
FURTHER DEVELOPMENTS ON PREVIOUS SYMPOSIA

THE APPLICATION OF UNIVERSAL LAWS TO PARTICULAR CASES: A DEFENSE OF EQUITY IN ARISTOTELIANISM AND ANGLO- AMERICAN LAW

ERIC G. ZAHND*

I

INTRODUCTION

The basis for a judge's use of equity, or "justice administered according to fairness as contrasted with strictly formulated rules of common law,"¹ has long been the subject of heated debate in Anglo-American legal systems. A portion of that debate was featured in a recent symposium of *Law and Contemporary Problems* entitled "Modern Equity."² Professor Deborah DeMott framed the controversy in the first sentence of that volume, remarking that "[e]quity, however large its triumphs, has long been trailed by challenges to its legitimacy."³ The articles that followed demonstrated a wide divergence of opinion about the role of equity in Anglo-American law. Professor Laycock proclaimed "the triumph of equity,"⁴ while Professor Rowe intimated that equity enjoys only a tenuous existence in U.S. constitutional law.⁵ This note attempts to carry forward the debate about the legitimacy of equity in Anglo-American law by looking backward to equity's roots in Greek philosophy. The note maintains that the dominant criticisms of equity miss the mark, largely because they fail

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* J.D., M.A. (Philosophy), Duke University, 1996.

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1. BLACK'S LAW DICTIONARY 540 (6th ed. 1990).

2. 56 LAW & CONTEMP. PROBS. (Summer 1993).

3. Deborah A. DeMott, *Foreword*, 56 LAW & CONTEMP. PROBS. 1 (Summer 1993).

4. Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53 (Summer 1993).

5. Thomas D. Rowe, *No Final Victories: The Incompleteness of Equity's Triumph in Federal Public Law*, 56 LAW & CONTEMP. PROBS. 105 (Summer 1993).

to understand equity's fundamental role in a legal system that respects the rule of law.

Of course, suspicion about the place of equity in Anglo-American law is not surprising, given that Western legal systems since the time of Aristotle have emphasized justice according to law rather than personal rule. A judge's unfettered use of equity, if it were to entail ignoring established legal principles in favor of wholly individualized case-by-case rulings, could destroy a system of universally applicable rules. Consider John Selden's famous invective against equity:

Equity is a roguish thing, for [in] law we have a measure [and] know what to trust too. Equity is according to the conscience of him that is Chancellor, and as that is larger or narrower so is equity. Tis . . . as if they should make the standard for the measure we call a foot, to be the Chancellors foot; what an uncertain measure this would be; one Chancellor has a long foot another a short foot a third an indifferent foot; tis the same thing in the Chancellors conscience.⁶

This note responds to the criticisms of equity by revisiting Aristotle's conception of ἐπιείκεια, which is usually translated as equity,⁷ as well as Roscoe Pound's similar notions. A full explanation of Aristotle's and Pound's writings demonstrates that a judge's use of equity is a necessary and stabilizing feature of the application of universal laws to particular cases. As such, equity does not invoke the mere vicissitudes of a judge's conscience; rather, equity accounts for the particular facts of any given situation and applies general laws to a specific case. Equity does not vary with the length of the Chancellor's foot. On the contrary, as Aristotle recognized, equity is like the special lead ruler used in Lesbian building that "is not fixed, but adapts itself to the shape of the stone."⁸ Indeed, like the flexible tape measure used by builders today, equity is not without a standard, but instead conforms a universal standard to the contours of the particular objects it encounters.

This note draws from both legal and philosophical sources, proceeding in four parts. Part II presents a short, uncontroversial account of Aristotle's concept of equity, followed by a sketch of the dominant interpretation of his theory. Part III reviews the role of equity in Anglo-American law, ultimately focusing on how equity came to be regarded as a doctrine to fill gaps in existing laws. Part IV examines two predominant criticisms of equity: first, that equity leads to arbitrary personal rule at the expense of justice according to laws and,

6. TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock ed., 1927) (spelling and capitalization modernized); see also H. Jefferson Powell, "Cardozo's Foot": *The Chancellor's Conscience and Constructive Trusts*, 56 LAW & CONTEMP. PROBS. 7 (Summer 1993).

7. This note follows W.D. Ross and several earlier translators in rendering ἐπιείκεια as "equity." See, e.g., ARISTOTLE, NICOMACHEAN ETHICS V, 1137a31 (W.D. Ross trans., 1925) [hereinafter ROSS TRANSLATION]. Terence Irwin's recent edition of the *Nicomachean Ethics* translates the term as "decency." See ARISTOTLE, NICOMACHEAN ETHICS 392 (Terence Irwin trans., 1985) [hereinafter ETHICS]. "Decency" may be a more etymologically sound translation. However, given that Anglo-American lawyers have consistently translated Aristotle's term ἐπιείκεια as "equity" for the purpose of informing their own views of equity, the former translation is used in this note.

8. ETHICS, *supra* note 7, at 1137b30-31. Except for the terms translated in notes 7 and 9, this note utilizes Irwin's translation of the *Nicomachean Ethics*.

second, that equity should disappear as a legal code expands. Part V, by drawing on selected works of Roscoe Pound and by submitting a different interpretation of Aristotle's writings, argues that Pound and Aristotle arrived at a concept of equity that not only avoids the criticisms outlined earlier, but also produces a coherent and justifiable role for equity in modern Anglo-American law.

II

ARISTOTLE'S CONCEPT OF EQUITY

As part of the exposition of τὸ δίκαιον, or justice, in Book V of the *Nicomachean Ethics*, Aristotle introduces the concept of ἐπιείκεια, or equity. Part II of this note presents a brief recapitulation of Aristotle's argument, followed by a summary of the dominant interpretation of his theory. Since Aristotle's discussion of equity also invokes the notions of νόμος, or law, and φρόνησις, or practical intelligence,⁹ a minimal account of those concepts is also warranted.

A. An Overview of Aristotle's Account of Equity

Book V of Aristotle's *Nicomachean Ethics*, which dates from the fourth century B.C., presents a puzzle regarding the relationship between equity and justice. Aristotle begins by noting that we often praise both what is equitable as well as the equitable person and even use the term "equitable" in place of "good" to describe a person.¹⁰ But given that we characterize justice as a virtue, it is puzzling that we also call equity good. Aristotle proposes that if what is equitable is different from what is just, both what is equitable and what is just cannot be good. Alternatively, if both what is equitable and what is just are good, they cannot be different: "For [apparently] either what is just is not excellent or what is equitable is not excellent, if it is something other than what is just, or else, if they are both excellent, they are the same."¹¹ Aristotle resolves this puzzle by insisting that both what is equitable and what is just are good, "[f]or what is equitable is better than one way of being just . . ."¹² That is, being equitable is better than being *legally* just. Indeed, the puzzle only arises because "what is equitable is just, but is not what is legally just, but a rectification of it."¹³

9. The translation of φρόνησις as practical intelligence combines the renderings of W.D. Ross and Terence Irwin, who define the term as "practical wisdom" and "intelligence," respectively. See ROSS TRANSLATION, *supra* note 7, at VI, 1140b4; ETHICS, *supra* note 7, at 411.

10. ETHICS, *supra* note 7, at V, 1137a34-1137b2. In this instance, translating ἐπιείκης as "decent" actually would make Aristotle's meaning clearer to English readers: Aristotle is pointing out that Greeks often call a "good" man a "decent" man.

11. *Id.* at 1137b4-5.

12. *Id.* at 1137b8-9.

13. *Id.* at 1137b11-13.

The way in which equity may be viewed as a rectification of the legally just centers on Aristotle's conception of law. He holds that all law is universal.¹⁴ But sometimes, no universal rule can be formulated to account for all situations. Hence, where a law must be enacted but cannot be drafted to cover all situations, "the law chooses the [universal rule] that is usually [correct], well aware of the error being made."¹⁵ Aristotle is quick to point out that this error is not the fault of the law or the legislature. Rather, "the law is no less correct on this account; for the source of the error is . . . the nature of the object itself, since that is what the subject-matter of actions is bound to be like."¹⁶

Even if an error in the law is not the fault of the law itself or of the legislature, the gravity of such an error is made apparent elsewhere in the *Nicomachean Ethics*, where Aristotle indicates the enormous breadth of the realm of the law under his theory. Since people yield to compulsion more quickly than to argument, laws should deal generally with all aspects of life.¹⁷ Indeed, to Aristotle, the law instructs people to perform actions expressing *all* of the virtues and prohibits *all* vicious actions.¹⁸ Moreover, Aristotle hints that law occupies the entire field of justice, for "what is just will be both what is lawful and what is fair, and what is unjust will be both what is lawless and what is unfair."¹⁹ Clearly, for Aristotle, "law" has a more extensive reach than it does in modern Western law, where positive law is often viewed as somehow disassociated from morality.²⁰

Yet Aristotle also recognizes that laws are often imperfect: A "correctly established" law promotes virtues and discourages vices well, whereas "the less carefully framed [law] does this worse."²¹ Equity is essential precisely because of these imperfections in the law.²² Sometimes the universal rule of law is inappropriate for a particular case, since a mechanical application of the universal rule would violate the intended scope of the rule. In such a situation, "the legislator falls short, and has made an error by making an unconditional rule."²³ Equity's role is to rectify the legislator's deficiency. But a judge²⁴

14. *Id.* at 1137b13-14. Aristotle's contention that laws should be general and universal is probably a reply to Plato. See PLATO, STATESMAN 294, in 3 THE DIALOGUES OF PLATO 429, 443 (B. Jowett trans., 4th ed. 1953) ("Law-making certainly is the business of a king; and yet the best thing of all is not that the law should rule, but that the king should rule . . .").

15. ETHICS, *supra* note 7, at V, 1137b15-16.

16. *Id.* at 1137b17-19.

17. *Id.* at X, 1180a3-5.

18. *Id.* at V, 1129b19-25.

19. *Id.* at 1129a35-1129b1. While Aristotle divides justice between general justice (positive law) and special justice (fairness), he asserts that special justice is a part of general justice. See *id.* at 1130b11-13 ("[W]hat is unfair is not the same as what is lawless, but is related to it as part to whole, since whatever is unfair is lawless, but not everything lawless is unfair.").

20. See, e.g., HANS KELSEN, GENERAL THEORY OF LAW AND STATE 5 (Anders Wedberg trans., 1945) ("Law and justice are two different concepts. Law as distinguished from justice is positive law.").

21. ETHICS, *supra* note 7, at V, 1129b25-27.

22. See *id.* at 1137b28-29 ("[O]n some matters legislation is impossible . . .").

23. *Id.* at 1137b21-22.

applying equity in adjudicating a particular case does not have unfettered discretion. On the contrary, Aristotle insists that the equitable “is what the legislator would have said himself had he been present [in the particular case], and what he would have prescribed, had he known, in his legislation.”²⁵ Plainly stated, equity employs the hypothetical judgment of the legislator to correct the deficiency resulting from the law’s universality.

Aristotle provides an example of the operation of equity in the *Rhetoric*. Suppose the legislature passes a law penalizing the wounding of a person with an iron instrument. Since a description of all of the sizes and kinds of iron instruments would be endless, the legislature simply makes a universal rule: Wounding with an iron instrument is illegal. However, in the case of a person who strikes another while wearing a ring, the person would be “guilty of a wrong under the written law, but not in reality,”²⁶ presumably because a mere ring (unlike, say, an iron sword) does not fall into the class of dangerous iron instruments. In this situation, equity would intercede to acquit the ring-wearer of violating the law dealing with iron instruments. Equity thus conforms the universal rule of law to the particular case, much like the flexible lead ruler used in Lesbian building conforms itself to the shape of the stone.²⁷

Aristotle closes his discussion of equity in the *Nicomachean Ethics* by describing the equitable person. He is “not an exact stickler for justice in the bad way, but tak[es] less than he might even though he has the law on his side.”²⁸ In other words, the equitable person is not preoccupied with inflexible legal rules, even if enforcing the letter of the law would be to his or her benefit. On the contrary, the equitable person is willing to compromise a legitimate legal entitlement in order to fulfill the spirit of the law. Aristotle returns to the description of the equitable person in Book VI, this time invoking the concept of practical intelligence. He explains that the intellectual virtues of practical intelligence, consideration, and understanding are ascribed to the same people and also deal with particulars. Then Aristotle remarks that “someone has comprehension and good consideration, or has considerateness, in being able to judge about the matters that concern the practically intelligent person; for what is equitable is the common concern of all good people in relations with other people.”²⁹ Simply put, equity is a relational concept that is especially important to the person exercising practical intelligence.

24. The use of “judge” with reference to Aristotle’s theory may be slightly misleading. Unlike modern Anglo-American law, there was no single judge and no separate jury in fourth century Athens. Instead, a large group of men known as δικασταί served as both judges and jurors in most cases. See *infra* text accompanying notes 78-79. However, given that under modern law a judge performs most of the tasks Aristotle ascribes to equity, this note will use “judge” to refer to the legal entity that exercises equity.

25. ETHICS, *supra* note 7, at V, 1137b22-24.

26. ARISTOTLE, RHETORIC I, 1374a35 (John Edwyn Sandys ed. & Richard Claverhouse Jebb trans., 1909) [hereinafter RHETORIC].

27. See ETHICS, *supra* note 7, at V, 1137b30-31.

28. *Id.* at 1137b35-1138a2.

29. *Id.* at VI, 1143a25-32.

Practical intelligence was an important concept for the Greeks of Aristotle's time. Aristotle defines the term as "a state grasping the truth, involving reason, concerned with action about what is good or bad for a human being."³⁰ Because it concerns action, practical intelligence must be grounded in knowledge of the particular as well as the universal. More precisely, "it must possess both [the universal and the particular knowledge] or the [particular] more [than the universal]."³¹ And because it deals with particular facts, practical intelligence involves experience as well as deliberation, since particulars are known best as a result of experience.³² Finally, practical intelligence is intimately involved with political science because it incorporates both legislative and judicial functions.³³

B. The Dominant Interpretation of Aristotle's Account of Equity

Since the account of equity in the *Nicomachean Ethics* takes up less than two pages of Irwin's 298-page translation of the work, it is not surprising that Aristotle's views on this important concept would be the subject of rival interpretations. Nevertheless, one interpretation appears to have gained ascendance among modern philosophers and lawyers. Most writers argue that Aristotle employs equity to fill gaps in the law;³⁴ that is, equity enables a judge to adjudicate correctly a case presenting a novel issue on which the legislature has enacted no law or that law is incomplete. In these cases, equity simply takes the place of legislation; it is, according to Aristotle, "what the legislator would have said himself if he had been present there . . ."³⁵

Consider the evidence in the *Nicomachean Ethics* supporting this interpretation. Aristotle suggests in several passages that gaps may exist in the law. While we ideally "need laws concerned . . . with all of life,"³⁶ Aristotle admits that "on some matters legislation is impossible . . ."³⁷ Hence, "not everything is guided by law."³⁸ Rather, decrees and equity are necessary, presumably to fill gaps where the legislature has failed to issue a relevant law. Granted, laws are intended to require actions that express all of the virtues and to prohibit actions that express all of the vices,³⁹ but Aristotle recognizes that laws framed by the legislature may not achieve this ideal. In fact, he notes that a legislator's "life would be too short" to enumerate all of the cases that may or may not fall under a given rule.⁴⁰

30. *Id.* at 1140b4-6.

31. *Id.* at 1141b21-22.

32. *Id.* at 1142a14-15.

33. *Id.* at 1141b23-24, 30-33.

34. *See infra* notes 41-49 and accompanying text.

35. *Id.* at V, 1137b23.

36. *Id.* at X, 1180a3-4.

37. *Id.* at V, 1137b28-29.

38. *Id.* at 1137b27-28.

39. *Id.* at 1129b23-24.

40. RHETORIC, *supra* note 26, at I, 1374a33.

Upon closer examination of these passages, we can discern two distinct types of cases in which Aristotle finds a gap in the law. First, in some cases, there may be no enacted law covering the situation. These are what modern legal scholars call “cases of first impression,” for they present issues on which a judge has no directly relevant law or precedent to apply. Aristotle denominates these cases as situations in which it is impossible to legislate, “and so a decree is needed.”⁴¹ Aristotle’s recognition of this first type of case is explicitly noted by Garrett Barden, who asserts that Aristotle “appealed to [equity] precisely when there is no statute and no precedent that adequately covers the case in hand.”⁴² Second, in other cases, the enacted law might sweep too broadly in that the law *appears* to address the situation, but the circumstances dictate a different outcome. Aristotle contends that in these cases, “what happens violates the [intended scope of] the universal rule.”⁴³ Here, the gap in the law arises from the legislature’s failure to contemplate a particular situation in which a usually bad act does not—in that situation—constitute a vice. The *Rhetoric*’s hypothetical in which a person wearing a ring strikes another but is not actually guilty of an assault with an iron instrument is a fine example of this type of case.⁴⁴

In each of these two types of cases, there is a gap in the law. The role of equity is to fill this gap, allowing an adjudication that otherwise would not be possible because of the failure of the enacted law to address the particular situation. As Wolfgang von Leyden puts it, Aristotle utilizes equity to cover “‘a gap left uncovered by law proper.’”⁴⁵ Indeed, equity simply allows a judge to fill the gap by saying what a legislator “would have prescribed, had he known, in his legislation.”⁴⁶ The judge steps into the legislator’s shoes, exercising the same sort of practical intelligence that the legislator would have utilized had he or she foreseen the situation.

Under this reading, one thing is clear: Equity operates only where there is no adequate law to cover the situation. If a situation falls within the bounds of a law enacted by the legislature, there is no role for equity. As one commenta-

41. ETHICS, *supra* note 7, at V, 1137b29

42. Garrett Barden, *Aristotle’s Notion of Epieikeia*, in CREATIVITY AND METHOD: ESSAYS IN HONOR OF BERNARD LONERGAN 353, 362 (Matthew L. Lamb ed., 1981). This citation and the following quotations from other commentators should not be taken to indicate that these authors hold exclusively that Aristotelian equity merely fills gaps in laws. On the contrary, many of these authors have complex views and, as Part V of this note will demonstrate, some of their observations are useful in responding to the interpretation outlined here. Nevertheless, the quoted passages suggest that even competent scholars of Aristotle can say some misleading things about how equity fills gaps in laws.

43. ETHICS, *supra* note 7, at V, 1137b21.

44. *See supra* text accompanying note 26.

45. WOLFGANG VON LEYDEN, ARISTOTLE ON EQUALITY AND JUSTICE 96 (1985) (quoting ARISTOTLE, RHETORIC bk 1, ch. xiii, §§ 12-14 (von Leyden’s translation); *see also* MAX HAMBURGER, MORALS AND LAW: THE GROWTH OF ARISTOTLE’S LEGAL THEORY 101 (1951) (“Equity constitutes legal dynamics . . . where there is a gap or defect in the formulation of the law.”); Lawrence B. Solum, *Equity and the Rule of Law*, in 36 NOMOS 120, 124 (Ian Shapiro ed., 1994) (Aristotle’s view of equity “corrects the law’s generality by filling gaps in the law . . .”).

46. ETHICS, *supra* note 7, at V, 1137b23-24.

tor has written, "the boundaries of the equitable are those outlined by the gaps in the law. The law remains authoritative outside the limits of the equitable. The equitable is not a competitor to the legally just but is adjoined to it for cases which are not envisaged or adequately covered by the law."⁴⁷ That is, Aristotle utilizes equity to deal with the narrow circumstance in which the legislature has not addressed a case through statutory law. Peter Charles Hoffer argues:

[A] characteristic of Aristotle's formulation is that equity worked in the interstices of law. If the law gave a full remedy, there was no need for equity. If equity was a requirement for any legal system (for the laws could never be comprehensive enough to do justice in all cases), it only applied to particular cases of injustice The theory of equity was universal, but the practice of equity confined itself to individual cases.⁴⁸

Hence, under the conventional interpretation of Aristotle's theory, a judge may employ equity to "rectify the deficiency"⁴⁹ of the enacted law only where the enacted law failed to comprehend a problem addressed to the court.

III

EQUITY IN ANGLO-AMERICAN LAW

Equity is a tremendously important concept in Anglo-American law. In fact, equity is so important and its use so widespread that it is impossible to discern a single, unitary conception of the idea in Anglo-American law. Legal historians often use "equity" to refer to the body of law administered by England's Courts of Chancery, a system of courts that had a separate, though sometimes overlapping jurisdiction distinct from common law courts.⁵⁰ This note does not address the history and procedures of courts of equity or the vestiges of those procedures operating in the equitable remedies of modern courts. Rather, the focus of this note is on equity in its more general sense, that is, as a method of judicial decisionmaking emphasizing the particular facts of a given case in an effort to reach a just outcome. Even in this more abstract sense, the term "equity" has been subject to almost innumerable characterizations in Anglo-American law. Still, it is worthwhile to review the influence of Aristotle's texts on Western jurisprudence and to generalize about the ensuing role for equity in Anglo-American law. Indeed, by the mid-eighteenth century, leading commentators insisted that equity was auxiliary to law and operated only in the gaps between laws. In so doing, they delineated a role for equity

47. Constantine Georgiadis, *Equitable and Equity in Aristotle*, in JUSTICE, LAW AND METHOD IN PLATO AND ARISTOTLE 159, 162 (Spiro Panagiotou ed., 1987).

48. PETER CHARLES HOFFER, THE LAW'S CONSCIENCE: EQUITABLE CONSTITUTIONALISM IN AMERICA 8-9 (1990).

49. ETHICS, *supra* note 7, at V, 1137b21.

50. For the history of the Courts of Chancery from a modern perspective, see generally HOFFER, *supra* note 48, ch. 2.

that is perfectly consistent with the dominant interpretation of Aristotle's *Nicomachean Ethics*.⁵¹

A. Aristotle's Influence on Anglo-American Law

Aristotle's influence on the concept of equity in Anglo-American law can hardly be overstated. Early Anglo-American legal philosophers quoted Aristotle liberally, and modern courts in the United States still occasionally cite Aristotle's passages on equity.⁵² Yet even when legal philosophers and jurists do not credit Aristotle, his exposition of equity has undoubtedly made a tremendous contribution to the development of equitable adjudication, especially the notion of "equitable interpretation" of statutes.

To understand the importance of Aristotle to Anglo-American law, we must return to the revival of Aristotelianism in Medieval Europe. In the thirteenth and fourteenth centuries, scholars succeeded in reintroducing Aristotelianism to Western society. Among the notions recovered was Aristotle's notion of equity. As St. Thomas Aquinas wrote in the *Summa Theologica*:

Now it happens often that the observance of some point of law conduces to the common weal in the majority of instances, and yet, in some cases, is very hurtful. Since then the lawgiver cannot have in view every single case, he shapes the law according to what happens most frequently, by directing his attention to the common good. Wherefore if a case arise wherein the observance of that law would be hurtful to the general welfare, it should not be observed.⁵³

In that passage, Aquinas implicitly called for the application of Aristotelian equity to reform the law where it is imperfect because of its universality.⁵⁴ Following Aquinas, Jean Gerson also referred to Aristotle in asserting that "[e]quity, which the Philosopher [Aristotle] calls *epieikeia*, outweighs the harshness of the law. It is, moreover, equity which considers all the particular facts of a situation with justice tempered by the sweetness of mercy."⁵⁵

What is particularly interesting about the Medieval view of equity, however, is the point at which it diverged from a strictly Aristotelian view. Recall that Aristotle urges that equity is intimately connected to legislative intent; equity is "what [the legislator] would have prescribed, had he known [about the particular facts of an individual case], in his legislation."⁵⁶ Yet for Medieval scholars, equity had a different reference point. As Aquinas wrote in a later passage of the *Summa Theologica*, "[i]n these and like cases it is bad to follow

51. See *supra* part II.B.

52. See, e.g., *Commissioner v. Beck's Estate*, 129 F.2d 243, 245 n.4 (2d Cir. 1942); *Simonds v. Simonds*, 380 N.E.2d 189, 192 (N.Y. 1978).

53. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA*, Part II, 1st part, ques. 96, art. 6 (Fathers of the English Dominican Province trans., 3d ed. 1942).

54. See Stephen W. DeVine, *The Concept of Epieikeia in the Chancellor of England's Enforcement of the Feoffment to Uses Before 1535*, 21 U. BRIT. COLUM. L. R. 323, 333 (1987) (Aquinas's account is a "classic restatement of the Aristotelian concept.")

55. 9 JEAN GERSON *OEUVRES COMPLÈTES* 94, 95-96 (P. Glorieux ed., 1973), quoted in DeVine, *supra* note 54, at 335 (DeVine's translation).

56. *ETHICS*, *supra* note 7, at V, 1137b22-23.

the law, and it is good to set aside the letter of the law and to *follow the dictates of justice and the common good*.”⁵⁷ Aquinas entertained a broader notion of discretion in the exercise of equitable judgment, for the “dictates of justice and the common good” is certainly more variable and judge-centered than the legislature’s intent. As one commentator has correctly suggested, “Aquinas’[s] brand of equitable construction would thus seem to involve the judge in a larger measure of law *making* than Aristotle’s.”⁵⁸ Given Aquinas’s heightened appreciation for natural law, his reference to justice and the common good rather than legislative intent is not surprising; however, as discussed below, it provided ammunition for critics who viewed equity as judicial decisionmaking without a standard.⁵⁹

In the early sixteenth century, English scholars first embraced the Aristotelian concept of equity. Initially, Christopher St. Germain, who was a scholar in divinity rather than law, drew upon the works of Aristotle to maintain that

[e]quity is a righteousness that considereth all the particular circumstances of the deed [and] also is tempered with the sweetness of mercy. And such an equity must always be observed in every law of man and in every general rule thereof, and that knew he well who said thus It is not possible to make any general rule of the law but that it shall fail in some case [Equity’s] exception is secretly understood in every general rule of every positive law.⁶⁰

St. Germain’s writings were followed by Edward Hake’s *Epieikeia*, which was directed at solicitors and chancellors in England’s Courts of Equity. Perhaps anticipating the criticism of Selden and others who argued that equity varied like the length of the Chancellor’s foot, Hake emphasized that equity did not arise from a judge’s unfettered discretion, but was an integral part of any statute. It should not be supposed, he wrote, that

Equity were a thing out of the law or beside the law, or as if it were the *Equity* of the judge, and not of the law, but that the *Equity* thereby meant is to be taken (as it is indeed) to be within the law, and that it being there found is to be applied by the judge of the law according to the particularity of the case that is before him⁶¹

Moreover, unlike Aquinas, Hake emphasized Aristotle’s notion that the exercise of equity was limited to implementing the legislature’s intent:

[I]f [it] should happen that there were a case which being brought to the words of the law were likely to receive rule or judgment contrary to the law of God, against the law of Reason, what else could the judge conceive in such a case but that, while he should stick in the letter of the law, he should but insist in the very husk and skin of the law,

57. AQUINAS, *supra* note 53, Part II, 2d part, ques. 120, art. 1 (emphasis added).

58. Raymond B. Marcin, *Epieikeia; Equitable Lawmaking in the Construction of Statutes*, 10 CONN. L. REV. 377, 391 (1978) (emphasis in original).

59. See *infra* part IV.A.

60. CHRISTOPHER ST. GERMAIN, DOCTOR AND STUDENT (1523), *reprinted in* 91 PUBLICATIONS OF THE SELDEN SOCIETY, at 95, 97 (T.F.T. Plucknett & J.L. Barton eds., 1974) (spelling modernized). Plucknett and Barton use the spelling “St. German,” but others generally use “St. Germain.”

61. EDWARD HAKE, *EPIEIKEIA: A DIALOGUE ON EQUITY IN THREE PARTS* 46 (D. Yale ed., 1953) (circa 1580-90), *quoted in* Marcin, *supra* note 58, at 395 (emphasis in original; spelling modernized).

and were therefore to turn himself by and by to investigate the *intent and hidden meaning of the law*?⁶²

In these ways, Hake made an early attempt to buttress courts of equity against the criticism that equity provided unlimited discretion to judges. But as we shall now observe, Hake's attempt to limit the exercise of equity in Anglo-American law was quickly discarded in favor of a far more important restriction.

B. The Gap-Filling Role for Equity in Anglo-American Law

Surely the most important, and the most enduring, purported limitation on the exercise of equity in Anglo-American law is the notion that equity operates merely to fill gaps in the written law. Of course, judges and jurisprudential scholars have not been entirely unified in restricting equity to that circumscribed role.⁶³ Yet the dominant characterization of equity in Anglo-American law—like the dominant interpretation of Aristotle's notion of Greek equity—has limited its use to instances in which there is a gap in statutory law or judicial precedent.

The contention that equity operates only where there is a gap in the law held sway as early as the eighteenth century. Henry Home, Lord Kames of Scotland, put the idea plainly, writing that “equity *commences at the limits of the common law*, and in certain circumstances neglected by common law And thus a court of equity, accompanying the law of nature in its general refinements, enforces every natural duty that *is not provided for by common law*.”⁶⁴ Put another way, equity works only in the interstices of the common law, filling gaps left by the common law's often haphazard development. This idea was echoed in the influential works of William Blackstone: “[T]he liberty of considering all cases in an equitable light must not be indulged too far, lest thereby we destroy all law and leave the decision of every question entirely in the breast of the judge.”⁶⁵

Jurisprudential scholars have carried the notion that equity simply fills gaps in the law into twentieth century Anglo-American legal theory. The division between law and equity is most visible in a strain of modern legal theory prominently represented by H.L.A. Hart. Although he rarely used the term

62. HAKE, *supra* note 61, at 16, *quoted in* Marcin, *supra* note 58, at 395-96 (emphasis added; spelling modernized).

63. *See infra* part V.

64. HENRY HOME, LORD KAMES, *PRINCIPLES OF EQUITY* 42 (2d Ed. 1767) (emphasis added).

65. 1 WILLIAM BLACKSTONE, *COMMENTARIES* *62. Commentators have often noted Blackstone's influential attempt to restrict equity to a gap-filling role:

William Blackstone, a conservative jurist whose influence on the interpretation of common law, statute, and equity was felt throughout the English-speaking world, recognized that the duality—the periodic recrudescence of higher principles of natural obligations—inherent in equity still rendered it a loose cannon on the ship of state. In his Vinerian lectures on the law, later published as *Commentaries on the Law of England* (1765-69), he insisted that equity was purely auxiliary to law. Narrowly reading Aristotle and emphasizing the technical side of English and Scottish equity treatises . . . there was but one equity [for Blackstone], and it had nothing to do with universal principles of conscience or fairness.

HOFFER, *supra* note 48, at 11-12.

“equity,” Hart essentially envisioned equity as a necessary component of adjudicating difficult cases because it fills gaps in laws previously enacted by the legislature or adopted by the courts.⁶⁶ Under this view, most cases faced by judges are straightforward; they involve the simple application of legal concepts to a set of facts. Other “hard” cases, however, involve novel legal situations that require judges who endeavor to act fairly to move beyond formally enacted laws, filling the gaps in those laws. It is worthwhile to quote from Hart’s influential theory at length:

The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case. None the less, the life of the law consists to a very large extent in the guidance both of officials and private individuals by determinate rules which, unlike the applications of variable standards, do *not* require from them a fresh judgment from case to case.⁶⁷

Hart therefore insisted that equity is relevant only in difficult (and relatively rare) cases where there is no clear statutory law or precedent that controls the case. The bulk of cases, by contrast, are straightforward applications of law to fact and require no reference to equity.

Not surprisingly, the view that equity only fills gaps in the law has found favor among the majority of modern Anglo-American judges, too. Consider the opinion of Judge Jerome Frank, a respected legal philosopher, in *Commissioner v. Beck’s Estate*.⁶⁸ In that case, the court decided a complex statutory issue, holding that a taxpayer was not entitled to a tax deduction for certain insurance premiums paid through an irrevocable insurance trust. But the language of the court in interpreting the relevant income and gift tax provisions is particularly interesting. “[C]ourts may not, as legislatures may, roam at large, confined only by the Constitution,” Judge Frank asserted; “their function, when dealing with . . . legislation, does not go beyond that of filling in small gaps left by the legislature—and to closing the gaps in accordance with what appears to have been the legislative purpose.”⁶⁹

Likewise, the comments of the dissenting judge in the classic case *Riggs v. Palmer*⁷⁰ are consistent with the prevailing notion that equity operates only to fill gaps in the law. The facts of the case are engaging. A sixteen-year-old boy murdered his grandfather in order to obtain the immediate enjoyment of his inheritance. Under the plain meaning of the applicable New York statutes, the boy would have inherited a portion of his grandfather’s estate according to the terms of the will. However, the majority invoked Aristotle’s discussion of equity and refused to enforce the will. Dissenting Judge Gray objected to the

66. See H.L.A. HART, *THE CONCEPT OF LAW* ch. 7 (2d ed. 1994).

67. *Id.* at 135 (emphasis in original).

68. 129 F.2d 243 (2d Cir. 1942).

69. *Id.* at 245. Judge Frank cites Aristotle’s *Rhetoric* and *Nicomachean Ethics* as authority for this proposition. *Id.* n.4.

70. 22 N.E. 188, 191 (N.Y. 1889) (Gray, J. dissenting). The majority opinion in this case is considered in a subsequent part of this note. See *infra* part V.C.

majority's application of equity because he found no gap in the statutory law. He wrote:

If I believed that the decision of the question could be effected by considerations of an equitable nature, I should not hesitate to assent to views which commend themselves to the conscience. But the matter does not lie within the domain of conscience. We are bound by the rigid rules of law, which have been established by the legislature In the absence of such legislation [prohibiting a slayer from inheriting from the victim], the courts are not empowered to institute such a system of remedial justice.⁷¹

Apparently, Judge Gray worried that the exercise of equity where there was no clear gap in the law would amount to unjustifiable judicial legislation.⁷²

Of course, Anglo-American judges have good reason to be concerned about the use of equity, if by equity we mean so-called judicial legislation. Following Montesquieu's and Locke's ideas on the separation of powers,⁷³ it is a cardinal principle of both British and American constitutionalism that legislatures alone are empowered to enact laws, while courts merely interpret and apply the laws. This notion is eminently justifiable. And, as this note will now discuss, the ideal of separation of powers and concern about unfettered, unaccountable judicial power animate two major criticisms of equity's role as a gap-filling device.

IV

CRITICISMS OF EQUITY

Parts II and III of this note have attempted to show that in both the dominant interpretation of Aristotle's works as well as the subsequent writings of Anglo-American judges and theorists, equity has been viewed as a device to fill gaps in laws. Unfortunately, this conception of equity presents a set of alternating difficulties for Aristotle's political theory as well as for modern lawyers who adopt a similar conception. On the one hand, if equity is necessary simply because it is impossible for the legislature to enact statutes completely covering every issue, would it not be possible—and perhaps even prudent—to abolish the legislature altogether in favor of personal rulings by judges? On the other hand, if a state maintains a legislature that continually enacts laws as society develops, would not the role for equity diminish as the legal code expands?

Before turning to these problems directly, it is important to note again that these criticisms are at least partly derived from post-Enlightenment concerns

71. *Id.* at 191-92.

72. Justice Oliver Wendell Holmes's remark about equitable lawmaking working only in the gaps of the law expresses much the same point. See *Southern Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) ("I recognize without hesitation that judges do and must legislate, but they can do so only interstitially . . .").

73. See MONTESQUIEU, *THE SPIRIT OF LAWS* bk. XI, ch. 6 (Thomas Nugent trans., David Wallace Carrithers ed., 1977) (1748) ("[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers."); JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* bk. II, ch. 12 (Peter Laslett ed., 1960) (3d ed. 1698).

about the separation of powers, especially as manifested in U.S. constitutional law. An elemental principle of the United States Constitution holds that it falls to the legislature to enact laws and to courts to adjudicate cases.⁷⁴ The separation of powers has become perhaps the most important constitutional doctrine governing the operation of and interaction between the branches of government in the United States. But this doctrine is a modern conception that is only crudely recognized by Aristotle. To be sure, Aristotle maintains in the *Politics* that legislative action is often preferred to adjudication because the former is the product of collective action and thus less subject to corruption.⁷⁵ But this realization is a far cry from adopting a comprehensive doctrine of separation of powers in which each branch of government is created with certain powers and clear limitations in order to check and balance the powers of the other branches. The point is clear: While Aristotle is open to some criticism because he did not foresee the importance of separating governmental powers, it is somewhat anachronistic to expect him to offer solutions to a problem of twentieth century Anglo-American, not fourth century Athenian, government.

Similarly, it is crucial to account for the tremendous differences between the operation of the court systems of fourth century Athens and twentieth century America. Take a typical criminal case today in the United States. A government prosecutor tries a defendant for a specific offense defined by the criminal code. During the trial, a judge decides issues of law, while the jury determines the ultimate issues of fact. Athenian law could hardly be more different. In fourth century Athens, there were no prosecutors for the government. Rather, defendants were prosecuted by their victims.⁷⁶ Also, criminal offenses were not defined in the primitive Athenian statutes.⁷⁷ And there was no judge to decide issues of law. Rather, a large body of *δικαστάι*, citizens who acted collectively as judges and jurors for a case, determined questions of both law and fact, rarely if ever distinguishing between the two types of issues.⁷⁸ Typically, 500 *δικαστάι*, selected from the same body of citizens that composed the Athenian legislature, heard a case.⁷⁹ Thus, unlike modern Anglo-American law, under Athenian law there was little concern about “judicial legislation,” since any court was comprised of a large body of the same citizens who formed the legislature. In Aristotle’s day, there was simply no reason to be concerned about the pernicious effects of judicial legislation.

74. Cf. U.S. CONST. arts. I, III.

75. See ARISTOTLE, *POLITICS* III, 1286a21-35 (T.A. Sinclair trans., Trevor J. Saunders ed., 1981) [hereinafter *POLITICS*].

76. S.C. TODD, *THE SHAPE OF ATHENIAN LAW* 91-92 (1993).

77. *Id.* at 61 n.14 (A “classic example” of a law without defined terms “is the law quoted at Dem. 21.47—‘if a man commits *hubris* [wanton aggression], the following procedure shall be available against him’—without saying what *hubris* was.”).

78. *Id.* at 82-83.

79. *Id.* at 83.

With these qualifications in mind, let us turn to two important criticisms directed at the concept of equity as presented in the writings of Aristotle as well as in Anglo-American law.

A. Equity Undermines the Rule of Law

A concept of equity that merely fills gaps in the law may be criticized initially for its tendency to undermine the development of a system of universally applicable laws. Consider the opinion of one modern appellate court:

Equitable justice is “better” than the legal kind, Aristotle contended, because by looking to the circumstances of the matter under adjudication it can cure the error that may result from the universal application of a legal generality. But at some point, though admittedly not one that is always clear, the introduction of equity challenges the development and administration of an ordered system of rules, a problem of considerably greater concern today than at the time and place in which Aristotle wrote.⁸⁰

In his discussion of Aristotelian equity, von Leyden frames the objection as follows:

[A] critic might argue . . . that precisely because laws are formulated in general terms, personal rule (single or collective) should take the place of legal sovereignty. This argument has always been the stock in trade of monarchists and all those favouring personal initiative and governmental power over and against the rule of law.⁸¹

Indeed, if it is impossible to enact laws to anticipate all circumstances, yet equity nevertheless permits fair adjudication in those instances, why not expand the realm of the equitable to encompass all cases? Or, to frame the issue in H.L.A. Hart’s vocabulary, if a judge has discretion to apply equity in *hard* cases, would it not be both possible and perhaps preferable to allow a judge to have similar discretion in *all* cases? The broad exercise of equity, which is tailored to the particular circumstances of an act, would appear superior to universal statutory rules, since equity faces none of the problems Aristotle attributes to universal rules “that cannot be correct” precisely because of their universality.⁸²

Of course, the vast majority of Anglo-American legal theorists reject wholly individualized, personal rulings by judges. Few would dispute that judging cases wholly on their equities is both ineffectual and subject to corruption. For example, Henry Sumner Maine contended:

A community which never hesitated to relax rules of written law whenever they stood in the way of an ideally perfect decision on the facts of particular cases, would only, if it bequeathed any body of judicial principles to posterity, bequeath one consisting of the ideas of right and wrong which happened to be prevalent at the time. Such jurisprudence would contain no framework to which the more advanced conceptions of subsequent ages could be fitted⁸³

80. *Kaiser Found. Hosps. v. Workers Compensation Appeals Bd.*, 202 Cal. Rptr. 520, 527 (Cal. Ct. App. 1984), *vacated by* 702 P.2d 197 (Cal. 1985) (citations omitted).

81. VON LEYDEN, *supra* note 45, at 95.

82. ETHICS, *supra* note 7, at V, 1137b16.

83. HENRY SUMNER MAINE, *ANCIENT LAW* 73 (3d Am. ed. 1888).

More recently, Judge Jack Weinstein has noted that the exercise of equity, if it involves uncontrolled flexibility and individuality in judicial decisionmaking, can lead to judicial tyranny and the abandonment of useful standards.⁸⁴

Likewise, even though Aristotle was not writing with an eye toward the development of modern law (as Maine was) or with concern for judicial integrity (as Weinstein does), even his political theory seems to reject the wholly particularized rule of equity. While the logical conclusion of his discussion of equity might be to replace legislated rules with judicial equity, Aristotle contends near the end of the *Nicomachean Ethics* that universal laws are necessary to compel people to act virtuously and to provide a universal concept of good.⁸⁵ Aristotle also argues that legislation is preferred to adjudication because it is the product of collective action and therefore less subject to corruption.⁸⁶

But the problem is that considerations within equity itself provide no principled reason to choose legislation over equity, despite the fact that other considerations in Aristotle's doctrine and Anglo-American law militate against the unfettered use of equitable rulings. If equity is a device to fill gaps in the law, there is no reason that it could not displace the rule of law altogether. Indeed, discussions of equity in Aristotle and Anglo-American law rarely furnish a convincing reason why an expansive application of equity would be either impossible or unwarranted on its own terms. Quite the contrary, both Aristotle and early Anglo-American theorists implicitly assent to a broad utilization of equity when they insist that equity is superior to legal justice.⁸⁷ Such a notion suggests that a judge's application of equity rather than a legislature's enactment of law would do no harm to the pursuit of justice.

Simply put, if equity can fill gaps in the law—taking the place of law where the legislature has enacted no statute or an incomplete statute—there seems little reason that a sufficient number of judges employing equity to adjudicate individual cases *could* not wholly supplant the legislative function. And if Aristotle and his successors are correct that equity is “better” than legal justice,⁸⁸ there seems little reason it *should* not.

B. Equity Should Disappear as the Legal Code Expands

Alternatively, if a state retains its legislature and the legislators are sufficiently attentive to their task of creating an ordered system of rules, the realm of the equitable should steadily decrease. That is to say, if it is correct

84. Jack B. Weinstein, *Justice and Mercy—Law and Equity*, 28 N.Y.L. SCH. L. REV. 817, 818-19 (1984) (noting that the approach of 19th century French judges, “who abandoned rules of law completely and instead engaged in ad hoc decisionmaking according to the equities of the cases,” was “individualism run riot”).

85. ETHICS, *supra* note 7, at X, 1180a5, 1180b14.

86. POLITICS, *supra* note 75, at III, 1286a21-35.

87. See *supra* text accompanying notes 12 and 57.

88. ETHICS, *supra* note 7, at V, at 1137b9.

that equity operates only in the gaps of the law, the exercise of equity would necessarily diminish as the legal code becomes more developed. Roger Shiner expresses the point admirably:

In the early stages of development of a legal system there are few laws [S]ituations arise which are not covered by the laws, or where a decision by way of strict application of those laws would be unjust. Courts should then exercise equitable judgment in the open area not covered by the laws. However, the body of law will grow, both by legislative and judicial activity. The area open for equitable judgment will decrease. In a fully developed modern legal system, there will be very little room for equity in the original sense at all.⁸⁹

This objection is especially problematic for Aristotle's political theory, since he apparently foresaw the development of a legal code that left little room for judicial discretion. As he proclaims at the outset of the *Rhetoric*, "it is most desirable that well-drawn laws should, as far as possible, define everything themselves, leaving as few points as possible to the discretion of the judges" ⁹⁰ The objection is also a problem for modern Anglo-American law. If Judge Frank is correct that equity may only fill small gaps in statutes enacted by the legislature,⁹¹ there would appear to be less and less room for the exercise of equity as statutory law becomes more sophisticated, as it has over the past two centuries.

But neither Aristotle nor most Anglo-American legal scholars appear to assert that the exercise of equity will disappear as the legal code develops. Given that Aristotle views equity as "superior" to legal justice,⁹² it would seem strange if he were to assent to its disappearance. Likewise, most Anglo-American legal observers, including Douglas Laycock, have proclaimed "the triumph of equity," asserting that "[t]he war between law and equity is over" and "[e]quity won . . . [and] is ordinary, not extraordinary, in remedies, procedure, and substance."⁹³

As such, the failure to account for the gradual disappearance of equity as the legal code develops presents difficulties for Aristotelian and Anglo-American legal theory. It is problematic for Aristotle because he contends that although both equity and legal justice are parts of justice, equity is the better part. It is problematic for Anglo-American law because, despite the tremendous expansion of statutory law, the exercise of equity continues unabated.

89. Roger A. Shiner, *Aristotle's Theory of Equity*, 27 LOY. L.A. L. REV. 1245, 1250 (1994).

90. RHETORIC, *supra* note 26, at I, 1354a31-32.

91. *See supra* notes 68-69 and accompanying text.

92. ETHICS, *supra* note 7, at V, 1137b11.

93. Laycock, *supra* note 4, at 53-54.

V

REEXAMINING THE ROLE OF EQUITY IN ARISTOTELIANISM AND ANGLO-AMERICAN LAW

Having advanced a pair of formidable objections to the dominant interpretation of equity in Aristotelianism and Anglo-American law, let us now consider how a different conception of equity can avoid the Scylla of arbitrariness in a system of individual case adjudication and the Charybdis of irrelevance under a complex statutory scheme. The objections stated in Part IV are predicated upon a misinterpretation of the role of equity. The proper role of equity is not simply to fill gaps in the law. Instead, equity consists primarily in a judge's exercise of practical intelligence to conform universal laws to particular situations. Rather than filling a gap in the *law*, equity fills inevitable gaps in the legislatures' *foresight* when the legislature makes a general legal rule without knowing the facts of any individual case in which it will be applied. In Aristotle's words, equity operates whenever the legislature's universally applicable law "falls short" of achieving justice precisely because of its universality.⁹⁴ In such cases, equity adapts the law to fit the case at hand. Since equity operates to conform universal laws to particular cases, a state would never be justified in abandoning the enactment of universal laws in favor of decisionmaking solely on a case-by-case basis. Moreover, given that a legislature cannot know the particular facts of future cases, the function of equity—applying universal law to individual cases—will exist regardless of how developed a legal code may become. Hence, equity is not a competitor to a legal tradition that emphasizes the importance of universal laws; instead, equity is a necessary component to that tradition because it allows judges to apply universal laws to each individual case they adjudicate.

To show why the operation of equity should be viewed in this way, we must take a fresh look at the writings of Aristotle. Indeed, a different interpretation of Aristotle's *Nicomachean Ethics* avoids the criticisms outlined earlier and helps chart a different path for the role of equity in Anglo-American law. Before returning to Aristotle's work, however, it is helpful to consider the views of a modern Anglo-American legal philosopher, Roscoe Pound.⁹⁵ Pound was one of the most prolific legal scholars of the twentieth century. His vision for the role of equity—although it has not gained ascendance in Western law—is an appropriate counterpart to Aristotle's writings, for Pound takes seriously the

94. ETHICS, *supra* note 7, at V, 1137b21.

95. Roscoe Pound lived from 1870 to 1964 and served as Dean of Harvard Law School for several years. He is an appropriate representative of Anglo-American legal thought because of his thorough knowledge of legal history and his tremendous influence on 20th century legal philosophy. See generally DAVID WIGDOR, ROSCOE POUND: PHILOSOPHER OF LAW (1974). Of course, other scholars in jurisprudence could serve as representatives of the Anglo-American tradition. For example, one author has recently published an admirable comparison of Aristotle's view of equity to those of H.L.A. Hart and Ronald Dworkin. See generally Shiner, *supra* note 89.

criticisms of equity outlined in Part IV of this note, yet steadfastly defends its role in a legal system committed to the rule of codified law.

A. Roscoe Pound's View of Equity

Roscoe Pound approaches the role of equity in the Anglo-American system from a thoroughly modern perspective. Unlike Aristotle, Pound considered the justifications for the operation of equity from within a fully developed legal system. He was fully aware of the criticisms of equity and, in fact, sympathized with the critics. Yet, like Aristotle, Pound was an unyielding apologist for the operation of equity within a system of codified law. Indeed, Pound's views roughly parallel those of Aristotelianism, and his conception of equity is striking because it departs from the prevailing view that equity simply fills gaps in the law.

Pound's conception of equity is remarkably cohesive, despite the fact that he developed it over a period of nearly six decades of legal scholarship. His writings never waver in their defense of equity and its role in judicial decision-making.⁹⁶ To Pound, equity is "the idea of wider discretion, greater freedom of application, [and] more elasticity in view of particular cases . . ."⁹⁷ Perhaps unwittingly, Pound adopts the Aristotelian definition of equity by citing two later sources: "Blackstone was not all in error, much as our modern text writers differ with him, when he gave equity the Grotian definition of 'the correction of that wherein the law (by reason of its universality) is deficient.'"⁹⁸ But most importantly, in Pound's view, equity is not merely a tool to fill gaps in the statutory law; rather, it plays a central part in adjudication even where there are few gaps. Indeed, "in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the cause before him."⁹⁹

In fact, Pound views the relationship between statutory law and the judicial exercise of equity as a foundational question for all of jurisprudence. "Almost all of the problems of jurisprudence," he writes, "come down to a fundamental one of rule and discretion, of administration of justice by law and administration of justice by the more or less trained intuition of experienced magistrates."¹⁰⁰

96. This note does not attempt to introduce every piece Pound wrote regarding the operation of equity. However, it does examine Pound's more substantial writings on the subject from every period throughout his life. His works on the subject are surprisingly consistent, as is his conviction that the application of equity is an essential component to any modern legal system. Compare, e.g., Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 35 (1905) [hereinafter *Decadence of Equity*] ("[E]quity is a part of law, in the sense that it is necessary to the working of any legal system.") with ROSCOE POUND, 2 JURISPRUDENCE § 65, at 242 (1959) [hereinafter JURISPRUDENCE] ("[E]quitable or individualized application of legal precepts is called for more and more in the law of today.").

97. *Decadence of Equity*, *supra* note 96, at 22.

98. *Id.* at 23 (quoting 1 WILLIAM BLACKSTONE, COMMENTARIES *61).

99. 2 JURISPRUDENCE, *supra* note 96, § 75, at 355.

100. ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 54 (rev. ed. 1954) [hereinafter PHILOSOPHY OF LAW]; see also ROSCOE POUND, JUSTICE ACCORDING TO LAW 40 (1951)

To Pound, judicial equity and statutory law may be conceptually antithetical to one another but need not conflict in practice. As he notes, "we have to take account of [both equitable discretion and the rule of law], either of which carried to its logical extreme negates the other, [but] which nevertheless are equally necessary for achievement of our practical task and must be kept in balance."¹⁰¹ Thus, while he accepts that the theoretical conflict between law and equity "will not down,"¹⁰² Pound argues that, in practice, the tension between equitable discretion and justice according to universally applicable laws creates "mutual checks and corrections of one another."¹⁰³ That is to say, both general laws and equity are essential to the legal process: The former provides stability in the law, whereas the latter allows for necessary growth. In the end, Pound views both general lawmaking and individualized equity as central to political and economic security:

Individualization in application is a problem in all systems of law which have reached maturity. In all such systems jurists are confronted by a need of balance between the general security and security of the economic order, on the one hand, calling for certainty, uniformity, and predictability, and the individual life, on the other hand, calling for individualized application.¹⁰⁴

Nevertheless, Pound recognizes that the tendency in modern Anglo-American law was to restrict the operation of equitable, discretionary decision-making. Partly due to the influence of nineteenth century analytical jurisprudence, which considered the application of legal precepts akin to the mechanical application of a mathematical formula, equitable discretion was commonly viewed as contrary to the rule of law.¹⁰⁵ Moreover, the increasing demands for uniformity and predictability in commercial transactions and other areas of economic life tended to restrict the individualized decisionmaking that characterized equitable adjudication. "[A]ll the circumstances of modern life," Pound writes, "draw us to the strictly legal side, and the judge, bound hand and foot by a code and the maxim that that law is best which leaves least to the discretion of the judge is our natural goal . . ."¹⁰⁶ Pound also understands

[hereinafter JUSTICE ACCORDING TO LAW] (The definition of law has "moved back and forth in the history of the science of law according to the circumstances of legal systems and the agencies by which their precepts have been formulated for the time being. It comes to a question of putting stress on one or the other of two elements in the legal system—of whether to emphasize rule or discretion. This is one of the persistent problems in the science of law.").

101. JUSTICE ACCORDING TO LAW, *supra* note 100, at 43.

102. *Decadence of Equity*, *supra* note 96, at 24.

103. *Id.* (quoting SHELDON AMOS, SCIENCE OF LAW 57-58 (1900)).

104. 4 JURISPRUDENCE, *supra* note 96, § 116, at 20; *see also* Roscoe Pound, *Runaway Courts in the Runaway World*, 10 UCLA L. REV. 729, 732 (1963) ("When, in the increasingly complex and continually changing details of individual relations in a changing world, courts adjust conflicting claims by reason instead of by rigid rules formulated in the simpler codes of the past, the unchanging laws of Medes and the Persians have ceased to apply. . . . So, too, law must be stable and yet it cannot stand still." (internal quotation omitted)).

105. *See* 2 JURISPRUDENCE, *supra* note 96, § 68, at 242.

106. *Decadence of Equity*, *supra* note 96, at 21.

that the complaint that equity allows for arbitrary personal rule contrary to the rule of law¹⁰⁷ might have tremendous persuasive appeal. He notes:

[W]e commonly think of [judicial discretion] at its worst, as in the stories of Harun al Raschid in the Arabian Nights, where one wrongdoer who tells a clever story and amuses the Commander of the Faithful will go free while the severest penalty will be inflicted on another who adds dullness to no greater crime and bores his judge.¹⁰⁸

How then should we view equity in a system dominated by statutory law? Pound's views, though incomplete, are instructive. According to him, the judicial process, that is, the decision of a particular case according to general laws, consists of four elements:

(1) Finding the facts, i.e. ascertaining the state of facts to which legal precepts are to be applied in order to reach a determination; (2) finding the law, i.e. ascertaining the legal precept or precepts applicable to the facts found; (3) interpreting the precept or precepts to be applied, i.e. ascertaining their meaning by genuine interpretation; and (4) applying the precept or precepts so found and interpreted to the case in hand.¹⁰⁹

Pound has nothing more to say about the first step in the judicial process, finding the facts. But his observations about the next three steps are important because they provide clues about how Pound views equity in the adjudicative process.

Pound recognizes that finding the law, the second step in the judicial process, is occasionally straightforward. Indeed, "[f]inding the law may consist merely in laying hold of a prescribed text of a code or statute."¹¹⁰ More often, however, finding the law is itself a process heavily influenced by equitable judicial discretion. Pound contends that, in many cases, finding the law is

not so simple. More than one text is at hand which might apply; more than one rule is potentially applicable, and the parties are contending which shall be made the basis of a decision. In that event the several rules must be interpreted in order that intelligent selection may be made.¹¹¹

And, of course, this discretionary element cannot be removed simply by making the distinctions within a legal code more minute and complex. In fact, the more complex and detailed a legal code becomes, the more likely it is that two or more rules might apply to a given set of facts.¹¹² Hence, even the preliminary attempt to find the law applicable to a particular case involves equitable discretion.

107. See *supra* part IV.A.

108. 2 JURISPRUDENCE, *supra* note 96, § 75, at 355 (citation omitted).

109. 4 JURISPRUDENCE, *supra* note 96, § 115, at 5-6 (citations omitted). In *An Introduction to the Philosophy of Law*, originally published 37 years before his five-volume *Jurisprudence*, Pound expounds a similar list of steps involved in adjudication. The earlier list differs in one important respect. It does not include the first step of Pound's later enumeration, "finding the facts." See PHILOSOPHY OF LAW, *supra* note 100, at 48. The inclusion of fact-finding as a part of adjudication is significant, especially when considering a correct interpretation of Aristotle's concept equity. See *infra* part V.C.

110. PHILOSOPHY OF LAW, *supra* note 100, at 50.

111. *Id.*

112. See *id.*; JUSTICE ACCORDING TO LAW, *supra* note 100, at 86 ("Attempt to control application of law by minute and detailed legislation is a mistake.").

Next, Pound submits that interpretation of the law, the third step in the judicial process, also involves a good measure of equitable discretion.¹¹³ “The greater part of what goes by the name of interpretation,” he writes, “is really a lawmaking process, a supplying of new law where no rule or no sufficient rule is at hand.”¹¹⁴ That is to say, the legislative process and the judicial process run into one another.¹¹⁵ Where the legislative process leaves off, the judicial process takes up. Granted, “[i]t is the function of the legislative organ to make laws. But from the nature of the case it cannot make laws so complete and all embracing that the judicial organ will not be obliged to exercise a certain lawmaking function also.”¹¹⁶ Unfortunately, Pound is not more specific about the precise lawmaking function of a court. Still, he plainly states that the “pious fiction” of mechanical interpretation of law, which would be little more than the deduction of “the logical content of authoritatively established principles,” is, in reality, a process by which judges shape the law even as they interpret it.¹¹⁷

Finally, Pound argues that the application of law, the fourth step in the judicial process, also involves equitable decisionmaking. In the context of applying the law to a particular case, equity is not so much about discretionary interpretation of law as it is about taking account of individual differences among cases. Hence, a “judicial decision [cannot] ignore [a case’s] special aspects and exclude all individualization in application without sacrificing the social interest in the individual life through making justice too wooden and mechanical.”¹¹⁸ On the contrary, Anglo-American law, especially in the United States, “has been manifest in a tendency to seek extra-legal attainment of just results [in individual cases] while preserving the form of law.”¹¹⁹ Thus, while Pound believes that many advocates of the equitable theory of application of law have gone “too far” in the direction of unbridled judicial authority, he also notes that Anglo-American law must find a way to “achieve an individualization which we deny in theory . . .”¹²⁰ In short, Pound understands that it is manifestly ridiculous to believe that application of the law to a particular case means nothing more than “apply[ing] Webster’s dictionary to the compiled statutes,” as those who support mechanical application of law apparently believe.¹²¹

113. Of course, this is especially true when a court explicitly invokes “equitable interpretation” or “equitable construction of a statute.” See *infra* notes 151-56 and accompanying text.

114. PHILOSOPHY OF LAW, *supra* note 100, at 49-50.

115. *Id.* at 51; 4 JURISPRUDENCE, *supra* note 96, § 115, at 6-7.

116. PHILOSOPHY OF LAW, *supra* note 100, at 51.

117. *Id.* at 52.

118. *Id.* at 53. Here, Pound cites Aristotle for the contrary thesis that “a court should have no discretion. To [Aristotle] the judicial office was a Procrustean one of fitting each case to the legal bed, if necessary by surgical operation.” *Id.* This interpretation of Aristotle’s writings is simply wrong. See *infra* part V.C.

119. 4 JURISPRUDENCE, *supra* note 96, § 115, at 14.

120. PHILOSOPHY OF LAW, *supra* note 100, at 63.

121. Pound, *supra* note 104, at 732.

In the end, then, Pound recognizes that the process of adjudication is intimately associated with equitable decisionmaking at virtually every turn. To him, there simply is no other way to achieve the necessary individualization of the law that justice requires. He puts the idea best in an address delivered at Westminster College in Fulton, Missouri:

Law is more than an aggregate of laws. It is what makes laws living instruments of justice. It is what enables courts to administer justice by means of laws, to restrict them by reason where the lawmaker exceeds his reason, and to develop them to the full scope of reason where the lawmaker falls short of it.¹²²

Law is not merely the collection of statutes enacted by the legislature but is also the singular decision made in a specific case affecting distinct individuals. As such, law must have a particular, individualized element to it. For Pound, that element is equity, or, as he frequently declared, it is "reason applied to experience."¹²³

B. The Unanswered Questions in Pound's Concept of Equity

Unfortunately, Pound never developed an entirely coherent concept of equity's role in the adjudicative process. To be sure, the observations laid out in the previous section of this note are helpful. For example, they suggest that equity is not merely a tool to fill gaps in the statutory law. Rather, equity is exercised at every stage of a judge's analysis of a particular case. Likewise, they point out that much of what goes on under the guise of mere "interpretation" or "application" of law actually involves something more. The problem, however, is that Pound never specifies exactly what that "something more" is. He tells us that the function of the judge is to apply reason to experience but does not specify how that should occur. He tells us that the first step in the judicial process is to find the facts but then fails to discuss the impact of that step on a judge's decisionmaking. And he tells us that interpretation often functions in a lawmaking capacity but never specifies how so.

Make no mistake, Pound clearly details *methods* of applying universal law. Consider the following passage:

In Anglo-American law today there are no less than seven agencies for individualizing the application of law. We achieve an individualization in practice: (1) through the discretion of courts in the application of equitable remedies; (2) through legal standards applied to conduct generally when injury results and also to certain relations and callings; (3) through the power of juries to render general verdicts; (4) through latitude of judicial application involved in finding the law; (5) through devices for adjusting penal treatment to the individual offender; (6) through informal methods of judicial administration in petty courts; and (7) through administrative tribunals.¹²⁴

122. JUSTICE ACCORDING TO LAW, *supra* note 100, at 60.

123. Pound, *supra* note 104, at 734; *see also* JUSTICE ACCORDING TO LAW, *supra* note 100, at 91 (Law "presupposes a life measured by reason, a legal order measured by reason, and a judicial process carried on by applying a reasoned technique to experience developed by reason and reason tested by experience.").

124. PHILOSOPHY OF LAW, *supra* note 100, at 64.

But Pound does not develop a coherent philosophical framework through which these methods might be unified and justified. For that endeavor, it is helpful to return to the work of Aristotle.

C. Pound's Questions Answered: A Different Interpretation of Aristotle's Account of Equity

Earlier this note summarized the dominant interpretation of Aristotle's concept of equity.¹²⁵ That interpretation, which coincides with the dominant interpretation of the role of equity in Anglo-American law, holds that equity operates to fill gaps in the law. Unfortunately, as Part IV of this note demonstrated, that vision of equity is subject to at least two serious criticisms. Might there be a better explication of Aristotle's theory that simultaneously avoids those criticisms and extends Pound's theory by addressing its unanswered questions, thereby providing a more sound justification for the exercise of equity in Anglo-American law? Consider the following interpretation.

Throughout his writings, Aristotle contends that equity consists in conforming the legislature's general law to a particular case. The "nature of what is equitable," he argues in the *Nicomachean Ethics*, is "rectification of law in so far as the universality of law makes it deficient."¹²⁶ Like the special ruler used by Lesbian builders that adapts itself to the shape of a stone,¹²⁷ equity adapts a general standard of law to a particular situation. This point is expressed more directly in the *Rhetoric*, where equity is said to apply when it is necessary for the legislature "to lay down an absolute rule, but [it is] not really possible to lay down more than a general rule . . ."¹²⁸ For Aristotle, then, a central feature of equity is that it accounts for the particular facts of a case and conforms the law to the individual situation, rectifying any deficiency of the law that may result from its universality.

Given that equity consists of the intellectual endeavor of applying general rules to particular cases, Aristotle's discussion of the intellectual virtues is significant. Indeed, Aristotle's identification of practical intelligence as the intellectual virtue that governs the application of universal rules to particular circumstances is central to a complete understanding of equity. In a passage contrasting practical intelligence with other virtues of thought, Aristotle contends that practical intelligence is not about "universals only" but is "concerned with action and action is about particulars."¹²⁹ Yet he is also careful to point out that when a person exercises practical intelligence, "there is a ruling [science]."¹³⁰ With respect to adjudications, the exercise of practical intelligence involves the application of a controlling rule—a general law—to a

125. *See supra* part II.B.

126. *ETHICS, supra* note 7, at V, 1137b26-27.

127. *Id.* at 1137b29-31.

128. *RHETORIC, supra* note 26, at I, 1374a29.

129. *ETHICS, supra* note 7, at VI, 1141b14-16.

130. *Id.* at 1141b21-22.

specific action—an individual case. In Aristotle's words, "since intelligence is concerned with action, it must possess *both* [the universal and the particular knowledge]."131 Much the same idea appears to be expressed through Pound's notion of "reason applied to experience."¹³²

Aristotle's illustrations provide insight into the operation of practical intelligence. Explaining that a person who exercises practical intelligence must have knowledge of both universals and particulars, Aristotle suggests that "someone who knows that light meats are digestible and healthy, but not which sorts of meat are light, will not produce health; the one who knows that bird meats are healthy will be better at producing health."¹³³ His point is that knowing universal rules—that it is good to be healthy and that light meats help to produce health—is not enough; the practically intelligent person must also know about particulars—that this specific meat, bird meat, falls within the class of healthy light meats. Consider how closely this illustration parallels Aristotle's example of the person who strikes another while wearing a ring.¹³⁴ In that context, the universal rule holds that wounding with an iron instrument is illegal. What the judge utilizing practical intelligence realizes, however, is that this particular iron instrument—a ring—does not fall within the class of iron instruments the legislature meant the law to address. Hence, the person wearing a ring who strikes another is not guilty of the law "in reality."¹³⁵

Of course, it is true that legislators exercise practical intelligence in the act of enacting legislation.¹³⁶ Indeed, Pound admits as much when he argues that the judicial function runs into the legislative function.¹³⁷ The problem is that while legislators may have sufficient knowledge to lay down universal rules, they usually do not have sufficient knowledge to allow them to frame laws capable of dealing with *every* conceivable case. In this event, according to Aristotle, "the law chooses the [universal rule] that is usually [correct],"¹³⁸ often without specifying all of the particular cases in which the rule does not apply. Aristotle suggests two instances in which legislators might promulgate a universal rule without also codifying all of its exceptions. First, a "point [may] escape[] their notice."¹³⁹ For example, legislators simply may not envision the particular case in which a person with an iron ring would strike another and would therefore technically be guilty of a law penalizing wounding with an iron instrument. Second, legislators may need to enact a law and yet be "unable to

131. *Id.* (emphasis added).

132. Pound, *supra* note 104, at 734.

133. ETHICS, *supra* note 7, at VI, 1141b18-21. Readers familiar with Aristotelian ethics will recognize this as an example of the practical syllogism.

134. See *supra* text accompanying note 26.

135. RHETORIC, *supra* note 26, at I, 1374b1.

136. ETHICS, *supra* note 7, at VI, 1141b24-25 ("One part of practical intelligence about the city is the ruling part; this is legislative science.").

137. See *supra* text accompanying note 115.

138. ETHICS, *supra* note 7, at V, 1137b15.

139. RHETORIC, *supra* note 26, at I, 1374a27.

frame a definition . . . for life would be too short for a person who tried to enumerate the cases."¹⁴⁰ Indeed, listing all of the particular iron instruments that the legislature intends to fall into the class of assaultive instruments would be an endless task. For either of these two reasons—mere oversight or the practical obstacles to drafting an exact rule—the legislature may enact universal laws that do not account for the particular facts of individual cases.

When this occurs, Aristotle says the legislator “falls short,” and has “made an error by making an unconditional rule” that does not account for every particular case.¹⁴¹ Yet, “the law is no less correct on this account, for the source of the error is not the law or the legislator, but the nature of the object itself”¹⁴² Aristotle’s point is that universal laws, while necessary, are nevertheless deficient because they cannot account for every particular case that might arise under the law. Put another way, general laws are defective precisely because they provide seemingly universal rules—“light meat is healthy” or “wounding with an iron instrument is illegal”—often without fully describing the particular instances in which the rule does or does not hold—“bird meat is light meat” or “a ring is not an iron instrument for the purposes of this law.” Pound arrives at essentially the same conclusion when he observes that “the very fact that laws are general rules, based on abstraction and the disregard of the variable and less material elements in affairs, makes them . . . bound in nature to act mechanically, and not according to the requirements of a particular case.”¹⁴³ In any event, equity, the exercise of practical intelligence in the judicial context rather than in the legislative context,¹⁴⁴ provides the premises that cannot be supplied at the time of enactment by stating “what the legislator would have said himself if he had been present there, and what he would have prescribed, had he known, in his legislation.”¹⁴⁵

Because equity conforms the law to a particular situation by adding missing premises, it is not surprising that Aristotle contends that “what is equitable is just, and better than a certain way of being just—not better than what is unconditionally just, but better than the error resulting from the omission of any condition [in the rule].”¹⁴⁶ In other words, the role of the judge exercising equity is to decide whether a given case falls within a general legal rule, partly by considering any implicit conditions the legislature meant to include in the seemingly unconditional rule. Garrett Barden’s expression of this idea is worth recounting:

The law is universal because it is an understanding and all understanding is universal. But that understanding which is expressed in law is legally relevant because it is an

140. *Id.* at 1374a28, 32.

141. *ETHICS*, *supra* note 7, at V, 1137b21-22.

142. *Id.* at 1137b17-18.

143. *Decadence of Equity*, *supra* note 96, at 20.

144. *See ETHICS*, *supra* note 7, at VI, 1141b33 (among the parts of practical intelligence are legislative and judicial parts).

145. *Id.* at V, 1137b22-24.

146. *Id.* at 1137b24-25.

understanding of a usual case. The application of the law to a case always requires the insight that this case is an instance covered by the law, that is, that this particular case is a member of the class of usual cases and that, therefore, there is no need to inquire further. What Aristotle here distinguishes as equitable judgment depends on the insight that the case is unusual and so must be understood differently.¹⁴⁷

Under this reading, Aristotle's puzzle regarding the relationship between equity and justice is easily resolved.¹⁴⁸ Indeed, as Aristotle suggests, "[t]he puzzle arises because what is equitable is just, but is not what is legally just, but a rectification of it. The reason is that all law is universal, but in some areas no universal rule can be correct . . ." ¹⁴⁹ That is to say, both equity and legal justice are parts of justice as a whole and, therefore, both are good. But in any individual case, equity is "better than"¹⁵⁰ legal justice because equity is exercised by a judge who knows the particular facts of that case, whereas legal justice—a piece of general legislation—often cannot account for those particular facts.

Interestingly, despite the fact that Anglo-American jurisprudence usually conceives of equity as filling gaps in the law,¹⁵¹ the doctrine of "equitable interpretation" of statutes is consistent with the view that equity confirms laws by accounting for particular facts. Rather than conceiving of equity as a device simply to fill gaps in the law, Anglo-American courts that conduct equitable interpretation assert that "by looking to the circumstances of the matter under adjudication [equitable interpretation of statutes] can cure the error that may result from the universal application of a legal generality."¹⁵² Consider again the case of *Riggs v. Palmer*.¹⁵³ Recall that a boy murdered his grandfather to obtain his inheritance and that, under the plain meaning of the New York statutes, the boy would have inherited according to his grandfather's will. However, the state's highest court refused to enforce the will. The court observed:

[I]t never could have been [the legislature's] intention that a donee who murdered the testator to make the will operative should have any benefit under it. If such a case had been present in their minds, and it had been supposed necessary to make some provision of law to meet it, it cannot be doubted that they would have provided for it.¹⁵⁴

In Aristotelian terms, the court held that, given the particular facts of the case at hand, the deficiency of the legislature's general law needed to be rectified by

147. Barden, *supra* note 42, at 358; see also Shiner, *supra* note 89, at 1258 ("Judgment about a particular case in the area of practice is ineluctably particular: It is always necessary for the judge to determine whether the case is one of the 'many' or one of the exceptions.").

148. See *supra* text accompanying notes 10-13.

149. ETHICS, *supra* note 7 at V, 1137b12-14.

150. *Id.* at 1137b33-34.

151. See *supra* part III.B.

152. Kaiser Found. Hosps. v. Workers Compensation Appeals Board, 202 Cal. Rptr. 520, 527 (Cal. Ct. App. 1984), *vacated by* 702 P.2d 197 (Cal. 1985).

153. 22 N.E. 188 (N. Y. 1889).

154. *Id.* at 189 (citing a portion of Aristotle's *Nicomachean Ethics*).

the exercise of judicial equity.¹⁵⁵ Yet the statutory provision that donees should inherit according to the terms of the testator's will was no less true because of the court's holding. As von Leyden aptly puts it, "by making explicit a qualification intended or understood but not actually expressed in the formulation of a general rule of law, [equity] confirms rather than abolishes this rule."¹⁵⁶

To summarize, under a correct interpretation of Aristotle's *Nicomachean Ethics*, it is misleading to say that equity fills gaps in the law and that it operates only where there is no adequate law to cover the situation. Instead, equity fills gaps in the exercise of practical intelligence, which is concerned with particular facts as well as universal rules. It is, as Pound would say, "reason applied to experience."¹⁵⁷ In the context of political affairs, practical intelligence is utilized in both the legislative and judicial functions. However, what distinguishes the use of practical intelligence in the adjudicative context is that a judge encounters an individual case—a particular set of facts—to which the law must be applied. Thus, while a legislator must choose the general rule that holds true in the majority of cases, a judge is presented with a discrete case that requires consideration of whether the general rule is applicable to the particular situation.

Under this interpretation, Aristotle's understanding of equity provides answers to the questions Pound left unaddressed. Consider how reference to Aristotle's theory fills out each of Pound's steps in the judicial process.

According to Pound, in adjudicating a particular case, a judge must first find the facts. Aristotle makes clear that this is the step a legislature often cannot perform in its own exercise of practical intelligence. Excepting *ex post facto* laws, the events of a particular case *cannot* have occurred when a legislature enacts a law. At best, the legislature can hypothesize about particular situations that *might* occur under a law. Hence, a judge's initial responsibility is to discern the particular facts which in turn act as essential, additional premises for the application of universal rule to the case at bar.

Second, Pound notes that in deciding a case, a judge must find the applicable law. Aristotle hints at this idea by maintaining that the knowledge of universals is essential to the exercise of practical intelligence. That is to say, the exercise of practical intelligence requires reference to a universal standard—in the adjudicative context, a law. There simply is no such thing as standardless equitable decisionmaking to Aristotle. Rather, equity is about the exercise of

155. Judge Jerome Frank recognized a similar idea in *Aero Spark Plug Co. v. B.G. Corp.*, 130 F.2d 290, 295 (2d Cir. 1942) (Frank J., concurring) ("Excessive concentration of attention" on legal rules sometimes results in "allotting inadequate attention to the interests of the actual parties in the specific existing cases which it is the duty of courts to decide."). *But cf. supra* notes 68-69 and accompanying text (Judge Frank asserting that equity only fills gaps in the law).

156. VON LEYDEN, *supra* note 45, at 97.

157. Pound, *supra* note 104, at 734.

practical intelligence, which necessarily involves reference to a universal standard.

Pound recognizes that finding the appropriate law involves interpreting the law (or several laws), and he therefore sets out interpretation of law as the third step in the judicial process. Both Pound and Aristotle acknowledge that interpretation incorporates a measure of judicial discretion. But Aristotle's conception of equity is especially helpful in describing what occurs at this point. He insists that even a simple law such as "wounding with an iron instrument is illegal" may be subject to unwritten exceptions. Yet these exceptions are not unlimited; on the contrary, the judge is permitted only to read in "what the legislator would have said himself if he had been present . . ." ¹⁵⁸ Simply stated, a judge's discretion is limited to effectuating the legislative intent, albeit sometimes a purely conjectural notion of what the legislature *would* have intended had it considered the particular facts of the case at hand.

The final step in the judicial process according to Pound is to apply the law to the individual case. In Aristotle's conception, this is the stage in which practical intelligence is fully manifested, for here the universal law squarely meets the particular situation. In the vast majority of cases, application of the law is straightforward. After using practical intelligence to find the facts of the case, to find the relevant law, and to interpret the law, a judge merely needs to follow the dictates of a statute for a case that falls neatly within its boundaries. In some cases, however, the process of interpreting the law will have resulted in a law that is not precisely what the prior statute (or case law) set forth, because the legislature (or other judges) did not draft the law to account for the particular facts of the case at hand. Had they foreseen those facts and had the time to draft a rule that would account for this exceptional case, they would have drafted the law differently. In any event, they would not have intended the seemingly relevant law to apply to the case. Therefore, the judge must apply what might appear to be a "new" law to the case, but it is a law that effectuates the legislative intent. Still, in both the straightforward and more complicated instances of applying the law, Aristotle's focus remains on a judge's exercise of practical intelligence, the intellectual virtue consisting of the ability to combine universal laws with particular facts to arrive at a just result.

D. Equity as the Application of Universal Laws to Particular Cases: A Reply to the Criticisms of Equity

The preceding interpretation of equity in the works of Aristotle and Pound avoids the alternating difficulties described in Part IV of this note. First, since equity acts only to rectify universal rules where they are deficient and not to replace them, its exercise by judges provides no justification for abolishing the legislature that promulgates universal rules. Second, since equity involves the exercise of practical intelligence by a judge with regard to particular cases,

158. ETHICS, *supra* note 7, at V, 1137b22-23.

equity will never disappear, irrespective of the developmental stage of the general legal code.

Recall the first objection posed in Part IV: If equity, which is “superior” to legal justice, can fill gaps in the law, there is little reason not to abolish the legislative task of enacting general rules in favor of wholly individualized decisions by judges.¹⁵⁹ A proper understanding of the relationship between practical intelligence and equity demonstrates that this objection is without merit. The exercise of practical intelligence requires knowledge of both the universal and the particular. That is to say, the exercise of equitable discretion presupposes a general standard. “Equity does not repeal the laws,” writes Aaron Kirchenbaum, “[i]t exists side by side with the law, correcting or supplementing it.”¹⁶⁰ Pound asserts that “[e]ven in the earliest and rudest justice the will of the judge is not exercised habitually and entirely as such, wholly free from the constraint of acknowledged rules of action or principles of decision.”¹⁶¹ Even as equity accounts for the particular facts of a situation and applies the law to meet those facts, it does so with reference to a universal standard. As von Leyden puts it, “a general and authoritative principle of some sort must be present even in the mind of a personal ruler [P]rinciples of equity are valueless if introduced without ‘rhyme and reason’, i.e. without a moral purpose or some general rule.”¹⁶² Hence, if the equitable judge’s exercise of practical intelligence always involves reference to a universal rule, the question becomes whether that universal rule should originate in the courts or the legislature.

Aristotle provides several convincing arguments for holding that the judge who exercises equity and practical intelligence should refer to universal rules originating in the legislature rather than in the court. He begins with the realization that while “treatment is more exactly right when each person gets special attention,” the moral education of an entire population requires “attention by the community work[ing] through laws.”¹⁶³ Put another way, while individual attention is theoretically more beneficial to teaching virtue, as a practical matter, the force of universal law represents the most suitable way for a city-state to produce the compulsion necessary to encourage virtuous acts. Additionally, as noted in Part IV, individual rule is subject to corruption because it is not subject to the moderating influences of collective action.¹⁶⁴ Finally, Aristotle suggests in the *Rhetoric* that a judicial decision must be given “off-hand,” making it difficult to “satisfy the demands of justice and expedien-

159. See *supra* part IV.A.

160. AARON KIRCHENBAUM, EQUITY IN JEWISH LAW: HALAKHIC PERSPECTIVES IN LAW 16 (1991).

161. 2 JURISPRUDENCE, *supra* note 96, § 75, at 355.

162. VON LEYDEN, *supra* note 45, at 95.

163. ETHICS, *supra* note 7, at X, 1180b11-12, 1180a35.

164. See *supra* text accompanying note 86.

cy,"¹⁶⁵ and that legislated rules are prospective and therefore not "entangled with likings and hatreds and private interests."¹⁶⁶

Likewise, Pound realizes that the exercise of equity by judges does not entail the abolition of general rules enacted by the legislature. In fact, Pound fervently supports the rule of law. Unlike Aristotle, he fully understands the importance of the doctrine of separation of powers to twentieth century Anglo-American law.¹⁶⁷ It is inconceivable to him that any legitimate political system would not vest in its legislature the primary responsibility for laying down rules and in its courts the duty of applying those rules:

The heavy pressure upon courts today to do what ought to be the work of legislatures is a hindrance to judicial justice. Attempt to control application of law by minute and detailed legislation is a mistake. On the other hand, attempt to set up new premises for legal reasoning on a large scale by judicial lawmaking impairs the stability of the legal and so for the economic order New starts, therefore, are better made by legislation which has no retroactive application and may be fitted into the system judicially by experience without unsettling the transactions of the past.¹⁶⁸

Like Aristotle, Pound believes that legislation is superior to personal rule because it allowed the experiences of a greater number of people to enter the adjudicative calculus.¹⁶⁹ But Pound is a realist. He acknowledges the impossibility of granting judges no power to individualize their decisions:

It was thought formerly that the ideal of justice according to law was administration by a perfect system of rules by which either (a) all cases were covered expressly, or (b) were covered indirectly through rigid deduction or a sort of mathematically exact development of the logical content of what was expressed. So the ideal was supposed to be that through this perfect system of rules all cause might be determined with an absolute certainty of like result in like cases and an absolute assurance that an accurate prediction of the result might be made if the facts were rightly understood *Experience has shown that this ideal cannot be realized.*¹⁷⁰

Instead, argues Pound, Anglo-American law must arrive at a theory that recognizes equity and discretion "as a legitimate part of the judicial function and insists that individualization in the application of legal precepts is no less important than the contents of those precepts themselves."¹⁷¹ In short, to Pound as well as Aristotle, equity is not about doing away with general rules. On the contrary, the exercise of equity consists primarily in the judge's cognizance of the particular facts that make that case fall inside or outside the scope of a general rule.

165. RHETORIC, *supra* note 26, at I, 1354b2.

166. *Id.* at 1354b8-10.

167. See JUSTICE ACCORDING TO LAW, *supra* note 100, at 64 ("[R]ecent examples of totalitarian government show what the separation of powers was devised to save us from and I shall assume that our administration of justice will continue to be held to conform to it.").

168. *Id.* at 86-87.

169. 2 JURISPRUDENCE, *supra* note 96, § 76, at 385 ("[T]he rules, principles, and conceptions of the law formulate the experience of the past in administering justice. No judge can hope to have the experience which law . . . makes available to him.").

170. *Id.* at 375 (emphasis added).

171. PHILOSOPHY OF LAW, *supra* note 100, at 60.

The second objection to the exercise of equity contended that since equity simply fills gaps in the law, the realm of the equitable will necessarily diminish as the legal code develops.¹⁷² Given a proper understanding of equity, this objection may be quickly and easily dismissed. As Part V of this note demonstrated, the judicial exercise of equity is rooted in the application of law to fact. In Paul Vinogradoff's words, equity is the "liberal application of rules to special sets of circumstances; it forms a link between the general [law] and the single case in its complicated surroundings."¹⁷³ Since adjudication will always require the application of law to fact, the exercise of equity will remain regardless of how developed a legal code may become. Indeed, as a statutory scheme becomes more complicated, the demand for the exercise of equity actually *increases*. If one element of equity is to determine whether an unwritten condition exists in a legal rule, then a judge's duty to rectify "the error resulting from the omission of any condition"¹⁷⁴ will multiply in proportion to the number of legal rules. Moreover, to the extent that legal rules may overlap, the equitable judge will be required to exercise practical intelligence more diligently in order to determine, on the particular facts of each case, which rule applies. Pound puts the idea clearly, writing that "in no legal system, however minute and detailed its body of rules, is justice administered wholly by rule without any recourse to the will of the judge and his personal sense of what should be done to achieve a just result in the cause before him."¹⁷⁵ Simply put, the development of a legal code in no way diminishes—and in an important sense actually reinforces—the judicial resort to equity.

VI

CONCLUSION

A revised account of the role of equity demonstrates that the dominant criticisms of equity miss the mark. Equity does not fill gaps in the law. As such, it does not allow for the unbridled exercise of judicial discretion where a judge contends that the law does not address the case before the court.¹⁷⁶ Rather, according to Aristotle and Roscoe Pound, equity is the exercise of practical intelligence in the judicial context. As Aristotle would put it, equity allows a judge to rectify the deficiency of a general legal rule that results from a legislature's inability to consider the facts of a particular case when codifying a universal law. Or, as Pound would insist, equity is a judge's reason (informed

172. See *supra* part IV.B.

173. PAUL VINOGRADOFF, II OUTLINES OF HISTORICAL JURISPRUDENCE 64 (1922).

174. ETHICS, *supra* note 7, at V, 1137b26.

175. 2 JURISPRUDENCE, *supra* note 96, § 75, at 355; see also PHILOSOPHY OF LAW, *supra* note 100, at 50 (Attempts to foreclose judicial discretion in finding the applicable law by "minute detailed legislation have failed signally.").

176. Cf. 2 JURISPRUDENCE, *supra* note 96, § 75, at 360 ("This discretion of an Anglo-American court of equity . . . is governed to some extent by principles. It is judicial as distinguished from personal discretion.").

by the relevant universal law), applied to experience (the particular facts of the case at hand).

Hence, equity is not subject to the mere whims of a judge's conscience; it is limited to effectuating the legislature's purpose. Equity does not undermine the rule of law; it fulfills universal laws by making plain the unexpressed conditions and exceptions intended by the lawmaker. And equity will not disappear as the legal code advances; it will always be a necessary part of selecting the law applicable to an instant case. In short, equity is not lawless; it allows judges to act within the confines of the rule of law. As Pound eloquently remarked, equity may not allow us to achieve the impossible ideal of "a government of laws and not men," but it does allow us to achieve an equally legitimate objective, "a government of men acting by law."¹⁷⁷ This vision of equity provides a sound justification for its exercise in Anglo-American law.

177. JUSTICE ACCORDING TO LAW, *supra* note 100, at 71.

