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Grounding Equitable Powers

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Abstract

Equity has traditionally been understood as a judicial corrective to the generality of statutory law caused by the limited foresight of legislatures. Because of the *ad hoc* and corrective character of equity, many scholars have seen a tension between the morality of equity and the positivity of law. Equity, John Gardner once suggested, is "justice's rebellion against law"—insofar as the positive law does not usually authorise the exercise of equity by judges. In this article, I argue that while the exercise of equity requires the exercise of an equitable power, there are good reasons for the law to allow this power. I do so while showing the conditions under which the positive law could implement the two main historical ways of exercising equity in adjudication: 'equitable interpretation' and 'equitable suspension' of the law. In defending this argument, I also offer a brief historical sketch of equity and its connection with the modern approach to the study of implicit exceptions in the law: legal defeasibility.

Keywords: *Equity; Legal Defeasibility; Equitable Powers; Implicit Exceptions in the Law*

> *. . . And law, without equity, tho' hard and disagreeable, is much more desirable for the public good, than equity without law.*[1]

1. Introduction

A brief look at the history of ideas suggests that, for centuries, the study of 'implicit exceptions' in the law was part of the broader tradition of equity (*epieikeia*, *aequitas*), until analytical legal philosophers in the twentieth century reformulated this inquiry as one concerning the defeasibility of legal rules. By 'implicit exceptions' in the law, I refer to those exceptions to the application of a legal rule for which the positive law has not explicitly provided, but which judges may have sound reasons to recognise or make (depending on the view to be adopted) when deciding a dispute where the application of that rule is at issue.[2] By 'equity', in turn, I refer to an *ad hoc* judicial corrective to the generality

1. William Blackstone, *Commentaries on the Laws of England, Volume 1: Of the Rights of Persons (1765)* (University of Chicago, 1979) at 62.
2. The expression 'implicit exception' suggests that an exception of this kind is *already* present in the law, though not explicitly recognised by a positive legal rule. Judges, therefore, *recognise* an exception of this type; they don't *make* one. I discuss this difference in Section 3.

of statutory law caused by the limited foresight of legislatures in regulating a specific activity. Thus, unless otherwise specified, 'equity' is used here as a shorthand for *corrective* equity: a technique by which a judge may make or recognise, either through 'equitable interpretation' or 'equitable suspension' (to be elaborated shortly), an exception to the application of a statutory rule to avoid an unforeseen moral conflict.

The shift from equity to legal defeasibility may not be coincidental. With the temporary decline of natural law theory and the (pre-realist) rise of analytic legal positivism, it became common for normative (i.e., value-laden) approaches to legal theory to go out of fashion. In the eyes of the scientific study of law, most clearly illustrated by Kelsen's *Reine Rechstlehre*, normative approaches were not regarded as 'purely juridical' and were therefore excluded from legal science.[3] With normative legal positivism appearing to lie dormant after Bentham[4] and legal realism still taking shape, the value-free analysis promised by analytical legal positivism became the dominant explanatory framework in legal theory. Against this backdrop, the traditional study of equity, clearly value-laden, may plausibly have faced a foundational challenge.

In this article I have three main goals. First I want to show, in a historically informed manner, the distinct but by no means opposing roles of equity and legal defeasibility in the study of implicit exceptions in the law. While these approaches differ in their theoretical aims, I will argue that we can see them as coming closer together when defeasibility scholars started grappling with some of the same evaluative questions that have worried equity scholars for centuries. In this sense, a key contribution of this article is to clarify the connection between equity and legal defeasibility as two distinct approaches to the study of implicit exceptions in the law.[5] Section 2 adopts a primarily informative tone, recognising the historical development of both equity and defeasibility in law, which any discussion on the topic should briefly consider. The equitable powers I will defend are not novel; my aim is to articulate them in a fresh light.

Second, I want to suggest that there are good reasons for returning our attention to equity, which I take to be the traditional approach to the study of implicit exceptions in the law. With its significant normative traction forged by centuries

3. See Hans Kelsen, *The Pure Theory of Law*, 2d ed, translated by Max Knight (University of California Press, 1967) at 1, 106-07 [Kelsen, *Pure Theory*]. Normative approaches (or at least many of them) would, on this view, better belong in the category of "politics" or "the art of Government." Hans Kelsen, "Author's Preface" in *General Theory of Law and State*, translated by Anders Wedberg (The Lawbook Exchange, 1999) xiii at xiv.

4. See Frederick Schauer, "Normative Legal Positivism" in Torben Spaak & Patricia Mindus, eds, *The Cambridge Companion to Legal Positivism* (Cambridge University Press, 2021) 61 at 64-71. Schauer considers Bentham a full-blown normative legal positivist, a view that is clearly shared by Gerald Postema: see Gerald J Postema, "Preface to the Second Edition" in *Bentham and the Common Law Tradition*, 2d ed (Oxford University Press, 2019) xii at xiii-xiv. A similar conclusion can be drawn about Thomas Hobbes, who grounded his juridical positivism in a strongly value-laden conception of political right: see Martin Loughlin, *Political Jurisprudence* (Oxford University Press, 2017) at ch 2.

5. I am not the first to draw the connection between equity and legal defeasibility—as will become clear soon, others have suggested this link before me. However, in this article, I aim to develop this connection more fully.

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of ethical, juridical, and political thinking, equity allows us to better cast the study of implicit exceptions as a topic that raises crucial concerns about judicial power, judicial discretion, and judicial accountability. While these concerns demand our recurrent attention, equity is particularly well-suited for this task. These concerns have been at the centre of equity for centuries. Equity, therefore, offers an opportunity to cast the topic of implicit exceptions in normative terms by focusing on the reasons for judges to make or recognise these exceptions, and on the reasons for *the law* to regulate how judges ought to deliver equity. Since nothing in the nature of law requires judges to base their decisions on equity, it is important to make clear that only reasons can support the exercise of an equitable *power*.

Third, I will argue that distinguishing between the two primary ways of exercising corrective equity in adjudication—'equitable interpretation' and 'equitable suspension'—provides a framework through which the positive law may guide the judicial dispensation of equity.[6] I will defend a particular account of these equitable methods while criticising alternative views, such as the account of equitable interpretation put forth by Richard Ekins. The value of my proposal is linked to the positive character of the law, the Rule of Law, and judicial accountability. This account is preferable to two alternatives: rejecting corrective equity altogether or leaving the decision of *whether* to deliver equity to individual judges. With respect to the first alternative, I have argued elsewhere that allowing for an equitable power does not necessarily lead to a slippery slope, nor is the exercise of such power inherently incompatible with fairness.[7] Readers may also find excellent scholarly defences of equity that I will not revisit here.[8] Instead, I will suggest one additional reason why the positive law should accommodate equity. When it does so, the law ensures that judges are not required to decide *contra legem* (against the law) or *praeter legem* (supplying the silence of the law) when morality demands an equitable outcome. Thus, judges are not required to breach their duty to apply the law or to stretch the limits of that duty when equity is needed. Contrary to Gardner's suggestion, equity need not be "justice's rebellion against law."[9] In relation to the second alternative, I will argue that the Rule of Law provides sound reasons for preferring a structured framework grounded in positive law.

Finally, let me add three caveats. First, I will assume—consistent with the prevailing tendency among equity scholars—that when giving effect to statutory

6. By 'two primary ways' of exercising equity I do not refer to the main *functions* of equity in law, which are numerous: see e.g. Paul B Miller, "Equity as Supplemental Law" in Dennis Klimchuk, Irit Samet & Henry E Smith, eds, *Philosophical Foundations of the Law of Equity* (Oxford University Press, 2020) ch 5. Rather, I refer to the two primary ways of structuring *how* judges deliver equity.

7. See Sebastian Lewis, "Stare Decisis and Equitable Power" (2024) 43:1 Law & Phil 1 at 23-28.

8. See e.g. Matthew Harding, "Equity and the Rule of Law" (2016) 132:2 Law Q Rev 278. In private law, see Dennis Klimchuk, "Equity and the Rule of Law" in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford University Press, 2014) ch 11.

9. John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) at 254.

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law, judges are primarily bound by the legislature's intention as expressed in the canonical formulation of the relevant statutory rule. Thus, the problem of corrective equity concerns the grounds on which judges may depart from this primary obligation. Accordingly, I will not consider what equity might look like under alternative views of judicial duty, such as Dworkinian integrity or broader conceptions of legal content.[10] Second, since my argument concerns the corrective role of equity in relation to statutory law, I will not discuss the administration of equity in relation to other sources of law, though I will briefly consider, for historical context only, the relationship between English equity and the common law.[11] Finally, for reasons that go beyond the aims of this article, I will use the term 'the law' to denote *positive* law, though I shall occasionally employ the two interchangeably for stylistic reasons. I trust, however, that my account will appeal to those who value the law's positive character but reject the view that law is wholly reducible to positive law.

2. Two Approaches to Implicit Exceptions

2.1 Equity: The Traditional Approach

At least since Plato, many philosophers have argued that every activity of statutory law-making is subject to the impossibility of anticipating the numerous circumstances that might potentially bear on the activity under regulation.[12] Let us call this a 'problem of legislative foresight'. Were it possible for legislatures to foresee all of these circumstances, then no equity would be needed. But it is a brute fact of reality that legislatures cannot foresee every possible scenario; and even if such foresight were achievable, Aquinas strongly urges the lawmaker against including every hypothetical situation in the written rule, to avoid creating confusion.[13] As a result, some cases will inevitably arise in which the strict application of a written rule may produce results not supported by the lawmaker's intentions at the time of enactment. The rule's application may even lead to

10. I discuss this caveat further at *infra* note 80.

11. As James Edelman suggests, equity's rationale "applies to all *written documents* that create legal rules and norms." James Edelman, "The Equity of the Statute" in Klimchuk, Samet & Smith, *supra* note 6, 352 at 352 [emphasis added]. Note that it is an open question whether non-written sources of law, such as customary law, can be the object of an equitable intervention. For a view of corrective equity in *stare decisis*, see Lewis, *supra* note 7.

12. See Plato, "Statesman" in John M Cooper, ed, *Plato: Complete Works* (Hackett, 1997) 338. Aristotle followed Plato: see Aristotle, "Nicomachean Ethics" in Jonathan Barnes, ed, *The Complete Works of Aristotle: The Revised Oxford Translation*: *Volume Two* (Princeton University Press, 1984) 1729 at 1795 (V.10.1137b15-16). For a list of English thinkers who endorsed this claim, see Mark Fortier, *The Culture of Equity in Early Modern England* (Ashgate, 2005) at 66, 71.

13. See Thomas Aquinas, *Summa Theologiae*, translated by Laurence Shapcote (Aquinas Institute, 2012) at Part I-II, Q 96, a 6, ad 3.

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injustice, and that is why Cicero claimed that "*summum ius summa iniuria*" (i.e., the rigorous application of the law often leads to extreme injustice).[14] For these philosophers, a problem of legislative foresight is neither an error of the law nor of the legislature, but part and parcel of legislating.[15] Legislating inevitably carries a negative by-product—namely, the risk that a party may suffer an injustice due to the application of a rule in a situation not anticipated by the lawmaker. It is this injustice, as Salmond notes, that judges may remedy or correct when they are permitted to decide disputes on equitable grounds.[16]

Proponents of equity argue that in 'unforeseen cases'—i.e., cases the legislature did not anticipate due to limited foresight—judges should qualify the canonical formulation of the statutory rule by giving effect to its underlying reasons. This technique is known, and has historically been known, as 'equitable interpretation'. Although it may resemble 'purposive interpretation', I prefer to treat the two techniques as distinct.[17] Equitable interpretation is possibly the first, but by no means the only, way of deciding unforeseen cases. Its scholarly origins can be traced to Aristotle, who argued that equity prioritises the intentions behind a rule over its canonical formulation.[18] To the extent that judges may avoid *summa iniuria* by basing their decisions on equity, many philosophers think that equity is a virtue. For Aristotle, whose views on the topic can be difficult to reconcile,[19] equity is even "better than one kind of justice," namely "legal justice."[20]

Because equitable interpretation looks at the reasons *the lawgiver* had for enacting a particular rule, it has often been presented as a lawful (i.e., law-respectful) means for deciding unforeseen cases. However, the history of equity suggests that identifying these reasons has frequently involved first-order moral (and political) reasoning.[21] The presence of this type of reasoning is partially explained by

14. Cicero, *De Officiis*, translated by Walter Miller (William Heinemann, 1913) at 34 (Book I.X.33).

15. See e.g. Aristotle, "Nicomachean Ethics", *supra* note 12 at 1795 (V.10.1137b16-17).

16. See John W Salmond, *Jurisprudence*, 4th ed (Stevens & Haynes, 1913) at 27.

17. 'Purposive interpretation' might refer to a canon of interpretation whose specific content varies across jurisdictions, depending on such factors as judicial practice. In contrast, the expression 'equitable interpretation', which aims to capture a general method of equitable decision-making, allows for a fairly consistent theoretical treatment, even if in a given jurisdiction purposive interpretation and equitable interpretation turn out to be the same.

18. See Aristotle, "Nicomachean Ethics", *supra* note 12 at 1795 (V.10.1137b21-22); Aristotle, "Rhetoric" in Barnes, *supra* note 12, 2152 at 2188 (I.13.1374b9-10).

19. For valuable attempts at this reconciliation, see e.g. Martha C Nussbaum, "Equity and Mercy" (1993) 22:2 Philosophy & Pub Affairs 83 at 92-96; Roger A Shiner, "Aristotle's Theory of Equity" (1994) 27:4 Loy LA L Rev 1245; Edward M Harris, *The Rule of Law in Action in Democratic Athens* (Oxford University Press, 2013) at ch 8; Charlie Webb, "Discretionary Justice" in Klimchuk, Samet & Smith, *supra* note 6 at ch 1; Dennis Klimchuk, "Aristotle at the Foundations of the Law of Equity" in Klimchuk, Samet & Smith, *supra* note 6 at ch 2.

20. Aristotle, "Nicomachean Ethics", *supra* note 12 at 1795 (V.10.1137b9-12). For Aristotle's claim that equity is superior to legal justice, see Klimchuk, *supra* note 19 at 34-36.

21. In England, this historical fact is evidenced both by the number of philosophers who conflated equity with other moral ideals, such as justice, and *The Earl of Oxford's Case (1615)*: see e.g. Fortier, *supra* note 12 at 8, 66, 71; David Ibbetson, "The Earl of Oxford's Case (1615)" in Charles Mitchell & Paul Mitchell, eds, *Landmark Cases in Equity* (Bloomsbury, 2012) 1.

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one problem we frequently find in the literature and case law dealing with unforeseen cases: What exactly are the reasons underlying a statutory rule? Are these the reasons the legislature *actually* considered when enacting the rule, or the reasons an idealised legislature *would have* considered had it foreseen the case in question?[22] In England, where equity was institutionally administered by the Chancery, there is important literature suggesting that the answer to this question often turned on whether judges had reliable epistemic access to the real intentions of the lawmaker. If they did not, then hypothetical reasons, usually framed in terms of presumptions about an idealised legislature, were required.[23]

While scholars such as Richard Ekins argue that equity should be exercised solely through equitable interpretation,[24] an alternative and more pragmatic method is also evident in the history of equity. This approach, which can be termed 'equitable suspension', does not require judges to focus on the rule's underlying reasons.[25] Instead, it aims to address a conflict between the application of that rule to a particular case and a sound moral consideration grounded in a hierarchically superior norm. By suspending the rule's application between the parties to the dispute and thereby creating an exemption to the decision otherwise required by law, the judge protects the moral consideration at risk. This is done even if the judge cannot show that the equitable decision aligns with the rule's underlying reasons.[26] What matters, in terms of justification, is that the judge grounds the value of protecting the moral consideration in a norm that holds a higher hierarchical status than the statutory rule being suspended.

The hierarchically superior norm has changed over time. In early-modern England, the Chancery frequently relied on medieval conscience as an objective basis for protecting moral considerations that might be jeopardised by strict

22. This is already an open question in Aristotle: see Aristotle, "Nicomachean Ethics", *supra* note 12 at 1795 (V.10.1137b26-27). *Cf* John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press, 1998). On the one hand, Finnis argues that equity looks at the real intentions of the enacting authority (*ibid* at 257-58, n 19), but, on the other hand, contends that such an intent should always be "assumed to be just and reasonable" (*ibid* at 216).

23. See John H Baker, *The Oxford history of the laws of England: Volume VI* (Oxford University Press, 2003) at 79-80. On the historical use of presumptions in equitable interpretation, see Georg Behrens, "Equity in the *Commentaries* of Edmund Plowden" (1999) 20:3 J Leg Hist 25.

24. See Richard Ekins, *The Nature of Legislative Intent* (Oxford University Press, 2012) at 275-77. Ekins criticises Timothy Endicott, for whom equity does not require interpretation: see Timothy Endicott, "Legal Interpretation" in Andrei Marmor, ed, *The Routledge Companion to Philosophy of Law* (Routledge, 2012) 109 at 119.

25. I prefer the term 'equitable suspension' over alternative expressions we find in the literature, such as 'equitable override' and 'equitable rectification'. See e.g. John Finnis, "Legal Philosophy: Roots and Recent Themes (1998)" in *Philosophy of Law: Collected Essays Volume IV* (Oxford University Press, 2011) 157 at 170; John Tasioulas, "Law as the Art of Justice: On Vermeule's *Common Good Constitutionalism*" (2024) 69:1 Am J Juris 61 at 67; Edelman, *supra* note 11 at 353.

26. *Cf* Edelman, who, while discussing a similar notion of equity, argues that this type of equity is not interpretation: "The equity here is truly a 'correction' or rectification of the statutory words. . . . It respects neither the intended meaning of the words nor the application to the facts that is required by that meaning. Rather, it involves *not* applying the meaning of the law that is actually enacted." Edelman, *supra* note 11 at 353 [emphasis in original, footnote omitted].

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adherence to common-law decisions.[27] Today, in the era of secular constitutional democracies, it is surely less common to find scholars and judges openly supporting the power of judges to suspend the application of statutory rules to protect moral considerations ultimately grounded in eschatological and theological concerns. But it is not uncommon to find neo-constitutionalist judges suspending the application of statutory rules on grounds of moral considerations they consider sound insofar as they can be supported by a constitutional value, such as a fundamental right. We may remain agnostic as to whether these judges decide this way out of necessity or "sudden risk" (as Aquinas thought they should),[28] or whether they do so as a customary yet politically fragile means of supplementing the will of the legislature.

Historically, equitable interpretation and equitable suspension have overlapped—particularly when, in the sixteenth century, Christopher St. Germain attempted to justify the Chancery's exceptional jurisdiction. As noted earlier, when compliance with a decision given at common law conflicted with a requirement of conscience, the Chancellor would provide residual relief to the losing party by suspending the binding effect of that decision.[29] For St. Germain, that exceptional power was justified on the ground that "every general rule of every positive law" has exceptions "secretly understood."[30] By interpreting the law according to its 'spirit', the Chancellor would recognise these secret exceptions as a way to fulfil its institutional mandate, namely to protect the requirements of conscience.[31] As Plucknett and Barton write, "St. German is the first English author to attempt anything which could be described as an account of the equitable jurisdiction of the Chancellor."[32]

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27. See TFT Plucknett & JL Barton, "Introduction" in Christopher St. German, *Doctor and Student*, ed by TFT Plucknett & JL Barton (Selden Society, 1974) xi at xli; Dennis R Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Routledge, 2010) at 31.

28. Aquinas, *supra* note 13 at Pt I-II, Q 97, a 6, ad3.

29. On the residual nature of an equitable relief, see Baker, *supra* note 23 at 174.

30. Christopher St Germain, *The Doctor and Student (1518), Or, Dialogues Between a Doctor of Divinity and a Student in the Laws of England Containing the Grounds of Those Laws Together with Questions and Cases Concerning the Equity Thereof*, 1874 edition, ed by William Muchall (Lonang Institute, 2006) at 24. "And it is called also by some men *epieikeia*; the which is no other thing but an exception of the law of God, or the law of reason, from the general rules of the law of men … the which exception is secretly understood in every general rule of every positive law" (*ibid*).

31. Georg Behrens offered the best explanation for this connection: "St German sought to win these critics by developing the thesis that conscience must 'follow' English law, albeit English law equitably interpreted; conscience makes exceptions to the law only when those exceptions are 'secretly understood' in the law itself. The Chancellor, then, co-operates with the common-law courts in judging only according to the law, *but the manner in which he follows the law is unique, for his conscience allows itself to be directed by the spirit of the law,* carrying out exceptions to the letter of the law according to the principle of *epikeia*." Behrens, *supra* note 23 at 27 [emphasis added]. See also Plucknett & Barton, *supra* note 27 at xliv-li; SFC Milsom, *Historical Foundations of the Common Law*, 2d ed (Butterworths, 1981) at 89; Timothy AO Endicott, "The Conscience of the King: Christopher St. German and Thomas More and the Development of English Equity" (1989) 47:2 UT Fac L Rev 549 at 564-65; Maria Drakopoulou, "Equity, Conscience and the Art of Judgment as *Ius Aequi et Boni*"(2001) 5:1 L Text Culture 345 at 357, 362; Fortier, *supra* note 12 at 60; Klinck, *supra* note 27 at 44-45.

32. Plucknett & Barton, *supra* note 27 at li. See also Drakopoulou, *supra* note 31 at 357.

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Now, however influential St. Germain's views may have been,[33] we should not overlook the fact that, in his account, most of the heavy lifting is done by the need to justify the Chancery's role in protecting the requirements of conscience, rather than by the proper ways of interpreting the law.[34] The reasons for this run deeper, I suspect, than merely being a matter of historical accident. They relate to how a judge approaches the task of avoiding an unforeseen moral conflict. As Section 3 aims to show, it is difficult to see how the reasons underlying a particular rule can, on their own—i.e., without first appreciating the moral significance of the facts of the case—justify the exception required to address such a conflict. It is only once an unforeseen moral conflict becomes apparent that equitable interpretation comes into play. Only after the "sudden risk" to which Aquinas referred becomes apparent, and the judge has accordingly formed an intention to act in an equitable way, can equitable interpretation get off the ground.

2.2 The Decline of Equity

For centuries, equity served as the standard approach to the justification of implicit exceptions in the law. Over time, however, equity went out of fashion. In England, although numerous factors may help to explain equity's decline, two stand out. These could be viewed as two opposites of the same spectrum: unpredictability, on the one hand, and rigidity, on the other.

Equity was unpredictable because its dispensation varied according to the individual who held the office of the Chancellor.[35] Pressed by its critics to be more law-like,[36] by the seventeenth century, equity began transforming into precisely what it was never intended to be—namely, a rigid measure of adjudication.[37] As some historians report, Chancellors would often require parties seeking equitable relief to cite a precedent supporting their claims,[38] a practice

33. St. Germain's influence is evident in one of the most famous cases in the history of English equity—the *Earl of Oxford's Case (1615)*: see Ibbetson, *supra* note 21.

34. As Klinck writes: "although equity is unquestionably foregrounded in *Doctor and Student*, most of the book is focused on conscience, and, more specifically, on how English (common) law accords with conscience. . . . That is, the book might be said to be *about* conscience, rather than equity." Klinck, *supra* note 27 at 46 [emphasis in original].

35. In England, John Selden posthumously raised a powerful objection concerning this point in the seventeenth century: see M Macnair, "Arbitrary Chancellors and the Problem of Predictability" in E Koops & WJ Zwalve, eds, *Law and Equity: Approaches in Roman Law and Common Law* (Martinus Nijhoff, 2014) 79 at 83. Other important critics included the Anonymous Serjeant and Sir Edward Coke. An unprecedented institutional crisis arose between common law judges and the Chancery precisely because of the exceptional status of equity in relation the common law. See JH Baker, "The Common Lawyers and The Chancery: 1616" (1969) 4:2 Ir Jur 368.

36. See e.g. Milsom, *supra* note 31 at 94-95; Klinck, *supra* note 27 at 168-69; Sarah Worthington, *Equity*, 2d ed (Clarendon Press, 2006) at 11.

37. As Macnair put it: "modern 'Chancery bar equity' is perhaps the *least* 'equitable', in the Aristotelian *epieikeia* sense of 'flexible', branch of English law." Macnair, *supra* note 35 at 79 [emphasis in original]. For an account of the assimilation of English equity to the juridical character of the common law, see *ibid* at 94-104.

38. See WHD Winder, "Precedent in Equity" (1941) 57:2 L Q Rev 245 at 246-47; Henry E Smith, "Equity as Meta-Law" (2021) 130:5 Yale LJ 1050 at 1060.

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that intensified by the eighteenth century.[39] By persistently demanding precedents and adhering to them where applicable, these centuries saw the gradual development of a body of rules.[40] The systematisation of these rules gave rise to what we recognise today as "Equity" (capitalised),[41] namely, a body of rules famously, though also controversially, defined by Maitland in terms of its jurisdictional origin.[42] But 'Equity', understood this way, has considerably moved away from its focus on implicit exceptions in the law. "The equity of the Chancery," Salmond once wrote, "has changed its nature and meaning."[43] If we consider all the various meanings equity has received in law, and if we extend this semantic analysis to other areas of practical life, we will soon realise that the meaning of 'equity' is far from clear.[44]

Prey of its own history, equity was also discredited. In many civilian jurisdictions (with notable exceptions) equity plays a limited role in guiding behaviour.[45] Some codified rules on statutory interpretation list equity as the last recourse available to a judge for interpreting statutes—only after the textual, historical, and contextual methods have failed to retrieve a rule's meaning.[46] Writing in 1905, Roscoe Pound claimed: "However severely and peremptorily equity ... may be controlled and discredited, there is a reason to think its *resurrection* must constantly be waited for."[47] But is equity dead, as Pound suggested (i.e., one can only be resurrected if one has previously died)? As a theoretical approach to implicit exceptions, equity seems out of fashion, and it is also difficult to grasp its meaning. However, although our concept of the law may change,[48] there seems to be a constant need to balance the predictability of canonically formulated rules with equity's inherent flexibility. This may help explain why, despite

39. See Winder, *supra* note 38 at 249-51. *Cf* Smith, *supra* note 38 at 1060.
40. As Klinck argues: "while general principles—of, say, justice or conscience—might have been the basis for original decisions in equity, once those decisions have been made, they become themselves the rule for subsequent like cases, obviating the need to return to basic concepts." Klinck, *supra* note 27 at 257.
41. Worthington, *supra* note 36 at 9. *Cf ibid* at 9, n 1.
42. See FW Maitland, "Lecture I: The Origin of Equity (I)" in *Equity: A Course of Lectures*, 2d ed by John Brunyate (Cambridge University Press, 1936) 1. According to Klimchuk, Maitland's position can be characterised as "nominalism"—the view according to which nothing (conceptually speaking) "ties together the doctrines collected in the law of equity." Klimchuk, *supra* note 19 at 32. While Klimchuk acknowledges that this approach may be correct in certain respects, he argues that it is still possible to make sense of the "complexity and contingency" of Equity by examining its (Aristotelian) foundations (*ibid* at 51).
43. Salmond, *supra* note 16 at 38.
44. See e.g. Fortier, *supra* note 12 at 4.
45. If we think that the use of moral clauses in contract law gives judges equitable powers, then that would be one exception: see e.g. WJ Zwalve, "The Equity of the Law: Law and Equity Since Justinian" in Koops & Zwalve, *supra* note 35, 17 at 37. See also Brian H Bix, "Defeasibility and Open Texture" in Jordi Ferrer Beltrán & Giovanni Battista Ratti, eds, *The Logic of legal Requirements: Essays on Defeasibility* (Oxford University Press, 2012) 193 at 198.
46. See e.g. Article 19 of Chile's Civil Code (1855).
47. Roscoe Pound, "The Decadence of Equity" (1905) 5:1 Colum L Rev 20 at 24 [emphasis added].
48. See Joseph Raz, "Two Views of the Nature of the Theory of Law: A Partial Comparison" (1998) 4:3 Leg Theory 249 at 280.

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its theoretical decline, equity found a way into the second half of the twentieth century—subtly, as a type of legal defeasibility. According to Frederick Schauer:

> But even with the decline of distinct equity jurisdiction and procedure . . . common law courts still routinely exercise the power of equitable override, and this is the central form of defeasibility. . . . The key to the idea of defeasibility, therefore, is the potential for some applier, interpreter, or enforcer of a rule to make an ad hoc or spur-of-the-moment adaptation in order to avoid a suboptimal, inefficient, unfair, unjust, or otherwise unacceptable, rule-generated outcome.[49]

Equity, as Schauer claims, is *the* central form of defeasibility in law. If this view is correct, then despite its theoretical decline and being discredited as anti-scientific, equity found its way into mainstream analytical jurisprudence. In that sense, Pound was right in thinking that equity would one day resurrect itself. Strictly speaking, though, equity did not resurrect itself, because it never died; it only lay dormant until defeasibility scholars began grappling with some of the same evaluative questions that had worried equity scholars for centuries.

In the next section, I will explain the notion of defeasibility in law and explore how equity and defeasibility have come closer together as distinct approaches to the study of implicit exceptions in the law.

2.3 Defeasibility: The Modern Approach

After the traditional model of equity went out of fashion, a second, revitalised approach to the study of implicit exceptions in the law arose. As suggested before, it does not seem to be a coincidence that this second approach began to flourish at a time when many scholars regarded natural law theories as obscure in both purpose and methodology. The dispensation of equity often relied on a hierarchically superior norm providing the basis for overriding a legal rule. Precisely because an appeal to that higher norm typically involved first-order moral reasoning—frequently grounded in a specific religious or metaphysical outlook—it is not implausible to suggest that equity was viewed as anti-scientific by analytical legal positivists in the first half of the twentieth century. Defeasibility in law emerged amidst what was widely regarded by scholars as the correct and healthy approach to legal theory: a descriptive and value-free inquiry into legal concepts, legal practices, and legal institutions.

Although modern studies on legal defeasibility typically focus on legal rules or norms, the origins of this approach lie in the study of legal *concepts*.[50] There is consensus that H.L.A. Hart was the first to use the term "defeasible" to describe the property of legal concepts whereby they may cease to be applied once certain

49. Frederick Schauer, "Is Defeasibility an Essential Property of Law?" in Beltrán & Ratti, *supra* note 45, 77 at 80, 81.

50. For helpful recent studies, see Vojko Strahovnik, "Defeasibility, norms and exceptions: normalcy model" (2016) 29 Revus 61; Francesca Poggi, "Defeasibility, Law, and Argumentation: A Critical View from an Interpretive Standpoint" (2021) 35:3 Argumentation 409.

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events obtain.[51] According to Hart, it is not possible to define a legal concept by specifying the necessary and sufficient conditions for its correct application, as some of these conditions may hold in certain contexts but not in others.[52] For Hart, this impossibility shows that a legal concept, such as 'contract', is "irreducibly defeasible."[53] In Hart's view, a full grasp of a legal concept requires knowing everything that follows after the word 'unless' which often accompanies the statement of its application conditions.[54]

It is telling that neither in "The Ascription of Responsibility and Rights" nor in *The Concept of Law* did Hart—despite his familiarity with the jurisprudential and ethical contributions of Plato and Aristotle[55]—use the term 'equity' in his discussion of legal defeasibility and the open texture of law.[56] Hart's analysis in *The Concept of Law* of the causes of law's "open texture"—relative ignorance of facts and relative indeterminacy of aim—bears significant resemblance to what equity philosophers have sought to capture with the notion of a 'problem of legislative foresight'.[57] That is, the impossibility of anticipating every possible circumstance that might bear on the enactment of a statutory rule. Whereas in "The Ascription of Responsibility and Rights," Hart proposed the notion of defeasibility to explain why legal concepts may apply in some situations but not in others—a proposal that, as Juan Carlos Bayón notes,[58] he later rejected—in *The Concept of Law*, Hart's explanation of how judges reckon with the open texture of law sparked one of the most enduring debates in jurisprudence. Nowhere in this framework do we find the notion of equity, as Richard Tur has rightly pointed out.[59]

What is significant is that, with Hart, the topic of implicit exceptions in the law regained the attention of both jurists and philosophers alike. Some scholars suggest that, in order to tackle the problem Hart sought to address with the notion of

51. HLA Hart, "The Ascription of Responsibility and Rights" (1949) 49:1 Proceedings of the Aristotelian Society 171 at 175. According to Hart's own admissions, he borrowed the term from English property law (*ibid*). See also Neil MacCormick, "Defeasibility in Law and Logic" in Zenon Bankowski, Ian white & Ulrike Hahn, eds, *Informatics and the Foundations of Legal Reasoning* (Kluwer, 1995) 99; Ronald P Loui, "Hart's Critics on Defeasible Concepts and Ascriptivism" in *Proceedings of the Fifth International Conference on Artificial Intelligence and Law* (ACM Press, 1995) 21; Juan Carlos Bayón, "Derrotabilidad, Indeterminación del Derecho y Positivismo Jurídico" (2000) 13 Isonomia: Revista de Teoría y Filosofía del Derecho 87 at 90; Jordi Ferrer Beltrán & Giovanni Battista Ratti, "Defeasibility and Legality: A Survey" in Beltrán & Ratti, *supra* note 45, 11 at 22. For a reconstruction of Hart's views, see Luís Duarte d'Almeida, *Allowing for Exceptions* (Oxford University Press, 2015) at 8-22.

52. See Hart, *supra* note 51 at 174.

53. *Ibid* at 176. *Cf* GP Baker, "Defeasibility and Meaning" in PMS Hacker & J Raz, eds, *Law, Morality, and Society. Essays in Honour of H.L.A. Hart* (Clarendon Press, 1977) 26 at 47.

54. See Hart, *supra* note 51 at 175.

55. For example, Hart offers a brief analysis of the concept of "voluntariness" in Aristotle's *Nicomachean Ethics*: Hart, *supra* note 51 at 180.

56. See HLA Hart, *The Concept of Law*, 3d ed (Clarendon Press, 2012) [Hart, *Concept of Law*].

57. *Ibid* at 128.

58. See Bayón, *supra* note 51 at 91.

59. See Richard HS Tur, "Defeasibilism" (2001) 21:2 Oxford J Leg Stud 355. Tur suggests that "judicial invocation of equity" may have been "regarded as an aberration at the time" (*ibid* at 360).

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defeasibility, a new approach to deontic logic was developed. Working in the field of *defeasible* deontic logic, Carlos Alchourrón explains the broader problem of defeasibility as follows:

> Often, in ordinary language, conditional constructions of the form "If A then B" are used in such a way that it is not intended to assert with them that the antecedent A is a sufficient condition of the consequent B, but only that the antecedent jointly with a set of assumptions accepted in the context of utterance of the conditional is sufficient for the consequent B.[60]

In law, Neil MacCormick distinguished between the "express" and "implicit" defeasibility of legal rules.[61] The former states "'ordinarily necessary and presumptively sufficient' conditions" of the state of affairs under regulation, while the latter suggests that the values and principles of a legal system may override some of its specific legal rules.[62]

This new terminology reflects a tendency to conceptualise defeasible conditionals in descriptive and value-free terms. Scholars working in this field have made significant theoretical contributions; for example, they addressed the issue, left open by Hart, of whether defeasibility applies to legal concepts, decisions, and/or utterances.[63] They also differentiated the propositional analysis of the negative elements of defeasible concepts from their positive elements,[64] and they clarified the burden of showing that a given conditional is defeasible.[65]

Over time, however, many pressing, rather evaluative questions were left unaddressed. Chief among these was the issue of the reasons, if any, for correcting a legal requirement by *defeating* it, who should have that power, and on which grounds it may be exercised. For this reason, it is plausible to think that a new trend emerged among defeasibility scholars who began engaging with these sorts of evaluative concerns. This turn can be seen, for example, in Richard Tur's efforts to accommodate equitable considerations within the doctrinal body of English law; Michael Moore's justice-based arguments for keeping the list of defeasible legal concepts open; and Fernando Atria's defence of the judicial power to correct statutory rules on grounds of human dignity.[66]

To conclude this first part of the article, Section 2.4 will address an important question in the literature on legal defeasibility, particularly given its potential implications for the power of judges to deliver equity by suspending a rule's binding legal requirement. I will argue that while the question is undoubtedly important, it can be bracketed on good grounds.

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60. Carlos E Alchourrón, "On Law and Logic" 9:4 Ratio Juris 331 at 340.
61. MacCormick, *supra* note 51 at 100.
62. *Ibid*. See also Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005) at ch 12 [MacCormick, *Rhetoric*].
63. See MacCormick, *supra* note 51 at 102; Duarte d'Almeida, *supra* note 51 at 34-46.
64. See e.g. Baker, *supra* note 53.
65. See e.g. MacCormick, *supra* note 51 at 104-06.
66. See Tur, *supra* note 59 at 360; MS Moore, "The Semantics of Judging" (1981) 54 S Cal Rev 151 at 239; Fernando Atria, *La forma del derecho* (Marcial Pons, 2016) at 226-27.

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2.4 Is defeasibility an essential property of law?

Some philosophers, influenced by Hart,[67] suggest that from the fact that every rule is subject to a list of unforeseeable exceptions it follows that defeasibility is an essential property of law.[68] Let us call this thesis 'strong defeasibility'.

Many proponents of strong defeasibility endorse the claim that legislators cannot anticipate every possible circumstance that might potentially bear on the activity under regulation.[69] For this reason, a judge who applies a rule to an unforeseen case may encounter what Schauer famously described as an issue of the "over- and under-inclusiveness" of the rule.[70] If a statute prohibits people from entering public hospitals with dogs to prevent noise, a judge might make an exception for a blind patient who enters with a quiet assistance dog. Although the dog falls within the letter of the rule, it falls outside of its underlying reasons—the dog makes no noise. Therefore, the rule is over-inclusive; its letter captures situations that, based on the rule's underlying reasons, should be excluded. By contrast, a judge addressing a problem of under-inclusiveness may extend the rule's scope to include someone who enters the hospital with a talking parrot. While the parrot falls outside the letter of the rule, it falls within its underlying reasons—the talking parrot makes noise.

Strong defeasibility holds that insofar as every rule is subject to some unforeseeable exceptions, it follows that defeasibility is an essential property of law. Opposing this thesis, Schauer has argued that the existence of legal systems in which officials do not *actually* defeat legal requirements shows that defeasibility is *not* an essential property of law.[71] According to Schauer:

> Rules are defeasible to the extent that such rule formulations may be changed at the moment of application for any of a number of reasons, but examples like those

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67. "Human law-makers can have no such knowledge of all possible combinations of circumstances which the future may bring. This means that *all* legal rules and concepts are 'open'." HLA Hart, *Essays in Jurisprudence and Philosophy* (Oxford University Press, 1983) at 270 [emphasis added]. Pablo Rapetti has raised the possibility that, from the fact that *all* rules are 'open' (Hart's claim), it does not necessarily follow that law is essentially defeasible. Exceptions, whether explicit or implicit, are exceptions to *something*—i.e., to something defined and established. That legal rules are 'open' means, following Hart's views on the open texture of language, that rules are, to a certain extent, undefined. This, in turn, would contradict the very presupposition of definition underlying the defeasibility claim. I am grateful to Pablo for this observation.

68. For philosophers influenced by Hart, see e.g. MacCormick, *supra* note 51 at 103; Tur, *supra* note 59 at 360. MacCormick includes Fernando Atria on that list too: see MacCormick, *Rhetoric, supra* note 62 at 252.

69. See e.g. MacCormick, *supra* note 51 at 103, 115; Richard HS Tur, "Defeasibility and Adjudication" in Beltrán & Ratti, *supra* note 45, 362.

70. Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991) at 31.

71. See Schauer, *supra* note 49 at 85-87. Similarly, Tom Adams has suggested to me that the fact that every rule could in principle be subject to exceptions does not show that defeasibility is essential to law, because it is possible to imagine a legal system in which such exceptions are never made. I am grateful to Tom for this observation.

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> above, and countless others, show that rules are often applied as written—treated as non-defeasible—even when what seem to be valid defeating conditions are present.[72]

On this view, because defeasibility is a function of judges' powers and how they choose to exercise them, it follows that "defeasibility is not a property of rules at all, but rather a characteristic of how some decision-making system will choose to *treat* its rules."[73] Thus, "once we recognize that it is linguistically and conceptually possible for there to be non-defeasible rules, the inquiry shifts to one about the advantages and disadvantages of treating rules as defeasible."[74]

This is a debate about the grounds of defeasibility in law. For proponents of strong defeasibility, law is essentially defeasible because something intrinsic to the concept of a rule—on which the law pervasively relies—renders *any* legal rule defeasible. For Schauer, however, that 'something' is not internal to the concept of a rule but rather external to it; it lies in the contingent fact of how a rule-applier decides to *treat* a particular rule—whether they decide to defeat it or not, regardless of whether the rule is conceptually defeasible. For Schauer, defeasibility is merely a contingent feature of law, not a necessary one.[75]

As noted earlier, this debate is relevant to corrective equity, but for obvious reasons it cannot be settled here. Fortunately, there is a way around it: One can offer arguments against the power to defeat legal requirements even if it turns out that the law is essentially defeasible—such that it may be doubted whether those reasons are doing any work at all. Conversely, one can argue in favour of the power of judges to defeat legal requirements (e.g., to exercise equity through an equitable suspension of the law) even if the law is *not* essentially defeasible. The question of whether the law is essentially defeasible can be addressed with significant independence from the question of whether there are sound reasons (grounded in value) supporting the power of judges to defeat legal requirements. This is the methodological assumption I will rely on in the next section. I will thus defend the value of an equitable power, while acknowledging that the question of whether the law is essentially defeasible remains open.

3. Grounding Equitable Powers

I have explained how the traditional model of equity can be analysed through the modern study of legal defeasibility. In this section, I aim to present a framework for how the positive law could regulate the judicial exercise of equity. Drawing

72. *Ibid* at 85.
73. *Ibid* at 87 [emphasis in original].
74. *Ibid* at 86.
75. An anonymous reviewer has suggested that insofar as a central purpose of equity is to deal with a problem of legislative foresight (an inescapable reality), any defeasibility caused by this, an *a priori* problem (as it were), militates against Schauer's claim. Yet, to the extent that equity entails a discretionary power for the judge, its contingent administration supports Schauer's point.

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on the historical discussion in the previous section, I will argue that at the core of this framework lies the notion of an equitable power. The juridical form of this power varies depending on whether equity is administered through an equitable interpretation or an equitable suspension of the law.

3.1 Unpacking Equitable Interpretation

Problems of legislative foresight do exist; they are not merely a theoretical presupposition relied upon by both supporters and opponents of equity, but are more generally a consequence or by-product of using canonically formulated rules to guide behaviour.[76] With this assumption in mind, let us consider how a problem of legislative foresight typically manifests itself.

Suppose the following provision, Article 122 of a hypothetical *Act Creating a Public Transport Service*, is in force in your jurisdiction:

> (1) Every passenger boarding a bus shall be legally required to validate their ticket using the machines provided for that purpose on the bus.
> (2) Ticket inspectors shall impose a fine not exceeding £100 on any person who, in contravention of paragraph (1), travels on a bus without a validated ticket.
> (3) In determining the amount of the fine, ticket inspectors shall take into account any mitigating and aggravating circumstances set out in Article 79.
> (4) The county judge shall have jurisdiction at first instance to hear cases arising from the application or interpretation of this Article, in accordance with the rules and procedures set out in Article 93.

Put aside for a moment any disagreement you might have regarding the wording of this provision; such disagreement is, to some extent, part of the data to be treated as a given when studying equity. Article 122 reflects a policy that is common in many jurisdictions: Passengers are required to validate their tickets upon boarding public buses in order to prevent free riders from using the same (unvalidated) ticket multiple times. Assume that the policy is ultimately justified on several grounds, with cost-benefit considerations and general deterrence being the primary ones.

Now let us consider an unforeseen case. Suppose you board a public bus with your elderly father. You are aware of the rule in Article 122 and its sanction, but you wish to find a seat for your frail parent before validating your ticket. The bus is full and the few priority seats are occupied, so it takes longer than expected to accommodate him. On your way to the ticket machine to validate your ticket, you unexpectedly encounter a ticket inspector. The inspector requests your ticket, which is not validated. You offer your reasonable explanation, but he does not accept it. He has a legal duty under Article 122 and, with people observing, he is unwilling to make an exception in front of everybody. You receive a fine of £90.

76. *Cf* Carlos E Alchourrón & Eugenio Bulygin, *Normative Systems* (Springer-Verlag, 1971) at 29-30.

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You appeal to the county judge. In order to grant an exception on grounds of equitable interpretation, the judge would first have to consider the reasons the legislature had for enacting the rule in Article 122. The judge determines that the rule is neither inefficient nor morally objectionable; it is simply that the legislature did not anticipate your case. However, the judge concludes that this lack of legislative foresight is not enough to justify granting you an equitable exception from the application of the rule in Article 122. The £90 fine is upheld.

Supporters of equitable interpretation might argue that the judge should avoid the morally harsh result produced by the straightforward application of the rule in Article 122. By contending that the legislature *would not* have intended the rule to be applied in this way, had it anticipated your case, defenders of equitable interpretation might argue that an exception is justified by equitably constructing the rule in Article 122. According to Ekins:

> I argue now that in some exceptional, *unforeseen* cases the reasoned choice on which the legislature acts comes apart from the legislature's intended meaning and that the reasoned choice is authoritative and should be taken to qualify or extend the law otherwise made out by the intended meaning. Interpreters should *recognize* exceptions or extensions to the statute's intended meaning in such cases.[77]

In the example we are considering, let us assume, for the sake of argument, that your case is unforeseen and exceptional. Using Ekins' terminology (which will be adopted for current purposes),[78] the "reasoned choice" on which the legislature acted—the policy of preventing free riders, justified in turn by cost-benefit analysis and general deterrence—"comes apart" from the legislature's "intended meaning"—i.e., from the meaning of the rule as formulated in Article 122. And because the two come apart, the reasoned choice *is* authoritative. Precisely because in Ekins' view the reasoned choice *is* (already) authoritative and is not *made* authoritative by the judge, the judge only *recognises* an exception instead of

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77. Ekins, *supra* note 24 at 275 [emphasis in original]. Whereas, judging from the passage quoted in the main text, it seems reasonably clear that Ekins urges interpreters to recognise exceptions when they are due, in later work he has qualified his position: "It is not quite so clear whether [interpreters] should subject statutes to 'equitable interpretation,' making exceptions (or extensions) to the legislature's intended meaning in order to correct a mismatch between the legislature's reasoned choice and that intended meaning, a mismatch which only arises in exceptional, unforeseen cases. . . . The particular difficulty that it poses is that the exercise of legislative authority might be consistent either with refusing to make exceptions or with making exceptions." Richard Ekins, "Interpretive Choice in Statutory Interpretation" (2014) 59:1 Am J Juris 1 at 21 [Ekins, "Interpretive Choice"].

78. Not much turns on whether we adopt Ekins' terminology or a different one. For context, Ekins' account of legislative law-making is roughly as follows: the legislature's lawmaking act is a 'reasoned choice' of a specific plan for the common good; this choice reflects the "reasons that the legislature had for . . . choosing some or other set of propositions." Ekins, *supra* note 24 at 247. These propositions are promulgated "by uttering the statutory text . . . and making clear its intention to convey this or that propositional meaning-content in uttering" (*ibid* at 246). The expression 'intended meaning' reflects this communicative activity (*cf ibid* at 212, 246). It is meaning qualified by the legislature's intention (*cf ibid* at 217). Thus, the reasoned choice is an authoritative plan of means and ends to affect the law for the common good. Statutory enactments, taken in their intended meaning, express this reasoned choice (*cf ibid* at 250-51).

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making one. For Ekins, a statutory rule is binding only if it reflects the legislature's intended meaning *and* no unforeseen and exceptional case obtains.

One thing that is unclear from Ekins' claim is whether a case is exceptional and unforeseen because the reasoned choice diverges from the intended meaning or because its facts make it morally compelling for the judge to look beyond the intended meaning and assess whether they fall within or outside the reasoned choice. On reflection, however, the first interpretation should be resisted, because it leads to a self-defeating and practically unfeasible scenario. The scenario is self-defeating, first, because by testing whether the content of the intended meaning is actually faithful to the reasoned choice on which the legislature acted, the number of possible scenarios that such a test might return becomes so exorbitant that we lose any meaningful sense of calling these situations 'exceptional' and 'unforeseen'. In fact, by the time we identify a case as exceptional and unforeseen, we are also, in quite a significant way, already anticipating it. The reading is practically unfeasible, secondly, because the test it leads to is simply impracticable for the judge who has a practical task ahead, namely, to decide the dispute in a timely manner.

The better interpretation is that, in the order of the factors that make a case exceptional and unforeseen, the facts of the case come first. Only after appreciating the moral and legal significance of those facts can the judge assess whether they are covered by the legislature's intended meaning and, if so, how they relate to the legislature's reasoned choice. If the judge thinks that the facts are indeed covered by the legislature's intended meaning—such that, in principle, the rule ought to be applied—then the judge may proceed to determine whether they fall within or outside of the legislature's reasoned choice. But why would a judge do this? Ultimately, it would be done to avoid an unforeseen moral conflict. Thus, it is both the facts of the case and the need to avoid moral conflict that direct the judge's reasoning towards the legislature's reasoned choice. If it is clear that the facts fall outside that choice—at which point we may finally say that the intended meaning and the reasoned choice have 'come apart'—then an exception ought to be 'recognised'.

In reality, though, there is almost no conceptual room for an exception to be recognised; more often than not the judge is required to *make* one. To claim that an exception ought to be recognised suggests that the exception is already part of the law, albeit one waiting to be carved out by the judge. On this view, the exception is not law that the judge creates, but law that the judge *declares*. But how can that exception be part of the law and ready to be recognised if, by the time it is needed, what is authoritative for the judge—at least under Ekins' view—is not the reasoned choice on which the legislature acted, but the legislature's intended meaning? Consider Ekins again:

> The subjects of the law should respond to the legislature's exercise of lawmaking authority by inferring the propositions it chose, which it acted to introduce into the law. Hence, interpreters should aim to infer the legislature's intended meaning,

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> which is how it formulates the set of propositions it intends to introduce into the law. This intended meaning is the central object of statutory interpretation.[79]

If the legislature's intended meaning (and not the legislature's reasoned choice) is the central source of authoritative guidance for the judge, then unless we adopt the first interpretation of what makes a case unforeseen and exceptional (which, for the reasons previously discussed, we should not), it is difficult to see how the reasoned choice can *ipso facto* be authoritative for the judge when it comes apart from the legislature's intended meaning.[80] Unless—and this is my point—the judge exercises a normative power that enables them to alter the order of priority of the authoritative guidance received from the legislature. Without the exercise of such normative power, the judge's initial legal position remains unchanged: The judge is bound by the legislature's intended meaning. Only through the exercise of this normative power can the judge change their initial legal position. To think otherwise is to make legal ontology unnecessarily obscure. Only upon the exercise of this normative power does the legislature's intended meaning cease to be authoritative for the interpreter, who is *now* bound by the legislature's reasoned choice. Only now can the judge proceed to justify an equitable exception on the ground that it is part of the content of the law. Without this normative power, the exception is not a legal exception; it is simply an exception that *may* be morally supported.

Equity, therefore, requires the exercise of a normative power, even when it is dispensed through equitable interpretation. As Blackstone put it,

> For since in laws all cases cannot be foreseen or expressed, it is necessary, that when the general decrees of the law come to be applied to particular cases, *there should be somewhere a power vested of excepting those circumstances*, which (had they been foreseen) the legislator himself would have excepted.[81]

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79. Ekins, *supra* note 24 at 246 [footnote omitted]. In a similar way, see Richard Ekins, "Statutes, Intentions and the Legislature: A Reply to Justice Hayne" (2014) 14:1 OUCLJ 3 at 3,6,7; Ekins, "Interpretive Choice", *supra* note 77 at 20; Richard Ekins, "Intentions and Reflections: *The Nature of Legislative Intent* Revisited" (2019) 64:1 Am J Juris 139 at 157. *Cf* Richard Ekins & Jeffrey Goldsworthy, "The reality and indispensability of legislative intentions" (2014) 36:1 Sydney L Rev 39 at 67.

80. Lucas Miotto has raised the possibility that what is binding for the judge is neither the legislature's intended meaning nor the legislature's reasoned choice, but the content of the law *as a whole*. I am grateful to Lucas for this observation. At the same time, I am inclined to think that, even under this view, it is necessary for a judge to ascertain what exactly is binding upon them from the content of the law as a whole. To that end, some form of interpretation, aimed at law application, is necessary. Similarly, for a Dworkinian judge, the distinction between intended meaning and reasoned choice may be irrelevant, as this judge would be guided by 'fit' and 'justification'. However, the Dworkinian judge would still engage in some form of interpretation, albeit guided by integrity rather than legislative intention. To avoid these difficulties, one could assume that there are various candidates to ascertain the content of the law, and my argument (in relation to equitable interpretation) would apply to those cases in which judges are bound by legislative intention. That would leave open the possibility that, for example, a Dworkinian judge may deliver equity through a different route—if it is correct to say that equity is what is delivered, as opposed to simply reaching the integrity-based decision that was right all along.

81. Blackstone, *supra* note 1 at 61 [emphasis added].

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Yet the price of acknowledging the role of this normative power is that when the judge's initial legal position changes, the resulting exception is not one that the judge has recognised, but rather one that the judge has *made ex novo*. By exercising the normative power in question, the input provided by the legislature's reasoned choice *becomes* (not that it *is*, as Ekins misleadingly claims) input capable of grounding an exception *in the law*. In exercising this normative power, the judge *makes* the legislature's reasoned choice authoritative *now*, and does so ultimately to avoid an unforeseen moral conflict. If the law provides for the exercise of this normative power, it authorises the use of a power to deliver corrective equity through equitable interpretation. This is why we may consider this specific power as an 'equitable power'.[82] Without positive legal backup, the judge who changes their initial legal position by altering the priority of the authoritative guidance received from the legislature exercises a normative power that *may* be morally justified.

So Ekins cannot simultaneously claim that (1) judges recognise *legal* exceptions rather than make them, and (2) this recognition does not require a normative power allowing the judge to change their initial legal position in relation to the legislature. Either an exception is made *ex novo* by exercising an equitable power, or the exception is legal but at the cost of maintaining that both the legislature's intended meaning *and* the legislature's reasoned choice are authoritative for the judge *at the same time.* Yet this latter option would be at odds with Ekins' overall approach to statutory interpretation.[83] Even if Ekins subscribes to a view whereby not all legal content is exhausted by positive law, he must still explain how the legislature's intended meaning, normally authoritative, becomes non-authoritative when an unforeseen case arises. Conversely, Ekins must also clarify how the legislature's reasoned choice, normally non-authoritative, becomes authoritative.

What is needed, therefore, for the judge to equitably interpret a statutory rule in a way that respects the positivity of law is another positive rule authorising the judge to change, through the exercise of a normative power, their initial legal position in relation to the legislature. If equitable interpretation is to ground an exception in the law—thereby providing legal input to an equitable decision—the law must first authorise the judge to interpret the law equitably through the intentional exercise of this equitable power. The exercise of this power is, thus, a necessary condition for a judge to legally justify an exception on the grounds of equitable interpretation.

Therefore, a great deal comes down to whether the positive law has previously authorised the judge to exercise an equitable power. I will soon argue that there are two crucial reasons for the law to recognise this power. First, judges would

82. Needless to say, there may be other types of equitable powers—both within the law of Equity and elsewhere. In this section, I am only articulating a specific equitable power in the context of equitable interpretation. Nothing in my argument should be taken to suggest that these powers exhaust the range of powers that equity might permit.

83. See the text accompanying note 79.

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not be required to decide *contra legem* or *praeter legem* (i.e., against the law or supplying the silence of the law) if morality demands an equitable outcome in a particular case. Second, the law has an opportunity to guide, authoritatively, how judges ought to deliver equity. By granting judges discretion to exercise an equitable power, the law does not provide them with an unfettered discretion. There are good reasons for placing conditions on how judges should exercise this power. What remains discretionary—and should remain so—is the decision *whether* to exercise the power in the first place. I will return to this issue in the final section.

Let us take stock. Under a sound approach to equitable interpretation, a judge qualifies the legislature's intended meaning based on the legislature's reasoned choice. This process requires the exercise of an equitable power enabling the judge to lawfully change their initial legal position *vis-à-vis* the legislature. However, a condition for the successful exercise of such a power is that the facts of the case indeed fall *outside* the legislature's reasoned choice. In other words, the reasoned choice must support the equitable exception, typically by not ruling it out by implication. But what if the facts of the case fall *within* the legislature's reasoned choice? This is the point at which, as I will now argue, equitable interpretation *alone*—i.e., unassisted by the positive law—may fail to deliver on what equity promises, namely, to avoid an unforeseen moral conflict.

Consider again our working example. By enacting the rule in Article 122, the legislature sought to give effect to the set of reasons on which it decided to act (the 'reasoned choice'). The question for the interpreter is to determine which aspects of the potential normative input provided by the reasoned choice become authoritative once they exercise the equitable power. In our example, the reasoned choice can be presented through at least two layers of justification: preventing the use of unvalidated tickets by free riders and running a publicly funded service in a cost-effective manner while also ensuring general deterrence. Your case falls within the first layer of justification and is therefore unsupported by the legislature's reasoned choice—unless it is part of that choice's content to consider your intention (to validate your ticket) when you approached the machine. And the same reasoning applies to the second layer of justification; your case falls within the legislature's reasoned choice unless its content allows the judge to take into account your intention through a sequence of external acts. We only need to adjust the example slightly for an equitable exception to be *unsupported* by the legislature's reasoned choice. Suppose the inspector requested to see your ticket before you even had a chance to approach the machine; or assume that the evidence for your intention could be easily disputed—for example, simply walking towards the machine may not be enough to show that you intended to validate your ticket.

These are some of the difficulties with which supporters of equitable interpretation must grapple. It is not easy to show—in a way that is open, transparent, and straightforward—that the legislature's reasoned choice 'supports' an equitable exception. The difficulty lies in the fact that such a 'support' imposes no particularly high threshold on the interpreter—in principle, anything not explicitly or

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implicitly excluded by the legislature's reasoned choice is supported by it. As soon as we start picturing all the justificatory work that equitable interpretation may demand from judges, it becomes clear that, without the assistance of the positive law, this form of exercising equity could impose a significant burden on them. Hence law's contribution to equity: The positive rule conferring the equitable power should help reduce the amount of normative input—and thereby potential legal indeterminacy—that the judge may otherwise derive from the legislature's reasoned choice. It can do so, for example, by giving epistemic salience to certain facts relative to the reasoned choice—such as an official indication that, following the completion of the ordinary process of legislature's will-formation, specific data should be treated as reflecting the reasoned choice for the purposes of equitable interpretation. The rule may give salience to the legislative debate while also placing conditions, like those found in Lord Browne-Wilkinson's judgment in *Pepper v. Hart*, on how courts should rely on that data.[84]

The natural objection relates, of course, to the limitations of the law itself. If one of the issues that equity seeks to address arises from legislative foresight, then are we not proposing a rule that may backfire? The rule conferring the equitable power and setting out the conditions for its proper exercise could itself be affected by a problem of legislative foresight. And this situation would support the well-known argument, held by Blackstone and others, that equity cannot be fully captured by positive rules without being self-defeating.[85] The objector may argue that, under the proposal here defended, equity could apply to the equitable power itself. Fair enough, but this argument also faces its own difficulties. First, we should not assume that every attempt to engage in equitable interpretation will necessarily give rise to an unforeseen case—that each positive rule conferring the equitable power will encounter problems of legislative foresight. In the same way that the positive law can reduce legal indeterminacy through its rules—despite a potential problem of legislative foresight—it can also reduce the level of indeterminacy that the legislature's reasoned choice creates for the interpreter. And while it is conceptually possible that this guidance could be affected by a problem of legislative foresight, it does not follow that we should treat this exceptional situation as the standard case.

Secondly, the objection overlooks the significance of the law's intent to preserve, through its rules and its claim to authority, its institutional and systemic character. There are good reasons for the law to assert its authority, even at the margins—that is, even when its limitations in regulating complex issues are made clear. With respect to implicit exceptions, these reasons concern, as I will discuss in more detail in the Conclusion, judicial discretion, judicial

84. *Pepper (Inspector of Taxes) v Hart* [1992] UKHL 3; [1993] AC 594 [640C] [*Pepper v Hart*].

85. As Blackstone put it: "there can be no established rules and fixed precepts of equity laid down, without destroying it's very essence, and reducing it to a positive law." Blackstone, *supra* note 1 at 61-62. *Cf* Pound, *supra* note 47 at 25; Drakopoulou, *supra* note 31 at 366; John Baker, *An Introduction to English Legal History*, 5th ed (Oxford University Press, 2019) at 118.

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accountability, and the Rule of Law. It would be a significant failure, relative to these reasons, if the law were to abdicate its mission of seeking systemic and institutional regulation, leaving the solution of difficult problems to the *ad hoc* and patchy approach of individual judges.

To summarise: Not only can the positive law assist judges in engaging in equitable interpretation, but there is also value in doing so. All it takes is a positive rule conferring an equitable power and specifying the conditions under which judges may lawfully exercise it. At the same time, that rule can guide the judge in navigating through the normative input provided by the legislature's reasoned choice. With this in mind, I now turn to equitable suspension.

3.2 Towards Equitable Suspension

The purpose of the second type of equitable power I want to defend is to enable the lawful exercise of an equitable suspension of a statutory rule. What is required is the identification of a hierarchically superior norm that can justify suspending the application of that rule in order to protect a sound moral consideration. Provided we can identify the source of such a norm and show how, within the framework of valid positive law, it may take precedence over the statutory rule in question, we can argue for an equitable power allowing the suspension of statutory law in a manner that respects the positivity of law.

It is admittedly more difficult to locate the source of that higher norm in a legal system characterised by the combination of a robust Parliamentary sovereignty and an uncodified constitution. That is the case in the UK, where the so-called "constitutional statutes" appear to carry no special juridical entrenchment beyond excluding the operation of the doctrine of implied repeal.[86] Nevertheless, one potential line of justification involves identifying the constitutional content of a statutory rule—for example, the fact that it gives legal protection to a fundamental right—and showing that this content should take priority over that of a non-constitutional statute when the two are in conflict. While space constraints prevent me from pursuing this line of inquiry here, it is worth highlighting the increasing judicial support in the UK, especially since *Jackson*,[87] for the view that by reason of their constitutional significance, certain Acts of Parliament are entitled to special protection by courts.[88] Admittedly, these are significant constitutional obstacles that raise the possibility that, in a country such as the

86. *Thoburn v Sunderland City Council* [2002] EWHC 195 (Admin), [2003] 3 QB 151 at para 62ff. The category "constitutional statutes," advanced by Laws LJ in this case, has found important support in crucial decisions by the UK Supreme Court. See e.g. *H v Lord Advocate* [2012] UKSC 24, [2013] 1 AC 413; *R (Miller) v Secretary of State for Exiting the European Union*, [2017] UKSC 5 at paras 66-67. On constitutional statutes, see Farrah Ahmed & Adam Perry, "Constitutional Statues" (2017) 37:2 Oxford J Leg Stud 461; Nick Barber, *The United Kingdom Constitution: An Introduction* (Oxford University Press, 2021) at 74-82.

87. *R (Jackson) v Attorney General* [2005] UKHL 56; [2006] 1 AC 262 [*Jackson*].

88. See Hayley J Hooper, "Legality, Legitimacy, and Legislation: The Role of Exceptional Circumstances in Common Law Judicial Review" (2021) 41:1 Oxford J Leg Stud 142. *Cf* John Laws, "Law and Democracy" (1995) 72:1 Public Law 72 at 84-90, defending the notion of a higher law in UK law.

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UK, the most appropriate way to exercise equity, all things considered, is through equitable interpretation.[89]

The case for equitable suspension is more straightforward in countries with a codified constitution. Provided that a judge can plausibly show how the application of a statutory rule creates an unforeseen conflict with a moral consideration that may be constitutionally grounded, the case for equitable suspension becomes clearer. On this view, although equitable suspension does involve a form of constitutional review of legislation by judges, it does *not* confer on them excessive powers, such as the power to strike down statutes. What is required with the equitable power I have in mind is merely a legal authorisation to suspend, temporarily and between the parties to the dispute only, the application of a statutory rule on grounds of equity. In relation to the constitution, Kelsen says:

> [T]he court, if it considers the law "unconstitutional," is usually only authorized to refuse the application of this statute in the concrete case, that is, to suspend its validity for the concrete case; but the statute remains valid for all other cases to which it refers, and has to be applied by all courts in these cases unless they, in turn, refuse application.[90]

If the moral consideration to be protected through an equitable suspension can be grounded in a constitutional provision, then the suspension Kelsen speaks of can be understood as an equitable power.[91] This authorisation is a legal one, and I argue that it provides the basis for the juridical form of the power to suspend the application of statutory law on grounds of equity. This power would neither affect the general validity of the statutory rule at issue nor create any law of general application upon which other parties may rely. Precisely because the effect of this power is relative rather than general, we can consider it *equitable*.

89. As suggested by one anonymous reviewer, judges may sometimes claim they are interpreting a statutory rule equitably when, in fact, they are suspending it. If it is clear that the decision lacks support from the legislature's reasoned choice, then equitable interpretation would be a fig leaf intended to preserve UK constitutional orthodoxy, particularly Parliamentary sovereignty and the Rule of Law. *Cf* Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55:1 Cambridge LJ 122 at 136. See generally Jeffrey Goldsworthy, "The Limits of Judicial Fidelity to Law" (2011) 24:2 Can JL & Jur 305 at 309-10.

90. Kelsen, *Pure Theory*, *supra* note 3 at 273-74.

91. Does that constitutional 'grounding' make the moral consideration a *legal* one? Perhaps, though I will not attempt to answer this difficult question here. A thorough analysis should consider the specific character of the constitutional text in question—whether it is legal, political, or a mix of both, as is often the case. The analysis should also explain what it takes for a moral consideration to be grounded in positive law, such that despite its ultimate moral character, that consideration can still be regarded, metaphysically speaking, as part of positive law. In the background, also, there is the rather normative question of whether the positive law ought to rely on such moral considerations—a question that Raz, for one, famously answered negatively. See e.g. Joseph Raz, *The Authority of Law*, 2d ed (Oxford University Press, 2009) at 50-52; Joseph Raz, *Ethics in the Public Domain* (Oxford University Press, 1994) at 230-35. For present purposes, I will remain agnostic on these difficult points. My account of equity will respect law's positivity provided that the positive law simply *authorises* the judge to suspend the application of a statutory rule to avoid a conflict with a higher norm—regardless of whether that norm is legal or moral. I am grateful to an anonymous reviewer for pressing me on this point.

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By introducing it, the law does not alter the general effects of the statutory rule in question—which is a significant aspect of what is at stake in the power to strike down legislation. Instead, the law merely suspends the application of a statutory rule between the parties to the dispute, as a means of avoiding an unforeseen moral conflict.[92] Possibly the most compelling reason why this power is equitable is that the legislature has not anticipated the moral conflict it aims to prevent. By authorising this equitable power, the law acknowledges the legislature's inability to foresee every possible circumstance bearing on the regulated activity, and it recognises that such inability may result in an unforeseen moral conflict. The law does so, crucially, without attempting to list—let alone exhaust—every potential source of moral conflict. By authorising this equitable power, the law acknowledges the limitations of its own institutions—which are, in a sense, its own limitations.

An example of an equitable power along the lines explored here can be found in the powers of the Chilean Constitutional Court.[93] Under the Chilean constitution, a party to a dispute before an ordinary judge may request the Constitutional Court to authorise the judge to suspend the application of a statutory rule if its application leads to a conflict with a value protected by the constitution.[94] If the Constitutional Court determines that applying this rule is indeed contrary to the constitution, the ordinary judge may lawfully suspend its application in that particular dispute. Finally, in line with Kelsen's remarks, this suspension does not affect the general validity of the statutory rule; the rule, therefore, may be applied in subsequent cases.

4. Conclusion

The notions of equitable power, equitable interpretation, and equitable suspension provide a framework through which the positive law may regulate how judges deliver equity. In the case of equitable interpretation, the law positively authorises a judge to change their initial legal position *vis-à-vis* the legislature, while also guiding them through the normative input provided by the legislature's reasoned choice. In the case of equitable suspension, the law positively authorises the judge to suspend the application of a statutory rule when its application

92. As explained elsewhere, this *inter-partes* effect could be another historical reason for why the power is equitable: see Lewis, *supra* note 7 at 18, n 29. When the Chancery exercised equity, it did not repeal a legal rule with *erga omnes* effect, but only corrected it *in personam*. See e.g. Plucknett & Barton, *supra* note 27 at xxx; Baker, *supra* note 23 at 19; Klinck, *supra* note 27 at 85, 90-91; Smith, *supra* note 38 at 1059; Klimchuk, *supra* note 19 at 43. *Cf* Cardozo, C.J.'s dissenting opinion in *Graf v Hope*: "There is neither purpose nor desire to impair the stability of the rule, *which is still to be enforced as one of general application*." *Graf v Hope Bldg Corp*, 254 NY 1(NY Ct App 1930) at 5 [emphasis added] [*Graf v Hope*].

93. For an introduction to the powers of the Chilean Constitutional Court, see Sebastian Lewis, "The Rule 'Pay First, Litigate Later' or *Solve et Repete* in Chilean Law" (2013) 8:1 J Comp L 105 at 111-12.

94. Article 93 No. 6 of Chile's Constitution.

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conflicts with a hierarchically superior norm—typically supported by the text of a codified constitution. To conclude, I would like to briefly address the value of this proposal.

First, there is value in the positive law taking an explicit stance on the important question of whether a judge may decline to apply a statutory rule to avoid an unforeseen moral conflict. By and large, this is a question that the positive law either answers negatively (as in many civilian jurisdictions) or addresses ambiguously through the messy workings of the common law. This value becomes evident in countries where it is often assumed that a judge may exercise equity if necessary, yet it remains unclear whether there is a positive legal rule explicitly allowing such an exercise.

There are, secondly, important Rule of Law benefits. The primary one, as I have argued, is the normative guidance the positive law provides to the interpreter by setting out the conditions for the lawful exercise of an equitable power. That guidance, which should also serve as a constraint on the judge, enhances predictability in the judicial administration of equity—both for the general population and for the parties involved in the dispute. Thus, the Rule of Law is *pro tanto* advanced through the positive regulation of equity by the law.

Finally, as mentioned in the Introduction, I believe that the law should take responsibility for addressing problems of legislative foresight, rather than denying equitable solutions or leaving such issues to individual judges. In other words, the law bears the primary responsibility for handling problems of legislative foresight. When the law does so, judges are not required to decide *contra legem* or *praeter legem*—which could lead to a serious conflict between the demands of the law and those of morality—in order to deliver morally sound decisions. This has direct implications for judicial accountability. Judges are required to justify their decisions, but insofar as the positive law has provided specific means for administering equity, the level of accountability for using those equitable powers is the same, or roughly the same, as that for exercising discretionary powers more generally. Judicial accountability is to be measured by the soundness of the reasons the judge offers when exercising a lawful but discretionary equitable power to avoid an unforeseen moral conflict.[95]

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95. *Cf* Gerald J Postema, *Law's Rule: The Nature, Value, and Viability of the Rule of Law* (Oxford University Press, 2022) at 219-20.

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