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Aristotle's Pharmacy

Abstract:

This essay draws on the works of Jacques Derrida and Bernard Stiegler, particularly the concept of the *pharmakon*, to outline a pharmacological critique of the concept of equity in Aristotle's *Nichomachean Ethics* and *Rhetoric* and the Equitable remedies of the former Court of Chancery which make up the architecture of financial capitalism.

Keywords: equity; pharmakon; mnemotechnics; Chancery; memory; writing; financial capitalism

'There is no such thing as a harmless remedy. The pharmakon *can never be simply beneficial.'*

Jacques Derrida, 'Plato's Pharmacy'

Towards the end of *Phaedrus*, Plato – well, Socrates – gives an account of Theuth who thought that he had invented a recipe or remedy for memory and wisdom. That invention was writing. Thamus, King of Egypt, didn't agree and said that far from being a remedy for memory, writing would actually produce forgetfulness; instead of producing wisdom writing was in fact producing only a semblance of it, not truth. Students would be able to read the texts of their teachers, but without proper instruction they would for the most part be incapable of real judgement. In 'Plato's Pharmacy' Jacques Derrida points to the ambiguity of the word '*pharmakon*', often translated as recipe or remedy, in *Phaedrus* in the following way:

> 'This *pharmakon*, this "medicine," this philtre, which acts as both remedy and poison, already introduces itself into the body of the discourse with all its ambivalence. This charm, this spellbinding virtue, this power of fascination can be – alternatively or simultaneously – beneficent or maleficent.'[1]

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[1] J. Derrida, 'Plato's Pharmacy' in J. Derrida, *Dissemination* (Bloomsbury Academic, 2016).

One of the key points in Derrida's reading of *Phaedrus* is the ambivalence of a text where a word such as *pharmakon* can be translated both as a remedy and as a poison.[2] As Derrida points out, 'there is no such thing as a harmless remedy'. Bernard Stiegler develops the *pharmakon* as a critical notion in his analysis both of political economy and various aspects of modern society more generally. For Stiegler the pharmacological question is precisely not to reject the poison but to notice how it is *at once* both curative *and* destructive. For Stiegler the *pharmakon* is constitutive of our being, and consequently it gives rise to an imperative to take care:

> 'The *pharmakon* is at once what *enables* care to be taken and that *of which* care must be taken – in the sense that it is necessary *to pay attention*: its power it *curative to the immeasurable extent* that it is also *destructive*.'[3]

It is already possible to make a couple of preliminary observations. First the *pharmakon* is beyond good and evil. It cannot itself be subjected to 'critique', if by critique we mean judgement. Indeed, the 'application' of the 'remedy' - the practice of pharmacology - is itself the exercise of judgement on this conception, as it calls for a decision as to how much of the toxin is safe to administer. Secondly, critical pharmacology goes beyond utilitarian analysis in two important ways. First it retains a link to questions of memory and mnemotechnics. In Stiegler's work, *pharmaka* are linked with the *production* of thought, anamnesis: 'the hypomnesic appears as that which constitutes the *condition* of the anamnesic.'[4] But this thought is never a pure interiority; rather it is conditional on external technologies of memory, what Stiegler calls tertiary retentions, which condition and make possible our very mode of life. This points to the second difference from utilitarian analysis: the curative and toxic dimensions cannot be held apart; they are co-constituents. The difficulty for practitioners of pharmacology is to learn to 'distinguish them in a new way, that is, without opposing them'.[5] This act of distinguishing, without simply opposing, is the practice of critique of the *pharmakon*.[6]

In this essay I make some suggestions for a critique of 'equity' drawing on the conceptual apparatus of the *pharmakon*. There is an obvious resonance between equity and pharmacology: equity is usually understood

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[2] The *pharmakon* is part of the same family of concepts as immunization and the immunitary, and possibly the state of exception: see R. Esposito, *Immunitas: The Protection and Negation of Life* (Polity Press, 2011); G. Agamben, *State of Exception* (University of Chicago Press, 2005). For discussion of state of exception and Equity, see P. Kahn, *Political Theology: Four New Chapters on the Concept of Sovereignty* (Columbia University Press, 2011).
[3] B. Stiegler, *What Makes Life Worth Living: On Pharmacology* (Polity, 2013) p 4 (emphasis in original).
[4] B. Stiegler, *What Makes Life Worth Living: On Pharmacology* (Polity, 2013) p 19.
[5] B. Stiegler, *What Makes Life Worth Living: On Pharmacology* (Polity, 2013) p 4.
[6] On which see Baldissone in this issue.

as a remedial *concept* (Aristotle) remedying failures in general rules, and a remedial *practice* (Chancery).[7] 'Remedy' is derived from the Latin *remedium* meaning a cure, medicine or antidote to restore health or to heal. While the 'sickness' that Aristotle's concept 'cures' is well known, the precise 'sickness' that Chancery Equity 'cures' is more ambivalent.[8] This ambivalence is in part because the close ties between Chancery and equity only emerges after St Germain's *Doctor and Student*, before which the Chancery was known as a court of conscience. It may be that the conceptual apparatus of 'equity' has little to do with Equity (the practices of Chancery), and this would certainly be the view of many contemporary legal scholars in Equity, although it should be noted there is a burgeoning scholarship seeking to demonstrate the equitable nature of Equitable doctrines.[9] In this essay I do not engage in this debate. Rather I focus on Aristotelian equity and aspects of Chancery Equity separately drawing on the conceptual framing of the *pharmakon*, with the intention of suggesting some avenues for future research. In doing so it will be necessary to consider, in relation to Equity, what the 'sickness' is to which Equity responds. But more than simply a focus on the sickness, a pharmacology of equity/Equity requires attention to be paid to equity's relations to memory and mnemotechnics and the toxic-yet-constitutive effects of equitable interventions and how to take care.

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Aristotle's short passages on 'equity' have been subject to many interpretations and readings over the centuries by philosophers and lawyers, and it is not my intention – nor within my competence – to say anything new. However, a pharmacological reading of Aristotle on equity does draw our attention to certain aspects of the concept that otherwise go understated. It is worth beginning by reminding ourselves that the aspect of the *Phaedrus* that Derrida particularly draws our attention to is the Socratic privileging of speech over writing. As Roy Boyne explains:

> 'The Socratic discourse against writing is directed at the art of sophistry. Just as the sophist may pretend to have knowledge, so might writing simulate truth. Thus, for Socrates, writing is inferior to spoken wisdom, to the felt knowledge of the genuine philosopher. For Derrida it is clear: "What Plato *dreams* of is a memory with no sign", a memory in direct communion with wisdom and truth.

[7] In this essay I draw a sharp distinction between the Aristotelian concept and Chancery practice for reasons of convenience. Two points must be recognised: first, Chancery practices have been shaped by the receptions (plural) of Aristotle's conception of equity; secondly, Aristotle's conception of equity is formed against the background of Athenian legal and political practices (as this essay will comment on). Theory and practice cannot be divided in the simplistic way in which this essay is structured.

[8] I adopt the convention of referring to concept of equity with a lower case 'e', and Chancery Equity (in Maitland's sense of those rules, doctrines and remedies that came from the Court of Chancery) with an upper case 'E'.

[9] See, for example, H. Smith, 'Property, Equity, and the Rule of Law' in L.M. Austin and D. Klimchuk (eds), *Private Law and the Rule of Law* (Oxford University Press, 2014); H. Smith, 'Why Fiduciary Law is Equitable' in A.S. Gold and P.B. Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014).

> … Derrida shows that the privilege of Socratic discourse is sustained only through an irredeemable claim of access to a wisdom that cannot be presented, since in its presenting it will always be a question of *re-presenting*; and it precisely in re-presenting that the undecidable alternation between poison and cure arises.'[10]

This forms part of Derrida's critique of Western philosophy's metaphysics of presence, the desire for immediate, and possibly unmediated, access to truth. This, arguably, is the problem Aristotle's equity is introduced to resolve in the *Nichomachean Ethics* although not unproblematically, as will be seen.

Although Aristotle doesn't use the word *pharmakon,* I suggest that *epieikeia* assumes the pharmacological function. In the *Nichomachean Ethics* Aristotle considers the problem of equity. The problem is the relation of equity and the equitable to the just and justice, because they do not appear to be generically (ie categorically) different but neither are they the same: if equity is different from the just and yet still praiseworthy, then they are different and one must not be good; or they are both good, in which case they are the same. But, Aristotle explains, this is to misunderstand the problem for there are different forms of justice nested within one another, so to speak. Equity is superior to one kind of justice, *legal* justice, but not better than *absolute* justice: 'What creates the problem is that the equitable is just, but not the legally just but a correction of legal justice.' Aristotle explains that the 'reason is that all law is universal but about some things it is not possible to make a universal statement which shall be correct'. The problem is related to the universality of legal statements and the 'nature of the thing', the complexity of the reality of practical affairs. The problem is twofold: the difficulty of foresight, the problem of knowledge of future events that may or may not fall under the rule; and secondly the problem of language, the 'absoluteness of the statement' which it is impossible to avoid. Neither is an error in the law, and nor are they errors with the legislator. Equity, then, is the remedy for difficult relationship between law and its application (the decision, judgment), the problem of the general and the particular, but also between words and things, language and practical affairs. Equity for Aristotle is the means of – or supplement – bridging this 'gap', this impasse, between law and life. Equity is the technique through which the memory – or at least judgement – of what the legislator either intended or would have done had they directed their mind to it, enters the legal field. This is confirmed later in the *Rhetoric*:

> 'For the equitable is held to be *right*, and *equity is right going beyond the written law*. This arises sometimes at the wish, sometimes not at the wish, of the lawgivers – the latter when they overlook it, and the former when they cannot give a universal definition, but while it is necessary for them to give a

[10] R. Boyne, *Foucault and Derrida: The Other Side of Reason* (Unwin Hyman, 1990) pp 96-97 (emphasis in original).

> general rule they cannot do so but only give one that holds for the most part and in such cases as are not easy to define through their unfamiliarity … .'

On the face of it the problem is with written law, and in this sense equity is *pharmakon* for the problem of writing, introducing a rupture in the written law because writing is not adequate to (the regulation of) life. But on reflection the problem isn't so much *written* law as the *generality* of rules which, must be expressed in language, as well as a problem of *knowledge of the future contingencies*. Equity, in this regard, is nothing other than the acceptance of failures of language and knowledge, and provides the legitimate or authorised opening in fabric of law through which the force of judgement enters, sealing the gap on its way, leaving the fiction of an unbroken legality. The risk is clear, and has been expressed more clearly in liberal debates about the 'rule of law': at what point does the 'exception' overwhelm the rule? But this obscures a further problem: that there is no perfect correspondence between the general and the particular, such that there must be a little equity in *all* decisions. As such rule and equity are always co-constitute of legality.[11]

In the *Rhetoric* equity has a far more complex role, and intersects with two related political debates in ancient Athens.[12] The first is the well-known debate over *physis* and *nomos*.[13] The Sophists argued that laws (*nomoi*) were man-made and secondary to the eternal natural laws (*physis*). For the Sophists *physis* was inescapable, whereas *nomos* must be based on agreement in order to be binding. This had the potential to undermine the Athenian *polis*; appeals to *physis* could be used by those disenchanted with the democratic process. As Theodore Ziolkowski states:

> 'The political implications of this controversy cannot be exaggerated: it gradually undermined the traditional Athenian respect for law by arguing that all *nomos* is essentially secondary, a man-made construct, in comparison to the primary and eternal forces of *physis*.'[14]

The Sophists saw *nomos* as basis for change in the *polis* (but did not deny *physis* in private). On the other hand, '[t]he appeal to *physis* … was a characteristic of the Athenian upper classes who were becoming

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[11] See G. Rose, *Dialectics of Nihilism: Post-structuralism and Law* (Blackwell Publishers, 1984) regarding the antinomies of law and thought more generally.

[12] The discussion of equity in the *Rhetoric* in this section draws on Theodore Ziolkowski's excellent discussion in *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton University Press, 2003) ch 8.

[13] On nomos-physis see D. Kelley, *The Human Measure: Social Thought in the Western Legal Tradition* (Harvard University Press, 1990) ch 2; E. Meiksins Wood, *Citizens to Lords: A Social History of Western Political Thought from Antiquity to the Late Middle Ages* (Verso, 2011) ch 2. On emergence of written law see M. Gagarin, *Writing Greek Law* (Cambridge University Press, 2008), R. Thomas, 'Written in Stone? Liberty, Equality, Orality and the Codification of Law' (1995) 40(1) *Bulletin of the Institute of Classical Studies* 59 and R. Thomas, 'Writing, Law, and Written Law' in M. Gagarin and D. Cohen (eds), *The Cambridge Companion to Ancient Greek Law* (Cambridge University Press, 2006). For the relationship between these controversies see T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* ch 8.

[14] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* (Princeton University Press, 2003) p 156.

disenchanted with democratic processes and who still felt a loyalty to the ancient bonds summed up by the word *physis*.'[15]

The *nomos-physis* controversy was played out before Athenian audiences in in Sophocles' *Antigone*. The story is well-known. Antigone's two brothers, Eteocles and Polynices, have died in battle. Eteocles had refused to hand over the ruling of Thebes to Polynices when the time came, as had been agreed, so Polynices attacked Thebes. Their uncle, Creon, assumes the ruling position and gives Eteocles full burial rights, and decrees that it is forbidden for anyone to bury the traitor Polynices. Antigone refuses to obey the decree and gives her brother the burial rights in accordance with ancient religious practice. The remainder of the play can be, and has been, read as the struggle between Creon and Antigone over the nature of authority, justice, the state, security and good order; between the (positive) secular law and the (natural) law of the Gods, between *nomos* and *physis*, between masculine and the feminine, and between reason and unreason. In the famous dialogue with Creon, Antigone appeals to 'the unwritten and steadfast traditions of the gods' while Creon maintains the importance of upholding law and security of the city. Antigone's appeal is to unwritten customs (which are divine and eternal), but she doesn't contrast these with written law but with man-made laws whether written or proclaimed (ie unwritten). In many ways, then, Antigone stands for the aristocratic interest while Creon is on the side of Sophist enlightenment.

The second debate in which to situate Aristotle's *Rhetoric* concerns written and unwritten law. The growth of written laws in Athens gave rise to a debate about the reform of law as there was occasionally conflict between the written law and the unwritten customs. On the one hand, as Ziolkowski points out, Athenians were proud of their written laws, symbolising liberation from tyranny. On the other certain groups, particularly from the upper classes, put forward suggestions for new written laws based on unwritten 'customs' they remembered which had not been reduced into writing.[16] This debate over written and unwritten law can be understood as an 'extreme radicalization of *nomos* and *physis*',[17] and 'it was precisely the *nomos-physis* dilemma that Aristotle sought to resolve in several of his writings.'[18]

In the *Rhetoric* Aristotle contrasts *particular* laws, which are those posited by and specific to different states, and may be written or unwritten (ie include decrees and proclamations), with *general* laws which are the universal laws of nature, and as such always unwritten and apply to everyone. This general law Aristotle links with Antigone:

[15] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* p 157.
[16] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* p 158.
[17] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* p 160.
[18] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* p 159.

> 'For there is something of which we all have an inkling, being a naturally universal right and wrong, even if there should be no community between the two parties nor contract, to which Sophocles' Antigone seems to be referring, in saying that it is just, though forbidden, to bury Polynices, as this is naturally right.'

Aristotle goes on to distinguish two species of just and unjust acts: some written, some unwritten. Of the unwritten there are two kinds: one comes from an excess of virtue or vice and are connected with blame, praise, disgrace, honour etc; the other is an omission or exception from the special written laws, and this he calls 'equity' and is explained in a similar way as in the *Ethics*. Later he is talking about non-technical proofs, ie modes of argumentation. Where written law is contrary to the position being sought to be taken, Aristotle explains that 'we must use the *general* law and the principles of greater equity and justice ... [T]hat the juror should not always follow the written laws, that equity is permanently valid and never changes, nor does the general law (for it is natural), whereas the written laws often do, the point of the lines from Sophocles' *Antigone*'. That is, the laws of the state, Creon's decrees, change from time to time, whereas the general/natural law does not. So here equity is assimilated to *unchanging* or *permanent* law, and not to the problem of written law and giving effect to the legislator's purposes or intentions. This is where we see the conflation of the two controversies, between written-unwritten law and *nomos-physis*, in Aristotle channelled *through Antigone*, despite the problem of 'equity', as understood in *Nichomachean Ethics*, not being present in *Antigone*.[19]

The importance of the *Rhetoric* is the way in which it assimilates equity to the natural law, and thereby goes beyond the conception in the *Nichomachean Ethics*; it is not only a 'safeguard against the inadequacies of the positive law,'[20] as Ziolkowski concludes, but a conduit for the memory of ancient laws and customs, bringing them within the fold of the law. This intensifies the *risk* associated with equity, that is the unfolding of the *posited* legal fabric. We have seen that the claims of both *physis* and for the reform of the written law premised on the remembered customs of the past come from the aristocratic families; such an unfolding can be seen as a strategic possibility or as a danger.[21] The *pharmakon* of equity in the *Rhetoric*, as a remedy for the two controversies, does not close the problem but rather lays it bare.

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[19] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* p 161.
[20] T. Ziolkowski, *The Mirror of Justice: Literary Reflections of Legal Crises* p 162.
[21] On the importance of memory *for* the written law in ancient Greece, and how this was linked to *mnemones* or remembrancers – clerks and scribes who had power within the system – see R. Thomas, 'Written in Stone? Liberty, Equality, Orality and the Codification of Law' (1995) 40(1) *Bulletin of the Institute of Classical Studies* 59.

In *For a New Critique of Political Economy*, published in the midst of debates concerning the Global Financial Crisis 2007-2008, Bernard Stiegler analyses economic systems in terms of the production of protentions, that is, anticipations and expectations, means of capturing the future:

> 'The capitalist system for creating protentions is a system of credit which brings about a change in the system of belief – by turning belief into something calculable, and by therefore engendering something better than belief: trust.'[22]

The credit system had been built on a protentional system that produced trust, but when trust system collapsed so did the financial system. Stiegler argues that there is a 'tendency to carelessness' inscribed within the logic of the credit system (which he calls 'free capital'), and it is in response to this tendency 'that regulatory systems are imposed, which aim to *limit* the destructive effects of this speculative tendency of free capital – and to keep a *sufficient and steady hold on things, that is, on investment*, given the instability of capital circulation'.[23] But this system of anticipations of 'free capital' – coupled with the rise of consumerism – 'become correlatively and *systematically short-termist, speculative and drive-based*'.[24]

Stiegler's account of the financial crisis in terms of credit and trust and systemic carelessness, which is clearly far more nuanced than I can do justice here, resonates with the view that in one way or another the financial crisis, and problems in the financial sector more generally, are problems of trust – whether in terms of trust in market confidence, faith in the integrity of market-actors, or belief in the effectiveness of existing regulatory frameworks. For example, in September 2009, almost a year after the Lehman collapse, Andrew Haldane (the executive director of financial stability at the Bank of England) gave a speech entitled 'Credit is Trust'.[25] The main thrust of the talk was that the 'credit crunch' was, etymologically and literally, a 'trust crunch' – that the financial crisis was 'a story of the progressive breakdown in trust': whether between banks and households, between banks and investors, between companies, between countries and so on. The solution to the problem of course was repairing trust. More recently, following the Financial Conduct Authority ruling on the LIBOR rate-fixing scandal Lord Blackwell (the Chairman of Lloyd's Banking Group who were at the centre of the fraud) stated 'trust is the core of our business'.[26] The centrality

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[22] B. Stiegler, *For a New Critique of Political Economy* (Polity Press, 2010; trans. D. Ross), p 67.
[23] B. Stiegler, 'Pharmacology of Capital and Economy of Contribution' in *For a New Critique of Political Economy*, p 80 (emphasis in original).
[24] B. Stiegler, 'Pharmacology of Capital and Economy of Contribution', p 84 (emphasis in original). Also see B. Stiegler, *What Makes Life Worth Living: On Pharmacology* ch 5.
[25] A. Haldane, 'Credit is Trust', speech given at the Association of Corporate Treasurers, Leeds, 14 September 2009. Available at http://www.bankofengland.co.uk/archive/Documents/historicpubs/speeches/2009/speech400.pdf
[26] See statement dated 28 July 2014, available at: http://www.lloydsbankinggroup.com/Media/Press-Releases/2014/lloyds-banking-group/settlements-reached-on-legacy-libor-and-bba-repo-rate-issues/

of trust to financial markets is confirmed by John Kay's emphasis on trust and confidence in his Report on long-term decision making in relation to UK equity markets, particularly in the context of institutional investors and intermediaries.[27]

Against this background there has been a view that Equity may provide a possible remedy to one or more of these problems of 'trust', in particular through the enhancement or perhaps simply enforcement of 'fiduciary standards' of behaviour. The clearest example of the emphasis on Equity's possible ethical response is given by Sir John Mummery, a former Court of Appeal judge, following the earlier dot-com bubble, in an article entitled 'Commercial Notions and Equitable Potions'.[28] For Mummery, 'the best things in equity can be used for a more ethical framework of conduct in some of the areas covered by commercial law',[29] in particular the 'trust idea':

> 'Provided that the trust idea is used sensibly, it can supplement the role of contract law in improving commercial integrity and confidence. Integrity and confidence form the essential foundations of stable and successful markets.'[30]

Mummery's argument was that fiduciary obligations in particular can provide an effective supplement to contract law and restore trust to markets. In 1994 Anthony Mason had similarly argued that '[e]quity, by its intervention in commerce, has subjected the participants in commercial transactions, where appropriate, to the higher standards of conduct'[31] and that the 'the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century'.[32] And more recently David Hayton has argued that equity is premised on a 'good person philosophy', that is, it treats obligations as if they have been performed, thereby constituting equitable subjects.[33]

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[27] *The Kay Review of UK Equity Markets and Long-Term Decision Making: Final Report* (July 2012). On the rise of impersonal trust, see R. Cotterrell, 'Trusting in Law: Legal and Moral Concepts of Trust' (1993) 46 *Current Legal Problems* 75.
[28] J. Mummery, 'Commercial Notions and Equitable Potions' in S. Worthington (ed), *Commercial Law and Commercial Practice* (Bloomsbury Publishing, 2003).
[29] Mummery, 'Commercial Notions and Equitable Potions' p 29.
[30] Mummery, 'Commercial Notions and Equitable Potions' p 31.
[31] A. Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238 at p 238.
[32] Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' p 239.
[33] D. Hayton, 'The Development of Equity and the "Good Person" Philosophy in Common Law Systems' (2002) *Conveyancer and Property Lawyer* 263.

In this section I want to briefly outline Equity's contributions to financial capitalism through the notion of the *pharmakon*. This framework provides one means through which we can see how Equitable remedies for a particular 'sickness' – failure of trust and confidence, unconscionable conduct – produce new forms of property, which enable memories of the future (ie anticipated profits) to be commodified, and new forms of subject. This architecture, in principle, contributes to the production of the 'trust' underpinning the credit system.[34]

By financial capitalism I mean a system with three elements. First, the raising of corporate capital, whether by means of share capital (known as 'equity' in the finance literature) or debt, by issuing bonds. Secondly, the rise of financialisation, by which I mean the creation of new financial products, in particular through securitisation of debt obligations. Thirdly, the formation of a secondary markets in both simple corporate capital allowing speculation on the price of shares and bonds, what Marx called 'fictitious capital', and financialised assets.

Equity has contributed to each of these. First in relation to debt capital, equity has contributed floating charges, to secure debentures, and note-trustees (known as indenture trustees in the US) between issuer and investor. In relation to financialisation book debts and other choses in action are transferred to Special Purpose Vehicles (the shares of which are often held in offshore purpose trusts) by way of equitable assignment which in turn issue bonds through note-trustees – a complex mix of contract and equitable forms. Finally, in relation to secondary markets, there is again the functional aspect of note-trustees and other custodians, on one side, and investment trusts and various fiduciaries on the other. Where note-trustees and other custodians are used in the issue of capital, transactions on the financial markets will consist not of the transfer of legal title but rather of equitable assignments.

While the above paragraph may appear a rather mundane outline of some elements of the legal framework of financial capitalism, it is remarkable because it was only in Equity that these forms of property central to financial capitalism developed. As Sarah Worthington states, 'To many minds, Equity's greatest contribution to the law has been its manipulation of traditionally accepted concepts of property'.[35] There are two essential points to observe. First, these forms of property enable the commodification of *future* value in the present. This was simply not possible at common law – *choses in action* could not be transferred. Equity, however, allowed the assignment of personal obligations, thereby producing capital from obligations:

[34] On trust in this context see Cotterrell, 'Trusting in Law: Legal and Moral Concepts of Trust'; also see and M. Harding, 'Trust and Fiduciary Law' (2012) 33 *Oxford Journal of Legal Studies* 81.
[35] S. Worthington, *Equity* (Clarendon, 2006) p 51. Also se S. Worthington, *Equity and Property: Fact, Fantasy and Morals* (University of Queensland Press, 2009).

> 'Debts, shares and other contractual claims … became usable wealth. This possibility was extended still further to include future benefits: claims to future dividends, interest payments, royalties and such like could all be sold immediately, in advance of entitlement to the underlying payment, for value. In this way, future benefits could be capitalised immediately and put to their most efficient use by those agreeing to the exchange.'[36]

The emergence of the equitable charge as a security interest also contributed to the production of credit.[37] Most notable in this regard is the ability to charge assets that are not yet owned[38] and circulating capital.[39]

The second point is that these forms of property – choses in action, floating charges as well as the trust – emerged from transforming obligations into property. For Worthington this occurs because equity accords special protection to obligations it considers important and specifically enforces the obligation: Equity considers as done that which ought to be done, thereby transforming the obligation into a property interest which can be transferred and in certain circumstances will bind third parties. David Hayton refers to this as equity's 'good person philosophy', that is, that equity will enforce the 'primary obligation' and hold subjects to their duties and promises in preference to requiring the payment of compensation for breach.[40] While Worthington and Hayton explain equitable property in terms of Equity ordering performance of the obligation (or primary duty) giving rise to a property right that will bind third parties, Lionel Smith argues that the third party effect emerges from Equity requiring third parties who have notice of another's obligations to respect those obligations – hence certain obligations may have third party effects.[41] It is not necessary to resolve the differences here. What is important is that in both accounts Equitable property emerges from obligation. But why?

One answer can be found in the history of Chancery, the enforcement of 'good faith' and the principle of conscience. According to Harold Berman, Chancery took on three aspects of the medieval legal landscape that the common law courts abandoned in the 14th century: 'the principle that the poor and helpless must be protected against the powerful and lawless; the principle that relationships involving trust and confidence

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[36] Worthington, *Equity and Property: Fact, Fantasy and Morals* 12-13.
[37] See Worthington, *Equity and Property: Fact, Fantasy and Morals* 29-34. Also see J. Getzler, 'The Role of Security over Future and Circulating Capital: Evidence from the British Economy circa 1850-1920' in J. Getzler and J. Payne (eds), *Company Charges: Spectrum and Beyond* (Oxford University Press, 2006).
[38] *Holroyd v Marshall* (1862) 11 HLC 191, (1862) 11 ER 999.
[39] *Re Spectrum Plus Ltd (in Liquidation)* [2005] 2 AC 680.
[40] On equity's logic of the fiction, see J. Getzler, '"As If.": Accountability and Counterfactual Trust' (2011) 94 *University of Boston Law Review* 973. On how this breaks down the binary categories of law see Samuel in this issue.
[41] L. Smith, 'Fusion and Tradition' in S. Degeling and J. Edelman (eds), *Equity in Commercial Law* (Law Book Co of Australasia, 2005).

must be enforced by law; and the principle that the law, in thus attempting to preserve peace on earth and good will among men, must not be bound strictly by doctrines of land tenure and status but may deal with persons directly and may compel obedience from the parties' (what he summarises as 'coercion of the person').[42] That principle of authority was conscience, and specifically 'the conscience of Christendom, and the identification of the inner convictions of every Christian with the teachings of the Church of Rome. …[T]he Chancellors dealt with each person as a conscionable Christian, examined him on oath, ordered him in God's name to do right'.[43] As such, 'the basic principles underlying medieval equity were: that the underling must be protected by law, that good faith must be enforced by law, and that the law must deal with persons directly as conscionable Christians.'[44] While the link with Rome may have been lost, the underlying principles – particularly the link with conscience and good faith – were not.

Arguably Equity enforced promises relating to obligations because it had more flexible procedures and was not confined, like common law, by the forms of action.[45] But if it did, it did so on the basis of trust and confidence, of 'good faith' – that it would be against 'good conscience' to go back on one's word where another had relied on it. In this sense Equity, acting *in personam*, *produced* conscionable Christians or, rather, 'equitable subjects'.[46] In doing so it also produced an artificial system of trust. That Equity took a different approach to the common law regarding the relevance of 'good faith' may be an historical accident, but is crucial to Equity's current value system according to Smith. This made possible the emergence of equitable property and, crucially, the fiduciary obligation:

> 'Legal liabilities … do not usually turn on motives of the defendant. Instead there is an obligation to do or not to do, and the obligation may be a strict one, or an obligation to make reasonable effort to bring about a result, or to take reasonable care to bring about a result. The civil law tradition has an important qualification to this, in that there is usually a general obligation of good faith. The obligation requires, at least in part, an examination of motives. … Pre-contractual negotiations are not binding and generally parties are at liberty to break them off. But there can be an examination into motive to determine whether this liberty has been abused … or used in bad faith.

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[42] H.J. Berman, 'Medieval English Equity' in H.J. Berman, *Faith and Order: The Reconciliation of Law and Religion* (Wm. B. Eerdmans Publishing, 1993) p 67.
[43] H.J. Berman, 'Medieval English Equity' pp 77.
[44] H.J. Berman, 'Medieval English Equity' pp 82.
[45] See H.J. Berman, 'Medieval English Equity' for the argument that Equity was simply applying law of the land, and that it was the common law that left Equity. Also see J. Langbein, 'The Contractarian Basis of the Law of Trusts' (1995) 105 *Yale Law Journal* 625 for how the limits of the common law impacted the development and understanding of the trust.
[46] See F. Nietzsche, *On the Genealogy of Morals* (Cambridge University Press, 2011), second essay; M. Lazzarato, *The Making of Indebted Man* (MIT Press, 2012) ch 2; M. Valverde, 'Pain, Memory and the Creation of the Liberal Legal Subject: Nietzsche on the Criminal Law' in P. Goodrich and M. Valverde (eds), *Nietzsche and Legal Theory: Half-Written Laws* (Routledge, 2005).

> 'The common law traditionally refuses to make this kind of inquiry … . Equity, however, inquires into good faith as a matter of course, it being an ingredient of the defence of good faith purchaser for value without notice. But Equity has refined its willingness to inquire into motives to a higher pitch than any other legal tradition, in the form of the fiduciary duty of loyalty.'[47]

What I want to emphasise is how Equity systematically remedied the sickness of 'bad faith' and 'bad conscience', including in contexts relating to *future* value, which had two consequences: the emergence of new property forms that secure capital and credit, and a system of (artificial) trust in this architecture. This trust was premised on Equity's production of 'equitable subjects'.

Equity's concern was not simply with holding people to their word, but also putting limits on their excesses – hence fiduciary obligations are seen private law's own regulatory system, keeping a check on the excesses and, in particular the temptations of self-interest, particularly of actors on the financial markets (and why John Kay and others can look to strengthen fiduciary obligations in order to enhance trust in markets). Equity's concern with the 'sickness' of human nature is a seen in a number of cases concerning fiduciary obligations, most notably Lord Herschell's famous statement in *Bray v Ford* (1895):[48]

> 'It does not appear to me that this rule is founded upon principles of morality. I regard it rather as based on the consideration that, human nature being what it is, there is danger, in such circumstances, of the person holding a fiduciary position being swayed by interest rather than duty, and thus prejudicing those whom he was bound to protect.'

In *Parker v McKenna*[49] James LJ referred to a concern about humanity itself arising from inquiring as to whether or not the breach of fiduciary obligation caused the fiduciary to make a profit. This concern with humanity can be linked with Christian concerns about temptation and the fall. Irit Samet draws out attention to this across over two centuries of case law in the context of fiduciary obligations:[50] in *Whichcote v Lawrence* (1798) it was said that 'where a trustee has a prospect of advantage to himself, it is a great temptation to him to be negligent';[51] in *De Bussche v Alt* (1878) that 'by this strictness the temptation to embark on what

[47] Smith, 'Fusion and Tradition' pp 35-36.
[48] [1896] AC 44.
[49] (1874-75) LR 10 Ch App 96.
[50] See I. Samet, Guarding the Fiduciary's Conscience—A Justification of a Stringent Profit-stripping Rule' (2008) 28 *Oxford Journal of Legal Studies* 763.
[51] (1798) 3 Ves Jr 740.

must always be a doubtful transaction is removed';[52] and most recently in *Harris v Digital Pulse* (2003) the New South Wales Court of Appeal stated:

> 'The height and strictness of the standards protect the principals of fiduciaries by nullifying temptation. In that sense they deter fiduciaries from drifting into a position of conflict, or worse. … [Fiduciary rules] are prophylactic in the sense that they tend to prevent the disease of temptation in the fiduciary – they preserve or protect the fiduciary from that disease. … The prevention of or protection from the relevant disease is assisted by the strictness of the standard imposed and the absence of defences justifying departure from it.'[53]

Here Equity is concerned with the *excess* of the economic subject, a remedy for the disease of distrust.[54]

Equitable remedies are constitutive of the liberal legal subject: not only an animal that is capable of making promises but an animal that is forced to carry out their promises, by being treated *as if* they have already complied; and secondly, an ascetic subject, one that is forced into self-denial. Here we see the heterogeneity of the liberal subject and the economic - that beast with all the passions and the interests, who unleased pursues his self-interest.[55] In this way Equity has constituted a market place consisting of property forms that hold memories of the future (promises) and 'autonomous' actors. Equity hasn't simply provided a remedial 'gloss' on the financial capitalism but has provided its very architecture: to paraphrase Annelise Riles, Equity lawyers are both the architects and sanitation workers of the market,[56] or rather, to return to the title of Mummery's article, that equitable potions *are* commercial notions.

We can end this brief outline – which is little more than a sketch of how we may use the notion of the *pharmakon* in the context of Equity – by referring back to Stiegler's point, that it is necessary to pay attention, to take care. In this regard we can see the destructive nature that Equitable property on the financial markets, holding as it does the empty promises of so many. Equally destructive is the contemporary move to dismantle Equity's own system of care, that of the fiduciary obligation, through a series of theoretical

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[52] (1878) 8 Ch D 286.
[53] (2003) 56 NSWLR 298.
[54] For discussion linking breach of trust and fiduciary obligation to questions of desire and the unconscious, see Herian in this issue.
[55] On the transformation vices of ferocity, avarice and ambition into the virtues or energy behind capitalism, see A. Hirschman, *The Passions and the Interests: Political Arguments for Capitalism before Its Triumph* (Princeton University Press, 2013). On the emergence of 'interest' from earlier notions of conscience see S. Wolin, *Politics and Vision: Continuity and Innovation in Western Political Thought* (Princeton University Press, 2016). On the heterogeneity of the legal and economic subject, see M. Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978-1979* (Palgrave Macmillan, 2010).
[56] See A. Riles, *Collateral Knowledge: Legal Reasoning in the Global Financial Markets* (University of Chicago Press, 2011) p 15.

and doctrinal manoeuvres: the contractualisation of trust and fiduciary law; conceptualising the duty of care as a non-fiduciary obligation; the proliferation of exemption clauses and the difficulties of holding trustees to account for negligence more generally; and the increasing assimilation of equitable compensation for breach of trust and fiduciary obligation with damages.[57] This 'loss of care' forms part of a general neoliberal movement towards deregulation. And in this move we may see the economic subject come to dominate.

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This essay has provided a sketch of two contexts in which the *pharmakon* may provide useful in a critical account equitable concepts and practices. The *pharmakon* points us towards a consideration of the sickness (or problem) that equity remedies and how these remedies undermine from within and produce new objects. Thinking equity through the *pharmakon* also reminds us of the essentially indeterminate nature of equity; it is a remedial technique that *in itself* cannot be judged. Its critique must therefore be historical. In this regard a history of equity could be written from the perspective of the *pharmakon*, a mode of historical framing that resonates with the model of history as problematization.[58] Such a history would put particular emphasis on equity's mnemotechnics and knowledge practices. Alongside an historical pharmacology of equity, thinking Equity through the *pharmakon* reminds us that equitable remedies 'can never be *simply* beneficial'; they are *complex*, and they are *constitutive* of new problems, new objects, and new subjects. And, finally, they are political.[59]

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[57] On aspects of these shifts see J. Getzler, 'Financial Crisis and the Decline of Fiduciary Law' in C. Morris and D. Vines (eds), *Capital Failure: Rebuilding Trust in Financial Services* (Oxford University Press, 2014); A. Hofri-Winogradow, 'The Stripping of the Trust: A Study in Legal Evolution' (2015) 65 *University of Toronto Law Journal* 1.

[58] See M. Foucault, 'Polemics, Politics, and Problematizations' in P. Rabinow (ed), *Ethics: Subjectivity and Truth: Essential Works of Michel Foucault 1954-1984* (Penguin, 2000).

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