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Davis Nicole Madeja April 10, 2020

Aristotelian Equity in the Modern Legal System

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Abstract

Aristotelian Equity in the Modern Legal System
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The purpose of my thesis is to study and analyze Aristotle's conception of equity and to argue that it is a concept useful for contemporary legal thinking. To this aim, I look at the relevant Aristotelian texts, historical reports of the application of equity in the American legal system, and contemporary discussions about the value of equity in legal debates.

My argument is developed throughout three chapters. First, looking at Aristotle's work, I develop a notion of equity that goes beyond equity as leniency, as various interpretations have defended. Instead, I argue that a proper sense of equity must include both cases of leniency and cases of stricter judgement.

Second, I discuss how considerations about equity as a potential virtue in legal thinking impact our understanding of the judge. Concretely, I consider which emotions play a role in the formation of equitable judges and present a case for a judge that is not completely dispassionate.

In the final chapter, I examine the purpose equity serves in our legal system. I discuss the historical reasons for the history of equity in our legal system, the problem it aims to solve, and the difficulties its application presented and might potentially bring about. To conclude, I use this material to argue that equity understood in an Aristotelian way is beneficial to contemporary legal thinking.

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Table of Contents

Introduction

While the law has changed since the time of Aristotle, the problem of its universality remains consistent. Despite the many significant developments in the law, cases still arise to which the common law cannot offer an adequate solution. Some of such cases may be representative of those identified by Aristotle as "involuntary" actions, in which agents act either unintentionally or unknowingly. In the present time, some cases may also represent changing cultural beliefs, with which the law cannot always keep pace. Regardless of the specific circumstances, however, cases such as these may be found worthy of special consideration, where the judge may prefer to make an exception, or the accused may be found worthy of a more lenient judgement. These cases are the central matter of "equity," an Aristotelian notion that still has currency today.

In this thesis I explain the notion of equity, argue for a broad understanding of the term, and show that it is a crucial tool for judicial decision. In Chapter I, I explain the notion of equity by appealing mainly to the Aristotelian conception as expressed in his *Nicomachean Ethics* and his *Rhetoric*. I offer an interpretation of Aristotle's understanding of the term, and argue that he has good reasons to maintain a view of equity that is broader than what it is usually taken to be. Concretely, I argue that Aristotle's notion of equity goes beyond "mercy" or "leniency" (as Martha Nussbaum often interprets it), and beyond mere "excuse" (as Carissa Phillips-Garrett takes it). My view is that equity includes *both* cases that require leniency *and* cases where a stricter treatment is needed. Focus is often placed only on equity's ability to produce lenient judgements. However, in this thesis, I will examine not only equity's capacity for leniency, but also its capacity to produce stricter punishment when necessary.

Despite the many the cases which require that leniency rightfully be shown, I believe there are also cases in which the common law does not act strictly enough, and judges need an

intellectual disposition to properly identify and deal with those cases as well. In the following chapters, I will identify examples of such cases. For example, the accused may be of a particularly poor moral character, or may have an extensive criminal history; the accused may not have even acted contrary to the law, but relied upon the shortcomings of the law to cause harm to another. Just as in cases where leniency becomes appropriate, I believe that cases such as these also require that particular judgement be shown.

I believe that one of the reasons why Aristotle's conception of equity remains relevant today is that it allows us to see beyond today's frequently formalistic application of the law. The proliferation of professionals who know "tricks" to tip-toe around the law, or know to find exceptions to avoid rightful fines or punishments, produces a dissatisfaction and a sensation that the law sometimes seems not truly "just" or "fair".[1] As Aristotle describes equity in *Nicomachean Ethics* V, it is a correction of the common law, a solution to its shortcomings to make it more fair, or more according to justice, with the purpose of making judicial decisions in accordance to what sometimes is called the "spirit of the law".[2] Equity thus addresses two sets of potential failures in the application of universal laws to particular cases: on the one hand, the judge might fail to see that there are exceptions and reasons to be lenient in certain circumstances; on the other hand, the judge might fail to see that the law leaves "off the hook" some cases that do constitute criminal behavior and are clearly cases of acting contrary to the values that the law was expected to protect.

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[1] This is the problem that Henry Smith calls "opportunism", which I will discuss in my final chapter. (See Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 1-74.)

[2] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.14.1137b.

Once I explain the notion of equity in my first chapter, I will examine the role of the equitable judge. Many believe that the judge should make decisions based on reason, as opposed to emotion. Carissa Phillips-Garrett, for example, argues that emotions are detrimental to legal judgements.[3] I will argue, however, that the equitable judge must rely upon both reason and emotion to form their decisions. According to Aristotle, the equitable judge has a unique understanding of human things.[4] Such an understanding, which is both rational and emotional, allows the judge both to sympathize with the accused (promoting occasional justified leniency)[5] and to get adequately irritated with the accused (promoting occasional justified greater punishment when necessary).

To argue for this view on the equitable judge as emotional, I also consider in Chapter II the emotions that play a role in the formation of the equitable judgements. I argue that the equitable judge should have both a capacity for sympathetic excusing of deserving agents and a capacity for indignation about abuses of the law. In both cases, I intervene in contemporary debates about the interpretation of Aristotle's theory of the good judge and propose an alternative view. For the cases when the accused deserves a lighter punishment, I argue that Aristotle proposes that the judge must be able to make proper excuses guided by feelings of sympathy, although that is different from forgiveness. While many, like Martha Nussbaum, believe that "sungnōmē" should be interpreted as "forgiveness," I disagree with this translation;[6] instead, I

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[3] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." *Apeiron*, vol. 30, no. 3, 2017, pp. 325. See also Rapp, Christof. "Dispassionate Judges Encountering Hotheaded Aristotelians," in Huppes-Cluysenaer L., Coelho N. (eds) *Aristotle on Emotions in Law and Politics*. Law and Philosophy Library, vol. 121, Springer 2018, pp. 27-49.
[4] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. I.13.1374b1.
[5] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.
[6] Nussbaum, Martha. "Equity and Mercy." *Philosophy & Public Affairs*, vol. 22, no. 2, 1993, pp. 94.

argue that "sungnōmē should be understood as "excuse". Excuse is only applicable, however, in cases which warrant leniency, which the judge will be able to identify through proper emotional alignment with the accused. For the cases in which the accused deserves greater punishment, I argue that the judge acts upon feelings of nemesis, or indignation, as opposed to anger.[7] Just as the judge's feelings toward the accused may inspire leniency, they may also inspire feelings of nemesis. Thus, the equitable judge acts not only upon reason, but upon the emotions brought about by the accused and the case at hand.

In the final chapter of this paper, I will demonstrate the ways in which equity, and the emotions that prompt equitable judgement, remain applicable in today's modern legal system. To this goal, I will explore how equity has been applied in the past and how it is applied today. In the past, there were separate equity courts which, unlike the common law courts, attended to the kinds of cases that more commonly presented unique circumstances.[8] Eventually, however, these courts merged. I do not propose that such separate court systems should be reintroduced, but instead argue that the ideals of the courts of equity pertain to all cases, and that the universal application of equity is necessary within all realms of the law.

After the merging of these courts, equity assumed a secondary role within the legal system. For years, little changed regarding the purpose and role of equity. However, in the 20th century, American Legal Realism altered popular conceptions of the common law and, by doing

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[7] This saves my argument from some of the problems raised by Rapp (Rapp, Christof. "Dispassionate Judges Encountering Hotheaded Aristotelians," in Huppes-Cluysenaer L., Coelho N. (eds) *Aristotle on Emotions in Law and Politics*. Law and Philosophy Library, vol. 121, Springer 2018, pp. 27-49).
[7] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis
[8] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." *Yale Law Journal*, vol. 64, no. 2, 1954, pp. 308.

so, granted greater responsibility to both the judge and equity.[9] This movement has had lasting effects on the American legal system and the role that equity plays.[10]

I will argue, however, that the effects the American Realist Movement had on equity and its application within the law, were not entirely beneficial. This is largely due to the importance the movement placed on the discretion of the judge, thus allowing equity to take precedence over the common law.[11] The precedence equity assumed also allowed for its application to be made apparent to citizens.[12] Such occurrences allow for the displacement of the common law, which is detrimental to the maintenance of order within the political community.[13] Thus, equity must not assume a primary role within the legal system, or else the political community will suffer.

Despite the problems that arise when equity assumes precedence over the common law, equity remains necessary to contemporary legal thinking. Aristotle's conception in particular is central to discussions of equity due to the simplicity and clarity of its purpose.[14] It offers a attractive solution to the logical problem of the universality of the law.[15] While arguments are made for the alternative purposes of equity, I argue that its purpose as a correction of the common law is what allows equity to remain pertinent within the modern legal system.

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[9] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 370-372.
[10] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 373.
[11] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 372.
[12] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 368.
[13] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 368-372.
[14] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2054.
[15] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2066.

Equity can serve as a correction both when the law is too strict, and when the law is too lenient. When equity imparts stricter judgement on the accused, it may seek to address problems of character or history, or even circumstances in which the law has not been broken, but a wrong has still been committed. This is what Henry E. Smith refers to as opportunism.[16] In the final chapter of this paper, I will rely on Smith's understanding of opportunism to demonstrate the importance of the contemporary application of equity as a secondary force, which corrects the common law when necessary.

In conclusion, I seek to demonstrate the importance of a model of equity which allows for both lenient judgement and stricter judgement when the common law falls short. I also hope to emphasize the significant role that the judge plays in cases that warrant equitable judgement. Emotion, not just reason, allows the equitable judge to achieve a better understanding of the accused and, therefore, to impart the appropriate judgement. I then look to contemporary legal discussions of equity to put forth a brief history of the application of equity in the legal system, and argue for the universal application of equity throughout the legal system. I identify the problems that arise when equity is not applied as it should be, but ultimately argue that equity is beneficial to contemporary legal thinking.

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[16] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 12-13.

Chapter I: What is Equity?

1.1 Aristotle's Conception of Equity

Aristotle is the first author that explicitly formulates the notion of equity as a response to the problem of the universality of the law. In this chapter, I begin my discussion of the notion of equity by providing a brief overview of the texts in which Aristotle deals with this notion, its context, and the main points that he raises to characterize it. I show that equity is a crucial concept in Aristotle's theory of practical thinking, as he is highly concerned with the fact that our moral judgements are always grounded on particulars and there are not universal formulas that can capture the complexity of practical situations.

After a lengthy analysis of the notion of justice in the first part of Book V of the *Nicomachean Ethics* (*NE*), Aristotle begins his discussion of the problem of the law and its universal application.[17] The essence of the problem is that it is impossible to craft laws which attend to all acts of injustice and the variability of human behaviors. Although the aspiration of the law is to be universal, there will always be cases that do not adequately fit under that universal formulation, and for those, we need to find a tailored solution. Aristotle refers to this strategy as a "correction" to and completion of the law:

> When the law makes a universal statement about a subject but an instance of that subject is not rightly covered by that statement, then it is right to correct that omission.[18]

This correction of the omissions of the law is the purpose of equity. It is the dispositional and intellectual tool that we can use to think beyond the written law to deliberate and make judgements that respond more adequately to the spirit of the law. To illustrate the point of equity,

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[17] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. V.14.1137b.
[18] Ibid.

Aristotle uses the metaphor of the so-called "Lesbian ruler", which adapts to the elements; similarly, equity allows us to see the law as something that can be malleable and bend according to the requirements of any given legal context:

> For of that which is indefinite, the rule too is indefinite, like the leaden rule used in Lesbian construction; for the rule here is not rigid but adapts itself to the shape of the stone, and so does the decree when applied to its [variable] subject matter.[19]

In his main analysis of the virtue of justice in *NE* V, Aristotle claims that the purpose of justice is to preserve the happiness of the political community.[20] Thus, acts of injustice are unlawful acts that threaten such happiness. Aristotle also writes that, "to act unjustly is to get more than what one deserves while to be treated unjustly is to get less than what one deserves."[21] One's character is of no importance to the law when an injustice has been committed. Whether one is a good man or bad one, "if one man acts unjustly while the other is harmed, the law attends only to the amount of harm and treats both parties as equals."[22] In addition to character, the intention behind one's actions may prove to be of interest to the law. Harmful actions are often committed voluntarily, with prior deliberation or without.[23] Involuntary actions, however, may also be punishable. There are some possible exceptions to or reconsiderations of the commands of the law, which include those involuntary actions that result because of ignorance, and not in ignorance.[24] It is because these possible exceptions exist that we need a higher form of

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[19] Ibid.
[20] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.3.1129b.
[21] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.9.1133b.
[22] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.7.1132a.
[23] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.10.1135b.
[24] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.10.1136a.

justice that goes beyond the strict universal formulation and is able to deal with the cases that do not fall under it.

Justice, like other virtues, is a mean between two extremes.[25] As previously stated, its purpose is to protect the political body and its happiness. It commands people to act according to the law, and according to what is good and right.[26] Justice proves beneficial then not only for the just, but for those whom it is directed toward. There are two kinds: one which oversees the distribution of property and goods, and another which attends to the wrongs committed in exchanges.[27] It is thus the judge who concerns himself with the preservation of such justice.[28] "To go to a judge is to go to what is just, for a judge tends to be something which is just and has a soul."[29] However, due to the problem of the universality of laws, the judge must also possess the ability to identify when the laws fail to produce appropriate results and sufficient knowledge of how to amend them as to consider cases in a way that adapts more adequately to the spirit of the law.

In *Nicomachean Ethics* V.14, the equitable is described as a correction to the universality of the law.[30] Thus, when the law fails to attend to the particulars of a given circumstance, it becomes necessary to consider such specifics and act accordingly, making the requisite corrections. While the equitable is sometimes considered to be that which is just, Aristotle believes it is not the same as justice itself, and is different from the just in some respects. In fact,

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[25] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.1.1129a3.
[26] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.2.1129b.
[27] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. V.5.1130b-1131a.
[28] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. V.7.1132a.
[29] Ibid.
[30] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. V.14.1137b.

he claims that, "it is better than one kind of what is just."[31] In other words, the equitable is superior to what is just in the strictly legal sense. It is, therefore, superior to the common law which it seeks to amend. Thus, the judge must not only possess and understanding of the just, but must also possess and understanding of what is equitable.

Aristotle continues his discussion of equity in Book I of the *Rhetoric* in further considering the implications of justice and injustice. In Chapter 12, he explains why it is that people commit acts of injustice, concluding that there may be a great number of reasons. For example, one may commit such an act because they believe they can "escape notice", "corrupt the judges", or "seem to have acted due to luck."[32] These individuals seek targets that appear to be to be easily susceptible to injustice and unlikely to prosecute, such as those that are careless, shameful, or fearful.[33] Aristotle once again states that injustice is that which always affects another. "For what one should do or not do is defined in relation to the community or in relation to an individual member of the community."[34] He argues for the defining of the specific acts of injustice, as outlined by the law, so as to prevent those accused from denying the deliberate nature of their actions.[35] Despite such definitions, however, the written law still remains incapable of attending to all cases.

It is for this reason that Aristotle again argues for the need for equity in a court of law. Here, it is described as an "unwritten law" that attends to cases which have been "omitted by the

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[31] Ibid.
[32] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. I.12.1372a1-1372b1.
[33] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. I.12.1372b1-1373a1.
[34] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. I.13.1373b1.
[35] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. I.13.1373b1-1374a1.

special written law," as a result of the inability of legislators to provide adequate definitions for particular acts.[36] It is in these cases that those who have committed involuntary errors should not be judged as are those who have committed deliberate injustices.[37] Yet, equity may also be applied to cases in which the accused possesses a particularly immoral character or has a lengthy history of prior bad acts. In such cases, greater action should be taken and greater punishment inflicted.[38] Thus, the reach of equitable judgement is wide and has the potential to attend to all matters of indefinable action.

In the legal cases in which a misfortune or error has occurred, but not an injustice, it becomes necessary to account for the motivations behind such occurrences. Neither misfortunes nor errors are committed as a result of depravity.[39] It is for this reason that such occurrences differ from injustices and, therefore, are deserving of particular judgement and further consideration. Specifically, they may be shown "sympathetic consideration" or "sungnōmē".[40] As defined in the *Nicomachean Ethics*, sungnōmē refers to forgiveness.[41] It is a particular kind of forgiveness which should be demonstrated by the equitable judge, one of good judgement, in the case of circumstances which require consideration of the particulars.[42] In certain contexts, sungnōmē may be the appropriate response, yet cases may also arise which deserve a more severe punishment.

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[36] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. I.13.1374a1.
[37] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.
[38] Ibid.
[39] Ibid.
[40] Ibid.
[41] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. Grinnell: The Peripatetic Press. 1984. VI.11.1143a.
[42] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. VI.11.1143a.

To summarize, equity is meant to serve as a correction to the law, which often fails to properly address injustices due to the universality of its application.[43] While it may be similar to justice, it is not the same as justice itself. Yet, Aristotle considers equity to be superior to legal justice and the common law.[44] To amend the shortcomings of the common law, equity applies when either lesser or greater action must be taken.[45] For example, those who commit unintentional errors deserve sungnōmē and those who commit unusually wrongful acts deserve more severe punishments.[46] Thus, the application of equity becomes appropriate in a wide range of circumstances, and serves to correct the written law in many possible manners.

In what follows, I explore some of the interpretations that are most common in contemporary discussions of these texts and argue for a broad notion of equity, that includes both cases of leniency and cases of stricter punishment.

1.2 Nussbaum "Mercy Model" of Equity

In her article, "Equity and Mercy," Martha Nussbaum puts forth an interpretation of equity as equivalent to mercy. Nussbaum's primary goal is to argue for the moral and legal significance of literature and to defend the tradition of mercy as an alternative to other views of punishment, and to that aim, the notion of equity is central to her argument.[47] In her interpretation of the texts on equity, she focuses both on equity's ability to attend to the unique aspects of particular situations and on equity's connection to leniency. She begins her discussion by analyzing sections 1137b8ff-1137b32 of Aristotle's *Nicomachean Ethics* and the arguments he puts forth for the

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[43] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. V.14.1137b.
[44] Ibid.
[45] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.
[46] Ibid.
[47] Nussbaum, Martha. "Equity and Mercy." *Philosophy & Public Affairs*, vol. 22, no. 2, 1993, pp. 85.

necessity of the correction of the universality of the law and the role of equity as a superior form of justice. "Equity may be regarded as a 'correcting' and 'completing' of legal justice."[48] She reads passage 1137b34-1138a3 as claiming that, in correcting the law, the judge of equitable person, is not inclined to punish, but to instead reduce punishment.[49] That is ground for her conclusion that Aristotle intentionally "links perception of the particular with mitigation," thereby demonstrating that one who is "truly just" is inclined to reduce punishment, not inflict it.[50] In Nussbaum's view, then, equity is mercy in that it is the ability that the judge has to pay attention to the particular circumstances in such a way that they can apply the law in a lenient manner and with a view of mitigating potentially harsh punishments.

The ability to accurately perceive the particulars is of great importance to Nussbaum. To assess the particulars, one must "judge with" the accused, taking into account their point of view.[51] If the judge is capable of perceiving the particulars and understanding the circumstances from the point of view of the accused, then they may accurately understand the motives and intentions of the accused.[52] In Book VI of the Nicomachean Ethics, Aristotle praises the equitable judge and their unique abilities.[53] The equitable judge is said to possess right judgement or good judgement.[54] "A sign of this is the fact that we speak of the equitable man as being the most likely to forgive and of equity as showing forgiveness in certain cases."[55]

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[48] Nussbaum, Martha. "Equity and Mercy." *Philosophy & Public Affairs*, vol. 22, no. 2, 1993, pp. 93.

[49] Nussbaum, Martha. "Equity and Mercy." Pp. 94.

[50] Nussbaum, Martha. "Equity and Mercy." Pp. 94.

[51] Ibid.
[52] Ibid.
[53] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. VI.11.1143a.
[54] Ibid.
[55] Ibid.

Nussbaum, thus, equates good judgement with forgiveness. However, while the equitable judge may excuse the accused from blame, they may not do so in every case. Equity cannot be interpreted as synonymous with forgiveness or mercy.

She goes on to discuss equity as it is described in sections 1374b2-10 of the *Rhetoric*, and the ways in which Aristotle continues to build upon the argument put forth in the *Nicomachean Ethics*.

> Aristotle adds a somewhat more detailed account of equitable assessment, telling us that the equitable person is characterized by a sympathetic understanding of 'human things.[56]

Here, she again links equity with leniency and sympathy for the perspective of the accused. To this aim, her interpretation of Aristotle's use of the word "sugnōmē," which she translates as "judging with" or "forgiveness," is central.[57]

For Nussbaum, the reason why Aristotle states that equity is connected to sungnōmē is that it allows the judge to see things from the point of view of the accused.

> One must, that is, see things from that person's point of view, for only then will one begin to comprehend what obstacles that person faced as he or she acted.[58]

Thus, Nussbaum assumes that the equitable person is sympathetic and inclined to mitigate, prepared to judge with the accused and not against. It is for this reason she argues that equity becomes synonymous with mercy and is always linked to the tendency to reduce punishments in consideration of the circumstances of the accused.

While I agree with Nussbaum's argument for the need for the consideration of the particulars and the possibility of flexible punishment in the modern legal system, I believe that

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[56] Nussbaum, Martha. "Equity and Mercy." Pp. 94.
[57] Ibid.
[58] Ibid.

she fails to produce a full picture of equity. She does not account for the full potential of equity or the other potential translations of sungnōmē and, as such, considers equity to be synonymous with mercy. In section four of this chapter, I will demonstrate the ways in which Nussbaum's model fails to fully address all aspects of Aristotle's original conception of equity and provide a broader model of equity.

1.3 Phillips-Garrett "Excuse Model" of Equity

In her article "Sungnōmē in Aristotle," Carissa Phillips-Garrett reacts against Nussbaum's interpretation of equity as mercy and offers the view that equity should be interpreted as "excuse" instead. Phillips-Garrett also grounds her interpretation on an analysis of the meaning of "sungnōmē," and its relationship to equity, in her article "Sungnōmē in Aristotle". Unlike Nussbaum, however, Phillips-Garrett does not interpret sungnōmē as forgiveness, but rather as excuse.[59] She explains that forgiveness is not the appropriate translation, as someone deserving of forgiveness must also be deserving of blame.[60] Therefore, to forgive the accused would contradict the purpose of equity, which relieves the accused of the blame received for the actions they have committed. For this reason, she considers that excuse is a more appropriate translation of Aristotle's conception of sungnōmē, as it is the one that preserves a stricter connection to fairness.

For Phillips-Garrett, then, Martha Nussbaum's translation of sungnōmē as forgiveness and model of equity as mercy, is inaccurate. Not only does she find forgiveness contradictory to the blame relieving purposes of equity, but she finds it unnecessary for the judge to be capable of such emotion.[61]

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[59] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." *Apeiron*, vol. 30, no. 3, 2017, pp. 311.
[60] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." *Apeiron*, vol. 30, no. 3, 2017, pp. 327.
[61] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 325.

> Thus, while sympathy may be useful in order to judge fairly or equitably, it is also, by Aristotle's lights, both unnecessary and possibly undermining since equity requires judgement and not feeling.[62]

She argues that such feelings may serve to undermine equitable judgements as they serve as incorrect basis for such judgements. For example, the judge should choose to excuse the accused not because they have sympathy for the accused, but because it is fair to do so.[63] Forgiveness is not an appropriate response as it admits to the blame of the accused and potentially tarnishes the final decision rendered by the judge.

While I agree with Phillips-Garrett that sungnōmē is not equivalent to forgiveness and, that forgiveness is indicative of blame on the behalf of the accused, I disagree with her interpretation of the equitable judge as one void of emotion. As Aristotle states in the *Rhetoric,* sympathetic consideration should be shown in cases where a wrong has been committed as the result of misfortune or error.[64] While forgiveness is not the appropriate response to one who has been wrongly accused, a judgement made free from the effects of emotion is not appropriate either. As I will argue in Chapter II, emotion becomes necessary not only in the cases deserving of sympathy or a reduction in punishment, but in cases deserving of stricter punishment as well.

In sum, I agree with Phillips-Garrett's point that equity should not be interpreted as forgiveness, since forgiveness is necessarily connected to blame, and the judge should not necessarily be lenient with those who are blameworthy – that would go against principles of fairness, as Phillips-Garrett argues. However, I find her understanding of the role of the emotions in judicial decisions to be excessively narrow and I believe it contradicts Aristotle's conceptions of sungnōmē and equity.

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[62] Ibid.
[63] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." *Apeiron*, vol. 30, no. 3, 2017, pp. 324.
[64] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.

1.4 A Critique and Expansion of Equity as Excuse

Through my reading of Aristotle's writings on equity in both the *Nicomachean Ethics* and the *Rhetoric*, I have come to develop a model of equity which differs from those of Nussbaum and Phillips-Garrett. The original aspect of my model is that it rejects that equity is applicable solely to cases in which punishment should be reduced and blame relieved from the accused – in other words, equity is broader than both forgiveness and excuse. I argue that Aristotle's conception of equity also attends to cases in which the accused is deserving of greater punishment than would be dictated by the written law. Such judgements, further, would result not only from the judge's understanding of fairness, but from their capacity for emotion as well. Ultimately, I put forth a model of equity which attends to a wide variety of particular circumstances and allows for the emotional input of the judge.

In the *Nicomachean Ethics*, Aristotle claims that equity serves as a correction to the law when the law, due to the universality of its application, fails to attend to the particulars of any given circumstance.[65] Such a purpose pertains to all such cases in which the written law cannot address the particulars. Equity is applicable in cases in which punishment should be reduced, as well as in cases where greater punishment is due. Nussbaum fails to account for the wide-reaching capabilities of equity. Through placing such great emphasis on the relationship between sungnōmē and equity, she fails to acknowledge that the equitable judge is capable of more than just forgiveness or excuse. While sungnōmē pertains to the conception of equity, it is not synonymous with equity.

While Phillips-Garrett acknowledges the breadth of equity's application as well as the failure of forgiveness to serve the purposes of equity, I believe that her model also falls short of

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[65] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. V.14.1137b.

providing a comprehensive analysis of Aristotle's conception of equity. Aristotle requires that the equitable judge possess sympathy so as to ensure they are capable of forming correct judgements about the cases they try.[66] It is crucial that the judge be able to rely upon emotion in his assessment of the particulars. It is such emotion that allows them to better understand the motivations of the accused and to recognize when equitable consideration becomes necessary. It is the judge's emotional response which determines whether or not punishment should be reduced or enhanced. Thus, the model I put forth requires the judge to rely on their emotions in deciding upon cases, while also making decisions based upon fairness.

The information presented by Aristotle in both the *Nicomachean Ethics* and the *Rhetoric* regarding his conception of equity offers good support for my own interpretation and model of the concept. I argue that equity may be applied to a wide variety of cases. In the face of the shortcomings of the written law, equitable judgements can allow for either the decrease or increase in severity of punishment when necessary. In formulating such decisions, the equitable judge relies upon both reason and emotion to arrive at a fair conclusion. In the following chapter, I will examine the various emotions which may become relevant in a legal context and which shape the formation of the equitable judge as well as the decisions they make.

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[66] Ibid.

Chapter II: The Equitable Judge

2.1 How Does Equity Impact Our Understanding of the Judge?

In this chapter I show that for Aristotle, the judge should be understood as using emotion, not just reason, to achieve legal decisions, and I argue that Aristotle has good reasons for holding that view. My proposal opposes alternative theories of equity, and the equitable judge such as that of Carissa Phillips-Garrett, who defends instead the view that the judge must be unfeeling. That is, at least, one of the arguments that she uses to show that the judge does not forgive the accused, but excuses them. While I agree that the judge is not responsible for forgiving the accused, it is not because the judge is incapable of feeling or refuses to rely upon emotion. I believe that excuse is motivated by both rational judgement and a reliance upon the emotions, and that in fact reason and emotions act together to reach the right decision. This is, I think, Aristotle's understanding of the judge and of equity. When the judge is presented with a case which exceeds the limits of the universal laws, it becomes necessary for them to rely upon sympathetic consideration, if the accused is not to blame.[67] It is this capacity for sympathy that alerts the judge of the need for equitable judgement. Thus, the equitable judge should not be completely dispassionate and unmoved by the stories of the accused.

Emotion also determines the judge's decisions when the accused is not only to blame, but deserving of greater punishment than the law would normally dictate. In such circumstances, it is not just the severity of one's actions that are subject to judgement, but their prior actions and their character. The judge must then be moved by the suffering of the afflicted or the cruelty of the accused. However, in following sections, I will demonstrate that it is not anger that moves the equitable judge to assign greater punishment to the accused, but nemesis. While the judge is

[67] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.

prompted by an emotional response to the circumstances before them, not all emotions are appropriate in such a context. One cannot feel or act upon the pain of another, but upon their own pain. For this reason, anger will not be an adequate emotion for a judge, but nemesis will be.

Ultimately, I argue that the equitable judge is not just capable of emotion, but that equitable judgement is determined by particular, appropriate emotions that are typically reactions to questions about justice and not about private, personal issues. Concretely, forgiveness and anger will not be adequate emotions for the judge. But this does not mean, as I argue, that judges must leave all their emotions at the door when making judicial decisions. Emotion is necessary to the development and application of good judgement. The judge's emotional response to the accused is what allows for particular consideration of cases typically subjected to the dictates of the common law, and for equitable judgements to be reached.

2.2 Forgiveness is not an Appropriate Emotion for the Equitable Judge

As discussed in the first chapter, Nussbaum argues for an interpretation of equity as synonymous with mercy. The equitable judge is capable of sungnōmē, or "judging with" the accused so as to build a greater understanding of the particular circumstances of the case. Nussbaum believes that such an ability demonstrates the judge's tendency toward mercy. Such a capacity to assess the particulars is considered by Aristotle to be indicative of the possession of good judgement, it does not ensure that the judge will always tend to mitigate.[68] It is incorrect to say that the judge is only capable of leniency of forgiveness. However, in the cases in which the accused is undeserving of the charges brought against them, and is found to be blameless, the judge does not forgive, but excuses.

[68] Aristotle, Hippocrates G. Apostle. *The Nicomachean Ethics*. VI.11.1143a.

Phillips-Garrett demonstrates the ways in which forgiveness fails to correspond to the actions of the judge. For Phillips-Garrett, sungnōmē should be translated as excuse, as opposed to forgiveness.[69] When one forgives another, one still acknowledges the faults of the forgiven. Just because they are forgiven, it does not mean that they are free of blame.[70] Phillips-Garrett argues that the judge would not forgive the wrongfully accused as they would be undeserving of blame. If one is found not to blame, then one would no longer qualify for the forgiveness of another. The judge would excuse the accused, dismissing the blame bestowed upon them.

It is not just the notion of blame that Phillips-Garrett takes issue with in the interpretation of sungnōmē as forgiveness. In addition, she takes issue with the fact that forgiveness is prompted by emotions, as opposed to reason. Phillips-Garrett believes that the judge should not be reliant upon their emotions when rendering legal decisions.[71] Such emotions have the potential to undermine their sense of good judgement.[72] The judge should excuse the accused, not because they sympathize with them, but because it is the fair thing to do.[73] Thus, not only is forgiveness an incorrect response on the part of the judge due to its implications of blame, but because it has the potential to tarnish the final decision rendered by the judge.

David Konstan offers a reading that harmonizes with Phillips-Garrett's interpretation. He believes both that emotion does have a place within the law and that the judge cannot forgive the accused. To begin with, the accused, would never ask for forgiveness as doing so would admit to one's responsibility for the wrong done.[74] Konstan agrees with Phillips-Garret that the judge

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[69] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 311.
[70] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 327.
[71] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 325. (See also Rapp 2018).
[72] Ibid.
[73] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 324.
[74] Konstan, David (2010). "Greeks and Romans on Guilt and Innocence" in *Before Forgiveness: The Origins of a Moral Idea*. Cambridge: Cambridge University Press, pp. 26.

does not forgive the accused as doing so would imply that the accused is still to blame for what they have or have not done. "I take it that one only forgives someone who has done something wrong, and that one cannot forgive an innocent person."[75] By forgiving the accused, the judge would acknowledge that a wrong has been done, that the wrong has caused harm, and that the accused is to blame for such occurrences.[76]

Konstan also argues that forgiveness is only applicable when a harmful act has been intentionally, and not unintentionally, committed.[77] For example, if one were to accidentally hit another, this would not qualify as an injustice and, therefore, would not warrant the forgiveness of the individual harmed. "What turns the harmful effect into a matter of wrongdoing is the deliberateness of the action on the part of the offending party."[78] Given that an equitable response becomes appropriate when the accused has unintentionally or unknowingly committed a wrongful act, and forgiveness is the response to an intentional act, the equitable judge would not forgive the accused in such a circumstance.

These are not, however, the only arguments to be made against the forgiveness of the judge, and against the interpretation of sungnōmē as forgiveness. Not only does the equitable judge not forgive the accused because they have acted unintentionally or because doing so would admit to the wrong done, but because the judge is simply not in a position to forgive the accused, even when a wrong has been intentionally committed. Forgiveness is an attitude one has regarding an individual who has wronged them, or intentionally caused them harm. While the

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[75] Konstan, David (2010). "What Is Forgiveness?" in *Before Forgiveness: The Origins of a Moral Idea*. Cambridge: Cambridge University Press, pp. 1-2.
[76] Konstan, David (2010). "What Is Forgiveness?" in *Before Forgiveness: The Origins of a Moral Idea*. Cambridge: Cambridge University Press, pp. 3.
[77] Konstan, David (2010). "What Is Forgiveness?" Pp. 3.
[78] Konstan, David (2010). "What Is Forgiveness?" in *Before Forgiveness: The Origins of a Moral Idea*. Cambridge: Cambridge University Press, pp. 4.

judge can ensure that the accused is appropriately punished, and that justice is upheld, they cannot act on behalf of the victim. As the judge suffers no harm, the judge cannot forgive the wrongdoer because there is nothing to forgive.

While I disagree with Phillips-Garrett's belief that emotion is detrimental to the law, I agree that forgiveness is not applicable within legal judgements. This is because forgiveness is implicative of blame and admits to the wrong that has been done.[79] Further, only wrongs that have been intentionally, and not unintentionally, committed warrant the forgiveness of another.[80] As an equitable judgement becomes necessary when the accused has unintentionally or unknowingly committed a wrongful act and is, therefore, unworthy of blame, forgiveness is not the appropriate response on behalf of the judge. Even if a wrongful act has been intentionally committed, and the accused is worthy of blame, the judge does not act out of forgiveness as they are not the one that has been wronged and, therefore, they have nothing to forgive. Overall, forgiveness is not an appropriate response on behalf of the equitable judge.

2.3 Excuse: Rational and Emotional Sources for Leniency

Phillips-Garrett presents excuse as an alternate, more appropriate interpretation of sungnōmē. She relies on this term largely because she finds it lacking of any implication of emotion, which she believes to be detrimental to legal judgements.[81] While I disagree with her belief that judges must act on behalf of reason alone, I agree that excuse is a more fitting translation of sungnōmē. This is because excuse resolves the problems identified by Konstan. Unlike forgiveness, excuse relieves those who have acted unintentionally of unwarranted blame.[82] Further, excuse allows the

[79] Konstan, David (2010). "What Is Forgiveness?" Pp. 3.
[80] Ibid.
[81] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 325.
[82] Konstan, David (2010). "What Is Forgiveness?" Pp. 3.

judge to relieve the accused of such blame, without requiring them to assume the pain, and subsequent capacity for forgiveness, of the victim.

Despite Phillips-Garrett's disapproval of the emotional judge, and belief that excuse is an entirely rational response, I argue that it serves as an emotional response as well. According to Aristotle, it is the responsibility of the equitable judge to show "sympathetic consideration" to the accused.[83] The judge must, as Nussbaum writes, "judge with" the accused and consider things from their point of view and take into account their unique circumstances.[84] I argue that the need to do so is triggered by the judge's emotional response to the accused, in addition to their rational response. Thus, the judge's emotional response to the accused allows for the consideration of their unique circumstances, ultimately warranting an equitable judgement.

One emotion that may provoke a lenient response from the equitable judge, is pity. In the *Rhetoric*, Aristotle defines pity as,

> …a sort of pain at an apparently destructive or painful bad thing happening to someone who does not deserve it, and one that a person might expect himself or one of his own to suffer, and this when it appears close at hand.[85]

If the judge feels that the accused is undeserving of the judgement or punishment dictated by the common law, then they may decide to excuse them of blame. Such pain is unlike that felt by the victim and, therefore, is appropriate for the judge to respond to and base their decisions upon. Further, feelings of pity are indicative of good character and good judgement, both of which the equitable judge possesses and relies upon to produce legal decisions.[86] Such feelings, which allow

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[83] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.
[84] Nussbaum, Martha. "Equity and Mercy." Pp. 94.
[85] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. II.8.1385b1.
[86] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. II.9.1386b1.

for a more thorough consideration of the particulars, are therefore, not contradictory to reason, but instead contribute to the equitable judge's decision and the preservation of justice.

Overall, I argue that excuse is a more appropriate translation of sungnōmē than forgiveness is. This is because excuse more closely aligns with the purposes of sungnōmē as they pertain to equity. The judge, while incapable of forgiveness within such a context, can excuse the accused, relieving them of blame and, therefore, producing a more lenient judgement.[87] Excuse is the product of both reason and emotions, such as pity, which work in tandem to ensure that justice is prioritized. Despite my disagreement with Nussbaum's translation of sungnōmē as forgiveness, I find her concern with the sensitivity that proper sungnōmē raises in the judge to be insightful. Equitable judges must be able to sympathize with others, and although that sympathy does not inspire forgiveness, it is an emotional reaction that allows them to perceive more accurately the particular circumstances of others, and to be better attuned to the possibility of excuse.

2.4 Anger

The model of equity that I have developed becomes applicable in a variety of contexts. In addition to its applicability for cases in which the accused is deserving of leniency, equity is also applicable in cases in which the accused deserves greater punishment than the common law would dictate. In such cases, the judge is not reliant upon sungnōmē, or excuse, as the goal is not to relieve the accused of blame or to reduce their punishment, but to demonstrate blame and inflict more severe punishment upon them. I sought to understand what quality or characteristic allows for the equitable judge to make such a judgement. I argue that, just as the judge must consider the feelings and circumstances of the accused in cases that require leniency, the judge

[87] Phillips-Garrett, Carissa. "Sungnōmē in Aristotle." Pp. 327.

must also consider the feelings and circumstances of the accused in cases that require more severe punishment. The judge is, therefore, guided by both reason and emotion when making such judgements.

Initially, I believed that the judge must act of feelings of anger in response to the injustice committed. In the *Rhetoric*, Aristotle writes,

> Let anger be desire, involving pain, for apparent revenge, because of apparent contempt on the part of someone unfitted to treat the person himself, or one of those close to him, with contempt.[88]

According to this interpretation of anger, the judge cannot be said to act out of anger. According to Aristotle's definition, a key component of anger is a feeling of pain in response to perceived mistreatment.[89] In his essay, "Aristotle on Anger and the Emotion: The Strategies of Status," David Konstan examines what the pain that prompts anger looks like. "It seems reasonable to suppose that it results from direct perception of something harmful or unpleasant, rather than from memory or anticipation."[90] Given this definition of pain, a direct perception of harm, the judge cannot be said to have suffered pain. Anger is a more appropriate response for the victim of the offense as they are the one that would likely suffer from such an experience. This is not unlike the judge's relationship with forgiveness. Just as the judge cannot forgive the accused on behalf of the victim, the judge cannot claim to experience the pain of the victim either.

In addition to feelings of pain, anger is defined by a desire for revenge.[91] Such a requirement further demonstrates that the judge cannot act out of anger towards the accused. As

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[88] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. II.2.1378a1.
[89] Aristotle, C.D.C. Reeve. *Rhetoric*. II.2.1378a1.
[90] Konstan, David (2003). "Aristotle on Anger and the Emotions: The Strategies of Status" in *Ancient Anger: Perspectives from Homer to Galen*. Edited by Susanna Braund and Glenn W. Most. Cambridge: Cambridge University Press, pp. 101.
[91] Aristotle, C.D.C. Reeve. *Rhetoric*. II.2.1378a1.

I've just established, the judge cannot feel the pain of the victim of an offense and act on their behalf. Without such feelings of pain, the judge has nothing to take revenge for. While it is the responsibility of the judge to punish the accused, such punishment is not an act of revenge. It is simply the role of the judge to produce a judgement regarding a wrongful act and the harm done to another.

Although the judge is responsible for upholding justice and for punishing those that do not act accordingly, the equitable judge does not respond to acts of injustice out of feelings of anger. This is made clear by Aristotle's definition of anger which requires that such feelings are accompanied by both pain and a desire for revenge.[92] As the judge cannot experience the pain of the victim and, therefore, has no reason to seek revenge, the judge cannot be said to act out of feelings of anger. Thus, it is not anger which drives the judge's strict application of equity and the decision to inflict more severe punishment upon the accused when necessary.

2.5 Nemesis

The equitable judge does not inflict more severe punishment upon the accused based upon feelings of anger. As previously stated, this is due to the fact that the judge does not suffer pain as the victim does, because the judge has not directly suffered as a result of the contempt, or wrongdoing, of the accused.[93] It is possible, however, for the judge to experience the pain brought on by pity in response to undeserved pain or misfortune, as the judge is necessarily well-educated and prone to such feelings.[94] While it is appropriate in such cases for the judge to feel pity in response to the perceived slight of an undeserving victim, I do not believe that it is pity which prompts the judge to inflict more severe punishment upon the accused. In the application

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[92] Ibid.
[93] Ibid.
[94] Aristotle, C.D.C. Reeve. *Rhetoric*. II.8.1385b1.

of equity, the judge considers the particulars as they pertain to the accused, not the victim. For example, the equitable judge may take into account the intentions of the accused, as well as their character or history of prior bad acts.[95] As such, in determining the punishment of the accused, the judge does not act upon the feelings of pity they have for the victim, but out of the feelings provoked by the actions of the accused.

Opposed to pity, is the feeling of indignation, or nemesis.[96] This refers to the feeling of, "being pained at what appears to be undeservedly doing well."[97] Just as the judge is prone to feelings of pity, it is appropriate that the judge would experience feelings of indignation in the face of undeserved good fortune, as indignation is also experienced by those of good character and good judgement.[98] As the judge is uniquely reliant upon their good judgement to assess the particulars, it is reasonable that such feelings would factor into the formation of their judgements. For example, if a particularly immoral actor was set to receive an inadequate punishment, the judge, inspired by feelings of nemesis, would feel inclined to inflict more severe punishment upon the accused. Doing so would correct the failure of the law to inflict upon the accused what they rightfully deserve.

While the judge, being of good character and judgement, would experience both feelings of pity and feelings of nemesis in response to a wrongdoing brought before them, I argue that only nemesis is applicable in the punishment of the accused. The judge could feel pity for the victim of the accused, but this would not impact their judgement of the accused. Such judgement

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[95] Aristotle, C.D.C. Reeve. *Rhetoric*. I.13.1374b1.
[96] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. II.9.1386b1.
[97] Aristotle, C.D.C. Reeve. *Rhetoric*. Indianapolis: Hackett Publishing Company. 2018. II.9.1387a1.
[98] Aristotle, C.D.C. Reeve. *Rhetoric*. II.9.1386b1.

would instead spring from the judge's feelings for the accused and their undeserved good fortune. To prevent such good fortune, and to correct the shortcomings of the common law, the equitable judge would inflict greater punishment upon the accused.

2.6 Conclusion

In this chapter, I have argued for the necessary role that emotion plays when the judge is faced with difficult cases. It is an emotional response that prompts a more thorough and accurate consideration of the particulars of case, and ultimately produces a more lenient or stricter judgement. Unlike Phillips-Garrett, for example, I do not believe that the judge should be entirely dispassionate.

In relation to forgiveness, while I agree that the judge does not forgive the accused, this is not because forgiveness is necessarily contrary to reason by being an emotion, but because it is not appropriate for the judge to forgive the accused. The judge cannot forgive, because the has not been harmed and, therefore, has nothing to forgive. Forgiveness is the responsibility of the victim. Forgiveness is, however, contradictory to the purposes of equity. Equity, in such cases, intends to resolve those of blame when they have acted unintentionally or knowingly and, as such, are not to blame for their actions. If the equitable judge seeks to relieve the accused of the blame for what they have done, forgiveness would not aid in this effort. To forgive indicates that the forgiven is to blame for what has been done, as there is something for which they can be forgiven. According to David Konstan, it is also indicative of the accused's malicious intentions.[99]

Phillips-Garrett's solution is to appeal to excuse instead. Excuse solves the problems presented by forgiveness. While the judge cannot forgive the accused, having not suffered any

[99] Konstan, David (2010). "What Is Forgiveness?" Pp. 3.

harm, they can excuse them. Excuse also allows the judge to adequately relieve the accused of blame, and does not suggest at the intentionality of their actions. I am in opposition of Phillips-Garrett's belief that excuse is a response void of emotion. I argue instead that excuse is necessarily prompted by emotion. It is what allows for consideration of the particulars, and leniency in judgement. Just as forgiveness, although inappropriate, is not contrary to reason, excuse is not contrary to feeling. It is dependent upon feeling. Ultimately, such an argument aligns with Aristotle's understanding of the equitable judge, and their unique capacity for judging and feeling with the accused.

Such a reliance emotion is also evident in cases where the actions of the accused warrant greater punishment than the common law would prescribe. While excuse is prompted by the judge's sympathy for the accused, stricter punishment springs from the judge's feelings toward the particularly harmful wrongdoer. Such decisions are not prompted, however, by the judge's feelings of anger. The judge cannot be said to feel anger in such a case, as anger is defined by pain and a desire for revenge.[100] The judge does not suffer pain due to the actions of the accused and, therefore, does not have a desire for revenge. Thus, just as the judge cannot forgive the accused for the victim, the judge cannot feel anger on their behalf either.

While it is not anger that the equitable judge feels and relies upon to determine the punishment of the accused, they do act out of their feelings toward the accused. When the law fails to punish the accused according to what they deserve, the equitable judge experiences feelings of pain. Such pain is characteristic of nemesis, or indignation, which is common to those of good character, like the judge. As such, the equitable judge seeks to right this wrong based upon their feelings of indignation for the accused. The judge, being of good character as

[100] Aristotle, C.D.C. Reeve. *Rhetoric*. II.2.1378a1.

previously stated, would also feel pity for the victims of the accused, but pity would not guide the judge's decision as the judge responds to the action and history of the accused. Thus, just as the judge's feelings for the accused prompt leniency in judgement, they also produce more severe punishment for the accused.

Chapter III: The Application of Equity

3.1 A Brief History of Equity in the Law

Conversations within the legal community surrounding the application of equity date back several centuries. One such source is Edward Hake, an author and lawyer active in England during the 16th century. At this time, there were both common law courts and equity courts that operated separately.[101] Courts of equity attended to requests for remedies, as opposed to damages. These cases were typically less straightforward than those dealt with in common law courts, and issues pertained to family law, for example. Despite the presence of these separate court systems, Hake argues that equity is applicable in both.[102] I agree that it is necessary that the particular consideration characteristic of the courts of equity, be more broadly applied. I do not, however, intend to argue for the reintroduction of separate equity courts into our modern legal system, but instead, just as Hake does, argue for a universal application of equity within all areas of legal practice.

While Hake references and consults the works of his contemporaries in his own consideration of the importance of equity, he is most reliant upon Aristotle and his definition of equity.[103] He considers equity as operating within the common law, "directing decisions according to spirit rather than letter, searching out true intent, and fulfilling without contradicting the law's real purposes."[104] It is a form or method of interpretation.[105] Despite the clarity of

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[101] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." Pp. 308.
[102] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." *Yale Law Journal*, vol. 64, no. 2, 1954, pp. 309.
[103] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." *Yale Law Journal*, vol. 64, no. 2, 1954, pp. 310.
[104] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." Pp. 309-310.
[105] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." Pp. 310.

Aristotle's interpretation, however, Hake, much like others of the time, appears largely conflicted about the nature of equity and its relationship to the common law.[106]

While Hake understands equity as operating within or according to the law, he still considers the equitable judges to be "courageous and stowte" due to their opposition to the dictates of the Queen and the common law.[107] Ultimately, such indecision prevented Hake, along with many others of the time, from crafting a general theory regarding the legal application of equity in common law courts.[108] Yet, despite the passage of time, conversations within the legal community surrounding the issue of equity remain largely the same. Questions regarding the interpretation and purpose of equity, and its relationship to the common law, continue to warrant discussion amongst many legal scholars.

Anton-Hermann Chroust's seminal article on Aristotle's conception of equity examines the applicability of Aristotle's conception of equity in the modern legal system. Just as Aristotle poses a distinction between justice and equity, Chroust identifies the differences between the common law and equity. The common law, "is just in a definite situation according to a definite rule of law," but equity represents a "universally just attitude."[109] However, while the common law responds to the majority of cases, it cannot apply to every possible circumstance.[110] This is because human behavior is irregular and indefinite.[111] Thus, when an indefinite situation arises, equity becomes applicable.

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[106] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." Pp. 309.
[107] Ibid.
[108] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." Pp. 311.
[109] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." *Notre Dame Law Review*, vol. 18, no. 2, 1942, pp. 122.
[110] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." Pp. 122.
[111] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." *Notre Dame Law Review*, vol. 18, no. 2, 1942, pp. 123.

According to Chroust, in the modern legal system, the application of equity is not relegated to a separate court system, but takes on the form of a special ordinance or order.[112] Such ordinances, however, must only be applied in extreme cases and only when necessary.[113] This is because, just as Hake describes, the equitable ordinance must always operate in agreement with the common law and, "has to conform to the general notion of Law and Justice.[114] Chroust agrees with Aristotle that equity is superior to the common law. However, he also argues that it is, at the same time, inferior to the common law due to its highly limited applicability.[115] Thus, while equity has a place within the modern legal system and continues to be used to correct the shortcomings of the common law, its application is strictly regulated and it most often takes a backseat to the operations of the common law.

In the 20th century, however, during the 1920's, there was a period in which equity took precedence over the common law, due to the effects of the American Realist Movement.[116] Founded in large part by Oliver Wendell Holmes Jr., with the support of other legal scholars like Karl Llewellyn, the group believed primarily in the importance of and need for empirical evidence in legal decision making.[117] The movement began with the notion that, "the law is not a set of pre-existing rules that govern legal decision-making, but consists instead of the decisions courts reach in response to particular facts."[118] Such a belief imposed greater responsibility on

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[112] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." *Notre Dame Law Review*, vol. 18, no. 2, 1942, pp. 124.
[113] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." Pp. 124.
[114] Ibid.
[115] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." *Notre Dame Law Review*, vol. 18, no. 2, 1942, pp. 125.
[116] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 370.
[117] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 370.
[118] Ibid.

judges, who were believed to be capable of producing fair outcomes.[119] With such power imposed on judges, equity no longer took on a secondary role, but instead began to have significant impact on legal decision making.[120] The effects of the American Realist Movement have had a lasting impact on the American legal system, but this impact has not been a wholly positive one.[121]

3.2 The Problem of Equity

As described in the previous section, the American Realist Movement of the 20th century had a profound and lasting impact on the American legal system.[122] However, its impact was not necessarily beneficial. The Realist Movement was reliant upon the notion that the law is not comprised of pre-existing rules, but of decisions based upon particular circumstances.[123] Such an interpretation is detrimental to the law as it places greater importance on equity than determinate rules.[124] While equity does play a necessary role within the legal system, correcting the shortcomings of the common law, it is only meant to assume a secondary role.[125] When equity assumes precedence, the legal system loses the benefits that determinate rules provide.[126] One such benefit is that they are easy for citizens to follow without extensive consideration.[127] They are also authoritative and demand that citizens comply, ensuring that order and the happiness of

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[119] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 372.
[120] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 372.
[121] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 373.
[122] Ibid.
[123] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 370.
[124] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 372
[125] Ibid.
[126] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 354.
[127] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 354.

the political community are upheld.[128] When equity takes precedence, citizens are forced to consider the implications of their actions and are relieved of the pressure to abide by strict laws. Thus, in a legal system in which equity assumes a primary role, as opposed to a secondary role, order is lost and the happiness of the political community is put at risk.

Further, when equity takes such precedence, its application becomes more greatly apparent to citizens.[129] Prior to the Realist Movement, which brought it to the forefront of legal decision making, equity operated covertly due to its secondary role.[130] "Equitable remedies traditionally are viewed as a special and secondary set of remedies, available only when legal remedies are not adequate."[131] Public awareness of equity, in addition to the power given to judges to produce decisions they believe to be fair, subordinated the determinate rules by which the political community is required to abide.[132]

> Assuming that equity works as described, the capacity of the legal system to maintain both determinate rules and particularized edicts depends on a form of deception.[133]

Thus, such a transparent application of equity further allows for the disintegration of order, which is necessary for the continued success of the political community.

The lasting effects of the American Realist Movement demonstrate that the problem of equity lies in its precedence. It is only when equity abandons its secondary role that the legal system suffers. When judges are given the authority to form decisions based upon what they

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[128] Ibid.
[129] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 368.
[130] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 368.
[131] Ibid.
[132] Sherwin, Emily (2019). "Equity and the Modern Mind" in *Equity and Law: Fusion and Fission*. Cambridge: Cambridge University Press, pp. 368.
[133] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 368.

believe to be fair, equity displaces the common law.[134] Then, when equity assumes precedence, its application becomes more transparent and apparent to the political community.[135] Such changes result in the subordination of the common law. Despite the inadequacy of its universal application, the common law is necessary as it provides determinate rules which are easy to follow and demands the compliance of citizens, thereby maintaining order within the political community.[136] The widespread and transparent application of equity does the opposite. Thus, while equity is necessary to the legal system, it must strictly maintain a secondary role, correcting the common law, but never replacing it.

3.3 The Necessity of Equity

Despite the problems that arise when equity takes on a primary role, its application is necessary, to the success of the legal system. As such, equity continues to stimulate discussion amongst members of the legal community. According to Darien Shanske, recently, there have been many appeals for maintaining greater equity in the law, some even arguing that it is a "constitutional obligation" to do so.[137] In these recent appeals, many look specifically toward Aristotle, and his conception of equity, to argue for its modern application.[138] Shanske believes this is due to, "the appeal of a solution to the question of equitable discretion without metaphysical baggage."[139] Unlike other conceptions of equity, Aristotle's conception of equity as a form of particular

[134] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 372.
[135] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 368.
[136] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 354.
[137] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2054.
[138] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2059.
[139] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." Pp. 2066.

justice simply seeks to solve the general logical problem of the universality of the common law.[140]

Unlike Aristotle, however, Shanske perceives equity to be far more complex, having many possible definitions and applications within the modern legal system.[141] While Shanske agrees with the necessity of secondary role of equity, he believes it operates in many ways.[142] Its purposes include creating a more flexible arbitration process, mandating more fact-intensive inquiries, and allowing for greater discretion, among many others.[143] While I agree with Shanske that equity does serve all such purposes, I believe that these are simply elements of equity's greater initiative of ensuring justice when the common law cannot. Flexible processes, fact-intensive inquiries, and the exercise of discretion all allow for the application of particular judgement. Thus, while I believe that equity applies in a wide variety of cases, I argue that its purpose in the legal system is quite clear. It is a solution to the problem of the universality of the law. My view, inspired by Aristotle, is that equity offers ways of being more lenient or stricter in cases where the law does not explicitly contemplate the particular circumstances, and this general approach is one that can encompass the more complex subdivisions that Shanske proposes.

3.4 Equity as a Solution to the Problem of Opportunism

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[140] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." Pp. 2066.
[141] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2068.
[142] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2063.
[143] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." *Stanford Law Review*, vol. 57, no. 6, 2005, pp. 2070.

I have argued that equity is not just about cases in which leniency is appropriate but also about cases where a stricter punishment is called for. In this class are included both cases in which the accused is of a particularly poor moral character or has an extensive history of wrongful action, but also those in which the law has been bent but not broken. Henry E. Smith describes the latter as cases of opportunism.[144] While opportunism is difficult to define, it can be understood most simply as acting in such a way that does not contradict the law, but does cause harm to another or would not be considered just.[145] Such a case may not be covered by the common law, but still must be dealt with.

Cases of opportunism clearly reveal the problem of the universality of the law. The common law leaves many openings for opportunists to find loopholes and use them to their advantage.[146] For this reason, there must be a solution in place to allow for the judgement and punishment of such individuals. Although cases of opportunism are semi-foreseeable, they are indeterminate in nature and, consequently, must be resolved through equitable judgement.[147] This does not mean, however, that equity should have power greater than or equal to the common law.[148] While detrimental to those affected, cases of opportunism are not prevalent enough to warrant the precedence of equity and the difficulties that such precedence creates. Yet, equity, the most viable solution to such cases in which the common law falls short, must continue to hold a place within the legal system to assist in the maintenance of justice.

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[144] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 1-74.
[145] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." Pp. 12-13.
[146] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 19.
[147] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 4.
[148] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." Pp. 4.

Smith cites the case of *Riggs v. Palmer* as a clear example of opportunism. Francis Palmer, a widower, had created a will leaving his estate to his daughters (*Riggs*) and grandson (*Palmer*).[149] When Palmer later remarried, however, he entered into a prenuptial agreement which required him to revise his will to include his new wife, .[150] His grandson, not wanting to share his grandfather's estate, murdered him before a new will could be drafted.[151] While the law was able to punish Riggs for the murder of his grandfather, there was no definite rule in place which prevented him from receiving what was left to him in the will.[152] While it was not against the law for him to receive money from the estate, it can be argued that for him to benefit from the murder was not in accordance with justice. For this reason, an equitable judgement was applied, so as to correct the failure of the law and to prevent him from benefiting from his own wrongful actions.[153] The successful resolution of this case clearly demonstrates the importance of equity and how it functions to assist the common law when faced with cases of blatant opportunism.

Overall, while Aristotle's conception of equity may serve multiple, potential purposes, I think one of its primary roles in the modern legal system must be to serve as a correction to the problem of opportunism, which is one of the clearest problems raised by the universality, of the common law. Despite harm brought about by cases of opportunism, equity must maintain a secondary role within the law so as not to do more harm than good. While the importance of equity's secondary role has not changed, neither has the benefit it brings to the legal system and

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[149] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 8.
[150] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." *Harvard Public Law Working Paper*, no. 15-13, 2015, pp. 9.
[151] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." Pp. 9.
[152] Ibid.
[153] Ibid.

cases which require particular judgement. Thus, equity, applied universally and interpreted as a correction of the law, is beneficial to contemporary legal thinking.

Conclusion

In examining Aristotle's conception of equity as a correction of the common law, I hoped to demonstrate the need for particular judgement that also affects today's modern legal system. I have argued that, while many discussions of equity focus solely on its capacity for leniency, I believe it is important to acknowledge the full extent of the circumstances in which equity applies, including those in which a stricter punishment is called for. While there are cases which require that the accused be excused of unwarranted blame, there are also cases in which the accused is deserving of stricter judgement or punishment. The universality of the common law proves as a detriment in both cases, and it is necessary that the judge be able to apply equity in both. Given that in modern contexts the problem of opportunism is frequent, this extension of the notion of equity is even more pertinent, since it allows us to see that equity is a good tool to deal with cases in which people bend the law and try to take advantage of loopholes.

In cases which require equitable judgement, the judge cannot rely upon preexisting laws or determinate rules, but must instead rely upon their own good judgement to reach an appropriate decision. Given the responsibility accorded to them, the judge assumes a highly important role in these cases. Thus, the judge must be uniquely capable of considering particular facts and circumstances. I argue that emotion, not just reason, contributes to the equitable judge's consideration of cases and the decisions they reach.

While not all emotions are applicable to the judge or appropriate in a court of law, others are necessary to the judgement process. The judge cannot forgive, and instead excuses, the accused unworthy of blame. Yet, I argue that emotion and the judge's ability to sympathize with the accused allow for such a decision. In cases which require stricter judgement, however, the judge acts out of feelings of nemesis, not anger, for the accused. Such feelings of pain are what

prompt the judge to impart greater judgement or punishment on the accused than the common law would mandate, as the accused would be undeserving of such good fortune.

Judges have been reliant upon equity to address unique facts and circumstances for some time. Discussions of equity and its application within the legal system date back several centuries, when courts of equity still operated separately from common law courts. Many of these discussions focus on the complicated relationship between equity and the common law. Although equity is a correction of the common law, it is not meant to contradict it.[154] Although equity is in one sense, superior, it is also inferior.[155] However, despite these apparent contradictions, it has been generally agreed upon that equity is intended only to assume a secondary role in the legal system.

The impact of the American Realism Movement of the 20th century demonstrates why it is that equity must only ever assume a secondary role. The movement placed greater responsibility on judges, allowing them to operate based on their individual perceptions of fairness and justice, as opposed to the common law.[156] This allowed for equity to assume precedence over the common law, and the frequency with which it was applied allowed for greater transparency.[157] Such changes were not wholly beneficial to the legal system and minimized the authority of determinate rules which have proven necessary to the maintenance of order in the political community.[158] Thus, when equity assumes a primary role in the legal system, order is disrupted and the political community suffers as a result.

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[154] Dawson, John P. "Hake: Epieikeia, a Dialgoue on Equity in Three Parts." Pp. 310.
[155] Chroust, Anton-Hermann. "Aristotle's Conception of Equity (Epieikeia)." Pp. 125.
[156] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 370.
[157] Sherwin, Emily (2019). "Equity and the Modern Mind." Pp. 368.
[158] Ibid.

Since that time, understandings of equity have once again shifted, and it has once again assumed a secondary role. Further, Aristotle's conception of equity has once again become central to legal discussions of equity, due its purely logical implications[159] Some argue against this singular objective, demonstrating that equity can serve multiple purposes.[160] I argue, however, that its primary purpose continues to be the correction of the law.

While many discussions explore equity's capacity for leniency in cases which warrant the absolution of blame, I sought out literature describing its ability to impart stricter judgement and punishment. In addition to cases of poor characters and extensive histories, cases of opportunism also demonstrate the need for a broader understanding of equity. These are cases in which the accused has not broken the law, but has still caused harm.[161] Equity allows for opportunists to be punished for their actions, despite the limits of the common law. While such cases are not prevalent enough to warrant equity to assume a primary role, they are prevalent enough to require a solution.

While we cannot prevent the universality of the common law, we can diminish its negative effects through the universal application of equity. This does not mean that equity should replace the determinate rules necessary to the success of the political community. However, it does mean that equity is essential to contemporary legal thinking and that equity should be applied when necessary, throughout all areas of practice and in a wide variety of cases, not just those that require leniency. Ultimately, I argue that equity aids the legal system in promoting and prioritizing justice, when what is just cannot be defined by the strict limitations of the definite rules of the common law.

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[159] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." Pp. 2066.
[160] Shanske, Darien. "Four Theses: Preliminary to an Appeal to Equity." Pp. 2068.
[161] Smith, Henry E. "Equity as Second-Order Law: The Problem of Opportunism." Pp. 12-13.

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