

The Culture of Equity in Restoration and Eighteenth-Century Britain and America

MARK FORTIER



THE CULTURE OF EQUITY IN RESTORATION AND EIGHTEENTH-CENTURY BRITAIN AND AMERICA

Drawing on politics, religion, law, literature, and philosophy, this interdisciplinary study is a sequel to Mark Fortier's book *The Culture of Equity in Early Modern England* (Ashgate, 2006). The earlier volume traced the meanings and usage of equity in broad cultural terms (including but not limited to law) to position equity as a keyword of valuation, persuasion, and understanding; the present volume carries that work through the Restoration and 18th century in Britain and America. Fortier argues that equity continued to be a keyword, used and contested in many of the major social and political events of the period. Further, he argues that equity needs to be seen in this period largely outside the Aristotelian parameters that have generally been assumed in scholarship on equity.

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MARK FORTIER

University of Guelph, Canada



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The cover image, from *Fables of Aesop and Others: Newly Done into English* (London, 1722), is courtesy of the William Andrews Clark Memorial Library, University of California, Los Angeles. It is an illustration of the fable “The Boy and His Mother.”

I dedicate this book to Gloria, Debra, Charlotte, Julia, Sarah, Courtney, Louisa, and Tugboat.

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Introduction

Equity as a Keyword

This present volume is in large measure a sequel to my previous study, *The Culture of Equity in Early Modern England*.¹ The culture of equity, as I see it, is not limited to law (as equity has most commonly been approached), but is at least as importantly at play in religion, politics, poetry, and revolution. My work began in the early modern period because I am trained as an early-modernist. Of necessity I glanced back at the long traditions, classical and Judeo-Christian, that have shaped equity, but a history of equity before the sixteenth century (and in contexts other than Anglo-American) is not something I have ever felt prepared to envision. My study, however, ended with an awareness of the differences between early modern equity and equity in our own time: equity remains an important word and set of ideas, but it is not the same complex that it was 400 years ago. That is to be expected. The present volume is an attempt to begin to bridge the history of equity, again largely outside narrowly legal parameters, from 1660 till now (leaving two centuries' worth of the story to be told by others). My familiarity with and focus on equity have given me the temerity to venture into a period of which my knowledge is otherwise decidedly that of a generalist. Once again, I limit myself to the English-speaking world, specifically Britain and British North America.

I have come to see the two books together as constituting a sprawling and incomplete supplement to Raymond Williams's *Keywords*. Williams's project was to select some of the words (he had to pare back his list a great deal in order to make it manageable) that have most influenced western culture and society and to show in relatively brief entries how the meaning and significance of these words have changed over time (equity is not one of Williams's keywords; neither is justice). Two aspects of Williams's work have particular resonance for me. First is that words matter—"some important social and historical processes occur within language."² Like Williams, I have a respect for rhetorical power. People write about important issues because they think words can make a difference. Equity is one of the words they have turned to, believing others will find it compelling. Second is that what often matters about words is not their definition but rather the

¹ Mark Fortier, *The Culture of Equity in Early Modern England* (Aldershot, UK: Ashgate, 2005). Much of the background material touched on in this present introduction is treated more elaborately in the earlier book.

² Raymond Williams, *Keywords: A Vocabulary of Culture and Society*, revised and expanded edition (London: Fontana, 1983), 22.

variation in their meanings.³ In my study of early modern England, I attempted a similarly twofold project: to show that equity was an important word in that period and to trace its various meanings and uses from early in the sixteenth century to 1660. To study equity is to follow the shifting relations between the word and its multiple associations. Here it is worth noting that Williams is more interested in the history of words than he is in ideas, although the two obviously overlap. Words and ideas are like fraternal twins: they share much in common, but they are not identical. What I have come to understand about equity is that it is both a word and a set of ideas, and that this distinction needs to be made and maintained. The two aspects of the project dovetail in my work because, as I argue, it is in large part because of the variety of its meanings and uses that equity was so prominent in early modern culture: it could be used by many people in many ways for many purposes, and its extensive presence, especially in polemical texts, indicates its presumed suasive force. People made arguments from various principles of equity in law, religion, and politics; explored its nuances in poetry, drama, and prose romance; and used it to support rebellion and revolution.

More needs to be said, however, about this notion of a keyword. What exactly makes something a keyword over and above a vague sense that a word has been somehow widespread or important? Williams writes that he means keywords in two senses: “they are significant, binding words in certain activities and their interpretation; they are significant, indicative words in certain forms of thought.”⁴ This seems less helpful, however, than some of the specifics he provides. Keywords range “from strong, difficult and persuasive words in everyday usage to words which, beginning in particular specialized contexts, have become quite common in descriptions of wider areas of thought and experience.”⁵ Keywords go through historical shifts and have changing meanings that illuminate important moments of historical change. They bring different strains of meaning together. They are interdisciplinary and bring together culture and society.⁶ In this way keywords upset commonsense belief in correct meanings: “Language depends, it can be said, on this kind of confidence, but in any major language, and especially in periods of change, a necessary confidence and concern for clarity can quickly become brittle, if the questions involved are not faced.”⁷ For keywords, it is often a question of meanings rather than meaning; for certain words, the range of meanings is what matters, and history takes words “quite beyond the range of proper meaning” into a “complexity of meanings.”⁸ Keywords exist in clusters of interrelated words.⁹

³ Williams, *Keywords*, 16–21.

⁴ Williams, *Keywords*, 15.

⁵ Williams, *Keywords*, 14.

⁶ Williams, *Keywords*, 12–14.

⁷ Williams, *Keywords*, 16.

⁸ Williams, *Keywords*, 17.

⁹ Williams, *Keywords*, 22.

My work shows over and over again, I believe, that equity is a keyword in all these senses,¹⁰ but let me provide a brief summary: equity is a difficult word, a persuasive word, in everyday language, arising from a particular context (law) but employed in many areas of thought. Its meanings and usages are interdisciplinary. Its meanings have shifted and changed through time. My previous book argued that the sixteenth and seventeenth centuries in England—certainly a time of social upheaval—can be seen in part as a “culture of equity”; this present volume attempts to show equity’s prominence in the long eighteenth century, another period of great change—the “age of revolution.” Equity unsettles commonsense notions of a correct meaning: to set one’s mind on a correct meaning for equity (Aristotelian, for instance) is to miss the nature of the keyword. Nor is my study slanted toward judging between uses of equity, valorizing some while disparaging others. As tempting as that might be, it defeats two basic directives of my work: treat what’s there and not what one would like to see there; don’t let a belief in “correct meanings” distract from the variability essential to a keyword. I, personally, for example, may be appalled by uses of equity to defend slavery, but that is not the main point of this book. As a work of “historical semiotics,”¹¹ my work, like Williams’s, is open to how words were actually used.

Equity exists within its own cluster of interrelated words, but it is a different cluster from the one Williams chooses to focus on. The words most interrelated with equity do not appear in Williams’s list: law, justice, conscience, reason (Williams does have rational as a keyword), right(s), fairness. One other important word in this cluster, as we shall see, does appear in Williams, but with a different focus from what arises in the context of equity. That word is *common*, and Williams is most interested in its classist meanings—as distinguished from the noble and higher.¹² Common in the context of equity has more to do with universality and human nature. As Williams’s work makes clear, awareness and analysis of the cluster of words that interrelate with equity are vital to a broader cultural and historical understanding; my primary focus, however, remains on equity and only secondarily on interrelated words.

Another aspect of a keyword and its usage that has become clear to me is the distinction between what we might call intensive and extensive usage (and the analysis that follows from one type of usage or the other). My work uses equity intensively—page by page and overall it is about equity. Some works in the early modern period use equity intensively: Edward Hake’s *Epieikeia*, William Lambarde’s *Archeion*, John Warr’s pamphlets, to name some prominent examples. Is equity used intensively in the eighteenth century? That is a question we will be coming to. But a word can also be used extensively: widely but sporadically, so

¹⁰ I am arguing primarily that Williams’s particular notion of a keyword helps elucidate the ways in which equity functions and secondarily that equity is a keyword, an important word in a more common sense.

¹¹ Williams, *Keywords*, 13.

¹² Williams, *Keywords*, 70–72.

that it isn't the focus of a particular work but appears occasionally but importantly in many, many works. The extensive use of equity, I dare say, is the real heart of the matter, even more so in the eighteenth century than in the sixteenth and seventeenth. Part of the methodology and deployment of evidence in my work is the myriad citation of the word and its cognates with only a few samples from any particular work. This deployment is necessary, I argue, not only to make my case that equity is a keyword, but also to indicate the particular dynamics of its predominantly extensive usage. My work, one might say, is an intensive study of the extensive use of equity. Moreover, I deploy instances of equity in several different ways. Throughout I attempt to keep the big picture clear: the dominant meanings of equity and their development. Particularly interesting instances are paused over and unpacked. To unpack each occurrence, however, would entail a volume many times the size of mine and would not add significantly to overall understanding. Often I let the examples merely accumulate: together they work to flesh out the big picture and to give weight to equity's extensiveness as a keyword; they are also offered as material for others to pursue.

Finally, I need to say something about the adjective equal. Equal is a common adjectival form for equity—that is to say, equitable—in the sixteenth and early seventeenth centuries and continues to occur through the later seventeenth and eighteenth centuries. It is imperative that the reader see past our present usage to ascertain when equal means equitable and has nothing necessarily to do with equality (this also holds true for the adverb equally). Examples occur throughout this study. Indeed, in the vast majority of citations in this study, I understand equal to mean equitable. Sometimes the overlaying of meanings—equal (in our common sense) and equitable—can be tricky. Here are three examples from Thomas Paine's revolutionary *Common Sense*: of kingship Paine writes, "the exalting one man, so greatly above the rest cannot be justified on the equal rights of nature." One could take this to mean there is a natural right to equality or equal rights to natural rights, but it more likely means the equitable rights of nature: what is not justifiable is to exalt one man "*so greatly* above the rest" (emphasis added). Paine is not standing for absolute equality but for proportionality, which is a quality of equity. Paine calls for a government "equally formed," which likely means equitably constituted, though it could mean founded on principles of equality. With American independence, Paine foresees the advent of "a free equal and tolerating government." This could mean a government that stands for freedom, equality, and toleration, but the syntax makes the phrase more persuasively read as meaning a government that is free, equitable, and tolerant.¹³

Equal in the equitable sense mirrors the various meanings of equity, although sometimes it adds its own particular color. A few examples from Alexander Pope's *An Essay on Man* can illustrate this point. God, we are told, sees "with equal eye"

¹³ Thomas Paine, *Common Sense: Addressed to the Inhabitants of America* (Philadelphia, 1776), 9, 29, 57.

“A Hero perish, or a Sparrow fall, / Atoms, or Systems, into ruin hurl’d, / And now a Bubble burst, and now a World!” The lesson to be drawn from this is

Hope humbly then; with trembling pinions soar;
Wait the great teacher, Death, and God adore!
What future bliss, he gives not thee to know,
But gives that *Hope* to be thy blessing now.¹⁴

Similarly, Pope expresses approval of the simple Indian, who “thinks, admitted to that equal sky, / [H]is faithful Dog shall bear him company.” The poet, moreover, thinks back to the prelapsarian time when man and animals, “All vocal Beings hymn’d their equal God.”¹⁵ A number of meanings are at play here. Firstly, God is equal, that is equitable, in the standard biblical sense of judging with equity. The equal sky is the seat of this god and the place of his final equitable reward following on his judgment. God watches the equitable and providential fates he has allotted to heroes and sparrows. There is as well a connection being made between equitable providence and equal providence, that is, one based in equality (a connection facilitated if not created by the shared meanings in the word *equal*). In the Argument to Epistle IV, Pope declares, “God intends Happiness to be equal” (both just and for everybody), and despite the “inequality” in the distribution of external goods, “the balance of Happiness among Mankind is kept even by Providence, by the two Passions of Hope and Fear.”¹⁶ In this way, “Equal is *common Sense*, and *common Ease*.”¹⁷ Thus the Indian sees his dog as a companion, an equal who deserves the same equitable fate as himself, and before the fall, God was equally the god of all creatures, and “Man walk’d with Beast, joint Tenant of the Shade; / The same his Table, and the same his Bed.”¹⁸ Finally, throughout the poem, Pope stands for the “equal eye” that can see God’s providence with equanimity and optimism, as the man with the dog does in his simplicity. The evenness of temper in this vision harkens back to one meaning of the Latin *aequus*. It should be noted that this equal eye sees the fall of a hero and the end of a world not with stoicism but with hope and a happy trust in the rightness of providence. It is through a familiarity with equity that these meanings of equal and their bonds reveal themselves.

¹⁴ Alexander Pope, *An Essay on Man, Being the First Book of Ethic Epistles* (London, 1734), 11–12.

¹⁵ Pope, *Essay*, 12, 46.

¹⁶ Pope, *Essay*, n.p.

¹⁷ Pope, *Essay*, 56.

¹⁸ Pope, *Essay*, 46.

What Does Equity Mean?

Williams's *Keywords* is not only a historical semiotics, but also a work in the history of ideas.¹⁹ Words and ideas are obviously intertwined. Equity is a word and a set of ideas. In the past I have posited that equity is an "essentially contested concept"—a concept with an internally complex character so that "no one use . . . can be set up as its generally accepted and therefore correct or standard use"²⁰ (note the similarity to what Williams says about the meanings of keywords). Now I am inclined to believe that it is several related "essentially contested concepts." I doubt that Hebrew ideas of equity, for example, are basically the same ideas as those that come from Aristotle. In this way, my work runs counter to a tradition, mostly neo-Aristotelian, that has seen equity as confined to one meaning or assimilating various meanings under one dominant sense. As such, my contribution to the history of ideas is an account not of the clear and linear development of one idea but rather of the complex and historically contingent interplay of multiple ideas (all associated with one word).

Equity is much like Edmund Blackadder, appearing with a difference at various important historical moments. Equity was important in the period of the present study in different ways than it was in the sixteenth and early seventeenth centuries. For a time the working title for this project was "What Happened to Equity in the Eighteenth Century?" The two long chapters of this book show equity in different historical situations. In the Restoration we see a concatenation of sameness and difference. The Restoration, in reversing the developments of the 1640s and 1650s, created a very different political and social context from the one that had immediately preceded it. This new context, with royalists in ascendance, was bound to influence how equity was used as a word and an idea. Nevertheless, although the political context had changed, in many ways the meanings of equity remained more or less what they had been, and equity largely retained the stubborn progressive and resistant quality it carried over from the first half of the century. In the second long chapter, we see much more striking change, as equity adopted progressive and radical associations different from those of the 1640s and 1650s, founded as those had been in Christian antinomianism and radical assertions of the free Christian conscience. Equity became much more a common set of progressive principles and practices based in natural law and right. Nevertheless, meanings and applications of equity are never, not even in one historical moment, uniform—so that all one can do is outline certain tendencies.

Very briefly, notions of equity in an Anglo-American context have four major sources: Aristotle's *Ethics* and *Rhetoric*; the Hebrew Bible and the New Testament, though one could easily count these as two different sources; the Roman notion of *aequitas*, from which technically the word *equity* is derived; the traditions and practices of English courts of equity, most prominently Chancery. Each of

¹⁹ Williams, *Keywords*, 13.

²⁰ See Fortier, *The Culture of Equity*, 21–22.

these provides different emphases, and in any particular period they are at play in different ways. Aristotelian ἐπιείκεια is an exception to positive law in situations where strict adherence to the law would create injustice; it is also prudence and moderation as an individual character trait. In the Hebrew Bible *equity* is most commonly the translation of a word meaning uprightness, and it describes God's judgment of his people and how good people should behave; in the New Testament "do unto others as you would have them do unto you" is often taken as the equitable basis of a benevolent, Christian society (equity thereby becomes associated with charity). Latin *aequitas* implies equality, evenness, levelness, balance, and fairness. English courts of equity, inter alia, impose exceptions to judgments at common law that seem unfair and posit the court of the conscience of the monarch, as God's lieutenant on earth, as above the courts of common law. Equity courts also support a certain kind of property right other than common law ownership (hence the equity one can have in one's home while still carrying a mortgage). In a legal framework equity also implies impartiality in a judge and is identified with certain metaphors such as the scales of justice (which also imply proportionality), or more disparagingly (legal equity has many detractors), the arbitrary measure of the Chancellor's foot. The Latin equitable maxim *salus populi lex suprema*—the well-being of the people is (or ought to be) the highest law—influenced the political view of England's court system, justifying Chancery and the king's position above the common law, although it could also be taken as a limit on royal power and grounds for rebellion.

So what did happen to equity in the eighteenth century? The culture of equity in the Restoration and eighteenth century as I trace it was predominantly political and social. Sophisticated exploration of equity in literary works that one finds in the sixteenth and earlier seventeenth centuries largely vanished (more on that later). Religious notions of equity remain very prominent but more often than not in association with political and social ideas. Equity as a way of evaluating political and social issues is ubiquitous. Equally important to note is the particular tenor of equity's interjections.

Given the scholarly tradition and its assumptions, for some the most striking finding of my study is likely to be how little Aristotle there is in the culture of equity in the Restoration and eighteenth century. I say this guardedly and wish to be careful about exactly what I mean. In part it is a strategic (though not inaccurate) statement meant to unsettle the Aristotelian orthodoxy of equity studies. In his 1797 edition of *Aristotle's Ethics and Politics*—the first complete translation of *Nicomachean Ethics* into English since 1547—John Gillies declared that Aristotle's works were "now rather admired than read," but nonetheless these two works especially were "useful to the people at large."²¹ What is striking about the second statement from the perspective of someone knowledgeable about Aristotle's reception in the sixteenth and seventeenth centuries is that Gillies felt the need to make it. In the earlier period discussions of equity most regularly refer

²¹ John Gillies, *Aristotle's Ethics and Politics*, volume 1 (London, 1797), v, xi.

to Aristotle. Even if they cite a range of meanings of equity not all Aristotelian, Aristotle will most likely be mentioned. There is likely to be a citation of Aristotle's term ἐπιείκεια or an English transliteration, such as *epiky*.²² Words like ἐπιείκεια or transliterations thereof are more or less unheard of in eighteenth-century writing (a few can be found in late-seventeenth-century religious discourse). Therefore, the first thing to be noted is the relative and unprecedented absence of explicit references to Aristotle in discussions of and appeals to equity in this period, especially after the end of the seventeenth century. This is the first thing I mean when I declare how little Aristotle there was. Of course, there could be a great deal of Aristotle at work without explicit reference to Aristotle. I am suggesting, however, that whatever influences of Aristotelian equity were at work, they had diminished from the previous period and other, predominantly non-Aristotelian notions were in ascendance.

Here we need to remind ourselves very briefly of what Aristotle says. In the *Ethics*, Aristotle posits ἐπιείκεια as "not the justice of the law courts but a method of restoring the balance of justice when it has been tilted by the law." Equity is "an exception to the rule" employed when a general rule would, in a particular, unforeseen case, cause an injustice.²³ Equity is separate from law, not a set of rules, but a particular ad hoc imposition in exceptional circumstances. Aristotle also posits equity as a particular virtue: "the equitable man is especially prone to have sympathy and fellow feelings for others."²⁴ These are the two basic notions of equity in Aristotle—in Gillies's words, "moderating strict justice, the justice founded on law"²⁵ and the quality of a man who "even when the law is on his side, will not avail himself of this advantage to treat others injuriously or unhandsomely."²⁶ Equity in the second sense perhaps lies behind notions of an equitable community (although Aristotle treats it as an individual quality—of a man "exceptionally prone" to sympathy), such as that in Christian thought, although the Hebrew Bible and the New Testament could be taken to have generated that idea independently, most prominently in the golden rule, "Do unto others as you would have them do unto you," a notion routinely identified as the essence of equity.

It is undeniable that equity in Aristotle's first sense is fundamental to the relations between equity and common law in Anglo-American jurisprudence. Nevertheless, there are certain aspects of Aristotelian equity that were comparatively deemphasized in the eighteenth century. Equity as exceptional is being replaced by a sense of equity as regular and common; equity as outside of

²² For the transliteration *epiky* see Hugh Latimer, *The Seconde Sermon of Maister Hughe Latimer* (London, 1549), 125. For a particularly rich example of transliteration, see William West, *The Second Part of Symboleography* (London, 1601), 174–175.

²³ Aristotle, *The Ethics of Aristotle* (Harmondsworth, Middlesex, UK: Penguin, 1955), 166, 167.

²⁴ Aristotle, *Ethics*, 186.

²⁵ Gillies, *Aristotle's Ethics and Politics*, 5n.

²⁶ Gillies, *Aristotle's Ethics and Politics*, 282.