ even in necessity, and even at the point of death, is null. For nothing can subsist without its form. Moreover, it is a divine law that a Sacrament consist of apt matter and form. The Church can, in regard to Matrimony, establish an “ineptitude” of matter; that is, it can state, for example, that marriage without pastor and witnesses is devoid of the nature of a contract. When such a decision is made, then by divine law, not merely by ecclesiastical law, a marriage attempted without the form prescribed, is void. For no matter how grave the necessity, it can never supply this essential defect. Finally, the conclusion that necessity does not excuse one from the observance of this regulation is not based upon a merely ecclesiastical law, but rather upon the natural and divine precept which forbids a man to have relations with a woman not his wife. Treating of the *casus perplexus*, Sanchez teaches⁹⁰ that where there is involved the impossibility of recurring to the Pope, the Bishop can dispense in urgent necessity.

Laymann. Despite the general observations of Laymann regarding invalidating laws, to which reference has been made above,⁹¹

⁸⁸ *Op. cit.*, Lib. III, Disp. 17, n. 4.

⁸⁹ In the cases considered in this section, which involve the Tridentine regulation, it is presupposed that the parties concerned were ordinarily bound by the decree, and that there is question of a region where the decree *Tametsi* was promulgated.

⁹⁰ *Op. cit.*, Lib. III, Disp. 40, n. 8.

⁹¹ Cf. pp. 388, 389 *supra*.

that theologian teaches ⁹² that in regions where the presence of a pastor at a marriage is impossible, the decree *Tametsi* does not bind.

Castropalao. On the other hand, while Castropalao ⁹³ admits that some theologians believe that in urgent necessity—in danger of death, or even in other cases when it is very expedient for the marriage to be contracted—there can be an exception from the requirements of the decree *Tametsi*, he himself is of the opposite opinion. For the decree designates the form for marriage, and without a form no act can subsist.

Pignatelli. Pignatelli ⁹⁴ argues that when there occurs a conflict between two precepts, the lesser must always yield to the greater. Now, in the *casus perplexus* there is a conflict between a purely ecclesiastical law and the law of charity (which is a precept of the natural law) that obliges the Bishop as pastor of souls to aid any subject of his who is placed in such grave necessity. Consequently, when recourse to the Pope is impossible, the law of charity obliges the Bishop to dispense in the *casus perplexus*, for it is to be presumed that the Pope grants the Bishop power to dispense in such urgency. Moreover, if the matter be considered from the point of view of the parties who wish to contract the marriage, it is evident that there is another conflict of laws. On the one hand is the ecclesiastical precept forbidding marriage, and on the other is the natural right of the parties to protect their reputation. The former, being inferior, must yield to the latter. Finally, the matter may be considered from the point of view of the legislator. For, since every ruler is bound to promote the utility of his subjects, he is not presumed to have an intention contrary to that utility. And indeed if such an intention did actually motivate him, it would be inefficacious, because it would be unreasonable. Consequently, the precept forbidding the marriage must be construed as no longer binding in the case.

Roncaglia. Roncaglia ⁹⁵ discusses the *casus perplexus*, supposing that recourse to the Bishop by the pastor is impossible. First of all, he rejects as perilous the solution proposed by some moralists—

⁹² *Op. cit.*, Lib. V, Tract. X, Pars II, Cap. IV, n. 7.

⁹³ *Op. cit.*, Vol. V, Tract. XXVIII, Disp. II, Punct. 13, § 8, n. 9.

⁹⁴ *Op. cit.*, Vol. III, Consul. 33, nn. 5-7.

⁹⁵ *Op. cit.*, Vol. I, Tract. XXI, Quaest. V, Cap. I, q. 2.

namely, that the parties should be required to make a temporary vow not to use the rights of marriage. He states that if the parties are in good faith, they should be so left. If they are not in good faith, the priest should nevertheless proceed with the marriage. Every one concedes, he explains, that a law of the Church ceases whenever its observance becomes very difficult—and *a fortiori* if it becomes pernicious. Consequently, when such a situation is verified in the case of an ecclesiastical law regarding a matrimonial impediment, and the Bishop cannot be reached, then the pastor can judge that the obligation to enforce the ecclesiastical law ceases. He does not dispense. He doctrinally interprets that the law does not oblige in the case at hand. For if, according to the opinion of theologians, the law regarding the obligation of a Bishop to recur to the Pope ceases in the face of grave inconvenience, the same conclusion must be reached in reference to the obligation of recurring to the Bishop when he cannot be reached. This solution appears to Roncaglia to be permissible. And yet, both out of reverence for the Church's law and for purposes of greater security, he advises that a subsequent dispensation be obtained from competent authority.

St. Alphonsus. St. Alphonsus' view is not entirely clear. As has been stated above,⁹⁶ in reference to clandestine marriages he asserts that "as regards the faithful who are in a place where the Tridentine regulation has been received, marriage would be null even in case of necessity."⁹⁷ Speaking in his *Praxis Confessarii* of the *casus perplexus*,⁹⁸ he reports that some favor the opinion that, when the Bishop is inaccessible, the pastor or confessor can declare that the ecclesiastical impediment ceases, because it is no longer useful but positively harmful. In his *Theologia Moralís*⁹⁹ he outlines several views current in his day. Affirming that it is most probable that the Bishop can dispense in the *casus perplexus* (he first considers a case

⁹⁶ Cf. p. 390 *supra*.

⁹⁷ "Quoad fideles autem qui sunt in loco ubi receptum est Tridentinum matrimonium esset nullum etiam in casu necessitatis."—*Theol. Mor.*, Lib. VI, n. 1079.

⁹⁸ *Praxis Confessarii ad Bene Excipiendas Confessiones* (ed. Gaudé; Romae, 1912), n. 8.

⁹⁹ Lib. VI, n. 613.

where the Bishop can be reached, and where there is question of an impediment from which only the Pope ordinarily dispenses), he mentions the arguments of several theologians that in such a situation it is presumed that the Pope delegates to the Bishop the faculty of dispensing, or even that the Bishop in his own diocese may do what the Pope has power to do in the universal Church. As a matter of fact, he continues, Pignatelli “proves at length that in that case the law which prohibits such a marriage is deemed to cease altogether.”¹⁰⁰ For every law is enacted for the common good, and when it becomes pernicious it no longer binds. Next, he cites Roncaglia’s conclusion that the pastor or confessor can declare that in such a case the law ceases to oblige, for not only has its utility come to an end, but the law itself has become harmful. What precisely St. Alphonsus’ own opinion is, is difficult to determine. However, from the manner in which he speaks of the arguments of those theologians who allow the marriage to be contracted in the *casus perplexus*—especially the arguments of Pignatelli—one would seem to be justified in concluding that St. Alphonsus probably inclines to their view.¹⁰¹ Where there is question of public impediments, however, the argument for proceeding with the marriage by reason of the scandal which would follow from a postponement, is no longer of value. In point of fact, it is especially in order to avoid scandal that the marriage should be deferred.

Feije. Feije¹⁰² discusses the *casus perplexus* at great length. His opinion may be summarized as follows. If the impediment is public, the marriage must be deferred. But if it is occult both in fact and in nature, and if the divulging of it would cause grave infamy (especially if the existence of the impediment is known to one party only), several considerations must be kept in mind. If the parties are in good faith, and there is question of an impediment from which

¹⁰⁰ “Imo addit Pignat. et fuse probat quod eo casu censetur omnino cessare lex qua prohibetur tale coniugium contrahi.”—*Loc. cit.*

¹⁰¹ In addition to stating that Pignatelli “proves at length” his opinion, St. Alphonsus asserts that the view is “not without foundation.” Cf. *Homo Apostolicus*, Tract. XVI, n. 114; also Tract. XX, n. 57.

¹⁰² H. Feije, *De Impedimentis et Dispensationibus Matrimonialibus* (ed. 4; Lovanii, 1893), nn. 641-649.

the Holy See is wont to dispense, and if there is no certitude that the marriage would be delayed if the impediment were divulged, then the priest should leave the parties in good faith, perform the marriage, and later obtain a dispensation or sanation. However, if one party has knowledge of the impediment, the marriage must be deferred if this can be done without infamy or scandal. But only rarely will these conditions be fulfilled. In practice, then, the opinions of theologians must be considered. According to one opinion the impediment ceases, and the marriage can be both validly and licitly contracted. A subsequent dispensation should be obtained out of reverence for the Church and for greater security—if possible, before the consummation of the marriage. Proceeding to an analysis of the argumentation of Pignatelli and Roncaglia, Feije denies that their reasoning is convincing. He does not agree that the impediment ceases. And yet, despite his seemingly unyielding opposition he concedes: “Nevertheless I may not affirm that never in a desperate case can that [opinion] be of service, as an extreme remedy, which St. Alphonsus terms not to be without foundation . . .”¹⁰³

The opinion that the law ceases only insofar as it is prohibiting and not insofar as it is invalidating, and hence the parties should proceed with the marriage, but should not consummate it until a dispensation has been obtained, is not acceptable to Feije. For he sees it as contrary to the teaching of Pope Innocent XI who condemned the proposition that grave fear is a just cause for simulating the administration of the Sacraments.¹⁰⁴ He likewise rejects the suggestion that the parties should contract the marriage *sub conditione dispensationis obtinendae* with the promise to abstain from marital relations until the dispensation has been granted.

Feije’s own solution is rather unsatisfactory. He states that, although in the supposition that both parties know of the impediment, they may marry *sub conditione dispensationis obtinendae*, and refrain from consummating the marriage until the dispensation has

¹⁰³ “Nihilominus non affirmaverim numquam posse in casu desperato tamquam extremum remedium inservire quod S. Alphonsus scribit non sine fundamento dici . . .”—*Ibid.*, n. 646. While admitting that St. Alphonsus in his *Praxis Confessarii* considers the opinion of Pignatelli and Roncaglia to have some foundation, Feije denies that the Saint offers it as his own view.

¹⁰⁴ Cf. *DB* 1179.

been obtained and consent secretly renewed, nevertheless, when only one is aware of the impediment and a dispensation cannot be obtained in time, the opinion that the nullity ceases can in practice be followed. In other words, Feije concedes in practice the value of the view which he had criticized speculatively—in a rare and extraordinary case for most grave reasons the invalidating law ceases.

Ballerini. As has been noted above,¹⁰⁵ Ballerini's contribution to the solution of the problem under consideration is of great consequence. That contribution consists in the fact that by definitely maintaining that the provisions of the decree *Tametsi* did not bind in cases of private difficulty, he opened up modern discussion of the point.

In answer to the question as to whether the impossibility of contracting marriage in the presence of one's pastor or Bishop excuses a subject from the form demanded by the Council of Trent, Gury¹⁰⁶ distinguishes between common impossibility and private impossibility. Insofar as cases of common impossibility are concerned, he admits that the law ceases to have its effect; as regards private impossibility he insists that "an invalidating law does not cease on account of private inconvenience."¹⁰⁷ In his comment on this reply, Ballerini¹⁰⁸ very definitely disagrees with Gury. His argumentation may be summarized as follows. In the first place, although St. Alphonsus in one section of his work adheres to the stricter view with regard to clandestine marriages, nevertheless in another passage he apparently agrees with Pignatelli that in a case of private necessity—insofar as the *casus perplexus* is concerned—the impediment ceases because it becomes pernicious. Now, argues Ballerini, all the reasons which are offered in favor of the view that necessity in a particular case does not excuse one from fulfilling the requirements demanded by the decree *Tametsi* can be reduced to this: the law of the Council of Trent is an invalidating law. But is it not true that the impediment involved in the *casus perplexus* is also invalidating? How can one logically maintain that an invalidating law ceases in one instance

¹⁰⁵ Cf. p. 382 *supra*.

¹⁰⁶ Gury-Ballerini-Palmieri, *op. cit.*, II, n. 652, Quaest. 4.

¹⁰⁷ "Lex irritans non cessat ob incommodum privatum."—*Loc. cit.*

¹⁰⁸ *Ibid.*, note 82.

of private difficulty, as St. Alphonsus appears to do, and yet deny that it ceases in another instance? Moreover, if an invalidating law always produces its effect, why admit that it ceases at all—even in cases of common difficulty. Again, nowhere in any of the responses of the Holy See regarding the common impossibility of fulfilling the requirements of the decree *Tametsi* is there mention of dispensation. Rather, these responses are declarations which signify that the faithful must not be deprived of the right to marry, merely because of the common physical or moral impossibility of observing the form prescribed by the Council of Trent. But are not the need and right of the faithful precisely the same when private physical or moral impossibility is involved? Why concede that the decree does not apply in the first instance, and deny this concession in the second?

To enter into a discussion of Ballerini's analysis of, and replies to, the objections which may be offered to his thesis would take us too far afield. Suffice it to point out that he adheres inflexibly to his position that in cases of physical or moral impossibility, whether it be common or private, an invalidating law ceases to bind. It makes no difference whether it be the *casus perplexus* or the decree *Tametsi* which is involved. The principle remains the same.

De Becker. Treating of the *casus perplexus* De Becker¹⁰⁹ would have the parties in the case—if both, or at least one, knew of the impediment—contract *sub conditione dispensationis obtinendae*. But if one refuses to make the condition, “it does not seem that in such extreme difficulty that opinion in practice should be condemned—namely, that the pastor or confessor can declare to the parties that the invalidating law no longer binds.”¹¹⁰ For greater security recourse should be made as soon as possible to ecclesiastical authority.¹¹¹

¹⁰⁹ J. De Becker, *De Sponsalibus et Matrimonio Praelectiones Canonicae* (ed. 2; Lovanii, 1903), pp. 380-381.

¹¹⁰ “In tantis angustiis non videtur damnanda in praxi opinio quod parochus vel confessarius possit declarare partibus legem irritantem non amplius obligare.” —*Ibid.*, p. 381.

¹¹¹ Rosset's opinion is substantially the same. Cf. M. Rosset, *De Sacramento Matrimonii* (Parisiis, 1895-1896), IV, nn. 2398 et sqq. This is substantially the view of Lehmkuhl (*op. cit.*, II, n. 1055) and of D'Annibale (*op. cit.*, III, n. 454) also.

Gasparri. Although Gasparri¹¹² discusses in detail the *casus perplexus*, it is sufficient here to mention only his conclusions and the basic reasons leading to them. If the impediment (occult) in question is one from which the Pope dispenses, the marriage should be performed, provided that the parties are in good faith. A dispensation or sanation should subsequently be obtained. Moreover, if the parties were aware of the impediment but in good faith failed to reveal it, a truly and certainly probable opinion—which St. Alphonsus seems to allow—holds that the impediment does not bind. But for greater reverence and assurance a dispensation or sanation should afterwards be obtained. If, however, the parties knew of the impediment, and in bad faith failed to divulge it, then it is not to be presumed that the Church relaxes her law for such persons. However, if the pastor cannot deter the people from the marriage, he may assist at it, as at the marriage of unworthy people, and then seek a dispensation or sanation for the marriage is null.

Speaking in general of diriment impediments, Gasparri in an earlier passage¹¹³ states that the impossibility of seeking and obtaining a dispensation does not in itself allow one to marry—even if this impossibility is general, as would be the case in a country suffering a fierce persecution. However, he believes that an exception is to be made in the case of an ecclesiastical law in those circumstances where it would be in opposition to the natural right to marry. That the impediment no longer binds in such a situation there can be no doubt. Thus, if in some region there are so few Christians that they cannot marry among themselves, and a dispensation cannot be sought, the impediment of disparity of cult ceases, for the natural right to marriage must prevail.¹¹⁴ Gasparri thus interprets the words of the reply of the Holy Office given on June 4, 1851, “*non esse inquietandos*,” as meaning not only that the good faith of the people in question should not be disturbed, but even that the marriage itself is valid.¹¹⁵

¹¹² P. Gasparri, *Tractatus Canonice de Matrimonio* (ed. 2; Parisii, 1892), I, n. 768.

¹¹³ *Ibid.*, n. 302.

¹¹⁴ *Ibid.*, n. 623.

¹¹⁵ *Coll. P. F.*, n. 1062. A doubt arose about the validity of marriages which

Turning to the problem of clandestinity,¹¹⁶ Gasparri maintains that a marriage without the requisite form is both valid and licit, if the attendance of the pastor or of witnesses in that region is impossible. Of course, for validity witnesses at least must be present if possible, although when they cannot appear it is most certain that the marriage without them would be valid. For to insist upon the binding force of the law of the Council of Trent in such circumstances would be to stand in opposition to the natural right of an individual to marry. Being a merely ecclesiastical law, the decree *Tametsi* must yield to an inherent natural right. But as regards the cessation of the binding force of the decree in cases of private difficulty, he advises¹¹⁷ adherence to the generally accepted doctrine which affirms that the obligation continues. He admits, however, that it is difficult to refute the *a pari* argument of Ballerini,¹¹⁸ concerning private difficulty as regards the *casus perplexus*, and private difficulty as regards the observance of the decree *Tametsi*.

It is to be noted that substantially the same opinions occur in the post-Code edition of Gasparri's work. Thus, he holds that if an ecclesiastical impediment comes into conflict with the natural right to marry the latter must prevail.¹¹⁹ He also teaches that for the same reason a marriage contracted without priest and witnesses in extraordinary circumstances where they cannot be obtained, is valid—provided, of course, that the requisites of Canon 1098 cannot be fulfilled.¹²⁰

Van den Berghe. Van den Berghe¹²¹ attacks the conclusions of some of the preceding moralists. Maintaining that *epikeia* is never lawful in reference to invalidating laws, he sees no solid reason for

Christians contracted with infidels in a region where there were few Christians, and where the distance was too great to communicate with an authority empowered to dispense. The Holy Office replied: "In propositis circumstantiis non esse inquietandos . . ."

¹¹⁶ *De Matrimonio* (ed. 2), II, n. 965.

¹¹⁷ *Ibid.*, n. 968.

¹¹⁸ Cf. pp. 398-399 *supra*.

¹¹⁹ P. Gasparri, *Tractatus Canonice de Matrimonio* (ed. nova ad mentem Cod. I. C.; Civ. Vat.: Typis Polyglottis Vaticanis, 1932), I, n. 260.

¹²⁰ *Ibid.*, II, n. 998.

¹²¹ *Art. cit.*, *Coll. Brug.*, 366.

the opinion that even in case of great necessity (as in the *casus perplexus*) an invalidating law may be deemed no longer to bind. Turning to the decree *Tametsi*, he states that a law ceases only where the impossibility of observing it is common—where, for example, there is a general impossibility of going to a priest for the celebration of marriage. In such a situation the common good itself requires the exception. But that this is *epikeia* is doubtful. Rather it should be said that the lawmaker (the Council of Trent in the case of the decree *Tametsi*) did not extend the law to places where the pastor could not be reached.

Valton. Writing in the *Dictionnaire de Théologie Catholique*, Valton states clearly that where an ecclesiastical law comes into conflict with the natural right to marry in such a way that an individual would be “condemned to perpetual or prolonged celibacy,” then the impediment in question ceases, for it is opposed to the natural law.¹²² That this is the mind of the Church he endeavors to demonstrate by citing several replies of Roman Congregations.

De Smet. De Smet’s solution¹²³ to the problem presented by the *casus perplexus* is as follows. If each party is in good faith concerning the diriment impediment, the marriage should be performed and later validated. But if each party is aware of the impediment, or if only one party knows of it, and the other can easily be warned, they should contract the marriage *sub conditione dispensationis obtinendae*. However, if only one party is cognizant of the impediment, and the other cannot be warned without grave inconvenience, the marriage ceremony should be performed.

De Smet believes that authors agree as to the solution proposed in this last case, but differ as to the juridical explanation of it. Some maintain that the ecclesiastical law ceases by reason of *epikeia* insofar as it is prohibiting, but not insofar as it is invalidating. Such an opinion De Smet deems to be startling, incomplete and defective. He himself follows the view which he believes St. Alphonsus seems to counsel—namely, that in such extreme necessity the law of the Church ceases by reason of *epikeia* not merely insofar as it

¹²² E. Valton, “Empêchements de Mariage,” *DTC*, IV, 2458.

¹²³ A. De Smet, *Tractatus Theologico-Canonicus De Sponsalibus et Matrimonio* (ed. 2; Brugis, 1910), n. 378.

is prohibiting, but even as invalidating. For the sake of greater security and reverence recourse should be made by the priest after the marriage. De Smet defends his solution by insisting that it is not true that the sole case which constitutes an exception to an ecclesiastical invalidating law is one which involves the public good. Essentially the same views are expressed in the post-Code edition of his work.¹²⁴

Wernz. Wernz¹²⁵ denies that the Response of the Holy Office referred to by Gasparri¹²⁶ in substantiation of his view, is able to prove that in extreme difficulty a diriment impediment ceases to bind. The Response in question, he maintains, is not a declaration but a favor. Moreover, even apart from this Response, it is not correct to say that the impediment of disparity of cult ceases in a situation where there are so few Christians that they cannot marry among themselves, and where recourse to authority for a dispensation is impossible. To base this supposed cessation on a presumed defect of the legislator's consent to urge the obligation in the case, is not safe in practice. Wernz-Vidal,¹²⁷ however, while continuing to maintain that the response of the Holy Office cited by Gasparri cannot prove his thesis, admit the probability of the reason adduced by Gasparri—the natural right to marry prevails over a canonical law.

Vlaming. Vlaming¹²⁸ believes that, generally speaking, an impediment does not cease by reason of grave difficulty, since invalidating laws always attain their effect. However, he concedes that an exception must be made in a case where an ecclesiastical impediment, on account of peculiar circumstances in a certain region, would prevent the contracting of marriage. In such a case, due to the common

¹²⁴ A. De Smet, *Tractatus Theologica-Canonicus De Sponsalibus et Matrimonio* (ed. 4; Brugis: Beyaert, 1927), nn. 469, 839.

¹²⁵ F. Wernz, *Ius Matrimoniale (Ius Decretalium* [Romae, 1905-1912], IV), n. 510, note 37.

¹²⁶ Cf. *Coll. P. F.*, n. 1062.

¹²⁷ F. Wernz-P. Vidal, *Ius Matrimoniale (Ius Canonicum* [Romae: Universitas Gregoriana, 1923-1938], V), n. 273, note 41.

¹²⁸ T. Vlaming, *Praelectiones Juris Matrimonii ad Normam Codicis Juris Canonici* (ed. 3; Bussum, 1919-1921), I, n. 198.

harm which would ensue if the binding force of the impediment should continue, it may rightly be deemed to be suspended, by reason of the benign interpretation of the mind of the legislator.

Oesterle. A prolonged consideration of the problem of the form of marriage, particularly in its historical aspects, is offered by Oesterle.¹²⁹ He is of the opinion that the various responses of the Roman Congregations do not exclude private difficulty as a cause excusing one from the obligation of observing the solemnities required for validity of marriage. But whether or not the responses in question include private difficulty as an excusing cause is an entirely different matter.¹³⁰ Oesterle's own view¹³¹ is that a thorough study of the question, especially as regards the intrinsic reasons adduced by theologians on both sides of the controversy, will lead to the conclusion that only in cases of common difficulty can it be said that the provisions of the decree *Tametsi* ceased to bind.

Davis. Davis¹³² teaches that in the case of a marriage to be contracted in danger of death, if no priest can be present to dispense according to Canon 1044, an ecclesiastical impediment from which the Church is accustomed to dispense, ceases. Moreover,

in extreme cases, where no witnesses or priest can be got and where it is a case of danger of death, the parties may marry themselves; for the presence of witnesses is a prescription of ecclesiastical law only. The same may be said for cases outside the danger of death that are extremely grave and urgent.¹³³

Merkelbach. Merkelbach¹³⁴ denies that the impossibility in a particular case of observing a law which establishes an impediment, prevents the impediment from attaining its effect, for the common good prevails over private good. But if the impossibility is common, then it seems by reason of *epikeia* that the impediment does not

¹²⁹ G. Oesterle, "Elucubratio Historica circa Declarationem Authenticam Canonis 1095 [1098]," *Jus Pont.*, VIII (1928), 174-182; IX (1929), 141-158.

¹³⁰ *Ibid.*, p. 179.

¹³¹ *Ibid.*, pp. 181-182.

¹³² *Op. cit.*, IV, p. 205.

¹³³ *Loc. cit.*

¹³⁴ *Summa Theol. Mor.*, III, n. 862.

bind in a case where it would be harmful to the community—but such an instance is rare. Merkelbach admits that some theologians allow *epikeia* in one or another exceptional case of particular necessity. In an earlier passage,¹³⁵ Merkelbach concedes that on account of private necessity in a more urgent case, *per accidens* the obligation of an invalidating law ceases, if the Church is known or can be presumed to dispense.

Vermeersch. A clue to Vermeersch's opinion is discernible when he discusses¹³⁶ the following case. If a secret ecclesiastical impediment is detected as a delegated priest is about to perform a marriage, what is to be done? Recourse is impossible, and to delay the marriage will cause at least probable danger of grave evil. Vermeersch offers two possible solutions. First, the delegated priest may be presumed to have the faculties to dispense. Secondly—and this solution is of interest to us—the case may be treated as a pre-Code *casus perplexus*, and hence the priest may declare that the impediment ceases, although there remains the obligation of recurring to the Ordinary.

Arregui. Arregui¹³⁷ discusses a case where the existence of a diriment impediment is discovered after the marriage. He teaches that relations may neither be sought nor given by the party who is aware of the impediment. However, if the woman—she alone knowing of the impediment—is forced to allow relations, due to the danger of a most grave evil, then the ecclesiastical impediment probably ceases, if it is one from which, at least in the internal forum, the Church is wont to dispense. In other words, Arregui seems to consider that the marriage becomes valid.

Ayrinhac-Lydon. Ayrinhac-Lydon¹³⁸ state that it is not certain that impediments of themselves cease in cases of urgency. They admit, however, that it is probable that ecclesiastical impediments no longer bind if otherwise a marriage, which for urgent reasons of conscience is necessary, and which cannot be deferred without peril

¹³⁵ *Ibid.*, I, n. 353.

¹³⁶ *Theol. Mor.*, III, n. 703.

¹³⁷ *Op. cit.*, n. 731.

¹³⁸ H. Ayrinhac, *Marriage Legislation in the New Code of Canon Law*, rev. by P. Lydon (new revised ed.; New York: Benziger Bros., 1939), n. 253.

to eternal salvation, is unable to be contracted. The opinion has greater weight if the impossibility concerns a region rather than isolated individual cases.

Cappello. Cappello¹³⁹ believes that it is probable that a marriage is valid which is contracted before two witnesses in urgent necessity, where a priest cannot be present to dispense from an ecclesiastical impediment from which the Church is accustomed to dispense. In such an instance, the ecclesiastical law ceases, for it is in conflict with the natural law. Moreover, "if there is present no one to dispense from the form, it is probable that a marriage by reason of *epikeia* can be performed even without witnesses in most grave circumstances," he continues, "for example, if one would otherwise be obliged to refrain from contracting marriage forever or for a very long time, or if he would be situated in proximate danger of eternal damnation."¹⁴⁰

Treating in general of the problem of whether an impediment ceases in the face of impossibility (that is, "a most grave inconvenience") of observing the law establishing it,¹⁴¹ Cappello advances the following conclusions: (1) The impediment does not cease on account of simple impossibility, unless simultaneously there is grave necessity (to contract marriage); (2) It most certainly continues to bind if the purpose of the law ceases only negatively in a particular case; (3) If the purpose of the law ceases contrarily for the community, the impediment no longer binds, for by a benign interpretation of the mind of the legislator it is deemed to be suspended; (4) If in a particular case observance of the law would tend to the detri-

¹³⁹ *De Sacrament.*, Vol. III, Pars II, n. 692.

¹⁴⁰ "Si desit qui supra forma dispensare valeat, probabile est, matrimonium ex epikeia etiam sine testibus posse celebrari in *gravissimis rerum adiunctis*, ex. gr. si quis secus *semper* ac *diutissime* a matrimonio contrahendo abstinere deberet, vel in proximo aeternae damnationis periculo versatur."—*Ibid.*, n. 695. For substantially the same view, cf. W. Doheny, *Canonical Procedure in Matrimonial Cases: Formal Juridical Procedure* (Milwaukee: Bruce, 1938), p. 676; J. Carberry, *The Juridical Form of Marriage*, The Catholic University of America Canon Law Studies, No. 84 (Washington, D. C.: The Catholic University of America Press, 1934), p. 155.

¹⁴¹ "Num lex seu impedimentum cesset ob impossibilitatem seu gravissimum incommodum."—*Ibid.*, Pars I, n. 199.

ment of souls, a prohibiting impediment most certainly ceases; (5) In a similar situation a diriment impediment of ecclesiastical law probably ceases. Thus, for example, if in some region inhabited by infidels, there were so few Christians that they could not marry among themselves, and distance or some other circumstances prevented recourse to authority for a dispensation, the Christians probably would not be bound by the impediment of disparity of cult.

Prümmer. Prümmer¹⁴² takes a much stricter view, and proceeds to criticize the argumentation of Ballerini. The reasons which that theologian adduces to substantiate his opinion prove only, according to Prümmer, that in difficult straits the parties may be left in good faith even if their marriage is invalid by reason of a diriment impediment—or that in the *casus perplexus* the Bishop or his delegate has the faculty of dispensing. A clear sign, continues the author, that even the proponents of Ballerini's view themselves do not place full faith in their own arguments, is seen in this, that they require that a dispensation be obtained as soon as possible after such marriages as they allow to be contracted by resort to the use of *epikeia*.

Werts. We may conclude this section by referring to the above mentioned¹⁴³ article by Werts. The author's first consideration revolves about instances of common difficulty or impossibility, and subjects to an analysis the two classical cases. Regarding the problem of whether in common difficulty the decree *Tametsi* continued to bind, Werts states that even before the present Code "the universal teaching admitted" that it did not.¹⁴⁴ Citing several responses from Roman Congregations in substantiation of his opinion, he insists that in these responses "there is no indication of a dispensation, or of abrogating the law. Rather, they speak of a 'declaration' that the marriages were valid in spite of the letter of the law."¹⁴⁵ The arguments of those theologians who held that marriages, contracted without the Tridentine form under circumstances of common difficulty, were valid, may be reduced to two, he believes: ". . . the

¹⁴² *Op. cit.*, I, n. 233.

¹⁴³ Cf. pp. 374, 380 *supra*.

¹⁴⁴ "The Cessation, etc.," *ThS*, IV, 229.

¹⁴⁵ *Ibid.*, p. 230.

natural right to marry prevails over the ecclesiastical law," and "the enforcement of the law would be harmful to the common good . . ." ¹⁴⁶

The second case concerns the problem of whether in circumstances of common impossibility an ecclesiastical impediment still continues to invalidate a marriage. Werts believes that "modern opinion holds that it does not." ¹⁴⁷ In agreement, Werts bases his view, first on the reply of the Holy Office of June 4, 1851 ¹⁴⁸ which he interprets to mean that the marriages therein referred to were valid; secondly, on the fact that the natural right to marry prevails over an ecclesiastical law; and thirdly, on the fact that harm to the community would result if the law continued in force.

The second consideration of Werts revolves about cases of individual difficulty or impossibility. He adheres to the view that marriages attempted under such conditions are valid—on the ground primarily that "particular individual difficulty proportionate to the gravity of an invalidating law is possible and may arise from conflict with the natural law or other law which is superior to the law in question." ¹⁴⁹ Moreover, "the difficulty may be one which is not sufficiently grave to be beyond the power of the legislator to impose, but which is beyond his will." ¹⁵⁰ And yet, Werts is very careful to point out that "these conclusions may not be applied indiscriminately to all invalidating laws." ¹⁵¹

ARTICLE 3. THESIS: HUMAN INVALIDATING LAWS SOMETIMES CEASE TO BIND; BUT *Epikēia* MAY NOT BE APPLIED TO HUMAN INVALIDATING LAWS

I. *Cessation of Human Invalidating Laws*

In discussing invalidating laws one is confronted with a two-fold problem. First, does a human invalidating law ever cease to bind?

¹⁴⁶ *Ibid.*, p. 231.

¹⁴⁷ *Ibid.*, p. 232.

¹⁴⁸ *Cf. Coll. P. F.*, n. 1062.

¹⁴⁹ "The Cessation, etc.," *ThS*, IV, 248.

¹⁵⁰ *Loc. cit.*

¹⁵¹ *Loc. cit.* For a further discussion of the problem, cf. G. O'Keefe, *Matrimonial Dispensations, Powers of Bishops, Priests, and Confessors*, The Catholic University of America Canon Law Studies, No. 45 (Washington, D. C.: The Catholic University of America Press, 1927), pp. 172 et seq.

Secondly, may *epikeia* strictly so-called ever be used in relation to an invalidating law? Several prefatory notes seem necessary. In the first place, reference is made only to human invalidating laws in the proper sense of that term.¹⁵² We are not concerned with those acts which are valid only because a positive law gives power to perform them, nor with those acts which cannot validly be posited due to a lack of capacity springing from the natural law. Moreover, our observations will have reference primarily to simple invalidating laws, not to those which are also penal. Again, the study is confined to those laws which *ipso facto* invalidate acts; it does not treat of those which require judicial sentence, or which render acts merely rescissible. Nor does our inquiry extend to invalidating laws which do not result in moral (as distinguished from civil) invalidity. Furthermore, only those laws which invalidate and also prohibit will be treated—not merely laws which only invalidate. Again, inasmuch as *epikeia* has little if any standing at all in civil law, it has been deemed advisable to confine the discussion to ecclesiastical invalidating laws. Finally, it cannot be emphasized too strongly that in this inquiry, as throughout the dissertation, the moral aspects of the problem, its solution insofar as it affects the consciences of those concerned, constitute our primary concern.

It would seem to be indisputable that any human law ceases to bind when it would be beyond the power of the legislator to urge its obligation. Now, in point of fact, there are times when it is beyond the power of a human legislator to urge the obligation of his invalidating law. It follows, then, that there are times when a human invalidating law ceases to bind.

It is to be noted, with regard to the first statement in the paragraph immediately preceding, that the word “when” possesses not merely a temporal connotation, but likewise a causal signification. That is, given a law, to demand the observance of which in the case at hand exceeds the legislator’s power, the law ceases to bind *precisely for that reason*. No further arguments need be resorted to; no other principle need be introduced. Once it has definitely been established that the lawmaker has no power to insist upon obedience to his law, that law ceases to bind.

¹⁵² Cf. pp. 373 et sqq. *supra*.

It cannot be denied that no lawmaker may impose an obligation, compliance with which would be either impossible or disproportionately difficult. This conclusion extends to invalidating as well as to other laws. Secondly, no legislator may demand that his law be obeyed if such observance would transgress, or necessitate the transgression of, a higher law. This is obviously true even when there is question of invalidating laws. These points have already been explained in connection with law in general,¹⁵³ and consequently need not detain us here. However, it is appropriate here to consider other cases in which the urging of the obligation of a law would exceed the lawmaker's power—when, for example, to demand obedience would be equivalent to the confiscation, not the mere restriction, of an inherent and inalienable natural right.

Every person, as a person, has been endowed by God with certain natural rights of which he may not be arbitrarily deprived. These rights are conferred upon him in order that with the assistance afforded by them he may work out his destiny and attain his eternal salvation.

With respect to their natural rights, all men are equal, because all are equal in the rational nature from which such rights are derived. . . . Because of this equality in the essentials of personality, men are of equal intrinsic worth, have ends to attain that are of equal intrinsic importance, and consequently have equal natural rights to the means without which these ends cannot be achieved.¹⁵⁴

Of these natural rights no individual who has not forfeited one or the other by sin, (or who has not voluntarily renounced it—in reference to some of these rights) may be despoiled, either for the benefit of some other individual or even for the benefit of the community. This is no denial of the fact that every man has certain duties toward society. But it does not therefrom follow that an individual is a mere means to be used at will for the purposes of the community. A law which would so provide is defective and lacking

¹⁵³ Cf. pp. 140 et sqq. *supra*.

¹⁵⁴ J. A. Ryan, *A Living Wage* (New York, 1912), pp. 46-47.

in obligation. For, as St. Alphonsus points out, one of the conditions that must be fulfilled in order that a law have binding force is "that it does not injure the rights of subjects."¹⁵⁵ It is true, of course, that the common good must take precedence over the private good of an individual.¹⁵⁶ But it is likewise true that this principle must be properly understood and very carefully applied. It is neither sufficient nor correct, simply to say that the common good must always prevail over an individual good. The common good has precedence, only insofar as this is possible without confiscation of basic personal rights. The material prosperity of a state is of little consequence in comparison with the loss of even one soul, for example. Or again, surely no innocent person may be murdered, simply because thereby the financial burden which, as an impoverished paralytic he may be causing to the state, is relieved. The end does not justify the means, even if the end is the common good. One may insist upon the truth of these assertions without denying that human authority may for the general welfare regulate and restrict rights. That the Church, for example, may restrict the right to marry has been declared by the Council of Trent.¹⁵⁷ But the power to restrict is not the power to confiscate. ". . . positive human law, while it may for the common good establish regulations for the use of a right, has no authority to suppress the right itself which is given by nature."¹⁵⁸

To expatiate upon man's basic natural rights is beyond the scope of this dissertation. Suffice it to point out that "the principal natural or moral rights of the person are: to life and physical integrity, to reputation, to liberty, to property, to livelihood, to marriage, to religious worship, to education, to association and to freedom of expression."¹⁵⁹

¹⁵⁵ ". . . ut non laedat subditorum iura."—*Homo Apostolicus*, Tract. I, n. 3.

¹⁵⁶ Cf. St. Thomas, *Summa Contra Gentiles* (*Opera Omnia*, XII), Lib. III, Cap. 146.

¹⁵⁷ Cf. *DB* 974. A similar doctrine is taught in condemnation of one of the errors proposed by the Synod of Pistoia (*DB* 1559).

¹⁵⁸ A. Vermeersch (T. L. Bouscaren, trans.), *What Is Marriage?* (New York: The America Press, 1932), n. 28.

¹⁵⁹ Ryan, *The Norm of Morality*, p. 56.

To consider the matter from another viewpoint—it is beyond the power of a human legislator to demand observance of his law when such observance would not merely cease to promote the utility of the subjects but would actually harm the community—that is, it would result in a situation directly contrary to the essential and intrinsic purpose of law. It is clear that a law ceases to bind once it commences to defeat the very purpose for which all law exists. “It is necessary that it [i.e., law] always be ordained to the common good.”¹⁶⁰ This necessity is predicated not only upon the fact that the good of the community is the primary and essential end of law as such, but also upon the fact that law is an act of public power which has been established only for the promotion and protection of the general welfare.¹⁶¹ Now, when a precept, though normally and in itself useful and commendable, becomes defective in such wise that obedience to it would result in harm to the community—spiritual harm in the case of an ecclesiastical precept—then the binding force of that precept, which in the final analysis is conditioned upon its moral goodness and the power of the legislator to enact it, ceases. For no one is obliged to observe a law which is morally harmful, nor to exercise obedience toward a lawmaker whose command is directly contrary to the purpose of law.¹⁶² Nor does this imply that when the purpose of a law ceases, the law itself and the obligation derived from it automatically and in every case come to an end. Reference may here be made to the theological principles regarding the cessation of the *finis* of a law.¹⁶³

It was declared above¹⁶⁴ that there are times when it is beyond the power of a human legislator to insist upon the obligation of his invalidating law. It is appropriate and necessary to expatiate here upon this statement.

¹⁶⁰ “Necesse est eam semper ad bonum commune ordinari.”—St. Thomas, *Sum. Theol.*, I-II, q. 90, a. 2.

¹⁶¹ Cf. Konings, *op. cit.*, I, n. 100.

¹⁶² Cf. St. Alphonsus, *Homo Apostolicus*, Tract. III, n. 3; *Theol. Mor.*, Lib. VI, n. 613.

¹⁶³ Cf. Chapter IV, note 15 *supra*.

¹⁶⁴ Cf. p. 409 *supra*.

It can sometimes happen that circumstances give rise to an encumbrance extrinsically connected with the observance of an invalidating law, which encumbrance is entirely out of proportion with the good intended, and with the gravity of the precept. That this is possible cannot be denied. Nor is it any less incontrovertible that in such an instance the legislator would in justice be unable to demand observance of his law. As a result, the invalidating law would cease, and it would therefrom follow that the act which originally would have been valid except for the intervention of the positive law, now actually becomes valid due to the cessation of that law.

Stress has already been placed upon the fact that invalidating laws are not of their nature penal. If a legislator should insist that, even in the face of an encumbrance entirely incommensurate with the gravity and purpose of his invalidating law, his law must be observed, he would be acting neither reasonably nor justly. But beyond that, an invalidating law, by reason of which an individual without crime or guilt would be unjustly and unreasonably restricted either perpetually or for a very long time in regard to an action which would be valid but for the intervention of human positive law—such an invalidating law would then assume the characteristics of penal legislation. While an invalidating law may be penal as well as nullifying, this note is in no way essential to the concept of invalidating law as such. It is not the intention of the Church, for example, to make every impediment to marriage a penalty, and certainly from the point of view of the subject, it would be unjust to be obliged to suffer a punishment where there exists neither crime nor guilt. Yet this is precisely the result which would ensue if, even in the presence of a difficulty entirely disproportionate, the legislator could justly demand observance of his law.

While it must be admitted that in practice this principle regarding disproportionate encumbrance insofar as it concerns invalidating laws is extremely difficult of application, nevertheless such difficulty is no solid argument against the principle itself. The difficulty of application emanates from the fact that, when invalidating laws are involved in a problem, due consideration must be paid to the fact that such laws are of the highest necessity and the greatest utility, and hence may be enforced with a rigor not to be expected where other laws

are concerned. How, then, may one judge what is disproportionate inconvenience? The difficulty in reaching a decision, grave though it is, should not, however, be unduly magnified. The fact of the matter is that in practically every instance where occasion might be given for the application of this principle, other principles will likewise be involved which will assist the subject in resolving upon a course of action. Some of these other principles we shall presently consider.

One point, however, must be emphasized. Where ecclesiastical laws are concerned, invalidating or otherwise, the final determination as to what constitutes disproportionate encumbrance abides with the Church. Any statements presented here will be made, and must be interpreted, in the light of that fact.¹⁶⁵ Keeping clearly in mind, then, the fact that "the ultimate decision as to the extent of the Church's legislative power rests with the Church herself,"¹⁶⁶ let us proceed to a further consideration of this intricate problem.

It is indisputable that it would exceed the power of a human legislator to demand the observance of his invalidating law if to exact obedience would necessarily infringe upon a higher law or right. There is no sound reason why what has been said above in regard to this principle, insofar as it concerns human laws in general, should not be true where human invalidating laws are concerned.

Reference may here be made to the *casus complexus* so widely discussed by pre-Code authors. A study of moralists and canonists treating of the matter will reveal that in practically every case the urgent necessity envisioned consisted in the fact that to postpone the marriage would do serious harm to the reputation of the parties and would give rise to grave scandal. Actually, then, in well-nigh every instance the problem could be reduced to a conflict of laws, in the sense that to demand obedience would be to transgress a higher

¹⁶⁵ Van Hove's observation seems pertinent here: ". . . si Ecclesia urget praeceptum, non obstante rationabili incommodo, eius iudicio standum erit."—*De Legibus Ecc.*, n. 291. An instance in point may be referred to. The Commission for the Interpretation of the Code was asked "whether the danger of offense on the part of the faithful and clergy constitutes a grave cause under canon 1215 so as to excuse from bringing the bodies of the faithful from the place where they are to the church where the funeral is held." The Commission issued a negative reply on October 16, 1919. Cf. *AAS*, XI (1919), 479.

¹⁶⁶ Werts, "The Cessation, etc.," *ThS*, IV, 247.

law which forbids unjust injury to the reputations of the parties¹⁶⁷ and forbids the giving of scandal (that is, at least in the case of *scandalum acceptum*, without sufficient reason).¹⁶⁸ In the light of the explanation developed above, it would seem that the right of the ecclesiastical legislator, being inferior—even though the law is invalidating—would be obliged to yield to the superior law; and hence, the parties naturally capable of entering marriage but obstructed by the ecclesiastical impediment, could contract validly—that is, the ecclesiastical law would cease to bind.

Despite the very broad provisions that have been made by the Code of Canon Law with respect to dispensations in this type of case, it is not at all impossible that certain instances may occur which partake more or less of the features of the *casus perplexus*. Canon 1045, § 3, for example, accords wide powers to a pastor, a priest assisting at a marriage in virtue of Canon 1098, 2°, and a confessor. Yet, these powers are explicitly restricted to occult cases.¹⁶⁹ Suppose that a case should arise in which all preparations for the marriage have been made, and just on the point of performing it the priest

¹⁶⁷ “Unicuique competit ius ad bonum existimationem *ordinariam* seu bonum nomen. . . . Porro ius est ad hanc famam non solum *veram* quae in vera bonitate et excellentia fundatur, sed et ad *falsam* quae in apparenti tantum et existimata bonitate nititur.”—Merkelbach, *Summa Theol. Mor.*, II, n. 426. “Good esteem is an object of acquired right, so that to take it away or to diminish it is an act of injustice.”—Davis, *op. cit.*, II, p. 417.

¹⁶⁸ It should be clearly noted that the argument advanced in this section of the dissertation is not to be construed as maintaining that in a particular case the observance of an invalidating law would lead to sin on the part of one who wishes to act against the law. Even if scandal should arise, the fact is that he would be only the occasion of the sin—and such can be lawful under certain conditions. So too, if he desired, the individual ordinarily could submit to the damage to his reputation (although in some rare cases the rights of others might intervene and forbid such submission). But the argument proposed here considers the matter from the viewpoint of the Church imposing the obligation of diriment impediments—it is contended that the legislator has not the authority to exact obedience with such disproportionate inconvenience, resulting in damage to a subject's reputation, scandal, etc.

¹⁶⁹ The occult cases may involve impediments which by nature are public but are in fact occult, according to an interpretation of the Commission for the Interpretation of the Code. Cf. AAS, XX (1928), 61.

discovers the existence of an ecclesiastical diriment impediment, there being no time to obtain a dispensation. The case, in point of fact, is not occult, but there is grave urgency that the marriage be celebrated immediately, otherwise immeasurably serious injury to the parties' reputations and extremely serious scandal will ensue.¹⁷⁰ Or again, suppose that in a case which is occult there is involved an ecclesiastical impediment from which the priest has no power to dispense—for example, affinity in the direct line, the marriage having been consummated. Few if any writers hold that the necessity in the case bestows upon the priest any extension of the dispensing power granted to him in law. On the other hand, there seems to be a conflict between a purely human law and the divine law which protects an individual's right to his reputation, for example. It is by reason of this conflict, and not due to any supposed power of the priest to dispense, that the opinion maintaining that the diriment impediment ceases seems soundly logical and consistent.

If this ecclesiastical impediment between the parties is public in point of fact, then, if recourse to the Holy See or the Ordinary is impossible, and the case is one of very grave necessity, it appears possible for the parish priest, without giving dispensation—forbidden by canon 83—to assist at the marriage on the ground of the supposed cessation of the impediment. But recourse to the competent Superior must afterwards be made in order that there may be no doubt about the validity of the marriage.¹⁷¹

To consider the matter from another viewpoint—no human legislator has any power by the instrumentality of law, invalidating or otherwise, to deprive permanently or for a very long time any innocent individual of his basic human rights. Should a law have this effect, even though in general it be just and laudable, that law ceases to bind. Now, it cannot be denied that in some instances invalidating

¹⁷⁰ Such a case, of course, could arise only very rarely. Ordinarily the fact that the case is public would demand that the marriage be postponed, precisely in order to avoid scandal. Nevertheless, the possibility of the occurrence of such a case as contemplated here cannot be denied.

¹⁷¹ Davis, *op. cit.*, IV, p. 172. Cf. Cappello, *De Sacrament.*, Vol. III, Pars II, n. 695; Pars I, nn. 237, 199; Aertnys-Damen, *op. cit.*, II, n. 843; Ayrinhac-Lydon, *op. cit.*, n. 253; Doheny, *op. cit.*, p. 676; Carberry, *op. cit.*, p. 155.

laws, if they should continue to be possessed of obligating force, would despoil certain subjects of basic human rights. Suppose, for example, that, in a region where the regulations of the Council of Trent regarding clandestine marriages had been promulgated, all the priests had been slain because of a persecution of the Church. If there was no possibility of any priest's re-entering the territory for an indefinitely long period, then to insist upon the binding force of the decree *Tametsi* would be equivalent to the confiscation of the natural right to marry. Or again, suppose that in our day a Catholic is forced down from an airplane, or shipwrecked on some far-distant and inaccessible island. After some time he desires to contract marriage with one of the natives. However, it is impossible to communicate with the outside world, and thus to obtain a dispensation from the impediment of disparity of cult. There is no indication that the infidel wishes to become baptized, or that the Catholic will within any reasonable time be enabled either to leave the island or to establish communication with ecclesiastical authorities in order to seek the necessary dispensation. Does the ecclesiastical impediment prevent him perpetually from exercising his natural right to marry? Must he remain in a constant, proximate and necessary occasion of sin, thus endangering his eternal salvation? In such cases it would most certainly seem to be beyond the power of any human legislator to insist upon the binding force of a human law, since such insistence would be equivalent to the confiscation of a natural right, and would probably result in an individual's being forced to remain in circumstances which render precarious his soul's salvation.¹⁷²

¹⁷² Another problem could arise in this connection. Suppose in the circumstances outlined, that it is clearly foreseen that the marriage would result in the danger of perversion to the faith of the Catholic party, or in the upbringing of the children outside the Catholic faith. Could the Catholic enter the marriage? In the first place, the marriage would be illicit, for although the impediment of disparity of cult insofar as it invalidates a marriage is ecclesiastical, nevertheless, insofar as it prohibits a marriage when there is danger to the faith of the Catholic or the offspring, it is of divine origin. Cf. Cappello, *De Sacrament.*, Vol. III, Pars I, n. 416; Merkelbach, *Summa Theol. Mor.*, III, n. 885; Noldin-Schmitt, *op. cit.*, III, n. 574; Davis, *op. cit.*, IV, p. 134. But the further problem arises as to whether the marriage would be invalid. To enter into this question would take us too far afield. But briefly, it would appear that such a

Again, Canon 1098, 1° makes wide provisions for cases involving the marriages of Catholics when a priest cannot be present to perform the ceremony. Yet, it is not inconceivable that an instance may arise where it is impossible to have witnesses—and Canon 1098, 1° cannot solve the problem. Is a Catholic, who without any fault of his own finds himself in such a situation, to be despoiled permanently of his natural right to marry, with a possible consequence that his soul will be placed in jeopardy of loss? The issues here at stake are graver than any human law. No attempt is made to deny the great need of invalidating laws, and their utility insofar as the public order and general welfare are concerned. But in the final analysis if an invalidating law is of human enactment, then howsoever necessary and useful it may be, it remains a human precept. And as such it cannot perpetually or for a very long time despoil a guiltless individual of his basic natural rights.¹⁷³

marriage would be invalid. The argumentation adduced above sought to establish the cessation of the ecclesiastical diriment impediment, because that impediment, if it persevered in the circumstances described, would confiscate a basic natural right of the individual in question. Now, no individual can be said to have a basic natural right to contract a marriage which is contrary to divine law. The obligatory force of the impediment of disparity of cult would seem, therefore, to continue in existence.

¹⁷³ Cf. Doheny, *op. cit.*, p. 676; Carberry, *op. cit.*, p. 155; Cappello, *De Sacrament.*, Vol. III, Pars II, n. 695; V. Dalpiaz, "Consultationes," *Apollinaris*, VI (1933), 83-87. In this connection, the question may arise as to whether a priest in extraordinary circumstances (e.g., shipwrecked on an island from which there is no hope of being rescued), who finds the observance of the obligation of chastity extremely difficult, may marry. Without any detailed discussion of the point—for such would be inappropriate here—it would seem that a negative reply must be forthcoming. The priest, in freely receiving Sacred Orders, freely relinquished his right to marry. While it may be granted that he did not foresee such an extraordinary situation as now exists, the fact of the matter is that he freely and without any condition entered a state in regard to which there exists a diriment impediment to marriage. If, even in the most extraordinary situation the Church absolutely refuses to dispense a priest and thus allow him to contract marriage (and thereby implies that under no circumstances has he the right to marry, and likewise seems to imply that marriage is not the only means whereby he may be kept from serious sin), surely it is logical to conclude that such a priest cannot allege the existence of a right to marry and justify his attempt to contract a union when communication with ecclesiastical authorities

These conclusions are by no means meant to deny that the Church has the power to restrict one's right to marry. The power of the Church in this regard is clearly stated in Canon 1016.¹⁷⁴ Moreover, it is not unjust that the exercise of one's right to marry be deferred for good reason. ". . . the right to marry does not imply the right to marry immediately. If the common difficulty of obtaining a dispensation," says Werts, "is foreseen to be only temporary, the parties must wait, for the common good demands that they submit to delay in order to observe the law. Hence the authors use such expressions as 'very long,' 'quasi-perpetual.'" ¹⁷⁵ Again, the right to marry "does not mean the right to marry anyone, but the right to marry someone." ¹⁷⁶

But confiscation of a right is entirely different from postponing the exercise of that right. To confiscate the right to marry would be, as Valton ¹⁷⁷ and Payen ¹⁷⁸ point out, equivalent to forcing in-

is impossible. Now, in point of fact, the Church does refuse to grant a dispensation to a priest to marry. This is clear from the words of a decree of the Sacred Penitentiary issued on April 18, 1936. "The law of sacred celibacy for the Latin clergy has always been and is now so treasured by the Church that, in the case of priests, dispensation from it, in past times, was hardly ever granted, and according to present discipline is never given, not even in danger of death." Cf. *AAS*, XXVIII (1936), 242. (Eng. trans.: Bouscaren, *The Canon Law Digest*, II, p. 579.) With regard to deacons and subdeacons, it would seem that they likewise may not allege any right whatsoever to contract marriage, even in a situation such as the one envisioned. Consequently, it cannot logically be argued that in their regard the diriment impediment arising from Sacred Orders ceases on the basis of the theory that the Church has not the power to demand its observance. The same must be said of the diriment impediment of a solemn vow. What must be said of an appeal to the Church's intention (as distinct from her power) to bind her subjects to the observance of ecclesiastical invalidating laws in extraordinary circumstances, will be discussed later in this chapter.

¹⁷⁴ "Baptizatorum matrimonium regitur iure non solum divino, sed etiam canonico, salva competentia civilis potestatis circa mere civiles eiusdem matrimonii effectus."—Can. 1016.

¹⁷⁵ "The Cessation, etc.," *ThS*, IV, 234.

¹⁷⁶ *Ibid.*, p. 233.

¹⁷⁷ *Art. cit.*, *DTC*, IV, 2458.

¹⁷⁸ G. Payen, *De Matrimonio in Missionibus ac Potissimum in Sinis Tractatus Practicus et Casus* (ed. 2; Zi-ka-wei: Typographia T'ou-sè-wè, 1935-1936), II, n. 1100.

dividuals against their will to a life of celibacy. No human legislator has that power. Nor has the Church ever claimed that power, much as it has exalted a life of celibacy. This teaching is clearly set forth by Pope Leo XIII, and incorporated into the encyclical *Casti connubii* of Pope Pius XI.

In choosing a state of life, it is indisputable that all are at full liberty either to follow the counsel of Jesus Christ as to virginity, or to enter into the bonds of marriage. No human law can abolish the natural and primitive right of marriage . . .¹⁷⁹

In discussing the deferring of a marriage, theologians frequently speak of *quasi* perpetual postponement or postponement for a very long time, as exceeding the legislator's power to demand. Specifically, what is to be understood by these terms? Cappello¹⁸⁰ states that an impediment of ecclesiastical law cannot be thought to cease merely because it would prevent the celebration of the marriage for a month. Vermeersch-Creusen likewise believe that "by no means can the foreseen absence for a month of priest competent [to dispense] alone *per se* suffice"¹⁸¹ for the cessation of an ecclesiastical impediment. Payen¹⁸² teaches that if a missionary visits the locality in question every year or every two years, a Catholic desiring to marry a pagan must defer the marriage until the arrival of the priest.

To conclude the discussion of this point, it may be stated that, although the Church most certainly has the power to establish diriment impediments and to restrict thereby a Christian's right to marry, it has no power to suppress that right entirely. If an ecclesiastical law, otherwise just and commendable, would by reason

¹⁷⁹ Encyclical "*Rerum novarum*," Leo XIII, 14 May 1891, ASS, XXIII (1890-1891), 645. This passage is quoted in Encyclical "*Casti connubii*," Pius XI, 31 Dec. 1930, AAS, XXII (1930), 542. (Eng. trans.: *Four Great Encyclicals*, p. 6.)

¹⁸⁰ *De Sacrament.*, Vol. III, Pars II, n. 695.

¹⁸¹ A. Vermeersch-J. Creusen, *Epilome Iuris Canonici* (Vol. I, ed. 6, 1937; Vol. II, ed. 5, 1934; Vol. III, ed. 5, 1936; Mechliniae-Romae: H. Dessain), II, n. 300.

¹⁸² *Op. cit.*, II, n. 1102.

of circumstances thus confiscate the natural right to marry, then insofar as that particular situation is concerned, the ecclesiastical law ceases to bind, precisely because the Church's power to urge the obligation of the law in those circumstances is no longer existent.

. . . positive human law, while it may for the common good establish regulations for the use of a right, has no authority to suppress the right itself which is given by nature. Now nature, in bestowing upon human beings the power of generation, allows the normal use of that power. In other words, the office of a human lawgiver is to adapt the order of nature to varying circumstances and to supplement its general decrees by more definite provisions; but he cannot subvert or contradict that order . . .¹⁸³

In this section in the treatment of natural rights reference has been made primarily to the natural right to marry. But instances may occur where there are involved other basic natural rights—the right to one's reputation, for example.¹⁸⁴ Thus, it may happen that immediately prior to the celebration of a marriage an impediment is discovered, revelation of which would seriously defame one or both of the parties. What could be done prior to the time that the Code in Canon 1045 made provision for such a contingency? Or indeed what may be done today if the case is not occult, the impediment being publicly known? It must be said that when there comes into conflict with this basic natural right a purely human law, invalidating or otherwise, the binding force of that law by reason of the arguments above explained must be deemed to have ceased.

It has been pointed out and explained above that, when the observance of a law would not merely cease to promote the utility of the legislator's subjects, but would actually harm the community,

¹⁸³ Vermeersch, *What Is Marriage?*, n. 28.

¹⁸⁴ "The estimation in which one is held; the character imputed to a person in a community, society or public' (Webster) is obviously a valuable and important possession. It is a necessary means to a person's economic, moral and intellectual welfare. Therefore, it is among his natural rights. It is based upon man's intrinsic worth and the essential relations of rational nature."—Ryan, *The Norm of Morality*, p. 57.

that is, result in a situation directly contrary to the very purpose for which law is enacted, then the binding force of that law ceases, because the lawgiver no longer possesses the power to insist upon its obligation. Now, that such a condition can be verified even with regard to invalidating laws there can be no doubt. The classical example is that which is mentioned by practically all the post-Tridentine moralists and canonists who treat the subject of marriage. In a region in which the decree *Tametsi* had been promulgated and where the presence of a priest over a long period of time was impossible, strict adherence to the regulation of the Council of Trent on Matrimony would seem to forbid entirely the marriage of the faithful. Again, even today, in an isolated region where recourse to ecclesiastical authority is impossible, and where there are so few Catholics that they cannot marry among themselves, if the impediment of disparity of cult should continue to bind, marriage would be impossible. Now, surely such a situation would be positively harmful to the common welfare. It would (especially with regard to the decree *Tametsi* in times past) jeopardize the salvation of a large number of souls. It would cause spiritual and temporal havoc. In short, insistence upon the binding force of these invalidating laws under all circumstances would be directly contrary to the very purpose for which Christ founded the Church—to continue His mission of saving souls. To state that in such a situation the Church has not the power to demand the observance of a purely ecclesiastical law, though it may be invalidating, is simply to state that the Church has not the power to act contrary to the purpose for which it was established by Our Lord.

More specific reference should here be made to the principle concerning the intrinsic cessation of human laws.¹⁸⁵ When the adequate (that is, the total and not merely the partial) purpose of a law ceases contrarily either for the community or for an individual—in other words, when observance of the law would be harmful, injurious or excessively difficult—the law itself ceases. There is no sound reason why it should be denied that this principle applies to invalidating, as well as to other laws. It is indeed true that by

¹⁸⁵ Cf. Chapter IV, note 15 *supra*.

reason of the nature of invalidating laws this principle will perhaps be employed far less frequently in their regard. But the possibility of application cannot be denied. Nor can any objection be raised on the score that invalidating laws are founded upon a presumption of universal danger. For it is true, as Van Hove clearly points out, that even when there is question of only an individual case (and therefore *a fortiori* in regard to cases involving many people)

the principle can be applied even to a law which is based on a presumption of universal danger, for canon 21 intended only to prevent one from withdrawing from such a law because in an individual case, the danger on which the law is founded, is not existent.¹⁸⁶

In fine, if it can be established that an invalidating law becomes harmful or excessively difficult, it must be concluded that that invalidating law ceases. And that at times an invalidating law does become harmful and excessively difficult would seem to follow from the explanations and examples adduced in the foregoing, where the endeavor was made to prove that insistence upon the observance of an invalidating law would at times involve disproportionate difficulty, a transgression of a higher law, a confiscation of basic natural rights and an injury to the community.

We may conclude with a repetition of the two statements made at the outset of this discussion.¹⁸⁷ (1) Any human law ceases to bind when it would be beyond the power of the legislator to urge its obligation. (2) Now, in point of fact, there are times when it is beyond the power of a human legislator to urge the obligation of his invalidating law. It would seem that the reasons adduced prove the

¹⁸⁶ "Principium applicari potest etiam in lege quae fundatur in praesumptione periculi universalis, quia can. 21 unice intendit prohibere ne quis tali legi se subtrahat, quia in casu individuo periculum, in quo lex fundatur, non adest."—*De Legibus Ecc.*, n. 288.

¹⁸⁷ Cf. p. 409 *supra*.

truth of these assertions. If that be so, then the conclusion is obvious—there are times when a human invalidating law ceases to bind.¹⁸⁸

In opposition to this conclusion, adversaries raise several objections. In the first place, it is charged that while possibly an ecclesiastical invalidating law may cease in cases involving extreme common difficulty, no private difficulty could be sufficiently grave as to cause the cessation of an invalidating law. Moreover, invalidating laws of their very nature are so peculiarly necessary for uniformity and public order, and disregard of them is so apt to result in deception, fraud, uncertainty and manifold other evils, that their binding force cannot be deemed to cease—especially since private good must yield to the general welfare.

In answer to this objection, several observations may be made. First of all, the very fact that those who thus argue, admit the possibility of the cessation of an invalidating law in some cases, destroys what, in the final analysis, is the only argument against the position defended in this dissertation—the argument concerning the

¹⁸⁸ This conclusion seems to be substantiated by several responses of Roman Congregations. Cf. e.g., S. C. de Prop. F., 27 June 1625 (*Coll. P. F.*, n. 17); S. Off., 17 Nov. 1835 (*ibid.*, n. 842); S. Off., 4 June 1851 (*ibid.*, n. 1062); S. Off., 1 July 1863 (*ibid.*, n. 1240); S. C. de Prop. F., 2 July 1827 (*ibid.*, n. 794). Cf. also *Bullariū Romani Continuatio Summorum Pontificum* (Prati, 1840-1856), Vol. VI, Pars III, p. 2624, where Pope Pius VI, writing to the Bishop of Luçon states that in extreme circumstances marriages contracted without the presence of the pastor by the faithful of the diocese of Luçon are to be considered valid. Regarding the response of the Holy Office given on June 4, 1851 (cf. note 115 *supra*) there has been much controversy. Gasparri (*op. cit.* [1932 ed.], I, n. 595), Vromant (*Ius Missionariorum* [Lovanii: Museum Lessianum, 1931] V, *De Matrimonio*, n. 66) and Werts ("The Cessation, etc.," *ThS*, IV, 232 et sqq.) among others, interpret the response to mean that the marriages in question are valid. The correctness of this interpretation is denied by Wernz (*op. cit.*, IV, n. 510, note 37) and Wernz-Vidal (*op. cit.*, V, n. 273, note 41). In any event, to the proofs already presented one may add that, in view of all the foregoing responses as well as the intrinsic arguments adduced above, it would seem that at the very least a prudent and reasonable doubt is created regarding the cessation of an invalidating law in extreme difficulty—and hence, the invoking of Can. 15 seems justifiable. This final argument, however, is purely canonical and, therefore, does not concern this dissertation.

necessity and gravity of invalidating laws. The concession that Christians were not bound to the regulations of the Council of Trent regarding the juridical form of marriage in those regions where access to a priest was impossible—which concession is demanded by authoritative responses—is a clear admission that there are cases in which an invalidating law can no longer bind.

Secondly, this cessation of obligation is not due to the existence of any dispensation. In none of the responses of the Congregations dealing with this matter is there an allusion of any kind to a dispensation. Frequently the word “declaration” is employed, and the whole implication is that the invalidating law itself ceases—it is not merely dispensed from.

Thirdly, the strongest arguments which can be used to substantiate the view that in common difficulty an invalidating law ceases to bind, apply with equal force in many instances to cases of individual difficulty. It cannot logically be maintained, for example, that when the observance of a human invalidating law would involve the transgression of the divine law, that human invalidating law ceases if an entire region is concerned, but continues to bind if only a few individuals are concerned.

Moreover, it cannot be denied that the lack of power in any human legislator to confiscate permanently or for a very long time a basic natural right is not in any way conditioned upon whether a few individuals (or even a single individual) or hundreds are concerned. Certainly no such distinction is found in the words of Pope Leo XIII alluded to above.¹⁸⁹ To be sure, considerations involving the common welfare may require restriction and regulation of natural rights, but they cannot lawfully effect their permanent suppression.

Again, while it is to be conceded that encumbrances must be far more serious to reach a stage where they may be deemed disproportionate when there is question of invalidating laws, there is no reason why the principles that no human law binds with disproportionate difficulty, and that any human law ceases when its *finis* ceases contrarily, should not be applied to human invalidating laws

¹⁸⁹ Cf. p. 420 *supra*.

as well as to other laws. It is indeed true that invalidating laws are especially necessary and useful, that the certainty and uniformity which they effect are of the highest consequence to the general welfare, that flagrant disregard of them would open the door to all manner of abuses.¹⁹⁰ But this too need be said. Passing over the fact that the cases envisioned are of the most extraordinary nature, and hence would occur with the greatest infrequency, and in practically every instance would be occult, one must insist upon the fact that howsoever important invalidating laws enacted by human legislators may be, the limitations which circumscribe all human laws must of necessity circumscribe them. The arguments of adversaries on this point may possibly prove that an invalidating law continues to obligate in all cases in which there is no question of the lawmaker's power to demand obedience; but they cannot establish that it does not cease to bind when to demand observance would exceed the legislator's power.

Moreover, it cannot be too strongly emphasized that the principle that the common good must prevail over the private good should be carefully interpreted. Improperly understood it could lead, and unfortunately has led, to abuses of incomparable detriment. The fact is that the common good need not always and in every case be preferred to a private good. For if the latter in a given instance is of a higher order than the common good—as, for example, when the salvation of a soul is at stake—surely right order does not demand that the private good yield. In point of fact, in many instances, particularly where spiritual values are involved, harm to the individual will redound to the injury of the community.

Finally, if we may use an *ad hominem* argument, most of the theologians, as Ballerini points out,¹⁹¹ who historically denied the soundness of this view in regard to a case of private difficulty involving the Tridentine regulations concerning the juridical form of marriage, accorded to it the note of probability at least, and admitted the lawfulness of its use in practice, when discussing the *casus perplexus*. Their inconsistency is obvious. If circumstances

¹⁹⁰ Thus, Suarez, *De Legibus*, Lib. V, Cap. XXIII, n. 7.

¹⁹¹ Gury-Ballerini-Palmieri, *op. cit.*, II, n. 652, note 82.

relating to private difficulty could cause the cessation of an ecclesiastical impediment in the *casus perplexus*, there seems to be no sound reason for denying that circumstances relating to private difficulty could cause the cessation of the ecclesiastical regulation found in the decree *Tametsi*, or in any human invalidating law.

What is to be said of the argument of Sanchez¹⁹² that the problem here under discussion involves the prohibition of the natural law whereby unmarried people may not lawfully have marriage relations?

This argument, as Werts points out,¹⁹³ is a *pctitio principii*. It assumes what it is meant to prove, namely, that marriage contracted by reason of private difficulty without priest and witnesses is always and without exception invalid. It is indeed true that only those persons who are validly married may lawfully have marital relations. It is likewise true that the impossibility of reaching a priest and two witnesses for the marriage will certainly not permit unmarried people to have relations. But that is not the point at issue. No one will deny that consummation is sinful if the marriage is invalid. The problem under discussion has no reference to this fact which is indisputable. The problem is whether the marriage thus contracted must be judged invalid. Subsequent consummation of such a union will be licit or illicit depending upon the validity or invalidity of the marriage. Seemingly Sanchez fails to realize that the contention that urgent necessity may cause the cessation of a human invalidating law, is entirely and essentially different from the contention that urgent necessity may cause the cessation of the natural law.

Is not the position here outlined regarding human invalidating laws very much weakened by the fact that authors generally require that, when marriage has been contracted under circumstances which might cause the cessation of a diriment impediment, a subsequent dispensation or sanation should be obtained?

It is essential to the proper understanding of our position that attention again be directed to the fact that this dissertation is con-

¹⁹² Cf. p. 393 *supra*.

¹⁹³ "The Cessation, etc.," *ThS*, IV,

cerned with the moral aspects of the problems discussed—not, except perhaps incidentally, with the canonical. When reference is made to marriages contracted in the face of an undispensed diriment impediment, two features must be distinguished: the validity of these marriages in the internal forum, and the demonstrability of their validity in the external forum. Primarily and essentially it is only the first aspect which concerns us here.

Authors generally point out that recourse represents an attitude of reverence and respect for the Church and for her law. This consideration is not to be overlooked. Moreover, it is significant that of the authorities who permit the marriage, in discussing the *casus perplexus* or the case where marriage for urgent reasons is contracted without a priest (prior to current ecclesiastical legislation), very few seem to deny the lawfulness of marital relations between the parties subsequent to such a marriage, and before recourse to authority. In other words, as far as the moral aspect of the matter is concerned, practically all seem to admit the validity of the marriage—in their refusal to assert that consummation of the marriage is even materially sinful.

Nor is the correctness of the position here taken weakened by the fact that some theologians who contend that in extreme cases invalidating laws no longer obligate, nevertheless demand recourse for a subsequent *dispensation* or *sanation* specifically. Passing over the fact that our concern lies with intrinsic arguments and not merely with the extrinsic support or opposition of authors, we may concede that certainly such procedure is advisable to make assurance doubly sure, and, by providing for the demonstrability of the marriage, thus to forestall future litigation. But in any event, insofar as the internal forum is concerned, the lawfulness of marital relations even before the obtaining of a dispensation or sanation does not seem to be denied—if indeed recourse is ever possible; for in some cases there may never be any opportunity to communicate with ecclesiastical authorities.¹⁹⁴

¹⁹⁴ It may be noted as regards the external forum that, should an Ecclesiastical Tribunal adjudicate a marriage contracted under the circumstances above described with no subsequent dispensation or sanation, the legal presumption of the validity of the marriage would be difficult to offset by anyone

It is sometimes stated that in Canons 1043-1045 and in Canon 1098, for example, the Church has made provision by positive legislation for all the benignity which she sees fit to exercise. Consequently, no subject may lawfully presume to interpret her mind in a more benign way than that actually manifested in the aforesaid Canons.

In reply, it may be pointed out that actually the objection is not pertinent at all. For it is based upon the supposition that the view upheld in this section of the dissertation regarding invalidating laws is predicated upon the benign interpretation of the legislator's will. Actually the whole basis of our position concerning the cessation of human invalidating laws is this: that in the circumstances under consideration in the above cases, it is not merely beyond the intention of the legislator to demand the observance of his laws; rather, it is beyond and above his power. When an invalidating law ceases because its continuance would permanently or for a very long time suppress a basic natural right, or because its observance would demand the transgression of a higher law, it ceases not merely because one presumes that the legislator would have it so. It ceases because the legislator lacks the power to have it otherwise.

What evaluation should be placed upon the statement that in cases of extreme difficulty an invalidating law may cease insofar as it is prohibiting, but continues to bind insofar as it is invalidating?

In the first place, whatever may be said of the solution in theory, in practice the necessity of resorting to such a distinction seems to be refuted by the responses already cited. Moreover, this solution seems entirely inadequate. For persons who find themselves in such situations that neither priest nor witnesses can be present for a very long time, or that there is no possibility over a long period of communicating with ecclesiastical authorities for the seeking of a dispensation, the mere cessation of the prohibiting element would be of no avail. In the *casus perplexus* the proposed solu-

seeking a sentence of nullity. Cf. Can. 1014: "Matrimonium gaudet favore iuris; quare in dubio standum est pro valore matrimonii, donec contrarium probetur . . ."

tion might be of some use in some rare instances (the parties might go through the ceremony, so that it would be generally believed that a true marriage had occurred), yet it would be extremely dangerous and might cause considerable scandal. But this very important consideration also must be taken into account. If, as has been shown above, it is true that in cases such as those under discussion the human legislator has no power or authority to demand observance of his law, then the law ceases to bind. To distinguish between elements in the law when, in point of fact, it is the whole law which the legislator has no power to enforce, is not pertinent. When a purely human law comes into conflict with a higher law, when its enforcement would be so disproportionately difficult as to exceed the lawmaker's power, when its continuance would confiscate a basic natural right, the law ceases. It has been pointed out above that these factors can at times be involved in regard to an ecclesiastical invalidating law as invalidating. Hence, in such instances the invalidating law as invalidating must cease to bind. We may, in short, agree with Rodrigo that "in diriment matrimonial impediments their force as prohibitive and their force as invalidating are juridically co-existent and inseparable."¹⁹⁵

A further objection has reference to an extraordinary faculty granted on December 18, 1872 by the Holy Office,¹⁹⁶ whereby certain Christians departing for far distant lands were dispensed in advance from the impediments which would arise, should they desire to contract marriage with infidels or with persons whom they baptized. Does not this prove that the Church does not consider invalidating laws to cease even in cases of extreme difficulty?

¹⁹⁵ ". . . in impedimentis dirimentibus matrimonialibus vis prohibitiva et vis inhabilitativa sunt coexistentiae iuridicae ad invicem inseparabilis."—*Op. cit.*, n. 415. It is to be noted that in the answer above given to the objection offered, mention is not made of the possibility that the distinction in question might lead to the simulation of a Sacrament (if the parties involved are Christians). Such an argument seems to be weak, since according to most theologians, there would, in point of fact, be no simulation—for there would be no positing of the real matter and form of the Sacrament, which is *true* matrimonial consent. Cf. Vermeersch, *Theol. Mor.*, III, n. 175; Merkelbach, *Summa Theol. Mor.*, III, n. 803.

¹⁹⁶ Cf. *Coll. P. F.*, n. 1392.

This inference drawn from the granting of the aforesaid dispensations is fallacious. For the fact remains, as has already been pointed out, that there are many responses clearly indicating that the Church considered the juridical form designated by the Council of Trent for the validity of marriage to cease in regions where compliance with it was impossible. It follows, then, that in some instances the Church herself deems that invalidating laws may cease to bind. With regard to the above mentioned document, it may well be that the Holy Office wished to protect the validity in the external forum of the marriages to be contracted. Moreover, a perusal of the text will make it quite clear that there is involved here merely the granting of a favor. There is no evidence at all to support the theory that the Holy Office wished to establish a principle.¹⁹⁷

One of the most frequently proposed objections to the solution of the problem here suggested is the following. The Council of Trent established the form of marriage. Consequently, without that form there can be no marriage, for no act can subsist without its substantial form. The same objection may be raised today in connection with an urgent case where a Catholic desires to contract marriage but cannot obtain witnesses nor seek a dispensation from the precept requiring their presence.

The objection could be sufficiently answered by pointing out its weakness in the light of the fact that the Church herself has recognized the validity of marriages contracted without the juridical form prescribed by the Council of Trent. Moreover, there seems to be an unanswerable argument in this fact. Prior to the adoption of the Code it was the common and more probable opinion¹⁹⁸ that in a case involving a marriage which had been contracted before a pastor and two witnesses, but was null by reason of an occult impediment, with the removal of the impediment, for the marriage to be validated it was not necessary to renew consent before the pastor and two witnesses. A private renewal of consent sufficed. This view was held by a majority of the older authors and by practically all of the

¹⁹⁷ Cf. Cappello, *De Sacrament.*, Vol. III, Pars I, n. 199.

¹⁹⁸ Cf. St. Alphonsus, *Theol. Mor.*, Lib. VI, n. 1110.

more modern moralists.¹⁹⁹ St. Alphonsus adds that it was confirmed by the practice of the Sacred Penitentiary and the declarations of the Sacred Congregation of the Council. Now, if the presence of priest and witnesses pertains to the substance of the Sacrament of Matrimony, it would be impossible to explain how such a marriage could be validated without the renewal of consent before the pastor and two witnesses.

In addition, these observations should be made. It is unfortunate that in the history of this question the external juridical form prescribed by human law should constantly be referred to as the substantial form, with the inference that it is a constituent of the very essence of the act in question. Actually, insofar as the Sacrament of Matrimony is concerned, the substantial form is "the mutual acceptance of the right to each other's body expressed by a sensible sign."²⁰⁰ Concerning the marriage contract as such, Merkelbach clearly points out:

. . . what are the matter and form of the sacrament are the matter and form of the contract. But in a contract the handing over of a thing or the externally expressed consent to the handing over is the matter; the acceptance or the externally expressed consent to the acceptance is the form.²⁰¹

¹⁹⁹ Cf. Sanchez, *op. cit.*, Lib. II, Disp. XXXVII, n. 3; Bonacina, *op. cit.*, Vol. III, Tract. *De Matrim.*, q. 2, punct. 9, n. 10; Herincx, *op. cit.*, Tract. *De Spons. et Matrim.*, Disp. V, n. 30; Elbel-Bierbaum, *op. cit.*, III, Tract. *De Matrim.*, n. 345; Gury-Ballerini-Palmieri, *op. cit.*, II, n. 652, note 82; Lehmkühl, *op. cit.*, II, n. 1051; Konings, II, n. 1634.

²⁰⁰ "Forma sacramenti est mutua iuris acceptatio signo sensibili expressa."—Noldin-Schmitt, *op. cit.*, III, n. 508.

²⁰¹ ". . . ea est materia et forma sacramenti quae contractus. Atqui in contractu traditio rei seu consensus in traditionem exterius expressus est materia; acceptatio seu consensus in acceptationem exterius expressus est forma."—*Summa Theol. Mor.*, III, n. 787. Of course, it must be kept in mind that since marriage is a social institution, in order that the mutual contract be valid, it must be acceptable to the competent public authority. But in the cases under consideration the persons by the law of nature have a right to contract marriage without the normally prescribed adjuncts such as witnesses, and hence the contract is reasonably acceptable to the Church.

There can be no denial, of course, of the importance and necessity for validity, of the requisite juridical form of marriage.²⁰² The matter may be conceived somewhat as follows. When two parties, possessed of all the requisites required by natural law for the contracting of marriage, exchange consent exteriorly, that act attains its effect, unless between the placing of the act and the effect which would normally follow, some obstacle has been raised by a positive law. In point of fact, it makes little difference whether that obstacle is a diriment impediment or a regulation concerning juridical form. Now if, for some reason or other, that obstacle can be swept aside, the act in question will attain its valid effect, because by supposition it is possessed of the matter and form demanded by the natural law. The juridical form prescribed by human authority is substantial in the sense that the act cannot subsist without it *so long as the law demanding it continues to bind*. But in a case where the law ceases to bind, the juridical form is no longer substantial or essential to the validity of the act. Or the point may be put in this way. The substantial form of marriage by natural law is the manifested consent of the two parties, approved by the proper public authority. Now, in the cases here envisioned, the proper authority must give approval, precisely because it has no power to do otherwise.

The foregoing solution seems to be confirmed not only by the generally admitted teaching that custom can abrogate an invalidating law,²⁰³ but also by the fact that when the Church dispenses from the juridical form, the marriage is valid. Let it not be said that the Church then establishes a different substantial form. For even if this were true,²⁰⁴ in a strict sense it would not be pertinent.

²⁰² As is clear, for non-baptized persons the State has the right to designate the form necessary for validity.

²⁰³ Cf. Noldin-Schmitt, *op. cit.*, I, n. 203; Merkelbach, *Summa Theol. Mor.*, I, n. 408; Arregui, *op. cit.*, n. 86.

²⁰⁴ Actually what the Church does in Canon 1043, e.g., insofar as that Canon involves the juridical form, is not to designate a new substantial form, but simply to allow the consent of the parties to attain its natural effect. This it allows by removing through the intervention of an episcopal dispensation the *obex* placed there by ecclesiastical law.

The problem is not whether the Church has the right to change its requisites for a valid marriage. The problem is whether any circumstances *ipso facto* cause the cessation of the Church's law, sweep aside the obstacle to a valid marriage placed by a human invalidating precept. It is most important to point out that our position does not require that we contend that a thing may subsist without its substantial form; we merely maintain that in the situations envisioned, the juridical form ceases to be essential to the validity of the act.

This same reasoning may well be used in response to the frequently posed objection that mere necessity will not render capable an individual who is incapable, by reason of a human invalidating law, of contracting marriage. It cannot be denied that the parties involved are by supposition capable naturally of entering marriage. A human law has intervened preventing that capability from being exercised in such a way that the act will be valid. Now, if circumstances render that human law ineffective, there is no longer an obstacle between the external exchange of consent and its effect, namely, the validity of the contract. Consequently, in the absence of the obstacle the parties may exercise validly their natural capability to marry, for that capability was never lost, but its exercise merely hindered by a human invalidating law. When a positive law, which invalidates an act that would by nature be valid, becomes for some reason or other ineffective, that act, in order that it subsist, does not require any further positive action on the part of the legislator.²⁰⁵

II. *Epikēia may not be applied to Human Invalidating Laws*

At the outset of this discussion²⁰⁶ a two-fold question was raised. First, does a human invalidating law ever cease to bind? Secondly, may *epikēia* strictly so-called ever be used in relation to a human invalidating law? The remainder of this chapter has reference to the latter problem.

²⁰⁵ Cf. Van Hove, *De Legibus Ecc.*, n. 294.

²⁰⁶ Cf. pp. 408-409 *supra*.

It is clear that the cases treated above, and the conclusions reached in their regard, cannot here be alleged in favor of the affirmative view of the problem at hand. The arguments, both intrinsic and extrinsic, which were employed in the previous discussion, all centered about the lack of power in the lawmaker to insist upon the obligating force of his precept. It does not follow that one who contends that human invalidating laws sometimes cease because it exceeds the power of the legislator to demand observance of them, must therefore admit the lawfulness of the use of *epikeia* properly understood—which concerns only the will of the legislator.

The problem is one which is extremely difficult to solve. It is not by any means claimed that a definitive solution is given here. However, it seems that a careful analysis of the question will lead to the conclusion that *epikeia* strictly so-called may not be applied to human invalidating laws.

It may be conceded that the foundations or roots of *epikeia*—namely, that defects on the part of the legal formula embodying the law, and on the part of the human legislator are possible—can be found in a human invalidating law no less than in other laws, as Rodrigo points out.²⁰⁷ It is likewise true that the Church, founded to continue Christ's mission of saving souls, is deeply solicitous for the spiritual welfare of her children. She is truly a *pia Mater*. But it must be remembered also that at times she refuses to take the positive step of granting extraordinary powers to aid one of her children.²⁰⁸ Nevertheless, it is argued by those who in regard to invalidating laws allow *epikeia* strictly understood, that we may hopefully believe that when there is involved an obstacle established by her own law, and particularly one from which she is wont ordinarily to dispense, the Church will not in every case insist upon it to the fullest extent.²⁰⁹

Invalidating laws are of their very nature such as to seem to exclude in practice the lawfulness of deviating from them on one's

²⁰⁷ *Op. cit.*, n. 399.

²⁰⁸ Cf. the example given below (p. 440) in regard to Extreme Unction.

²⁰⁹ The question of rendering impossible the soul's salvation is, of course, not pertinent. Such an act would be directly contrary to the Church's purpose, and would exceed her power, not merely her will.

own authority, except for a reason which renders the legislator incapable of insisting upon their observance. Moreover, there seems to be no positive evidence that the Church is willing to relax her invalidating laws in situations of less seriousness than those in which there is question of her power to demand obedience. From one point of view the indications seem to lead to the contrary opinion. And, of course, *epikeia* may never be used in regard to any law unless there is at least a probable presumption that the legislator does not urge the obligating force of his precept. Again, the liberal granting of exceptions stated in the law itself may be indicative of the unwillingness of the legislator to exercise additional benignity in regard to her precepts. Certainly abundant and generous liberality in regard to the matter of dispensations is exemplified in the wide provisions of Canons 1098 and 1043-1045, for example.

As is evident from the historical outline sketched above, there are extremely few theologians who admit the lawfulness of applying *epikeia* strictly so-called to invalidating laws. It seems appropriate here to consider the views of Van Hove and Werts on the matter. These authors are chosen because they affirm that *epikeia* taken in its proper sense may sometimes be used in reference to invalidating laws.

Van Hove's position is stated in the following passage:

. . . when there is question of making a benign interpretation of the will of the legislator, it is much more difficult to admit the cessation of these invalidating laws, although that benign interpretation is not absolutely excluded. But such *epikeia* is not to be admitted except for the gravest reasons and according to the doctrine of serious writers.²¹⁰

This passage need not long detain us. For, as is evident, it is a mere statement. Absolutely no proof is offered. Indeed the statement itself is so qualified that, as was pointed out above,²¹¹ Roelker

²¹⁰ “. . . quando agitur de *interpretanda benigne voluntate legislatoris*, multo difficilius cessatio harum legum est admittenda, quamvis benigna illa interpretatio non absolute excludatur. At talis *epikeia* non est admittenda nisi ob gravissimas rationes et iuxta doctrinam gravium scriptorum.”—*De Legibus Ecc.*, n. 294.

²¹¹ Cf. p. 385 *supra*.

believes that in practice Van Hove's opinion must be taken as not admitting the applicability of *epikeia* strictly so-called to invalidating laws.

The arguments which Father Werts uses to substantiate his view are briefly presented toward the end of his article.

In many cases it is difficult to determine with certainty whether these exceptions of the authors involve difficulties which exceed the power of the legislator to impose, or those which are merely beyond his will to enforce. Although they frequently say a case is beyond the will of the legislator, they add reasons that involve a conflict with a higher law. If the higher law prevails, it is beyond the power of the legislator to enforce the inferior law.

However, in some of the exceptions made it seems that the enforcement of the invalidating law would be within the power of the Church. When the subject of the law is culpable, as when two persons have lived in sinful union with every opportunity to remedy their condition, the Church is not bound to provide extraordinary means or to relax her laws in order to validate the union when one of the parties is dying, especially since the dying person can repent and be saved without this validation. But it is certainly the mind of the Church to offer every aid to her dying wayward children.

Such persons are in urgent difficulty through their own fault. If, instead of imposing penalties for the fault, the Church makes an exception to her law in order to remove the difficulty, the exception is not forced upon her by the limitation of her power, but is granted by her will.

* * * * *

Her will [the Church's] concerning her laws is indirectly manifested in canon 15 which says that even invalidating laws do not oblige in doubt of law. . . . The legislator foresees that there will be cases in which the law is probably beyond his power to enforce, or beyond his will as interpreted doctrinally, and this canon expresses the Church's unwillingness to enforce the law in such difficulty.

Since the promulgation of the new Code of Canon Law, the most frequent difficulties that might interfere with invalidating law are excepted by the law itself. But some cases unforeseen by the Code may occur, as has been seen in the examples given.²¹²

²¹² "The Cessation, etc.," *ThS*, IV, 247-248.

In connection with Father Werts' position on the matter, several observations are called for. In the first place, in spite of the implication made in the above quotations, nowhere in the article in which they occur is there mention of an argument by authors which proves that the cessation of an invalidating law could be based merely upon the will of the legislator. Thus, for example, in speaking of common difficulty in observing an invalidating law, Father Werts declares:

The chief reasons used by theologians in favor of this doctrine [i. e., in common difficulty the decree *Tametsi* ceased to bind] were that the natural right to marry prevails over the ecclesiastical law, and that the enforcement of the law would be harmful to the common good and detrimental to society.²¹³

The reasons they [i. e., authors] give for the cessation of the impediment are the same . . .²¹⁴

These two reasons for the cessation of invalidating laws in common moral impossibility of observing them may be reduced to the general principle that human law ceases to bind when it is in conflict with a higher law . . .²¹⁵

In discussing cases of private difficulty the author makes no mention of any moralist or canonist favoring the view that invalidating laws sometimes cease to bind, who does not base his opinion on the lack of power in the legislator to demand observance of his law.²¹⁶

Secondly, we may agree that cases may arise in regard to which the legislator foresees that "the law is probably beyond his power

²¹³ *Ibid.*, p. 231.

²¹⁴ *Ibid.*, p. 232.

²¹⁵ *Ibid.*, p. 234.

²¹⁶ Cf. his citations of Sanchez (*ibid.*, p. 237), Pignatelli (*ibid.*, pp. 237-238), Roncaglia (*ibid.*, p. 238), St. Alphonsus (*ibid.*, p. 238), Gury, Giordanini, etc. (*ibid.*, p. 238), Ballerini (*ibid.*, p. 240), Van Hove (Werts states that it is Van Hove's view that "it is beyond the power of the legislator to enforce the law in such circumstances,"—*ibid.*, p. 241), Ayrinhac (*ibid.*, p. 241). It is true that De Smet speaks of the cessation of an impediment by *epikeia*, yet he appears to use the term in a broad sense, for the reasons alleged in favor of the cessation seem to touch upon the legislator's power—"common impossibility," "most urgent necessity," "the urgent necessity of celebrating the marriage in order to avoid defamation," etc. Cf. De Smet, *op. cit.* (1927 ed.), nn. 469, 839.

to enforce, or beyond his will as interpreted doctrinally, and this canon [15] expresses the Church's unwillingness to enforce the law in such difficulty." But surely the application of Canon 15 to a particular case cannot be construed as an example of the use of *epikeia*. *Epikēia* represents an appeal to the intention of the legislator existing outside the law; to invoke Canon 15 is to appeal to the intention of the legislator as expressed in that Canon. Nor is it logical to conclude that, because Canon 15 demonstrates that the Church is a benign legislator, she is therefore willing to relax the binding force of invalidating laws even in cases to which Canon 15, benign as it is, cannot be applied.

Thirdly, careful consideration should be given the case proposed by Father Werts, concerning two persons who have lived together in concubinage and have neglected to regularize their status. Now, one of the parties is dying, and presumably no priest is present to dispense according to the provisions of Canon 1044.²¹⁷

It is the belief of the author that "if . . . the Church makes an exception to her law in order to remove the difficulty, the exception is not forced upon her by the limitation of her power, but is granted by her will." Surely we may agree that this conclusion is justified if the condition is fulfilled. But Father Werts offers no convincing argument to prove that in the case presented the condition is actually verified.

Affirming that the Church possesses the power to insist that the parties in question cannot be married, Father Werts believes that she does actually relax her law. Now, on what basis can it be argued that, although the Church can justly forbid these people to marry and can consider invalid and seriously sinful their attempt to do so, nevertheless she removes her invalidating law? No reason seems to be offered other than that "it is certainly the mind of the Church to offer every aid to her dying wayward children."

²¹⁷ We assume that the parties in the case presented are hindered from marriage by reason of the existence of a diriment impediment or because witnesses are lacking. Otherwise, there is no problem involved at all. The mere absence of a priest would not prevent a dying person from contracting marriage, for Can. 1098, 1° may be applied.

But even this statement cannot be accepted in the unqualified manner in which it stands. The Church cannot be said to offer every *extraordinary* aid, as is evidenced by the following example. Let us suppose a case where an individual having the habitual intention of receiving Extreme Unction is certainly unconscious, on the point of death, and in mortal sin. Subsequent to his fall into serious sin some days previous, he made an act of attrition. The priest at the side of the dying man may impart conditional absolution, acting on the probability of the Scotist opinion, and on the bare possibility that the individual may be actually conscious and endeavoring to manifest contrition. But it is very probable that this absolution is not valid, and hence, that it has no effect on the soul of the dying man. On the other hand, under the conditions imagined in the case, Extreme Unction will certainly be valid and will certainly remit the mortal sin. However, the only oil available is oil not blessed by the Bishop, and hence certainly invalid.²¹⁸ If the general principle enunciated by Father Werts is universally true without qualification, it would seem that the Church could be presumed to give to the priest the faculty to bless the oil at hand and to confer the Sacrament of Extreme Unction—for that a priest can be delegated to bless the oil is certain, and is confirmed by the fact that Oriental priests possess this power. Yet, in point of fact, the Church does not grant to the priest in the case this power, and according to the teaching of the Holy Office, not even in a case of the gravest necessity can unblessed oil be used, or oil blessed by a priest without the faculty to do so. In fact, oil not consecrated by the Bishop is invalid matter.²¹⁹ In the light of this fact, the

²¹⁸ On the *materia* of Extreme Unction cf. *DB* 908, 700.

²¹⁹ "SSmus (Paulus V) in congregatione generali coram se habita, praevio maturo examine et censura propositionis sequentis, quod nempe *Sacramentum Extreme Unctionis oleo Episcopali benedictione non consecrato ministrari valide possit*, auditis DD Cardinalium suffragiis, declaravit dictam propositionem esse temerariam et errori proximam."—S. Off., 13 Jan. 1611 (*Fontes J. C.*, IV, n. 717). Cf. also S. Off., 14 Sept. 1842 (*Coll. P. F.*, n. 956); S. Off., 15 May 1878 (*Coll. P. F.*, n. 1494). Can. 945 states: "Oleum olivarum in sacramento extremae unctionis adhibendum, debet esse ad hoc benedictum ab Episcopo, vel a presbytero qui facultatem illud benedicendi a Sede Apostolica obtinuerit." Kilker comments: ". . . the juridical facts stand out unobscured and undisputed. No mat-

principle enunciated by Father Werts must be very carefully understood. It is not a cogent argument upon which to base the entire thesis that *epikeia* strictly so-called may be applied to invalidating laws.

To consider the problem from another angle—*epikeia* always involves the presumption that if the legislator were present he would not urge the observance of his law, because he willed not to include in his law the case at hand. In the case proposed by the author let us suppose that the obstacle to the validity of the marriage of the couple in question is the impediment of affinity in the direct line, the marriage from which this relationship arises having been consummated. May *epikeia* be used on the basis that "it is certainly the mind of the Church to offer every aid to her dying wayward children?" The only positive indication of the mind of the Church that we actually have is this: that even if the priest were present, the Church would not allow him to dispense.²²⁰ And so, it would appear either that the parties may lawfully and validly marry because the impediment ceases as being beyond the power of the legislator to insist upon (and this is not *epikeia* strictly so-called), or the parties may not marry. Possibly the latter alternative is correct since, by supposition, "the dying person can repent and be saved without this validation."²²¹ But in any event, in the light of Canon 1044 it is impossible to see the reasonableness of the third opinion that the impediment ceases as being beyond the wish of the Church to enforce. And if it be objected that our case here chosen is not pertinent since it involves an impediment from which it is known beforehand that the priest, were he present, could not dispense, it may be pointed out that this is precisely the reason why, as the sole basis for the opinion that *epikeia* may be applied to ecclesiastical invalidating laws, the general and un-

ter how it is to be explained, it is none the less plain that a Latin priest can bless the oil of the sick only with an Apostolic faculty."—A. Kilker, *Extreme Unction* (St. Louis: B. Herder Book Co., 1927), p. 312. Cf. Merkelbach, *Summa Theol. Mor.*, III, n. 692; Noldin-Schmitt, *op. cit.*, III, n. 433; Davis, *op. cit.*, IV, p. 3; Jones, *op. cit.*, n. 622.

²²⁰ Cf. Cann. 1043, 1044.

²²¹ Werts, "The Cessation, etc.," *ThS*, IV, 247.

qualified statement of Father Werts cannot be accepted—that “it is certainly the mind of the Church to offer every aid to her dying wayward children.”

It will be noted that Father Werts’ explanation quoted above has reference only to cases where the danger of death is involved. May his opinion be extended to include other cases as well? The author does not say. If it may not, it is difficult to justify this unqualified statement: “The difficulty [by reason of which *epikeia* may be used] may be one which is not sufficiently grave to be beyond the power of the legislator to impose, but which is beyond his will.”²²² Would it not be more correct to add “provided that the danger of death is involved,” or some other such qualifying clause?

If, on the other hand, the opinion is meant to be extended to cases in which there is no danger of death, very many problems arise.²²³ It is difficult, for example, to determine why the author looks approvingly upon the view that in cases of common difficulty of obtaining a dispensation, before the parties concerned may be allowed to marry the delay must be foreseen to be very long or *quasi* perpetual.²²⁴ Surely if the postponement must be foreseen to be of such duration, there is question of the legislator’s power to insist upon his invalidating law, and not merely of his will.

Or again, may this opinion be applied to the *casus perplexus* when the faculties conferred upon the priest by Canon 1045, § 3 cannot be invoked, because, for example, the case is not occult? In other words, may the priest (on the theory that the impediment has ceased by reason of *epikeia*; since the case is not occult there seems to be no question of a dispensation) perform the marriage forbidden by the Church, even though to postpone it would not cause disproportionate inconvenience, would not conflict with a higher law, would not suppress a natural right, and would not be seriously harmful to the community?

²²² *Ibid.*, p. 248.

²²³ It might even seem to be a logical deduction from this opinion that a priest in the extraordinary circumstances mentioned above (cf. Cap. VIII, note 173) could marry.

²²⁴ Werts, “The Cessation, etc.,” *ThS*, IV, 234.

But perhaps it may be contended that if in the supposed case there is truly probable peril of grave evil—yet evil less serious than those described above when there was question of the legislator's power to insist upon his law—*epikeia* may be used. If this contention be made, two hypotheses must be considered. First, if the case is occult, there is no reason for resorting to *epikeia* since Canon 1045, § 3 grants the priest power to dispense. Secondly, if the case is not occult, then on what basis can it be presumed that the law does not bind? The Church definitely and explicitly expresses her unwillingness to relax her law in this case by way of dispensation; why presume that she is willing to relax it in this same case by way of *epikeia*—since by supposition no extraordinary or disproportionate inconvenience exists.

In opposition to the position taken in this dissertation, the following objection may be raised. Before the provisions of the Code of Canon Law²²⁵ had definitely settled the point, there was some controversy as to whether, for the validation of a marriage which had been contracted before a priest and two witnesses but was null by reason of an occult impediment, the Tridentine form had to be repeated, when the impediment later ceased by the granting of a dispensation or in some other way. As St. Alphonsus points out,²²⁶ the negative view was common and more probable. Subsequently it became practically universal. Since the literal interpretation of the words of the decree *Tametsi* might appear to demand that the prescribed form be observed even in this instance, it would seem that the common opinion which “rightly presumed that it [i. e., the Council] was unwilling to include this case”²²⁷ was based upon the use of *epikeia*. If this be true, there is an instance of *epikeia* which has reference to an invalidating law.

This objection demands a brief study of the reasons alleged in support of the opinion held by St. Alphonsus, and a brief review of the decree *Tametsi*.²²⁸ St. Alphonsus' view is based upon a dec-

²²⁵ Cf. Cann. 1133 et sqq.

²²⁶ *Theol. Mor.*, Lib. VI, n. 1110.

²²⁷ St. Alphonsus, *loc. cit.*

²²⁸ If one adheres to the opinion held by a few theologians that renewal of consent before the pastor and witnesses was necessary, the difficulty here proposed concerning *epikeia* does not, of course, arise.

laration of Pope Pius V, certain responses of the Sacred Congregation of the Council, the practice of the Sacred Penitentiary—all of which reasons do not concern us here—and upon the argument that it was not the intention of the Council of Trent to include in its law such a case as that under consideration. It is only this last argument which is pertinent here. Admittedly, from the terminology employed it might seem that St. Alphonsus refers to the use of *epikeia*, although it is significant that nowhere in his discussion does that word appear.

The reason for this omission will become clear from an analysis of the argument that the Council of Trent “was unwilling to include this case.” The decree *Tametsi*, before designating the necessary judicial form for future marriages, clearly expressed the reason for the legislation.²²⁹ Marriage before a priest and witnesses was necessary, it stated, because of the grave sins which arose from clandestine contracts. Among these was the fact that it sometimes happened that, after a secret marriage, one of the partners left his spouse and then openly contracted marriage with another, and continued to live with her in concubinage. That this union was bigamous could not be proved, because the previous marriage had been secretly entered.

The opinion of St. Alphonsus and other authors who subscribe to the same view is based ultimately upon the intention of the Council of Trent as discernible in the text of the law itself. “For the Council,” declares St. Alphonsus, “through that presence [of pastor and witnesses] wished only to prevent the sins which used to arise from marriages secretly celebrated.”²³⁰ This *mens* of the Council of Trent alluded to by St. Alphonsus as the basis of his interpretation, is found explicitly in the very text of the decree *Tametsi*; it is the *causa finalis* of the law and appears therein expressly. It was the conviction of St. Alphonsus that if a marriage had once been contracted according to the Tridentine form, there was no possibility that the evils which were wont to arise from clandestine

²²⁹ Cf. pp. 375-376 *supra*.

²³⁰ “. . . concilium enim per illam praesentiam tantum voluit occurrere peccatis quae consurgebant ex nuptiis clam celebratis.”—*Loc. cit.*

unions could occur, and hence, the explicitly expressed purpose of the decree was fulfilled. There is exemplified here, then, an instance of interpretation strictly so-called—interpretation based upon the *causa finalis* of the law and the *mens* of the legislator as expressed in the text of the law itself. *Epikēia*, on the other hand, would be entirely different. For in instances of *epikēia* there is an appeal to the presumed intention of the legislator outside and beyond the precept, and even contrary to its words.

Precisely the same line of reasoning is evident in the discussions of other authors, preceding and subsequent, who adhere to the same position.²³¹ Sanchez²³² points out that the Council wished primarily to prevent bigamous remarriages by forbidding occult unions. Once a marriage had been performed *in facie Ecclesiae*, this purpose was attained, and even though the union was later discovered to be null,²³³ that fact would not contravene the achievement of the law's end. Moreover, the marriage would still stand in the external forum for, by supposition, the impediment was occult.

Bonacina²³⁴ maintains that in the case under consideration re-marriage *in facie Ecclesiae* is not necessary, since the purpose of the decree is already sufficiently attained. Herinx²³⁵ points out that the evils which the Council wished to avoid could not arise in the case in question, even if the parties should not present themselves again before the pastor and witnesses. Gury²³⁶ and Konings²³⁷ subscribe to the same opinion, not only because the Council "is rightly presumed to have been unwilling to include this case"²³⁸ but also because the precept seems to have been sufficiently fulfilled in the

²³¹ Ballerini alone seems to be the exception. He refers to the opinion as exemplifying the use of *epikēia*. But it is not certain whether he means *epikēia* to be understood in a loose or a strict sense. Cf. Gury-Ballerini-Palmieri, *op. cit.*, II, n. 653, note 82.

²³² *Op. cit.*, Lib. II, Disp. 37, n. 3.

²³³ It is supposed, of course, that at the ceremony the priest and witnesses believed the marriage to be valid.

²³⁴ *Op. cit.*, Vol. III, Tract. *De Matrim.*, q. 2, punct. 9, n. 10.

²³⁵ *Op. cit.*, Tract. *De Spons. et Matrim.*, disp. V, n. 30.

²³⁶ Gury-Ballerini-Palmieri, *op. cit.*, II, n. 710.

²³⁷ *Op. cit.*, II, n. 1634.

²³⁸ Thus Gury, *loc. cit.*

first marriage, and because extension of the law would be harmful, in that it would give rise to many scandals and would expose the parties to defamation.²³⁹ Perhaps the clearest expression of the point is found in the observation of Elbel: "The mind of Trent *as is clear from the text* [italics not in original] was only that there be avoided the grave sins which used to arise from clandestine marriages . . ." ²⁴⁰

To sum up, then, it seems clear that the common opinion (that, for a marriage once contracted *in facie Ecclesiae* to be validated when an occult impediment had ceased to exist, it was not necessary to submit again to the Tridentine form) was not based upon the application of *epikeia*. It was based rather upon an interpretation (properly so-called) of the law itself, made in the light of the legislator's intention and of the *causa finalis* of the law, as expressed in the text itself.

SCHOLION. *Epikēia* and the Absolution of an Accomplice

This chapter may be brought to a close with a consideration of a case commonly discussed by authors ²⁴¹ in treating of the relation of *epikeia* to invalidating laws. According to positive ecclesiastical legislation,²⁴² the absolution of an accomplice (where a *res turpis* is concerned) is gravely forbidden, and is indeed invalid in all cases except in danger of death. Even in this latter contingency it is not always licit. The question arises as to whether *epikeia* strictly so-called may ever be used to impart absolution outside the danger of death.

It is beyond the scope of this dissertation to enter into detail as to the precise meaning of the terms of the law in question. The type of sin alluded to, the manner of co-operation required in order

²³⁹ Obviously this final reason, if it could be verified in a particular case, would forego entirely the possibility or need of *epikeia*, for the power of the legislator to insist upon observance of his law would be involved.

²⁴⁰ "Mens Tridentini prout ex textu patet solum fuerit ut vitentur gravia peccata ex clandestinis nuptis olim suborta . . ."—Elbel-Bierbaum, *op. cit.*, Vol. III, Tract. *De Matrim.*, n. 345.

²⁴¹ The need for brevity requires that this discussion mention the opinions of only the more recent authors.

²⁴² Cf. Can. 884; Constitution "*Sacramentum Poenitentiae*," Benedict XIV, 1 June 1741, Documentum V Codici adnexum; Constitution "*Apostolici Muneris*," Benedict XIV, 8 Feb. 1745, *Fontes J. C.*, I, n. 355.

that the prohibition be effective, etc. are matters which do not concern us here.²⁴³ We simply suppose an instance where the sin has certainly been committed and where there is no danger of death. More specifically, moralists imagine a case in which are concerned a missionary and a woman penitent living in a mission district, which there is no hope that any other priest will ever, or at least for a very long time, visit. May *epikeia* be used by the missionary to give absolution to the penitent?

This case is discussed here, only because reference to it is made by many authors in their treatment of *epikeia*. But this point should be clearly kept in mind. Canon 884 is not an invalidating law in the strict sense of the term, as defined at the beginning of this chapter. There it was pointed out that an invalidating law strictly understood nullifies an act which would by natural law be valid. An invalidating law places an obstacle between an act and its valid effect; hence, if the invalidating law were not in existence, the act in question would be valid. But laws which confer a certain defined and limited grant of jurisdiction make valid the acts exercised in virtue of that jurisdiction. Without this grant the acts would not by natural law be valid. This is no meaningless distinction. From it flow many important corollaries, the most important of which for us here is this. It is impossible to employ in this discussion one of the most cogent arguments used in that section of the present chapter in which it was pointed out that invalidating laws sometimes cease. For in answer to the objection that extreme necessity will not render *habilis* an individual who by reason of a positive invalidating law is *inhabilis*, but that a positive act of the legislator is required, it was shown²⁴⁴ that when the obstacle of an invalidating law was removed, the act then placed was valid *ipso facto* because by nature the person was *habilis*. That is not true in a case involving jurisdiction. A priest has that jurisdiction to absolve which the Church gives to him; he has neither more nor less.

²⁴³ Cf. L. Linahen, *De Absolutione Complicis in Peccato Turpi*, The Catholic University of America Canon Law Studies, No. 164 (Washington, D. C.: The Catholic University of America Press, 1942).

²⁴⁴ Cf. pp. 433-434 *supra*.

The arguments supporting the contention that in the case envisioned the Church would not insist upon the observance of Canon 884 and the Papal Constitutions on the point, and hence that absolution might be given, may be thus briefly summarized:

(1) It is inconceivable that it is the mind of the Church to prevent the penitent in the case from ever, save in danger of death, receiving Sacramental absolution. The Church is a *pia Mater*, and hence, cannot be deemed to insist so rigorously upon her law.²⁴⁵ Moreover, the confessor accomplice is rendered *inhabilis* only in order that the woman may seek absolution from another. The Church in legislating supposed that other priests would be available for confession. Consideration was not given the case now in question.²⁴⁶

(2) Desiring only to remove the occasion of very grave scandal, the Church in enacting this law did not intend to exclude the penitent entirely from the way of reconciliation instituted by Our Lord, and to leave at her disposal as the sole means of attaining sanctifying grace, the act of perfect contrition.²⁴⁷

(3) To demand that this law be obeyed in the case in question renders impossible the fulfillment of the precept of annual confession and Communion.²⁴⁸ More important, the divine law prescribing the reception of these Sacraments sometimes in life cannot be obeyed, if the prohibition forbidding the priest to absolve is not relaxed.²⁴⁹

(4) To insist upon this ecclesiastical law would create a conflict with the natural law which forbids scandal and protects the reputa-

²⁴⁵ Cf. Gury-Ballerini-Palmieri, *op. cit.*, II, n. 399, note 3; Cappello, *De Sacrament.*, Vol. II, Pars I, n. 632.

²⁴⁶ Cf. Ballerini, *loc. cit.*; Sabetti-Barrett-Creedon, *op. cit.*, n. 785, Quaest. 6.

²⁴⁷ Cf. Ballerini, *loc. cit.*; Werts, "The Cessation, etc.," *ThS*, IV, 245.

²⁴⁸ Cf. Ballerini, *loc. cit.*

²⁴⁹ Cf. Ballerini, *loc. cit.*; Ferreres, *op. cit.*, II, n. 688, Quaest. 7; Prümmer, *op. cit.*, III, n. 458; Vermeersch-Creusen, *op. cit.*, II, n. 160. In Vermeersch-Creusen it is noted that of itself this argument is insufficient unless other circumstances are added. For *per se* the accomplice can and must receive Holy Communion without confession, after an act of perfect contrition.

tion of an individual. The scandal would arise especially when it would become well known that the woman did not receive Paschal Communion.²⁵⁰

Linahen²⁵¹ believes that "almost all authors" subscribe to the affirmative opinion allowing absolution to be given. Beste²⁵² states that it is held by "a few authors." Sabetti-Barrett-Creedon²⁵³ observe that the negative view is "more common." Moreover, of those who adhere to the affirmative position, practically no author teaches it as certain. At most, they accord to it the note of probability. Cappello²⁵⁴ insists that it is intrinsically probable. Linahen is concerned primarily with its extrinsic probability. "Even if the law itself does not seem to admit an exception," he writes, "it would be difficult to contradict the number of authors."²⁵⁵ As to whether the absolution of the sin of complicity in the case is direct or indirect, there is no agreement. Although many of the authors refuse to take any clear stand on this question, Cappello²⁵⁶ seems to believe that it is direct, while Prümmer,²⁵⁷ Vermeersch-Creusen²⁵⁸ and Arregui²⁵⁹ teach that it is indirect.

Moreover, many authors who at first reading seem to be in favor of the affirmative opinion, are seen after more careful study, merely to state that some moralists and canonists subscribe to this view for the reasons which they then list, but they themselves take no side.

²⁵⁰ Cf. Ballerini, *loc. cit.*; Ferreres, *loc. cit.*; Prümmer, *loc. cit.*; Vermeersch-Creusen, *loc. cit.*; Linahen, *op. cit.*, p. 47; Werts, *loc. cit.*

²⁵¹ *Loc. cit.*

²⁵² *Op. cit.*, p. 82.

²⁵³ *Op. cit.*, n. 785, Quaest. 6.

²⁵⁴ *De Sacrament.*, Vol. II, Pars I, n. 632.

²⁵⁵ *Loc. cit.*

²⁵⁶ *Loc. cit.*

²⁵⁷ *Op. cit.*, III, n. 458.

²⁵⁸ *Op. cit.*, II, n. 160. These authors advise that the priest should warn the penitent to confess the sin, if confession ever be made to another priest.

²⁵⁹ *Op. cit.*, n. 647. He implies that the absolution would be direct in a case where there is no hope that any other priest would ever come into the region.

Thus, Van Hove²⁶⁰ and Rodrigo.²⁶¹ Although Aertnys-Damen are frequently listed with authors favoring the milder teaching, actually they merely observe that most grave necessity on the part of the penitent is commonly considered equivalent to the peril of death. They do not definitely state that this view is theirs. The Code, they point out, is silent on the matter.²⁶² Linahen mentions that there is a *dubium juris*, and hence the priest by resorting to Canon 15 may validly and licitly absolve.²⁶³ Aertnys-Damen²⁶⁴ also mention that writers consider this possibility. Finally, Cappello²⁶⁵ remarks that many authors extend *epikeia* to the case of a priest who, without unavoidable peril of most grave infamy, could not refrain from hearing confession and granting absolution to the accomplice.

The opinion that *epikeia* may not be used in the case under consideration rests upon the following arguments of theologians:

(1) In the Constitutions of Benedict XIV one and only one exception was made. In all other cases the confessor accomplice lacks all jurisdiction, as is clear from the words of the Pope.²⁶⁶ It is wrong to make various exceptions to a law when the legislator makes one and only one.²⁶⁷

(2) It cannot be seriously asserted that when the present Code was being drawn up there could have been an unawareness of the possibility of the occurrence of the case in question. For many years theologians had been discussing it. Yet, Canon 884 clearly states that the absolution of a priest accomplice is invalid except in danger

²⁶⁰ *De Legibus Ecc.*, n. 294.

²⁶¹ *Op. cit.*, n. 399.

²⁶² Aertnys-Damen, *op. cit.*, II, n. 401.

²⁶³ *Op. cit.*, p. 47.

²⁶⁴ *Op. cit.*, II, n. 401.

²⁶⁵ *De Sacrament.*, Vol. II, Pars I, n. 633.

²⁶⁶ “. . . sublata propterea illi ipso iure quacumque auctoritate et iurisdictione ad qualemcumque personam ab huiusmodi culpa absolvendam.”—*Sacramentum Poenitentiae*.

²⁶⁷ Cf. B. Merkelbach, *Quaestiones Pastorales*, Vol. IV, *Quaestiones de Poenitentiae Ministro Eiusque Officiis* (ed. 2; Liège: La Pensée Catholique, 1935), p. 112. He adds: “Nullum . . . adest positivum fundamentum pro sententia indulgentiore, quae proinde non est solide probabilis.”

of death. Moralists and canonists are not justified in restricting or extending the sense of a law, for such is the prerogative of an authentic interpreter only.²⁶⁸

(3) The obligation of confession arising from the divine law does not urge when no confessor is available who can absolve.²⁶⁹

(4) The supposed conflict between the ecclesiastical precept and the divine law which forbids scandal and protects an individual's reputation need not arise. The penitent, considering the necessity of receiving Holy Communion to be urgent, and no confessor to be available, may receive the Sacrament after making an act of perfect contrition. Or again, the conflict may be avoided by the priest's recurring to the Sacred Penitentiary.²⁷⁰ Merkelbach mentions that some believe that the priest is bound to do so.²⁷¹ He adds that it is important that missionaries, who by reason of special circumstances are exposed to greater danger, should not have an easy and ready means of absolving an accomplice and of escaping the consequences of their sin.

In the endeavor to reach some conclusion concerning this difficult problem, the exact point at issue in our discussion should be clearly kept in mind—may *epikeia* strictly so-called be lawfully used in regard to Canon 884? All other considerations, such as the possibility of invoking Canon 15 or Canon 209, or the possibility of so interpreting the phrase "peril of death" as to include the penitent in this case²⁷²—such considerations are exambient to our purpose.

²⁶⁸ Cf. Merkelbach, *loc. cit.*

²⁶⁹ This argument is insinuated by Vermeersch-Creusen (*op. cit.*, II, n. 160), and stated by Sabetti-Barrett-Creedon (*op. cit.*, n. 785, Quaest. 6) in their presentation of the negative case.

²⁷⁰ Cf. Noldin-Schmitt, *op. cit.*, III, n. 372. In earlier editions Noldin allowed the priest to absolve. Cf. H. Noldin, *Summa Theologiae Moralis* (ed. 15-16; Oeniponte, 1923), III, n. 372.

²⁷¹ "Sacerdos complex facile praevidere poterit causam et Romae recurrere ut, tacito nomine, et ficta residentia, facultatem obtineat absolvendi complicem; ceteroquin, etiam in sententia aliorum si praeviderit casum, ad id tenetur."—*Quaest. de Poenit. Ministro*, p. 112.

²⁷² Acertnys-Damen (*op. cit.*, II, n. 401) seem to hint at this possibility.

It would seem that an analysis and study of the problem will lead to the conclusion that *epikeia* may not be used in the case at hand. The arguments presented by the theologians who adhere to this opinion seem convincing and irrefutable. In connection with them, the following observations may be made.

Epikeia is always based upon the presumption, at least probable, that the legislator would not demand the observance of his law were he now present, for it was not his intention to include the case at hand in his law. Obviously the more serious a law is, the more cogent must be the reasons leading to this positive presumption. In the case at hand there is in question not merely an invalidating law (broadly understood)—and hence stringent—but a law which by direct design of the Church is of the most extreme strictness and rigor. There seems to be no positive evidence—and such there must be, if the use of *epikeia* is to be allowed—for believing that the Church in its statement that “The absolution of an accomplice *in peccato turpi* is invalid except in danger of death . . .”²⁷³ meant anything more or less than that. Sabetti-Barrett-Creedon remark: “It is true that Benedict XIV made only one exception, but it is also true that in enacting his law he supposed that other priests would be at hand, or could easily be found, nor did he have our case before his eyes.”²⁷⁴ Passing over the fact that such a statement seems unwarrantedly categorical and apodictical, one is inclined to ask why the most obvious explanation must be entirely eliminated from consideration. Is it not possible that the Pope made only one exception because he deliberately intended to make only one exception? Moreover, moralists and canonists had discussed for years prior to the formation of the Code the problem here under consideration. It is inconceivable that the Church was not fully aware of the controversy. Yet in the Code of Canon Law she clearly and explicitly legislated: “The absolution of an accomplice *in peccato turpi* is

²⁷³ “Absolutio complicitis in peccato turpi invalida est, praeterquam in mortis periculo . . .”—Can. 884.

²⁷⁴ “Verum est Benedict. XIV unicam fecisse exceptionem, sed verum est etiam ipsum supposuisse in lege illa ferenda alios adesse, aut facile inveniri posse sacerdotes, nec casum nostrum prae oculis habuisse.”—*Op. cit.*, n. 785, Quaest. 6.

invalid, except in danger of death . . . ²⁷⁵ Surely, then, the argument cannot be sustained that, when the Church in 1917 enacted anew the law concerning the absolution of an accomplice, she did not mean exactly what she said.

The proponents of the milder view make much of the argument that the ordinary avenue of reconciliation to God would be closed for the sinner, if the Church should insist on the continuance of the effectiveness of Canon 884 in the case. Yet, inasmuch as they do not deny to the Church the power to demand the observance of the law in question, one wonders precisely what conclusion is to be deduced from this argument. Moreover, what they term the ordinary avenue of reconciliation is ordinary only in ordinary situations. They seem to posit an extraordinary set of circumstances and demand that the Church relax her law in order that the problem may be solved in an ordinary way. Finally, one should not belittle or underestimate the preciousness of the gratuitous gift of God, whereby He remits grievous sin and its eternal punishment when a penitent makes an act of perfect contrition. It is not unlikely that in the Providence of God this is the usual avenue of reconciliation for the majority of those who are saved.²⁷⁶

The contention that Canon 884 must cease in the case under consideration, because otherwise the precepts of annual confession and Paschal Communion could not be fulfilled, seems of itself to lack cogency, unless it be taken in conjunction with the argument that divine law prescribes the reception of Penance for one in mortal sin after Baptism, and of Holy Communion sometimes in life (once a year by divine-ecclesiastical law).²⁷⁷

²⁷⁵ Can. 884.

²⁷⁶ Regarding the question as to whether an act of perfect contrition is easy to make, cf. Tensing, *op. cit.*, pp. 59 et sq. The author points out (p. 59) that the opinion that an act of perfect contrition is very difficult is "opposed to the teaching of most present day theologians, to the doctrine of Tradition, and to Divine Revelation." Stating that "many writers of theological manuals in use today insist that the acts of love of God and of perfect contrition for sin are relatively easy," he cites Billot, Merkelbach, Gury, Perrone and Tanquerey to substantiate his belief. The opinion of Tensing seems sound, though one need not entirely agree that the opposite view is "opposed to Divine Revelation." Cf. also H. Semple, *Heaven Open to Souls* (New York, 1916).

²⁷⁷ Cf. Cappello, *De Sacrament.*, I, n. 475.

These arguments, however, are not convincing. The prescription that Holy Communion must be received during the Easter time is of ecclesiastical origin (though the determination that It must be received once a year is divine-ecclesiastical), and consequently there is no intrinsic repugnance if the Church should render impossible its observance by withdrawing the means to fulfill it. If the proponents of the milder view insist, however, on the force of this argument,²⁷⁸ they must logically admit the following. Should the sin in question occur shortly before the Easter season, or even during it (the supposition is that the woman has not yet complied with the Paschal precept), then, even though it is foreseen that another priest with faculties to absolve will certainly visit the district shortly after the close of the Paschal time, the priest accomplice may absolve—for, according to the argument being considered, the woman must go to confession and receive Holy Communion during the Easter time. The argument seems logically to lead to the conclusion, then, that under some circumstances absolution may be given by a priest to an accomplice, outside of danger of death, even though it is foreseen that within a few days or a few weeks another priest with faculties to absolve will certainly be available. This extreme opinion, a logical deduction from the argument under consideration, seems untenable.

More serious, however, is the element of the argument regarding divine law. But even this seems to be based upon a false supposition. It assumes that the continuance in operation of Canon 884 excludes the possibility of receiving Holy Communion. In point of fact it does not. For the possibility of attaining the state of grace through an act of perfect contrition must be taken into account.²⁷⁹ Nor is the

²⁷⁸ Vermeersch-Creusen are careful to point out that this argument taken by itself is insufficient. Cf. *op. cit.*, II, n. 160. We may note, too, in connection with this argument, that the burden of proof to show that there is an available confessor, lies with the proponents of the milder view.

²⁷⁹ On the question of the difficulty of making an act of perfect contrition, cf. note 276 of this chapter. It may be added that if the Church, having in mind such a case as that under consideration, did not see fit to banish all doubt entirely, by making specific provision for the granting of faculties to absolve to the priest accomplice, then she must have considered that the spiritual welfare of the woman could be provided for by an act of perfect contrition.

possibility, and perhaps duty, that the priest obtain faculties to absolve, to be overlooked.²⁸⁰

Reference may here be made to a *petitio principii* of which Sabetti-Barrett-Creedon seem guilty. For to state, as they do,²⁸¹ that absolution may be given by the priest in the case under discussion because to all human laws, including invalidating laws, *epikeia* may be applied, is certainly to beg the question. This is the very point at issue—whether *epikeia* may lawfully be used in reference to Canon 884, in view of the fact that it is an invalidating law (in a broad sense), a most stringent precept, an enactment providing specifically for only one exception, and making no provision at all for an exception in this case which the legislator almost certainly foresaw.

Again, it is not correct to charge, as do most of the proponents of the milder view, that to insist upon the provisions of Canon 884 is to institute a conflict with the natural law which forbids scandal and protects the reputation of the penitent. If it can be verified that the failure of the penitent to receive Holy Communion will give rise either to grave scandal or to serious harm to her reputation, then she may worthily receive Holy Communion after an act of perfect contrition.

If the objection of Ballerini be raised,²⁸² to the effect that her reception of Holy Communion without prior confession will in itself cause grave scandal, several replies are possible. In the first place, the argument seems to be based upon the assumption that one is expected always to receive the Sacrament of Penance before Holy Communion. Certainly, at least in our day, that fallacious notion is not widespread. Again, it is difficult to understand how one's absence from confession could become so notorious as to cause serious scandal. The woman is bound to confess but once a year. Even if Ballerini's view is allowed and the woman confesses to the priest in confession only once a year, is it not quite likely that the fact of that confession will be known only by few? And if that be true, is her absence

²⁸⁰ Cf. Noldin-Schmitt, *op. cit.*, III, n. 372; Merkelbach, *Quaest. de Poenit. Ministro*, p. 112.

²⁸¹ *Op. cit.*, n. 785, Quaest. 6.

²⁸² Cf. Gury-Ballerini-Palmieri, *op. cit.*, II, n. 399, note 3.

from that one confession apt to be a matter of such widespread knowledge that grave scandal will result? But even if beyond all these considerations serious scandal will most certainly arise, may it not easily be averted by the woman's receiving the blessing of the priest in the confessional, rather than absolution—or, as some might possibly suggest, by her making a confession which is not materially integral, but only formally such?

Those who adhere to the position that *epikeia* may be used in the case in question, seem entirely to lose sight of the very important fact that in any event, whether a law be invalidating or not, *epikeia* based upon only a probable presumption may never be used to deviate from a precept when there exists a possibility of recourse. And in regard to the case at hand, it is difficult to imagine a situation in which recourse to the Sacred Penitentiary is altogether impossible.²⁸³

Another observation may be made. Many of the authors who subscribe to the affirmative view, caution that the absolution given by the priest in the case is only indirect.²⁸⁴ The logic of their position is difficult to justify. For Canon 884 either does or does not cease to bind. If the former alternative is true, then why is not the priest empowered directly to forgive all the sins confessed to him? If the latter is true, the affirmative stand, of course, collapses.

Emphasis should be placed on the fact that the negative view, maintaining that *epikeia* is not applicable in the case at hand, does not deny that the Church is a benign Mother and a kindly legislator. But it does insist that in the final analysis the question of the extent to which benignity may fittingly be employed, consistent with the needs of public order and the common welfare, rests with her. It points to the fact that in the law under consideration she has made one exception. It calls attention to the fact that the present law (Canon 884) is considerably less rigorous than the pre-Code law on the point. For whereas, according to the latter, a priest accomplice could absolve only "*in ipsius mortis articulo*,"²⁸⁵ the present legislation allows absolution "*in mortis periculo*."²⁸⁶

²⁸³ Cf. Noldin-Schmitt, *op. cit.*, III, n. 372; Merkelbach, *Quaest. de Poenit. Ministro*, p. 112.

²⁸⁴ Cf. p. 449 *supra*.

²⁸⁵ Const. Benedict XIV, *Sacramentum Poenitentiae*.

²⁸⁶ Can. 884.

Vague and general appeals to the benignity of the legislator constitute no sufficient or suitable substitute for a sound probability that such an extremely strict law ceases to bind in a case which the Church certainly must have foreseen. Arbitrary use of this argument might easily become an instrument to subvert the whole legislative structure of the Church. If we are to believe that, although the Church makes specifically only one exception to her law, there can be a sound and probable presumption that, because she is a benign legislator, she intended to make two, then we may inquire how proponents of this theory justify the existence of Canon 884 at all. For surely it would have been more benign on the part of the Church to enact a much less stringent law. And if it be objected that the Church refrained from declaring exceptions (other than that referring to a case in which danger of death is involved) simply in order to avoid prolixity and confusion in her law, then it may be asked why the fear of verbosity and profuseness did not prevent the Church from stating in Canon 1098, § 1 two exceptions to her general law. In fine, our point may well be summarized in the words of Miaskiewicz, who speaks in reference to invalidating laws in general:

. . . although it is readily admitted that, if she so willed, the Church could have carried on her mission without her system of invalidating jurisdictional laws and could even now abrogate their force, still it cannot be denied that the existence of such jurisdictional sanctions in the Code is open evidence of her will that such laws continue. No one can seriously and sanely challenge the wisdom of the Church in retaining these laws, for she has a venerable experience and the unceasing guidance of the Holy Ghost with her. It is precisely in the milieu of these factors . . . that the Church has decided upon her present jurisdictional system as the best human manner of insuring an adequate order for her social discipline . . .²⁸⁷

One final and very important remark seems in order. In the foregoing argumentation many of the statements of the proponents of the milder view seem to touch upon the Church's power—that is, they

²⁸⁷ F. Miaskiewicz, *Supplied Jurisdiction According to Canon 209*, The Catholic University of America Canon Law Studies, No. 122 (Washington, D. C.: The Catholic University of America Press, 1940), p. 158.

insinuate, at least, that in view of the divine natural and divine positive law, the Church under such circumstances as those envisioned, could not insist upon the binding force of Canon 884. For the reasons above alleged, it is our contention that these arguments are not convincing. But even if their complete cogency be assumed, the conclusion would seem to be that in such instances the law would cease for it would be beyond the power of legislator to enforce. *Epikeia*, however, understood in a proper sense would not be involved even on the basis of that assumption, inasmuch as *epikeia* concerns only the intention, and not the power, of the lawmaker.

CONCLUSIONS

THIS dissertation is concerned with *Epikēia*, insofar as its history in Moral Theology, its nature, and its use according to the principles of that science are concerned. The historical development of this concept among moralists has been traced, a commentary on their views presented, and a comparative study instituted between the teaching of modern authors and that of writers of earlier times. At the close of each section of Part I a resumé has been offered, and consequently no further discussion with regard to the history of the concept need be undertaken here.

In reference to Part II of this dissertation, the following opinions are offered as conclusions.

(1) *Epikēia* is a lawful institute of Moral Theology, based ultimately on the intention of the legislator to exclude from his law a particular case, and hence the presumed intention of the legislator is of the highest import in regard to *epikēia*. For *epikēia* properly so-called is concerned, not with the lack of power in the legislator to include a particular case in his law, but rather with his will not to do so.

(2) *Epikēia* may be defined as follows: A correction or emendation of a law which in its expression is deficient by reason of its universality, a correction made by a subject who deviates from the clear words of the law, basing his action upon the presumption, at least probable, that the legislator intended not to include in his law the case at hand.

(3) The intention of the legislator not to include a particular case in his law is not a merely interpretative intention, but exists in the mind of the legislator at least virtually though perhaps only implicitly.

(4) *Epikēia* may be used only with the greatest discretion; in the internal forum it may be applied to affirmative precepts and to negative precepts (ecclesiastical and civil), but very infrequently with regard to affirmative precepts, because the latter, binding *semper* but not *pro semper*, are more susceptible of interpretation than of *epikēia*.

(5) *Epikēia* may be used, not only when advantage would accrue to the community, but likewise in cases where the good of an individual only is concerned. Moreover, the good may have reference to the avoidance of a *damnum* or to the gaining of a *lucrum*.

(6) In an instance in which the legislator's intention not to include the case in his law is known with certainty, recourse to a Superior is not necessary; in a case where the evidence regarding this presumed intention of the legislator is so unsubstantial that the subject cannot even hesitatingly assent that he is free, *epikēia* may not be used; if the subject can make a soundly probable judgment that the circumstances of the particular case at hand are such that the legislator willed not to include it in his law, he may deviate from the words of the law on the strength of that presumed intention of the legislator—but only when recourse to a Superior is impossible, and when there cannot be a delay until such time as recourse becomes possible.

(7) *Epikēia* is related to Prudence, in that it is directed by the virtue of *Gnome*, a potential part of Prudence. It is probable that *epikēia* is a subjective part of the virtue of *Aequitas* which is a potential part of the virtue of Justice.

(8) *Epikēia* properly so-called has no standing in civil law, insofar as the external forum is concerned.

(9) *Epikēia* is not to be identified with Interpretation, Dispensation, Presumed Permission, Excusing Cause, or Popular Acceptance of Human Law.

(10) *Epikēia* may not be applied to precepts of the natural law, nor to precepts of the divine positive law of the New Testament.

(11) It seems probable that the use of *epikēia* was not permissible in reference to precepts of the divine positive law of the Old Testament.

(12) Human invalidating laws sometimes cease to bind; but *epikēia* may not be applied to human invalidating laws.

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ABBREVIATIONS

- AAS—*Acta Apostolicae Sedis.*
AER—*The American Ecclesiastical Review.*
Archiv. Giurid.—*Archivio Giuridico.*
ASS—*Acta Sanctae Sedis.*
CLR—*Columbia Law Review.*
Coll. Brug.—*Collationes Brugenses.*
Coll. P. F.—*Collectanea S. C. de Propaganda Fide.*
CSEL—*Corpus Scriptorum Ecclesiasticorum Latinorum.*
DB—*Denzinger-Bannwart-Umberg, Enchiridion Symbolorum et Definitionum.*
DTC—*Dictionnaire de Théologie Catholique.*
ER—*Ecclesiastical Review.*
EthL—*Ephemerides Theologicae Lovanienses.*
GCS—*Die Griechischen Christlichen Schriftsteller der Ersten Drei Jahrhunderte.*
GLJ—*Georgetown Law Journal.*
In Ethica—*St. Thomas, In X Libros Ethicorum ad Nicomachum Aristot. Commentarius.*
Jus Pont.—*Jus Pontificium.*
MLR—*Minnesota Law Review.*
MPG—*Migne, Patrologia Graeca.*
MPL—*Migne, Patrologia Latina.*
NDL—*Notre Dame Lawyer.*
NRTh—*Nouvelle Revue Théologique.*
Periodica—*Periodica de Re Morali, Canonica, Liturgica.*
Quodlibet.—*St. Thomas, Quaestiones Quodlibetales.*
RDC—*Rivista di Diritto Civile.*
REL—*Revue Ecclésiastique de Liège.*
RIFD—*Rivista Internazionale di Filosofia del Diritto.*
Sent.—*St. Thomas, Commentum in Quattuor Libros Sententiarum Magistri Petri Lombardi.*
Sum. Theol.—*St. Thomas, Summa Theologica.*
ThQS—*Theologisch-praktisch Quartalschrift.*
ThS—*Theological Studies.*

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