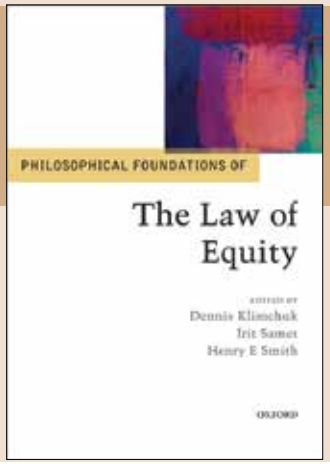
Philosophical Foundations of the Law of Equity



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Reviewed by David W. Thompson

Attorneys in Michigan are familiar with equity as a doctrine generally concerned with fairness, i.e., preventing bad actors from profiting from their bad behavior. Consider, for example, unjust enrichment.[1] But is it accurate to understand equity as the product of a coherent underlying doctrine with a singular theme or goal, whether fairness or otherwise? Or is equity instead merely a disjointed body of judges' decisions with no common doctrinal thread?

Philosophical Foundations of the Law of Equity is a collection of 17 essays that attempts to give a unifying account of equity, in various ways rejecting the theory that equity is merely a scattershot collection of judge-made decisions in the courts of chancery. Similar attempts have been made as to the common law,[2] and this work frequently draws comparisons to common law. The essay authors mostly coalesce around a central proposition set forth by Aristotle, that equity corrects errors in law: "[T]his is the nature of the equitable, a correction of law where it is defective owing to its universality."[3] In other words, equity exists because legislators cannot anticipate all factual scenarios to which laws might be applied. Thus, law is too general—at turns overinclusive, at others underinclusive—to reach a just result in all cases. Equity, which is more flexible (and, therefore, more capable of grappling with moral questions in factual contexts), fills gaps when law is too rigid and clumsy.

Equity as preventing opportunism

Taking Aristotle as a starting point, the essayists debate the fundamental nature of equity vis-à-vis law, attempting to discern its internal mechanics and external contours. They largely conclude that there are normative or remedial underpinnings to the gap-filling function Aristotle identifies. For example, Charles Webb considers that equity is more than correction of law owing to its generality—in other words, more than mere gap-filling—but instead corrects "bad rules." (p 13) He considers the example of a debtor who pays a debt, but the bond is not cancelled. While the common law would declare the debt unpaid, equity intervenes to prevent double payment. (p 13)

Dennis Klimchuk picks up on this notion and posits that the substance of equity prevents individuals (opportunists) from being sticklers for their rights "in a bad way." (p 39) In other words, equity intervenes substantively to prevent an unjust result owing strictly to procedural infirmities, which careful sticklers exploit to their advantage. Similarly, James Penner (consulting Immanuel Kant) observes that equity forces opportunists to refrain from exercising their rights in a bad way, and has developed over time to establish precedents and, thereby, protect the integrity of the legal system. For Kant, human collisions with each other are inevitable, for which reason human beings leave the "state of nature" and create an authority to adjudicate disputes.[4] (p 64) But any legitimate authority must avoid disparate resolutions as would be rendered by equity unmoored from precedent: "[p]erhaps out of considerations of this kind equity chose more and more over time to treat its own decisions as precedents, rule-generating precedents which were to be conceived of as corrections to the injustices of the common law." (p 66)

Not all the essayists frame equity in terms of opportunism; some offer a positive notion of equity related to fairness and individual autonomy.

Equity as promoting fairness and autonomy

A subgroup of authors goes beyond the question of opportunism, which is more or less concerned with negative authority (restraining opportunists), and instead identify positive conceptions of equity, i.e., as promoting fairness and individual autonomy. John Goldberg and Benjamin Zipursky assert that equity provides a mode of "discretionary relief" to those who experience injustice on account of the rigid application of law. They note that while law speaks in terms of entitlement based on legal rights, equity speaks in terms of discretion based on moral rights when legal rights offer no recourse. (pp 293, 296) They conclude that by considering the "hardship on the person seeking [legal] relief," equity improves law and maintains "something approximating a just social order." (pp 297, 312)

Attorneys in Michigan are familiar with equity as a doctrine generally concerned with fairness, i.e., preventing bad actors from profiting from their bad behavior.

One also wonders about fairness as it relates to process or the procedure for realizing legal rights. Larissa Katz argues that legal process can be unjust in barring or delaying access to rights: "procedures for acquiring rights are always temporally extended: it takes action to complete a procedure, and action is never instantaneous." (p 173) Katz appears to agree with Penner (and Kant) concerning the state's role as an authority—a role she argues is eroded by oppression and injustice wrought by cumbersome procedures. Thus, equity intervenes as a proxy for the state's "political conscience" to protect individuals. This is necessary because "[t]here are limits to what the state can tolerate while maintaining its status as a legitimate public authority." (p 171) One considers, however, whether these procedures preserve a larger good, i.e., as guardrails to allow worthy right-claimants and disallow unworthy ones.

There is also the question of how freely individuals make decisions in modern society. Simone Degeling focuses on "the consent of the claimant" in transactions, noting that equity serves to ensure that individuals are free from coercion and have sufficient information to make decisions. (p 313)

But not all the essay authors agree that equity has anything to do with fairness or autonomy, or even morality as such. Lionel Smith observes that equity may exhibit certain characteristics, but does not have any single underlying normative principle. (pp 146–147) Also, the courts of chancery are creatures of a bygone era—law and equity have since fused together. Henry Smith, while acknowledging the moral foundations of equity, asks whether its fusion with law promotes or inhibits moral considerations, and concludes the latter. This is owing to the loss of a "second-order equitable safety valve…reflecting the fairness of general rules…[and] greater accuracy of contextualized justice." (p 226) In other words, post-fusion equity does not mediate between general rules and particularized fact scenarios as effectively as before.

Equity also has its skeptics. Emily Sherwin discusses abuse and overuse of equity, and concomitantly its potential to undermine law. She observes that "[j]udges are not perfect reasoners," and that "[i]f actors perceive that judicial decisions do not regularly conform to rules, they will not expect other actors to follow the rules." (pp 257–258). Thus, any advantage from uniform application of rules is lost at the hands of equity.

Comparison with common law

Overall, the reader discerns a common thread running through the essays: a tension arises within equity between the interests of the individual and the community. The more responsive equity is to individual moral claims, the less predictable, and, therefore, the less responsive it is to the community.

In this respect, equity and common law have a lot in common. They share not only the appearance of fragmentation, but also (arguably) unifying threads. Just as the common law appears to be fragmented owing to tensions between individual interests and community interests,[5] equity also appears to be fractured along the same lines. For both common law and equity, these tensions may be resolved by understanding equity in terms of resolving individual and community interests.

For a philosophical framework, the reader considers G.W. Hegel, who posited that the individual and community rely on each other—the former relies on the latter for its laws and protections, while the latter relies on the former for free participation in public life.[6] This interdependent and mutual recognition between individual and community arguably resolves any tension between them and manifests itself in the common law. For example, contract law typically recognizes the freedom of the individual to contract, which expresses "individual liberty and self-reliance."[7] Yet since the mid-twentieth century, courts have recognized the common good (e.g., compulsory contractual warranties to prevent oppression of less powerful bargainers) and, thus, promote it.[8] Similarly, Aruna Nair and Irit Samet write that equity responds to moral questions between individuals, but is flexible enough to account for justice generally. (p 290)

In other words, one comparison between equity and the common law may be that both achieve unity through preserving individual *and* community rights.

Separation of powers: A problem?

Beyond questions of fairness, unity, and individual *contra* community, the reader also wonders whether discretionary equity squares with contemporary notions of government and separation of powers. These hold that legal relationships—rights and obligations between actors—are created by the legislature. But as James Edelman notes, "[t]he process of creating new law by reference to considerations of justice independent of the statute was recognized as one that can cross the line of constitutional settlement between adjudication and legislation." (pp 364–365)

In other words, when judges make determinations of rights and responsibilities based on notions of justice or morality that ignore or even contradict the legislature's ordering of these relationships, they breach the separation line between judicial and legislative activity.

Separation of powers: Solutions?

The fusion of law and equity is not recent, and Edelman also discusses how their coexistence can work in the context of

modern government. He effectively argues that equity *may* effectuate a departure from the rule of law and separation of powers, but not necessarily. He raises judicial interpretation as the central question. Specifically, Edelman proposes that if judges operate within the parameters of the law ("the equity of the statute")—i.e., are careful to interpret a statute to avoid perverse results through narrow or broader readings as appropriate according to its purpose—then what are commonly understood as equitable principles do not necessarily undermine separation of powers. (p 353)

Perhaps another way to think about the problem of separation of powers is that legislatures and courts work symbiotically to achieve the best results. If a particular law is too rigid in application and leads to unjust results, it is not uncommon for judges to exercise what is commonly understood as equity jurisdiction to achieve a fairer result. The legislature, in turn, has the power to adopt or reject a court's equity-driven interpretation of a law. In either case, however, law is ultimately the end product of legislative, as opposed to judicial, activity.

Conclusion

This is a worthy book. For practitioners' purposes, it is timeless and prudent counsel that advocacy employ pathos, demonstrating that a particular result is not only legally correct, but also morally correct or just. Philosophically speaking, as it is a collection of essays, the reader may or may not come to a singular understanding of equity—whether a haphazard constellation of unrelated cases and subject matters or a coherent doctrine (and if the latter, its decisive characteristic, e.g., fairness, preventing opportunism, or otherwise). That is not the book's aim. Quite the opposite: its greatest strengths are its structure and eclectic writing and sourcing, which invite readers to draw from a number of theories and cases, as well as their own experiences, to make up their own minds. ■

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ENDNOTES

1. Unjust enrichment applies "when a party 'has and retains money or benefits which in justice and equity belong to another.'" *Kammer Asphalt Paving Co, Inc v East China Twp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993). See also Restatement Restitution, 1st, § 1, comment a, p 12.
2. Brudner, *The Unity of the Common Law: Studies in Hegelian Jurisprudence: Second Edition* (Oxford: Oxford University Press, 2013).
3. Aristotle, *The Nichomachean Ethics* (Oxford: Oxford University Press, 1998), pp 133, 152–153.
4. Kant, *Groundwork of the Metaphysics of Morals* (New York: Cambridge University Press, 1996), p 29.
5. *Unity of Common Law*, pp 10–13.
6. *Id.* at 15–16, 149. See also Hegel, *Phenomenology of Spirit* (Oxford: Oxford University Press, 1977), p 111 and Hegel, *Elements of the Philosophy of Right: Tenth Edition* (New York: Cambridge University Press, 2005), pp 276–277.
7. *Unity of Common Law*, p 89.
8. *Id.* at 89–90.