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# EQUITY AS META-LAW

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## EQUITY AS META-LAW

**Abstract:** *With the merger of law and equity almost complete, the idea of equity as a special part of our legal system or a mode of decisionmaking has fallen out of view. This Article argues that much of equity is best understood as performing a vital function. Equity and related parts of the law solve complex and uncertain problems—including interdependent behavior and misuses of legal rules by opportunists—and do so in a characteristic fashion: as meta-law. From unconscionability to injunctions, equity makes reference to, supplements, and sometimes overrides the result that law would otherwise produce, while primary law operates without reference to equity. Equity operates on a domain of fraud, accident, and mistake, and employs triggers such as bad faith and disproportionate hardship to toggle into a “meta”-mode of more open-ended scrutiny. This Article provides a theoretical account of how a hybrid law, consisting of relatively simple and general primary-level law and relatively intense and directed second-order equity can regulate behavior better through these specialized modes than would homogeneous law alone. The Article tests this theory on the ostensibly most unpromising aspects of equity, the traditional equitable maxims, as well as equitable fraud, defenses, and remedies. Equity as meta-law sheds light on how the fusion of law and equity spawned multifactor balancing tests, polarized interpretation, and led to the confusion of equity with standards, discretion, purely public law, and “mere” remedies. Viewing equity as meta-law also improves on the tradeoff between formalism and contextualism and ultimately promotes the rule of law.*

## INTRODUCTION

No aspect of law is as pervasive and as misunderstood as equity. Doctrines from unconscionability to estoppel, defenses sounding in unclean hands and disproportionate hardship, remedies like injunctions and much of restitution, entire areas including trusts and corporate law, and much of our system of civil procedure all trace back to the courts of equity. As if that were not a sprawling enough menagerie of law, the whole idea of equity, associated as it was with courts that drew their share of justified criticism, was engulfed in the process of fusion,<sup>1</sup> which unified the court system and placed the distinctiveness of equity in a harsh and unflattering light. Common-law legal systems have been trying to digest equity ever since.

With limited success. After a century or so of fusion, equity refuses to be consigned to the dustbin of history. For all the efforts to diffuse it throughout the legal system, to assimilate it into law, or to abolish it altogether, equity hangs on by its fingernails. In this country, culprits

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<sup>1</sup> See, e.g., SIR JOHN BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 105-25 (5th ed. 2019); JOHN H. LANGBEIN, RENÉE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 267-412 (2009); F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 1-22 (A.H. Chaytor & W.J. Whittaker eds., 1936).

for the delay include the federal constitutional requirement of jury trial in civil cases,<sup>2</sup> which leads courts to distinguish legal issues that fall under this requirement from equitable ones that do not. Beyond that, equity is regarded as a mere hanger-on, benefiting from inertia rather than doing anything special to justify its continued existence.

This Article challenges that view. Contrary to the deflationary view of equity, a major theme of equity was, and is, to solve complex and uncertain problems by going to a new level of law. Equity is law about law, or meta-law.

What does it mean for equity to be meta-law? In the theory of language and in the theory of complex systems, orders are defined in terms of the domain of their operation. A meta-language takes a lower-order language as an input. Thus, when we talk about language we need to use a meta-language.<sup>3</sup> Likewise, a second-order component system acts on the output or the structure of the first-order system, but not vice versa.<sup>4</sup> Thus, a temperature-control module will take input information on temperature from a first-order component and act on the rest of the system in response. In terms of its operation, the temperature-control module presupposes the rest of the system, but the rest of the system operates without reference to temperature control. Similarly, some law regulates other law and needs to take it as an input. This Article will argue that meta-law in this sense is a theme of equity.

Going meta is usually done for functional reasons, and equity is no exception.<sup>5</sup> Like other meta-systems, equity addresses a special class of problems—those of high complexity and uncertainty, which lack foreseeability. By “complex” I do not mean complicated or having many parts. A system is complex when it is so interconnected that system behavior is difficult

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<sup>2</sup> U.S. CONST. amend. VII (“In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.”).

<sup>3</sup> See, e.g., John M. Rogers & Robert E. Molzon, *Some Lessons About the Law from Self-Referential Problems in Mathematics*, 90 MICH. L. REV. 992, 994-96 (1992) (explaining meta-language and formal language); William Ewald, *The Emergence of First-Order Logic*, STAN. ENCYCLOPEDIA PHIL. ARCHIVE (Nov. 17, 2018), <https://plato.stanford.edu/archives/spr2019/entries/logic-firstorder-emergence> [<https://perma.cc/QD67-JBCW>] (discussing the importance of the distinction between logic and meta-logic for raising issues of, inter alia, completeness, consistency, and decidability). The reason that generative linguistics has a precursor in ancient Indian grammar is that the Indian grammarians developed an explicit meta-language (an artificial form of Sanskrit) for expressing rules about Sanskrit itself. See Paul Kiparsky, *Pāṇinian Linguistics*, in 6 THE ENCYCLOPEDIA OF LANGUAGE AND LINGUISTICS 2918 (Ronald E. Asher & James M.Y. Simpson eds., 1993).

<sup>4</sup> See LUDWIG VON BERTALANFFY, *GENERAL SYSTEM THEORY: FOUNDATIONS, DEVELOPMENT, APPLICATIONS* 27-29, 74, 213-14 (1968) (discussing hierarchy in systems); JOHN H. HOLLAND, *HIDDEN ORDER* 11-12 (1995) (discussing aggregation and meta-agents); A.Y. Aulin-Ahmavaara, *The Law of Requisite Hierarchy*, 8 KYBERNETES 259, 261-62 (1979) (discussing required property of higher-order control mechanisms); Francis Heylighen & Cliff Joslyn, *Cybernetics and Second-Order Cybernetics*, in ENCYCLOPEDIA OF PHYSICAL SCIENCE & TECHNOLOGY 2-4, 10 (R.A. Meyers ed., 3d ed. 2001) (discussing motivations for moving to higher orders in cybernetics and the notion of systems of systems).

<sup>5</sup> Cf. Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1230 n.2 (“My colleague, Leon Lipson, once described a certain species of legal writing as, ‘Anything you can do, I can do meta.’ What follows is a pure instantiation of his category.”).

to trace to individual elements.<sup>6</sup> In complex systems such as brains, social networks, economies, and ecosystems—and the law—the action is in the connections, and not in the elements themselves.<sup>7</sup>

Problems combining high complexity and uncertainty are those best suited for meta-law. Increased variance at one level can be better handled by going to a higher level through another system that acts on the first-order system from outside.<sup>8</sup> Everything from safety systems to thermostats work this way. In law, complexity and its attendant uncertainty stem from at least three major phenomena isolated and explored in this Article. First, some problems involve many densely interacting elements and so are multiparty, multipolar, or, as is sometimes said, “polycentric.” Multiple parties with conflicting customary rights and potential third-party effects would be a prime example.<sup>9</sup> Second, conflicting presumptive rights that are each context-dependent lead to complexity and uncertainty, as in situations of good faith purchase or nuisances in which activities clash in a particular setting.<sup>10</sup> And third and quite characteristically for equity, deliberately caused or exploited uncertainty and complexity stem from the problem of opportunism, in which an actor takes unforeseen advantage of a rule that works under normal circumstances.<sup>11</sup> The traditional heading for this phenomenon was “constructive fraud” and included much of unconscionability and violation of custom.

All of these types of problems—polycentricity, conflicting rights, and opportunism—are defined functionally. They are special because multiplex interactions lead to hard-to-foresee results. It is exactly here that law, in its normal aspirations of ex ante certainty, is at its weakest. As Aristotle put it, equity intervenes when law fails because of its generality.<sup>12</sup> Courts have long cited this Aristotelian account,<sup>13</sup> especially when it comes to the question of when equity will intervene. The question thus becomes: when does law fail and why would it fail because of its generality?

The account offered here allows us to fill in this picture: because regular law seeks generality and ex ante certainty, it cannot handle situations in which intense interactions can lead to unforeseen and undesired results. Equity is a second system that corrects these problems from without and thereby allows law to be more general and certain than it otherwise could be. Despite equity’s reputation as a wild card, a combination of distinct law

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<sup>6</sup> MELANIE MITCHELL, *COMPLEXITY: A GUIDED TOUR* 3-4, 12-14 (2009); HERBERT A. SIMON, *THE SCIENCES OF THE ARTIFICIAL* 193-196 (2d ed. 1981).

<sup>7</sup> See, e.g., W. BRIAN ARTHUR, *COMPLEXITY AND THE ECONOMY* (2015); JOHN H. MILLER & SCOTT E. PAGE, *COMPLEX ADAPTIVE SYSTEMS: AN INTRODUCTION TO COMPUTATIONAL MODELS OF SOCIAL LIFE* (2007).

<sup>8</sup> See, e.g., VON BERTALANFFY, *supra* note 4,; see also HOLLAND, *supra* note 4, at 11-12 (discussing second-order agents and properties).

<sup>9</sup> See *infra* Section I.D.1.

<sup>10</sup> See *infra* Section I.D.2.

<sup>11</sup> See *infra* Section I.D.3.

<sup>12</sup> ARISTOTLE, *THE NICOMACHEAN ETHICS* 1137b, at 314-15 (H. Rackham trans., Harvard Univ. Press rev. ed. 1934).

<sup>13</sup> See *infra* note 58 and accompanying text.

and equity can promote the law's ends—including rule-of-law values—better than could a more homogeneous legal system.

The account of equity this Article offers is functional, rather than jurisdictional or historical. While equity jurisdiction has left traces all over the law and although equity is a major strand of the history of legal systems in the English-speaking world, the theory offered here focuses on a functional inquiry into what equity does. The jurisdiction and the history are relevant because they are the partly contingent vehicle through which a more basic function expresses itself. It is for that reason that we can speak of an “equitable” function rather than some anodyne “System II” of law that solves uncertain and complex problems with law’s “System I.”

This Article’s reconstruction of equity goes against the grain in another way. Simply put, complexity is seen as the weakness of equity.<sup>14</sup> And indeed equity’s opponents have stressed its arbitrariness, epitomized by the “Chancellor’s foot.”<sup>15</sup> I will argue that this view of equity gets things exactly backwards. Equity is part of law’s response to the world’s inevitable complexity. Explaining and justifying equity requires being clear on what functions it does and does not serve. The conventional view of equity is tenacious because it is plausible. Commentators are correct that not everything denominated “equitable” can receive a unified justification. And it is true that only by being justified functionally does equity deserve to survive. Putting these criticisms together, it would be hopeless to give a unified functional explanation of even a broad swath of such a seemingly variegated collection of legal odds and ends.

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<sup>14</sup> See, e.g., John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 945-46 (2005) (citing CHARLES DICKENS, *BLEAK HOUSE* 7 (George Ford & Sylvere Monod eds., W.W. Norton & Co. First Modern Library ed. 1985) (1853) (“Suffer any wrong that can be done you, rather than come [to Chancery]!”)). Other contemporaries made the same point less colorfully. Langbein, *supra*, at 945 n.70 (citing Baron Bowen, *Progress in the Administration of Justice During the Victorian Period*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 516, 527 (Ass’n of Am. Law Sch. ed., 1907) (“The middle classes were alarmed at [Chancery’s] very name, for it swallowed up smaller fortunes with its delays, its fees, its interminable paper processes.”)). See generally BAKER, *supra* note 1, at 120-22 (describing the “mischiefs” of the Chancery). It is worth noting that Dickens’s critiques of the equity court were superseded by reforms long before the book was published and have given a misleading picture of the nature of equity ever since. M.J. Leeming, *Five Judicature Fallacies*, in 1 HISTORICAL FOUNDATIONS OF AUSTRALIAN LAW: INSTITUTIONS, CONCEPTS AND PERSONALITIES 169, 171-72 (J.T. Gleeson, J.A. Watson & R.C.A. Higgins eds., 2013).

<sup>15</sup> BAKER, *supra* note 1, at 119-22. The most famous critique of equity is Selden’s:

Equity is a Roguish thing, for Law we have a measure, know what to trust to, Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure, we call a Chancellors Foot, what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellors Conscience.

JOHN SELDEN, *Equity*, in TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ.; OR HIS SENCE OF VARIOUS MATTERS OF WEIGHT AND HIGH CONSEQUENCE RELATING ESPECIALLY TO RELIGION AND STATE 18, 18-19 (London, Printed for E. Smith, 1689).

And yet. Nothing in the pages that follow will require us to fetishize the label “equity,” to engage in empty formalism, or to be ruled by the dead hand of the past. On the contrary, equity in American law is a response to universal problems in legal systems and human institutions generally. Equity serves a vital and dynamic function in the law and should be better understood.

This Article does not just fill the equity-shaped gap in our understanding of the law; it shows that there is such a gap in the first place. Although this Article focuses more on the theory of equity as a function that every legal system serves in some way, it sheds unique light on our system and where it comes from. The fusion of law and equity half obscured the essential role of equity, which now requires some excavation. Part of that process is overcoming reflexive skepticism that equity could be serving a characteristic function that does more good than harm. Thus, in this Article I focus on those aspects of equity that are the most resistant to making sense in our bottom-line-oriented, post-Realist age. As a major testing ground, I consider the maxims of equity. The maxims are as central to equity as they are dismissed as empty and malleable.<sup>16</sup> I will show that the role of the maxims is orthogonal to our expectations: rather than serving as clumsy rules or vague standards, they are signals that meta-law reasoning is taking place—a process that needs to be brought out in the open in order to understand equity in the first place. More generally, I will integrate much previous work on equity and show that it hangs together—as meta-law.

This Article reconstructs equity along functional lines. It begins in Part I with how equity developed as meta-law and where the current state of fusion leaves us today. It also sets out how equity as meta-law pervades the interstices between property and contract, and lays out equity’s domain and structure and how these have functioned and still do function as meta-law. Part II turns to a theoretical account of the specialization of equity as meta-law, drawing on notions of specialization and emergence in complex adaptive systems. This analysis shows that a combination of equity that specializes in solving complex, uncertain problems and regular law that focuses on providing relatively simple guidance can be superior to a homogeneous model that tries to do everything in an undifferentiated fashion. Part III tackles some of the biggest challenges for any account of equity’s specialness: the maxims of equity, varieties of fraud, equitable defenses, and remedies. With this positive picture in hand, Part IV turns to the place of equity in the legal system today. Seeing equity as meta-law allows us to understand why equity is so misunderstood as being reducible to standards, discretion, contextualized interpretation, public law, and, perhaps most commonly, “mere” remedies. All of these

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<sup>16</sup> Roger Young & Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175, 176 Roger Young & Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175, 176 (2003) (“[T]here is additional conflict among judges and others as to the utility of maxims. Many judges and practitioners proclaim the view that maxims are of little practical value in the real world.”). A similar state of affairs exists with respect to the canons of statutory construction, with similar criticisms being voiced. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 399-400 (1950).

misconceptions can be traced to the misfiring of fusion, giving rise to the polarization and exaggeration of certain problems and the obscuring of others. The Article concludes after some thoughts on the prospects for revitalizing equity as meta-law.

## I. THE NATURE OF EQUITABLE INTERVENTION

The current state of equity provokes skeptical questions about what “equity” is and what an account of equity should provide. Equity responds to some universal problems in human institutions, but it does so in historically contingent ways. It also responds to the very problem of generality in law in a particularized fashion. It is therefore easy to misunderstand. The history and philosophy of equity contain strands of meta-law, and its basic structure of domain, triggers, and ex post principles work together as a meta-system to solve problems of high uncertainty and complexity.

### A. The Tides of Equity

Theorists of equity frequently trace its origins to the Court of Chancery. By the early fourteenth century, a process was underway whereby the Lord Chancellor, dispensing justice as the “keeper of the King’s conscience,” began to act as a judicial official, and the Chancery to function as a court.<sup>17</sup> Among its functions was to entertain petitions by those seeking justice unobtainable in the law courts—in other words, those asking the Chancellor to do equity. Part of the Exchequer Court also developed an equity jurisdiction. The officials in charge of these courts were originally clerics, and they drew on civil and canon law in formulating their approach to equity.<sup>18</sup> The equity court had one power: to act against the person and hold them in contempt.

Equity courts would not change the law, but they could prevent people from enforcing legal judgments that were inequitable. So, for example, if someone accepted payment on a debt and promised not to sue, but the debtor did not secure the formality of a cancellation of the debt, the equity court would enjoin an action at law or a judgment on the debt as against conscience. Just this kind of intervention eventually led to a showdown between the law courts and the Chancery—pitting Edward Coke against Thomas Edgerton (Lord Ellesmere) and Francis

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<sup>17</sup> BAKER, *supra* note 1, at 107-12; 1 SIR FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 202 (Liberty Fund 2010) (1898); *see also* S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* 82 (2d ed. 1981) (“Few beginnings are so elusive as that of the chancellor’s equitable jurisdiction, and one reason is that the end is probably the most important and certainly the most astonishing of English contributions to legal thought.”).

<sup>18</sup> HAROLD J. BERMAN, *FAITH AND ORDER: THE RECONCILIATION OF LAW AND RELIGION* 55-82 (1993); Richard Hedlund, *The Theological Foundations of Equity’s Conscience*, 4 *OXFORD J.L. & RELIGION* 119, 123-24 (2015).

Bacon—in the early seventeenth century.<sup>19</sup> While equity ultimately prevailed, the equity courts developed doctrines of self-restraint to prevent further backlash.

In the seventeenth and eighteenth centuries, the equity courts adopted a kind of stare decisis and much of equity became regularized.<sup>20</sup> Nevertheless, equitable principles remained more open ended and were associated with “natural justice,”<sup>21</sup> even if the exact relationship has always been controversial.<sup>22</sup> Although common-law courts were also concerned with justice (with an occasionally defensive tone about it), the rigidities of the writ system and common-law procedure left much room for equity’s modulation. The problem with the common law at that time was not that it lacked the resources of meta-law altogether, but rather that it was unable to supply sufficient meta-law. In a sense, common-law reasoning contains elements of higher-order control: it is law which shapes and produces law at a primary level.<sup>23</sup> Nor was the “conflict” between law and equity always a genuine one. The development of the trust, which started out as law about law, and retains that formal structure, was not unwelcome in the law courts.<sup>24</sup> Procedurally, equity would exercise an auxiliary jurisdiction that allowed for collection of evidence from parties (affidavits, discovery) that were not possible at the time in the common-law courts.<sup>25</sup>

In the United States, law and equity started out more distinct in some places than in others. The U.S. Constitution affords the judicial branch equity power, which was originally vested in single courts with separate jurisdictions.<sup>26</sup> Some states, such as New York, had separate equity courts. Others had a single court with separate equity jurisdiction.<sup>27</sup> States

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<sup>19</sup> BAKER, *supra* note 1, at 116-18; *see also* Douglas Laycock, *The Triumph of Equity*, 56 LAW & CONTEMP. PROBS. 53, 53 (1993) (“The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won.”).

<sup>20</sup> *See, e.g.*, Dennis R. Klinck, *Lord Nottingham’s “Certain Measures,”* 28 LAW & HIST. REV. 711, 712-13 (2010).

<sup>21</sup> *See, e.g.*, Jennings v. Kotz, 132 N.E. 625, 627 (Ill. 1921) (“Equity is based on moral right and natural justice, and while it is not coextensive with them, equitable rights are established and enforced in accordance with principles of equity jurisprudence under some general principle or rule governing courts of equity.”); HENRY HOME KAMES, PRINCIPLES OF EQUITY 98 (Michael Lobban ed., Liberty Fund 2014) (1778).

<sup>22</sup> *See* 1 FRED F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE § 3 (1929) (arguing that it is fallacious to regard equity as based on natural justice).

<sup>23</sup> *See, e.g.*, Shyamkrishna Balganesh & Gideon Parchomovsky, *Structure and Value in the Common Law*, 163 U. PA. L. REV. 1241, 1244 (2015) (distinguishing the “jural meaning” of common-law concepts, its core, from “normative meaning,” which “refers to the meaning that a legal concept and its jural meaning come to be cloaked in as a result of external interpretive influences, which may in turn be drawn from a variety of situational goals”); *cf.* George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 977-79 (1981) (distinguishing the meta-level of law in discussing judicial reasoning and Dworkin’s jurisprudential theory); Sebastián Urbina, *Legal Reasoning and Formal Criteria of Recognition*, 15 LAW & PHIL. 1, 18-20 (1996) (identifying the “meta-level” in judicial reasoning).

<sup>24</sup> *See* J.E. Penner, *An Untheory of the Law of Trusts, or Some Notes Towards Understanding the Structure of Trusts Law Doctrine*, 63 CURRENT LEGAL PROBS. 653, 665-66 (2010); *infra* Section I.D.4.

<sup>25</sup> *See, e.g.*, HENRY L. MCCLINTOCK, HANDBOOK OF THE PRINCIPLES OF EQUITY 547-62 (2d ed. 1948).

<sup>26</sup> U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority.”); Robert von Moschzisker, *Equity Jurisdiction in the Federal Courts*, 75 U. PA. L. REV. 287, 289-90 (1927).

<sup>27</sup> *See id.* at 289-90.

tracing back to colonists with a suspicion of royal power tended to downplay equity, but were still not able to eliminate it altogether.<sup>28</sup>

Over time, the separateness of courts (or jurisdictions) became difficult to maintain, especially as matters become more complex. Cases would sometimes require the involvement of multiple courts, and the perils of choosing the wrong court could be severe. In the course of the nineteenth century, clamor grew for merger, and after some initial steps in that direction, England passed the Judicature Acts.<sup>29</sup> In this country, New York led things off with the Field Code of 1848, which many states imitated.<sup>30</sup> The nineteenth-century legislation provided that in situations of conflict the rule from equity would govern. Merger at the federal level followed in stages over the twentieth century, culminating in the Federal Rules of Civil Procedure.<sup>31</sup> The Federal Rules generally adopted equitable devices and an equitable style of notice pleading and liberal discovery.

In the late nineteenth and early twentieth centuries, fusion preoccupied legal reformers, who not only sought to overcome the jurisdictional clumsiness of two courts but promised thereby to solve virtually every ill in the legal system.<sup>32</sup> The merger of law and equity in the

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<sup>28</sup> See, e.g., Joseph H. Beale, *Equity in America*, 1 CAMBRIDGE L.J. 21, 22-23 (1921); Samuel L. Bray, *Equity: Notes on the American Reception*, in EQUITY AND LAW: FUSION AND FISSION 31, 36-38 (John C.P. Goldberg, Henry E. Smith & P.G. Turner eds., 2019); Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1202 (2005) (describing the conflict between parliamentarians and royalists lining up with the common law versus equity conflict, and noting its transplant to early America). For the early United States, see LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 54-55 (2d ed. 1985); and von Moschzisker, *supra* note 26, at 288-89. For (over)statements of this thesis, see, for example, Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 825 (1911).

<sup>29</sup> See Supreme Court of Judicature Act 1873, 36 & 37 Vict. c. 66 (Eng.); Supreme Court of Judicature Act 1875, 38 & 39 Vict. c. 77 (Eng.); BAKER, *supra* note 1, at 122-24; Stephen Waddams, *Equity in English Contract Law: The Impact of the Judicature Acts (1873-75)*, 33 J. LEGAL HIST. 185, 185-88 (2012).

<sup>30</sup> COMM'RS ON PRACTICE & PLEADINGS, FIRST REPORT OF THE COMMISSIONERS ON PRACTICE AND PLEADINGS: CODE OF PROCEDURE iii-iv (1848); Ralph E. Kharas, *A Century of Law-Equity Merger in New York*, 1 SYRACUSE L. REV. 186, 186-87 (1949).

<sup>31</sup> See ADVISORY COMM. ON RULES FOR CIVIL PROCEDURE, PROPOSED RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES 22-44 (1937); see also Kellen Funk, *The Union of Law and Equity: The United States, 1800-1938*, in EQUITY AND LAW: FUSION AND FISSION, *supra* note 28, at 46, 46-47 (sketching a history of the American debates and tensions over the fusion of law and equity); Patricia I. McMahon, *Field, Fusion and the 1850s: How an American Law Reformer Influenced the Judicature Act of 1875*, in EQUITY AND ADMINISTRATION 424, 424-25 (P.G. Turner ed., 2016) (discussing the debates leading to and statutes implementing core elements of procedural fusion).

<sup>32</sup> See, e.g., Charles T. McCormick, *The Fusion of Law and Equity in United States Courts*, 6 N.C. L. REV. 283, 285 (1928) ("Any separation of the stream of equity from the main channel of legal administration is today seen to be unjustifiable as an administrative device and explainable only as a historical survival from an era of multitudinous separate courts. The desirability of reforming the practice in Federal Courts by abolishing the formal distinctions between proceedings at law and in equity, in harmony with the modern practice in England and most of the States, seems too clear for argument."); Edward Robeson Taylor, *The Fusion of Law and Equity*, 66 U. PA. L. REV. 17, 17 (1917) ("In the fusion of law and equity lies, in the opinion of the writer, the one great object to be achieved, if we would reach anything like a true reformation of the evils of the present administration of justice."); see also Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 5 (1925) ("In fact it is unfortunate to continue to speak of law and equity, since that naturally tends to preserve old distinctions. The former principles of equity jurisprudence are now a part of our one body of applicable legal rules.").

United States reached its culmination in the Legal Realist era. The Legal Realists were suspicious of equity largely because they saw injunctions as a dangerous tool that courts had wielded overenthusiastically in labor and speech cases.<sup>33</sup> As time went on, equity skeptics also pointed to the inconveniences of the dual-court system and the intricacies of the rules at their interface.<sup>34</sup> As equity was seen as less extraordinary towards the end of the nineteenth century, it tended to slip its principles-based self-restraint, and started to produce strange situations of conflicting injunctions in corporate cases.<sup>35</sup>

Finally, and perhaps of most enduring significance, was the Realist effort at caricaturing the common law as “formalist” as part of a program to recast it in more policy-oriented terms. The Realists made their critique of formalism easier by playing down the traditional role of equity, an attitude foreshadowed by Oliver Wendell Holmes, Jr., who emphasized the unreasonable formalism of law by dismissing equity as a peripheral relic of clerical influence.<sup>36</sup>

In practice, conflict came to replace the creative tension of law and equity. Because the fusion of law and equity occurred in an era when the law’s formalism was increasingly unmoored from natural rights and natural law, the structures of common law and equity alike were regarded in increasingly positivist and reductionist terms. The law was treated as a collection of rules and flattened out. This reductionism, which seems almost like second nature now, can likewise be traced to the fount of modern thinking on the subject, Holmes’s *Path of the Law*. He avers that “a body of law is more rational and more civilized when every rule it contains is referred articulately and definitely to an end which it subserves, and when the grounds for desiring that

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<sup>33</sup> See, e.g., FELIX FRANKFURTER & NATHAN GREENE, *THE LABOR INJUNCTION* 47-53 (1930); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 169-73 (1999).

<sup>34</sup> Funk, *supra* note 31, at 59.

<sup>35</sup> *Id.* at 49-50.

<sup>36</sup> O.W. Holmes, Jr., *Early English Equity*, 1 *LAW Q. REV.* 162, 173-74 (1885) (describing equity claims as “relics of ancient custom”). He did not deal with equity separately in his book *The Common Law* or in his famous article, *The Path of the Law*, and in his account of contracts as promises to perform or pay damages he explicitly downplayed the importance of specific performance and equity. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *HARV. L. REV.* 457, 462 (1897) [hereinafter Holmes, *Path of the Law*] (“The duty to keep a contract *at common law* means a prediction that you must pay damages if you do not keep it,—and nothing else.” (emphasis added)). To be clear, he returns to equity:

I have spoken only of the common law, because there are some cases in which a logical justification can be found for speaking of civil liabilities as imposing duties in an intelligible sense. These are the relatively few in which equity will grant an injunction, and will enforce it by putting the defendant in prison or otherwise punishing him unless he complies with the order of the court. But I hardly think it advisable to shape general theory from the exception, and I think it would be better to cease troubling ourselves about primary rights and sanctions altogether, than to describe our prophecies concerning the liabilities commonly imposed by the law in those inappropriate terms.

*Id.* at 462-63; see also *id.* at 462 (discussing *Bromage v. Genning* (1616) 81 Eng. Rep. 540; 1 Roll. Rep. 368 (KB) (Lord Coke) (denying specific performance for a covenant to grant a lease)). Holmes was not against all morality in the law but sought objective standards. See, e.g., OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 130-40 (Boston, Little, Brown & Co. 1881) (describing moral elements of various torts); see also DAVID ROSENBERG, *THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY* 42-68 (1995) (discussing the “new jurisprudence”).

end are stated or are ready to be stated in words.”<sup>37</sup> This is reductionism of law to a heap of rules with no synergistic effect.<sup>38</sup> Rule and purpose have to be matched directly, leaving little room for doctrines to act in concert or for the law to exhibit a more articulated structure.

After fusion and the rise of common-law reductionism, what we are left with is a half-submerged, diffuse, and flattened equity. The rationale for equity as a separate system is hard to discern. So Maitland could say that the only thing unifying equity was a set of courts that no longer existed:

Equity is a certain portion of our existing substantive law, and yet in order that we may describe this portion . . . we have to make reference to courts that are no longer in existence. . . . The only alternative would be to make a list of the equitable rules and say that Equity consists of those rules. . . . [But] if we were to inquire what it is that all these rules have in common and what it is that marks them off from all other rules administered by our courts, we should by way of answer find nothing but this, that these rules were until lately administered, and administered only, by our courts of equity.<sup>39</sup>

Later, on this side of the Atlantic, Zechariah Chafee took the expansive post-Realist view that “[e]quity is a way of looking at the administration of justice; it is a set of effective and flexible remedies admirably adapted to the needs of a complex society; it is a body of substantive rules.”<sup>40</sup> Yet ultimately, he took Maitland’s idea “even farther” to say that “[e]quity is that body of rules which would be taught in courses called equity if there were any such courses.”<sup>41</sup>

Equity is submerged enough that many argue forcefully for complete fusion (with spirited pushback from some Australians).<sup>42</sup> Law and equity have been likened to having two sets of rules

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<sup>37</sup> Holmes, *Path of the Law*, *supra* note 36, at 469.

<sup>38</sup> See Henry E. Smith, *Systems Theory: Emergent Private Law*, in THE OXFORD HANDBOOK OF THE NEW PRIVATE LAW 143, 144, 158 (Andrew S. Gold, John C.P. Goldberg, Daniel B. Kelly, Emily Sherwin & Henry E. Smith eds., 2020) (discussing the heap-of-rules picture of law and the heap-of-sticks version of the bundle of rights theory and arguing that a systems theory helps overcome their limitations).

<sup>39</sup> MAITLAND, *supra* note 1, at 1.

<sup>40</sup> Zechariah Chafee, Jr., *Foreword* to SELECTED ESSAYS ON EQUITY, at iii (Edward D. Re ed., 1955).

<sup>41</sup> Zechariah Chafee, Jr., *Book Review*, 30 CORNELL L.Q. 405, 408 (1945) (reviewing HAROLD G. HANBURY, MODERN EQUITY: THE PRINCIPLES OF EQUITY (1943)).

<sup>42</sup> Andrew Burrows, *We Do this at Common Law but that in Equity*, 22 OXFORD J. LEGAL STUD. 1, 5 (2002) (arguing that law-versus-equity distinction is arbitrary, multiplies terminology, and prevents desirable fusion). *But see, e.g.*, Irit Samet, *What Conscience Can Do for Equity*, 3 JURISPRUDENCE 13, 14 (2012) (arguing that Kantian conscience can supply the standard for a distinct equity); P.G. Turner, “Mending Men’s Bargains” in *Equity: Mortgage Redemption and Relief Against Forfeiture*, 130 LAW Q. REV. 188 (2014) (analyzing *Cukurova Finance International Ltd v. Alfa Telecom Turkey Ltd* [2013] UKPC 20). In parts of Australia fusion happened late, and the strongest partisans for a distinct equity are to be found there. See J.D. HEYDON, M.J. LEEMING & P.G. TURNER, MEAGHER, GUMMOW AND LEHANE’S EQUITY: DOCTRINES AND REMEDIES § 2-140 (5th ed. 2015) (defining the “fusion fallacy” as drawing substantive legal consequences from legislation merging courts of law and equity). See generally PAUL M. PERELL, THE FUSION OF LAW

and umpires, red and green, in a soccer-like game. Substantive fusion stands for the idea that having one completely separate set of rules (purple) would be better than any other way of combining two potentially conflicting and necessarily incoherent sets of rules.<sup>43</sup> Most challenging is Glanville Williams's idea that two systems are inherently ridiculous:

Equity thus worked "behind the scenes" of the common law action; the common law principles were theoretically left intact, but by means of this intricate mechanism they were superseded by equitable rules in all cases of conflict or variance. The result justified the sarcasm of the critic who said that in England one court was set up to do injustice and another to stop it.<sup>44</sup>

Generally speaking, common-law countries share an impulse to assimilate law and equity to produce a unified set of rules. On the Holmesian and "modern" American view, the law was regarded as single-tiered device for solving problems as they arose. In the United States, fusion thus became an occasion to mix law and equity together and to prefer equitable-style contextualism, but without either constraints or the second-order aspect. Instead, considerations of commercial morality, fairness, and policy would in principle inform the development and application of rules across the board. By partial contrast, in England equity retained its separate character to a greater extent, but there too it was increasingly placed on one plane with the regular law. However, instead of allowing equitable contextualism and discretion to slip its traditional bounds, English courts developed ever more baroque doctrine to solve the problems of polycentricity, conflicting rights, and opportunism on a single level.<sup>45</sup>

Equity has been further obscured because of its dynamic relation to law over time. A common fusionist objection to theories of equity is that the label "equity" and the equity courts' jurisdiction both varied over time. What was once equity has sometimes become law. For example, some varieties of fraud were first handled by equity before gradually being brought under the heading of common-law fraud.<sup>46</sup> If we focus on which specific problems and which particular rules were associated with "equity" at various times, the associations look arbitrary. If, as I will argue, we focus on equity's role in tackling new problems and domesticating them

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AND EQUITY (1990) (recounting the fusion of law and equity and arguing that through the adoption of stare decisis equity had become rigid before the passage of the Judicature Acts). The controversy is not just academic but judicial. *Compare* *United Sci. Holdings Ltd. v. Burnley Borough Council*, [1978] AC 904 (HL) 925 (appeal taken from Eng.) ("[T]he waters of the confluent streams of law and equity have surely mingled now."), *with* *GR Mailman & Assocs. Pty Ltd v. Wormald (Aust) Pty Ltd* [1991] 24 NSWLR 80, 99 (Austl.) ("[In *United Scientific Holdings v. Burnley Borough Council*] Lord Diplock . . . expressed the remarkable view that the [Judicature Act 1873] effected a 'fusion' of law and equity so that equity as a distinct jurisprudence disappeared from English law. That view is so obviously erroneous as to be risible, and one may confidently anticipate that no Australian court will ever follow it in that regard.").

<sup>43</sup> SARAH WORTHINGTON, *EQUITY* 4-6 (2d ed. 2006).

<sup>44</sup> GLANVILLE WILLIAMS, *GLANVILLE WILLIAMS: LEARNING THE LAW* 25 (A.T.H. Smith ed., 16th ed. 2016) (critiquing separate systems of law and equity).

<sup>45</sup> Joshua Getzler, *Patterns of Fusion*, in *THE CLASSIFICATION OF OBLIGATIONS* 157, 192-93 (Peter Birks ed., 1997).

<sup>46</sup> *See, e.g.*, D. J. IBBETSON, *A HISTORICAL INTRODUCTION TO THE LAW OF OBLIGATIONS* 208-09 (1999).

through meta-law, we begin to see that these associations are rather the byproduct of a coherent function.<sup>47</sup>

Not everyone is a fusionist. Before very recently, equity traditionalists, particularly in Australia, have argued for equity's distinctness from law. They term the expectation that unified courts should produce uniform law the "fusion fallacy."<sup>48</sup> They are onto something here, and likewise when they aver that "[e]quity can be described but not defined."<sup>49</sup> However, in their pronouncements that "[e]quity is not a set of rules but a state of mind,"<sup>50</sup> noninitiates hear impenetrable mysticism. The holism endorsed by equity's defenders is not misplaced—those aspects of equity that are meta-law cannot easily be reduced to a first-order concept without losing something. But since a definition of equity as a first-order concept will be inaccurate or hopelessly vague, the fusionists and traditionalists are speaking past each other. Their views are orthogonal, almost literally.

More recently, moderate fusionist positions and moderate nonfusionist positions have also come into play. For example, based on policy reasons specific to context, Leigh Anenson would extend unclean hands in a limited way to damages actions at law,<sup>51</sup> whereas Samuel Bray performs a similar kind of analysis to conclude that laches should be confined to equitable claims and remedies.<sup>52</sup> Seeing a role for meta-law will allow us to differentiate functionally between situations calling for fusion of law and equity, and those contexts where they should be kept distinct conceptually, if no longer institutionally.<sup>53</sup>

## B. The Roots of Equitable Meta-Law

For an aspect of the legal system that has been semiobscured through fusion's influence on our post-Realist system of law, equity has strikingly long and deep roots within the Western intellectual tradition. This tradition and many other tributaries which feed into modern equity bear the signs of meta-law.

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<sup>47</sup> See *infra* notes 235-238 and accompanying text.

<sup>48</sup> The term "fusion fallacy" has developed among those, especially in Australia, who criticize the substantive blending of law and equity. HEYDON, LEEMING & TURNER, *supra* note 42, § 2-140 (defining "fusion fallacy").

<sup>49</sup> *Id.* § 1-005. This is the treatise's opening statement. The opening section is entitled "The History of Equity in England Before 'Fusion'" (note the scare quotes).

<sup>50</sup> Lord Millett, *The Common Lawyer and the Equity Practitioner*, 6 U.K. SUP. CT. Y.B. 175, 175 (2018).

<sup>51</sup> T. LEIGH ANENSON, *JUDGING EQUITY: THE FUSION OF UNCLEAN HANDS IN U.S. LAW* 126 (2019).

<sup>52</sup> Samuel L. Bray, *A Little Bit of Laches Goes a Long Way: Notes on Petrella v. Metro-Goldwyn-Mayer Inc.*, 67 VAND. L. REV. EN BANC 1, 8 (2014); see also Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201, 1238 (1990) (arguing on functional grounds for "retaining separate defenses to equitable relief").

<sup>53</sup> See Henry E. Smith, *Fusing the Equitable Function in Private Law*, in *PRIVATE LAW IN THE 21ST CENTURY* 173, 185-87, 193-94 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017) (employing the notion of meta-law to evaluate varieties of fusion of law and equity).

In his *Nicomachean Ethics*, Aristotle summed up the nature of equity (*epieikeia*) as “a rectification of law where law is defective because of its generality.”<sup>54</sup> Indeed, there are hints in Aristotle of a meta-law function for equity: equity is a correction (*epanarthoma*), a term he uses repeatedly and which denotes something second order.<sup>55</sup> At any rate, equity is distinct from law and corrects the law—not the other way around.

This tradition extends through the Middle Ages into the modern era.<sup>56</sup> In *The Earl of Oxford’s Case*, which set off the jurisdictional crisis of the early sixteenth century, Lord Ellesmere echoes Aristotle in averring that “The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances.”<sup>57</sup> Courts and commentators continue to cite the Aristotelian notion to this day.<sup>58</sup>

A notion of equity as meta-law has been implicit in the equitable tradition. That equity acts in personam is often shorthand for how equity is apart from the law and only works on it indirectly. At times, equity as meta-law comes through more clearly. Robert Chambers, Blackstone’s successor at Oxford, dealt with equity in his four final Vinerian Lectures in collaboration with Samuel Johnson.<sup>59</sup> In a much more sympathetic treatment than

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<sup>54</sup> ARISTOTLE, *supra* note 12, 1137b, at 316-17; *see also* ARISTOTLE, ART OF RHETORIC 1374a-b, at 141-45 (Gisela Striker ed., J.H. Freese trans., Harv. Univ. Press 2020) (discussing equity).

<sup>55</sup> In arguing that equity is superior to any particular instance of justice, Aristotle also uses both a term for morally superior (*beltion*) and a term that suggests greater might (*kreitton*), which again suggests a meta-level. ARISTOTLE, *supra* note 12, 1137b, at 314-15. Intriguingly, in other contexts *kreitton* can also mean “having power over.”

<sup>56</sup> *See, e.g.*, 2 THOMAS AQUINAS, SUMMA THEOLOGICA q. 96, art.6, at 73-75 (Fathers of the English Dominican Province trans., Benziger Bros. ed. 1915) (discussing how law should be simple and general and conditions under which someone can go beyond it); *id.* at q. 120, art.1-2, at 168-71 (“[L]egal justice is subject to the direction of *epikeia*. Hence *epikeia* is by way of being a higher rule of human actions”); 1 WILLIAM BLACKSTONE, COMMENTARIES \*62 (discussing equity); CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 94-107 (T.F.T. Plucknett & J.L. Barton eds., 1974) (discussing Aristotelian equity); Max Radin, *A Juster Justice, A More Lawful Law*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY 537, 541-43 (Max Radin & A.M. Kidd eds., 1935) (discussing Aristotle’s *epieikeia* and comparing uses of the term in other sources); *see also* Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 LAW & CONTEMP. PROBS. 263, 270-75 (1996) (documenting the influence of Aristotelian equity on Anglo-American law). *But cf.* Darien Shanske, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053, 2066 (2005) (arguing that Aristotle’s equity was not primarily legal).

<sup>57</sup> *The Earl of Oxford’s Case*, 21 Eng. Rep. 485, 486 (Ch. 1615).

<sup>58</sup> *See, e.g.*, *Riggs v. Palmer*, 22 N.E. 188, 189 (N.Y. 1889) (quoting Aristotle on equity); William F. Walsh, *Is Equity Decadent?*, 22 MINN. L. REV. 479, 483 (1938) (arguing that equity does not exist “simply to grant discretionary relief in hard cases at law,” and that its “function is very much broader” and “may fairly be regarded as the spiritual and reforming influence of the law, correcting deficiencies in the law where legal relief is inadequate, and leading the way to reforms in the law”).

<sup>59</sup> 2 ROBERT CHAMBERS, A COURSE OF LECTURES ON THE ENGLISH LAW 1767-1773, at 228-63 (Thomas M. Curley ed., Univ. of Wis. Press 1986) (1767-1773).

Blackstone's,<sup>60</sup> Chambers elaborates on the kind of uncertainty that gives rise to the problem of law's generality and how that calls for what we might call meta-law:

The end of all law is *suum cuique tribuere*, to give to every man that which he may justly claim, and the design of all juridical maxims and institutions is to adjust and satisfy the various degrees of right which may arise in [myriad circumstances]. These combinations, being indefinitely variable and increasing every day as new schemes of action produce new relations among men, could never be all foreseen by any legislator, and therefore cannot have been all comprehended in any law. It will therefore sometimes happen that those rules which were made to secure right would if they were closely observed establish wrong, because they would operate in a manner not foreseen when they were made. Upon these occasions the aid of equity is solicited, not properly to control or supersede the law, but so to regulate its operation that it may produce the effect which the law always intends. The decisions of equity as contradistinguished from those of law are not *contra legem* but *praeter legem* [not *against law* but *beyond law*], they do nothing which the law forbids, they do only what the law desires but cannot perform.<sup>61</sup>

Chambers goes on to echo Aristotle in making the measure of the equitable what the legislator would have wanted. Interestingly, Chambers also extends Aristotle by specifying why law fails on account of its generality, and in particular points to the combinatorial power of interacting shifting circumstances, almost in the terms of modern complex-systems theory. Further, Chambers (perhaps Johnson) brings out the nature of the second-order quality of equity that it "regulates" the law without changing it, altering its application to serve its ends.<sup>62</sup>

In the United States, reflections on equity contain hints of meta-law. In Federalist 83, Alexander Hamilton argues for separate equity courts, citing the desirability of keeping exceptions segregated from the "general" rules.<sup>63</sup> Later in the federalist tradition were other prominent proponents of equity, James Kent and James Story, the latter of whom supported

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<sup>60</sup> Blackstone downplayed equity's specialness, emphasized the justice in the common law, and favored the fusionist tendencies of Mansfield. See, e.g., DAVID LIEBERMAN, *THE PROVINCE OF LEGISLATION DETERMINED: LEGAL THEORY IN EIGHTEENTH-CENTURY BRITAIN* 84-86 (1989); W.S. Holdsworth, *Blackstone's Treatment of Equity*, 43 HARV. L. REV. 1, 11 (1929).

<sup>61</sup> CHAMBERS, *supra* note 59, at 230-31 (footnote omitted).

<sup>62</sup> Trying to figure out which parts of the Lectures might have been written by Johnson is a hazardous enterprise, but it is suggestive that Johnson in a letter to Boswell advising Boswell on a case he was handling as a lawyer, used the term "regulates":

Concerning the power of the Court to make or suspend law, we have no intention to inquire. It is sufficient for our purpose that every just law is dictated by reason, and that the practice of every legal Court is regulated by equity. It is the quality of reason to be invariable and constant; and of equity, to give to one man what, in the same case, is given to another.

E.L. McADAM JR., *DR. JOHNSON AND THE ENGLISH LAW* 132-34 (1951), cited and discussed in Jeffrey O'Connell, *Diverse Doctor Johnson: Among Other Things, a Lawyer's Lawyer*, 65 NOTRE DAME L. REV. 617, 635-37 (1990).

<sup>63</sup> THE FEDERALIST NO. 83, at 338 (Alexander Hamilton) (J. McLean & A. McLean eds., 1788).

separate courts for reasons similar to Hamilton's.<sup>64</sup> One can discern an implicit meta-law in these sophisticated defenses of the two-court system. And in his description of the two-court system, Oliver S. Rundell gives perhaps the clearest formulation of equity as meta-law:

The common-law courts . . . acted in general *with bland disregard of equity's doings*. Equity, on the other hand, acted *in the light of a full recognition of the activities of the common-law courts and of the rules of the common law which it admitted were binding upon it*, though often frustrating those activities and nullifying those rules by denying to individuals brought before it the right to take advantage of them.<sup>65</sup>

Even Maitland, who was skeptical about any substantive theme of equity, recognized that equity presupposes the law and not vice versa. As he put it: if equity had been abolished, "in some respects our law would have been barbarous, unjust, absurd."<sup>66</sup> And yet, by contrast, abolishing common law would have meant "anarchy," because "[a]t every point equity presupposed the existence of common law."<sup>67</sup> In his famous formulation, "Equity without common law would have been a castle in the air, an impossibility."<sup>68</sup> There can be no meta-law without law.

Equity's role in modifying the law through individualized moral analysis also arises in legal systems over time.<sup>69</sup> Abuse of right in civil-law systems partially serves the functions of equity in our system.<sup>70</sup> Parts of the common law can be regarded as "equitable" in our functional sense. Examples include quasi-contract and parts of nuisance, which were legal in jurisdiction but equitable in style.<sup>71</sup> Even an adversary of jurisdictional equity like Coke saw

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<sup>64</sup> JOSEPH STORY, *Chancery Jurisdiction*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 148, 169-79 (Boston, Charles C. Little & James Brown 1852).

<sup>65</sup> Oliver S. Rundell, *The Chancellor's Foot: The Nature of Equity*, 27 U. KAN. CITY L. REV. 71, 82 (1958) (emphasis added). Cote uses the interesting metaphor of "different planes," which captures the separate systems he argues still operate after fusion, without being clear on their hierarchical relationship when equity serves as meta-law. J. E. Cote, *Ex Parte Maitland*, 4 ALTA. L. REV. 134, 140-41 (1965).

<sup>66</sup> MAITLAND, *supra* note 1, at 19.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> See generally RALPH A. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* (1961) (surveying and analyzing equity across legal systems).

<sup>70</sup> On abuse of right, see, for example, Larissa Katz, *Spite and Extortion: A Jurisdictional Principle of Abuse of Property Right*, 122 YALE L.J. 1444, 1448-52 (2013); Joseph M. Perillo, *Abuse of Rights: A Pervasive Legal Concept*, 27 PAC. L.J. 37, 38-47 (1995); Anna di Robilant, *Abuse of Rights: The Continental Drug and the Common Law*, 61 HASTINGS L.J. 687, 688-95 (2010); and A.N. Yiannopoulos, *Civil Liability for Abuse of Right: Something Old, Something New . . .*, 54 LA. L. REV. 1173, 1192-93 (1994), which notes similarities and differences between abuse of right and equity.

<sup>71</sup> JAMES BARR AMES, *LECTURES ON LEGAL HISTORY* 166 (1913) (referring to "essentially equitable quasi-contracts"). On jurisdiction, see 8 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 87-88, 97 (1924). See also *Moses v. Macferlan* (1760) 97 Eng. Rep. 676, 680-81 (KB) ("This kind of equitable action, to recover back money, which ought not in justice to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, ex aequo et bono, the

“discretion [as] a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections.”<sup>72</sup> As we will see, this rationale of discretion is not inconsistent with equity as meta-law.

The aspect of equity as meta-law can be found implicitly in its long history. The structure of separate equity courts allowed the idea of correction or regulation of the law to come to the fore. Later, in the process of merging law and equity courts, there was no reason in principle for this equitable meta-law to disappear, but a combination of Realist-inspired skepticism of doctrine and a lack of appreciation of meta-law woven in among the strands of equity has led to the semiobscuring of equity as meta-law. The legal system still contains meta-law, and its association with “equity” has not disappeared, but equity has sometimes been displaced by less apt substitutes such as multifactor balancing tests or has been recast as amorphous discretion. There is a better way to handle certain kinds of uncertainty and complexity, and I will argue that reviving equity as meta-law should be part of such reform.

### **C. Functional Equity**

The functional account of equity offered here is grounded in the special kinds of problems that meta-law is suited to solve. Problems involving a high degree of variability and uncertainty call for meta-law, just as such problems call for higher-order “control” systems in a wide variety of settings, from industrial temperature regulation to software design to administrative regulation.<sup>73</sup> As we will see in Part II, allowing for meta-law to address these problems at a higher level in a specialized fashion allows the rest of the law to be simpler and more general than it otherwise could be. The resulting system can work better than can a single homogeneous law.

#### **1. The Problems of Equity**

Certain problems of high variability and uncertainty are characteristic of legal settings. Without claiming to be exhaustive, we can include on this list polycentric tasks, conflicting presumptive rights, and opportunism.

*(a) Multipolar Problems and Polycentricity.* Polycentric tasks are those that involve many items (people, objects, activities) and many interdependencies, leading to complexity. As a classic

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defendant ought to refund: it does not lie for money paid by the plaintiff, which is claimed of him as payable in point of honor and honesty . . . . In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”). *But cf.* *Marriott v. Hampton* (1797) 101 Eng. Rep. 969, 969 (KB) (allowing defendant to keep undue payment from plaintiff because “[a]fter a recovery by process of law there must be an end of litigation”); *Phillips v. Hunter* (1795) 126 Eng. Rep. 618, 625-26 (Exch. Ch.).

<sup>72</sup> *Rooke’s Case* (1598) 77 Eng. Rep. 209, 210 (CP).

<sup>73</sup> See *supra* note 4 and accompanying text.

polycentric legal problem, Lon Fuller offered the division of a collection of paintings left under a will to two museums in the absence of further instructions.<sup>74</sup> What makes the problem polycentric is that the value of any painting to either museum depends on which other paintings the museum gets. As the number of paintings increases, so does the difficulty of allocation. With dense interconnection, computational complexity increases exponentially with the size of the problem.<sup>75</sup>

Equity's role in solving these multiparty problems gave rise to devices like joinder and the class action, and is the source of the devices for complex litigation familiar in the Federal Rules of Civil Procedure.<sup>76</sup> Equity also plays an important role in complex, multiparty situations like water disputes under prior appropriation.<sup>77</sup> Such settings connect equity and public law, of which equity's longstanding relationship with administrative law is a particular example.<sup>78</sup>

Polycentric problems pervade the field of equity. A clear example is multiparty litigation with multiple interlocking claims. One difference between an action for accounting and an action for tort damages is that in the former the elements of a situation must be adjusted with respect to each other on both sides of the balance.<sup>79</sup> Should, for example, efforts by a defendant fiduciary count against gains subject to "disgorgement"? Whereas damages are keyed to losses sustained by plaintiffs, an accounting involves investigation with a view to

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<sup>74</sup> Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978), reprinted in LON L. FULLER, *The Forms and Limits of Adjudication*, in THE PRINCIPLES OF SOCIAL ORDER: SELECTED ESSAYS OF LON L. FULLER 86, 87-88 (Kenneth I. Winston ed., 1981) (introducing the concept of polycentric tasks); see also MICHAEL POLANYI, THE LOGIC OF LIBERTY 170-71 (1951) (likening the problem of polycentric order to calculating the displacement of pinpoints on a framework with loaded weights). Fuller saw polycentric problems as calling for administration, which makes sense in that equity and administration have a close connection. See *infra* note 78 and accompanying text.

<sup>75</sup> Like many classic problems in complexity theory, the time required to solve the problem sometimes increases exponentially as the size of the problem—here the number of paintings—increases. The problem here is reminiscent of the famous "Knapsack Problem," which requires one to pick  $n$  objects under a weight limit that will maximize value and whose full solution is probably "intractable" ("NP-complete"). See RAYMOND GREENLAW & H. JAMES HOOVER, FUNDAMENTALS OF THE THEORY OF COMPUTATION: PRINCIPLES AND PRACTICE 287-313 (1998); KEITH DEVLIN, THE MILLENNIUM PROBLEMS: THE SEVEN GREATEST UNSOLVED MATHEMATICAL PUZZLES OF OUR TIME 105-30 (2002).

<sup>76</sup> Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 868 & n.4 (1977) (citing ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY 149-295 (1950)).

<sup>77</sup> See Duane Rudolph, *Why Prior Appropriation Needs Equity*, 18 U. DENV. WATER L. REV. 348, 363 (2015) (noting the role of equitable apportionment and equitable remedies in multiparty complex water disputes under prior appropriation).

<sup>78</sup> The early proponents of the administrative state pointed to equity as a precedent for their efforts. See, e.g., ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 111-35 (1922) (drawing parallels between equity and administration in terms of the need to supplement mechanical law with flexible solutions to problems of change); see also L.J. JAMES McCAULEY LANDIS, *Statutes and the Sources of Law*, in HARVARD LEGAL ESSAYS 213, 213-16 (1934) (drawing on equity to justify the administrative state), reprinted in 2 HARV. J. ON LEGIS. 7 (1965); see also Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEX. L. REV. 244, 253-54 (1945) (presenting administration as the new equity). See generally Henry E. Smith, *Equity and Administrative Behaviour*, in EQUITY AND ADMINISTRATION, *supra* note 28, at 326 (examining administrative law's equitable background).

<sup>79</sup> See Samuel L. Bray, *Fiduciary Remedies*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW 449, 452-54 (Evan J. Criddle, Paul B. Miller & Robert H. Sitkoff eds., 2019).

bringing about the defendant's performance of duties. The accounting looks to both sides of the ledger and isolates net profits – the illicit gains minus legitimate costs in producing them.<sup>80</sup>

Perhaps most familiar is the remedy of injunction. Despite a tendency to see it simply as a supracompensatory remedy—as a property rule rather than a liability rule<sup>81</sup>—the injunction is actually multidimensional (along time and activity) and responds to interdependent actors in a flow chart of decisionmaking that depends on the type of situation.<sup>82</sup>

*(b) Conflicting Rights.* Equity as meta-law is also well suited to resolving situations of conflicting rights. Where two or more parties hold presumptive but conflicting rights, one solution is to define rights better ex ante. A better alternative is often to leave the presumptive rights in place and to reconcile them ex post based on an equitable, context-sensitive style of reasoning.<sup>83</sup> That is, dealing with the problem at the second order is simpler and more transparent than trying to build a solution into the system at the first level.

A paradigmatic case of conflicting rights comes from the law of nuisance, in which a contextualized inquiry forms the basis for resolving conflicts over resource use between two parties who have a prima facie “right” to do what they are doing.<sup>84</sup> Consider the traditional principle *sic utere tuo ut alienum non laedas* (use what is yours so as not to injure another's). Principles such as these reflected a natural rights approach in which one would work out the mutual rights and duties that would maximize mutual freedom and autonomy in a symmetric fashion.<sup>85</sup> Traditional nuisance analysis involved reconciling conflicting rights using second-order analysis. First, a court would ask how the complained-of activity compared to what was expected in the locality. It would then consider factors like avoidability, good faith, priority, and disproportionate hardship, all the while under the constraint that the resultant packages of rights should be symmetric.<sup>86</sup> The idea was to create an interface between parcels that would

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<sup>80</sup> *Id.*

<sup>81</sup> See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1089-90, 1105-06 (1972); *infra* notes 347-350 and accompanying text.

<sup>82</sup> See Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 225-42 (2012).

<sup>83</sup> See, e.g., *Campbell v. Seaman*, 63 N.Y. 568, 568-69 (1876).

<sup>84</sup> John C. P. Goldberg & Henry E. Smith, *Wrongful Fusion: Equity and Tort, in EQUITY AND LAW: FUSION AND FISSION*, *supra* note 28, at 309, 315; Smith, *supra* note 53, at 190-91.

<sup>85</sup> H.G. WOOD, *A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS; INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY* 2 (Albany, NY: John D. Parsons, Jr., 1st ed. 1875) (setting forth mutual accommodation approach to nuisance). For a variety of views on the natural rights paradigm and its decline, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 31-74 (1977); (natural rights paradigm declines because of its instability); Robert G. Bone, *Normative Theory and Legal Doctrine in American Nuisance Law: 1850 to 1920*, 59 S. CAL. L. REV. 1101, 1137-84 (1986) (charting developments in the competing rights model of nuisance); Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1409-13 (2010) (arguing for superiority of natural rights over law and economics approach to nuisance); Jeff L. Lewin, *Boomer and the American Law of Nuisance: Past, Present, and Future*, 54 ALB. L. REV. 189, 198-209 (1990) (drawing out phases of nuisance law growing out of earlier natural rights paradigm).

<sup>86</sup> See, e.g., Goldberg & Smith, *supra* note 84, at 315-19; Smith, *supra* note 53, at 190-91.

protect landowners in a freedom-maximizing way.

While maintaining a second-order style of nuisance law does not require natural-rights or natural-law foundations, the loss of those moorings for nuisance led to the futile search for a single-level replacement for nuisance's two-tier structure. The Legal Realists made it conventional wisdom that *sic utere* is an empty question-begging phrase,<sup>87</sup> good in principle but useless as a grounds for decision because it does not determine any right or obligation.<sup>88</sup> Much has been made of how pre-Realist law supposedly had no theory of "harm without injury."<sup>89</sup> As a result, the analysis of nuisance has become a mystery, devolving into a multifactor balancing test.<sup>90</sup> This is symptomatic of equity gone wrong. Any attempt to reduce nuisance analysis to a single level will leave it hopelessly confused and complex.

To take another example, consider the doctrine of "coming to the nuisance."<sup>91</sup> Should someone be able to complain of a nuisance that was already there when she bought her land? A flat-out no is a problem, because then landowners could acquire what amount to prescriptive rights just by being first. A simple yes is also a problem, because there are situations in which people could easily avoid nuisance but may act deliberately to court one. Overall, we want each

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<sup>87</sup> See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1031-32 (1992) (criticizing the invocation of the *sic utere* maxim as conclusory). Holmes stated an early version of this critique:

But whether, and how far, a privilege shall be allowed is a question of policy. Questions of policy are legislative questions, and judges are shy of reasoning from such grounds. Therefore, decisions for or against the privilege, which really can stand only upon such grounds, often are presented as hollow deductions from empty general propositions like *sic utere tuo ut alienum non laedas*, which teaches nothing but a benevolent yearning, or else are put as if they themselves embodied a postulate of the law and admitted of no further deduction, as when it is said that, although there is temporal damage, there is no wrong; whereas, the very thing to be found out is whether there is a wrong or not, and if not, why not.

Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1, 3 (1894).

<sup>88</sup> See *Hale v. Farmers Elec. Membership Corp.*, 99 P.2d 454, 456 (N.M. 1940) (citing cases and commentary to this effect).

<sup>89</sup> See, e.g., Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1035-37 (1982).

<sup>90</sup> The *Restatement (Second) of Torts* defines nuisance:

An intentional invasion of another's interest in the use and enjoyment of land is unreasonable if

(a) the gravity of the harm outweighs the utility of the actor's conduct, or

(b) the harm caused by the conduct is serious and the financial burden of compensating for this and similar harm to others would not make the continuation of the conduct not feasible.

RESTATEMENT (SECOND) OF TORTS § 826 (1979); see also *id.* § 827 (setting out the factors relating to the gravity of the harm, including the social value of the plaintiff's use); *id.* § 828 (setting out the factors relating to the utility of an actor's conduct, including its social value); 6A AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY § 28.22, at 66, § 28.26, at 75-77 (A. James Casner ed., 1954) (emphasizing the vagaries associated with, and importance of, a determination as to whether a defendant's conduct is unreasonable); 1 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 1.24, at 70-74 (Boston, Little, Brown & Co. 1956) (discussing the importance of reasonableness considerations in nuisance cases). See generally Lewin, *supra* note 85, at 212-14 (documenting the limited adoption of the balance-of-the-utilities test for reasonableness, and citing cases). Courts may invoke the Restatement formulation but not actually engage in the cost-benefit test, instead following a more traditional approach to nuisance. See, e.g., *Morgan v. High Penn Oil Co.*, 77 S.E.2d 682, 689-91 (N.C. 1953).

<sup>91</sup> See Goldberg & Smith, *supra* note 84, at 315-19.

party to take the other's behavior into account and in a way that avoids opportunism. A law-and-economics analysis invariably sees this as a first-order problem, but specifying a set of general first-order rules that can fully account for all possible situations is difficult to impossible.<sup>92</sup>

In equitable fusion, the presumption that coming to the nuisance is not a defense can be overcome if the second mover takes too much account of the behavior of the first party in the wrong way. This requires a second-order analysis. So, where someone buys a nearly valueless parcel with an inadvertent nuisance simply in order to threaten an injunction, a court should deny the injunction to deprive the plaintiff of the leverage it would afford.<sup>93</sup> In the multilevel system of analysis, there is no longer any need for across-the-board specification of inefficient threats.<sup>94</sup>

Interestingly, those parts of the law that involve second-order resolution of conflicting rights are among the most difficult for rules-based legal analysis. It is here that equity can play a crucial role in allowing for context-sensitive outcomes.

(c) *Opportunism*. Finally, equity has always had a special role in combatting opportunism. Historically, this went under the banner of “constructive fraud”—activities that might not technically be fraud but that carried a danger of the same kind of harm.<sup>95</sup> In everything from unconscionability, to denials of injunctions, to unclean hands, equity has been an important defense against hard-to-foresee misuses of the law by the sophisticated and unscrupulous. Opportunists often achieve their objectives by creating uncertainty, as is familiar in the problem of compliant noncompliance by regulated parties in complex environments.<sup>96</sup> An extreme example is where avoidance shades off into evasion in tax law. Not surprisingly, anti-avoidance

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<sup>92</sup> Robert Innes, *Coming to the Nuisance: Revisiting Spur in a Model of Location Choice*, 25 J.L. ECON. & ORG. 286, 288-89 (2009); Donald Wittman, *First Come, First Served: An Economic Analysis of “Coming to the Nuisance,”* 9 J. LEGAL STUD. 557, 563 (1980) (“Sometimes the answer [as to the most efficient legal rule] is not so clear-cut.”).

<sup>93</sup> See e.g., *Edwards v. Allouez Mining Co.*, 38 Mich. 46, 49-53 (1878) (finding there to be injury but deciding that the legal remedy was adequate because the plaintiff “invit[ed] an injury”); *supra* note 70 and accompanying text.

<sup>94</sup> Cf. Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 50-51 (1999).

<sup>95</sup> JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE: AS ADMINISTERED IN ENGLAND AND AMERICA § 258, at 280 (Boston, Hilliard, Gray & Co. 1836). In the nineteenth-century view, “unconscionability” referred to fraud that could not readily be proved. See, e.g., *Seymour v. Delancey*, 3 Cow. 445, 521-22 (N.Y. 1824) (“[I]nadequacy of price, unless it amount[s] to conclusive evidence of fraud, [is] not itself a sufficient ground for refusing a specific performance of an agreement.” (emphasis omitted) (citing cases)); James Gordley, *Equality in Exchange*, 69 CALIF. L. REV. 1587, 1639-40 (1981); see also Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 294-301 (1975) (discussing the doctrine of unconscionability in contract law). For a discussion of opportunism in an earlier version of this Article, see Henry E. Smith, *Equity as Second-Order Law: The Problem of Opportunism* (Jan. 15, 2015) (manuscript at 1-5), <http://ssrn.com/abstract=2617413> [<https://perma.cc/JQ3G-8Z3M>].

<sup>96</sup> See, e.g., DOREEN MCBARNET & CHRISTOPHER WHELAN, CREATIVE ACCOUNTING AND THE CROSS-EYED JAVELIN THROWER 103 (1999); John Braithwaite, *Rules and Principles: A Theory of Legal Certainty*, 27 AUSTL. J. LEGAL PHIL. 47, 55-56 (2002).

doctrines in tax law—which, like equity, are ex post—employ holistic analysis and emphasize substance over form.<sup>97</sup>

Traditionally, equity judges and commentators had some idea of equity's antiopportunity function. For example, Justice Story recognized that equity must be open textured in light of the ability of parties to opportunistically evade their obligations: "[f]raud is infinite" given the "fertility of man's invention."<sup>98</sup> Story quotes the somewhat hyperbolic statement of Lord Cowper in *Dudley v. Dudley*, which contains the germ of the antiopportunity theory. In that case the Chancellor prevented an heir from invoking a technicality that at law would delay a widow's dower rights for ninety-nine years:

Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtleties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.<sup>99</sup>

Functionally, equity is part of the law broadly conceived but remains outside the more formal part of the law. Equity draws on morality, but in a constrained fashion.<sup>100</sup>

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<sup>97</sup> See, e.g., Mark P. Gergen, *The Common Knowledge of Tax Abuse*, 54 SMU L. REV. 131, 132-33 (2001); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 363-68 (2005); David A. Weisbach, *An Economic Analysis of Anti-Tax-Avoidance Doctrines*, 4 AM. L. & ECON. REV. 88, 93-95 (2002); David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860, 860-63 (1999); see also Alan Gunn, *Tax Avoidance*, 76 MICH. L. REV. 733, 735-58 (1978) (describing the doctrine and expressing skepticism about inquiry into intent).

<sup>98</sup> STORY, *supra* note 95, § 186, at 212 (quoting a Letter from Lord Hardwicke to Lord Kaimes (June 30, 1759)). Or, as Chancellor Ellesmere put the point: "The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances." *The Earl of Oxford's Case*, 21 Eng. Rep. 485, 486 (Ch. 1615).

<sup>99</sup> STORY, *supra* note 95, at 18-19 (quoting *Dudley v. Dudley*, 24 Eng. Rep. 118, 119 (Ch. 1705)). In keeping with his cautious approach to equity, Story expresses some reservations about the broad identification of equity with virtue, but endorses this account of equity's function.

<sup>100</sup> By "law," the Master of the Rolls, Sir John Trevor, may have rather meant "regular law," which he mentions earlier in the opinion. *Dudley*, 24 Eng. Rep. at 119. Story qualifies his endorsement of the formulation on the grounds that it sounds too broad and identifies equity too closely with morality in general. Perhaps, but the passage in question is susceptible to a narrower interpretation in which equity is not the same as all of morality but is a type of law that draws on morality to protect the regular or formal law. (As I will argue, that is true whether or not there are separate courts of equity.) As Justice Roujet Marshall put it for the Wisconsin Supreme Court:

The text-writers disagree, in some respects, in the manner of stating this, but are in harmony in this: While new principles are not to be added to those long established for the government of equitable remedies, the rules, not the precedents, are to control. There is no vitality in precedents; there is in rules. They are susceptible of expansion along every line necessary to reach new conditions. *The ingenuity of*

In law and economics, Nobel laureate Oliver Williamson famously defined opportunism as “self-interest seeking with guile.”<sup>101</sup> The problem then reduces to what guile is and why it is bad. Guile is related to fraud, which is a knowing misrepresentation that is intended to induce another to part with an entitlement and that succeeds in doing so.<sup>102</sup> Fraud is uncontroversially regarded as morally wrong; it is also generally social-welfare decreasing, reinforcing the case for a general ban.<sup>103</sup> Accordingly, everyday morality has a clear view of fraud: bad.

While legally fraud is narrowly defined, there is a larger set of misrepresentations that have an effect similar to fraud. Nineteenth-century equity jurisprudence featured a sophisticated notion of “near fraud” or “constructive fraud”: behavior that seems infected with fraud but is not provable as such, which can be deterred by withholding enforcement for the party responsible for the unconscionability.<sup>104</sup> The practical problem thus becomes not how to define opportunism with exactitude, but how to find visible proxies that are closely associated with opportunism.

Perhaps the most salient feature of opportunism is the difficulty of defining it in advance. Nonetheless, one can offer definitions of opportunism that allow us to identify it with *hindsight*. The irreducible need for some hindsight is at the heart of equitable decisionmaking.

Definitions of opportunism in law and economics tend to be broad, making many nervous about their vagueness and sweep. For example, opportunism is often identified with

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*man in devising new forms of wrong cannot outstrip such development.* In all situations and under all circumstances, whether new or old, the principles of equity will point the way to justice where legal remedies are infirm. Precedents will be a constant guide, but never a bar. Where a new condition exists, and legal remedies afforded are inadequate or none are afforded at all, the never-failing capacity of equity to adapt itself to all situations will be found equal to the case, extending old principles, if necessary, not adopting new ones, for that purpose. That is a very old doctrine.

Harrigan v. Gilchrist, 99 N.W. 909, 936 (Wis. 1904) (emphasis added). The opinion is 334 pages long and was described by his rival Chief Justice Winslow as a “compendium of legal lore.” WIS. SUPREME COURT, PORTRAITS OF JUSTICE: THE WISCONSIN SUPREME COURT’S FIRST 150 YEARS 26 (Trina E. Gray, Karen Leone de Nie, Jennifer Miller & Amanda K. Todd eds., 2d ed. 2003).

<sup>101</sup> OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 47 (1985); see also Oliver E. Williamson, *Opportunism and Its Critics*, 14 MANAGERIAL & DECISION ECON. 97, 97-98 (1993) (defending the usefulness of the notion of opportunism against social-science critics).

<sup>102</sup> Or, in Susan Koniak’s plain-English definition, “lying to someone to get them to give you their stuff.” Susan P. Koniak, *Corporate Fraud: See, Lawyers*, 26 HARV. J.L. & PUB. POL’Y 195, 197 (2003).

<sup>103</sup> These latter arguments against fraud parallel those against theft. See, e.g., Richard L. Hasen & Richard H. McAdams, *The Surprisingly Complex Case Against Theft*, 17 INT’L REV. L. & ECON. 367, 368-75 (1997) (refining a theory of a general ban on theft based on its indirect costs); Fred S. McChesney, *Boxed in: Economists and Benefits from Crime*, 13 INT’L REV. L. & ECON. 225, 227-28 (1993) (casting the theory of theft’s indirect costs in dynamic terms); Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224, 228-31 (1967) (proposing a theory of theft bans based on indirect costs).

<sup>104</sup> See *infra* notes 138-139.

immoral conduct.<sup>105</sup> We need, therefore, to ask more about what is immoral, and which moral norms we want to enforce in the law. Indeed, historically, a major controversy over equity focused on the question of how far equity should enforce morality.<sup>106</sup> Others would define opportunism as trying to regain an opportunity that one has contracted away.<sup>107</sup> This still requires a method for figuring out the scope of what has been contracted away as opposed to left open for acquisition. Finally, “opportunism” can mean doing something that does not violate the literal terms of a contract but that contradicts the other party’s legitimate expectations.<sup>108</sup> Opportunism is exploiting the law against its purpose.<sup>109</sup>

These definitions of opportunism get at something, and further refinement can avoid the criticisms of both those alarmed at the expansiveness of the notion and those inclined to see it as nothing special. What is needed is a multistep procedure: we need to define the domain of concern—opportunism—and then set up proxies and presumptions that will allow equitable intervention to do more good than harm once in that domain.

Let me propose that opportunism is undesirable behavior that cannot be cost-effectively defined, detected, and deterred by explicit ex ante rulemaking. Opportunism is residual behavior that would be contracted away if ex ante transaction costs were lower. Not coincidentally, it often violates moral norms, which are incorporated into the ex post principles that deal with opportunism. As we will see, opportunism resists taming by tailored ex ante rules. This leaves us with ex ante untailored rules, ex post tailored standards, and ex post untailored standards. Ex ante untailored rules deal with opportunism with broad prophylactic prohibitions on self-dealing by fiduciaries.<sup>110</sup> The second category, ex post tailored standards, includes most of the equitable “safety valves” aimed at opportunism. The final category, ex post untailored standards, are the most threatening: an announcement of “do the right thing” or else the chancellor will rewrite contracts and statutes according to a personal sense of

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<sup>105</sup> George M. Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 957 (1992) (defining “opportunism” as “any contractual conduct by one party contrary to the other party’s reasonable expectations based on the parties’ agreement, contractual norms, or conventional morality”).

<sup>106</sup> See Calvin Woodard, *Joseph Story and American Equity*, 45 WASH. & LEE L. REV. 623, 643-44 (1988).

<sup>107</sup> See Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 387-92 (1980) (defining bad faith as using contractual discretion to recapture opportunities foregone by contracting).

<sup>108</sup> See *Mkt. St. Assocs. Ltd. P’ship v. Frey*, 941 F.2d 588, 595-97 (7th Cir. 1991); Margaret F. Brinig & Steven M. Crafton, *Marriage and Opportunism*, 23 J. LEGAL STUD. 869, 871 (1994); Juliet P. Kostritsky, *Plain Meaning vs. Broad Interpretation: How the Risk of Opportunism Defeats a Unitary Default Rule for Interpretation*, 96 KY. L.J. 43, 47-48 (2007); Timothy J. Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521, 521-24 (1981). Even broader is Richard Posner’s definition in his treatise. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 4.1, at 102-03 (5th ed. 1998) (defining “opportunism” in the contracting context as “trying to take advantage of the vulnerabilities created by the sequential character of contractual performance”).

<sup>109</sup> Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 623 (2011) (“In common parlance, the evasive actor is one whose project is to get around the law. She seeks to avoid sanction while engaging, in substance, in the very sort of behavior that the law means to price or punish.”); Kostritsky, *supra* note 108, at 47-48.

<sup>110</sup> See *infra* note 186 and accompanying text.

morality. This broad ex post approach is not just chilling but destabilizing and inimical to the rule of law. Thus, equity has always aimed for either tailoring (ex post) or ex ante announcement (prophylaxis), and it seeks to avoid broad blunderbuss invocations of ex post fairness and morality. Equity as meta-law includes a theory of how equity can manage this feat by employing a set of proxies and presumptions—which happen to accord closely with strains of the equitable tradition.

Opportunism is not the same thing as fraud. Fraud can be defined ex ante, and a high penalty can make up for the low probability of detection.<sup>111</sup> Opportunism is different. It often consists of behavior that is technically legal but is done to secure unintended benefits that are usually smaller than the costs they impose on others.

To prevent opportunism, the law could attempt to anticipate every type of evasion ex ante. But announcing a clear list of ex ante rules enables evaders to exploit their knowledge of where the bright line is. Plugging nine out of ten holes is sometimes no better than plugging none. As the next Section discusses, equity as meta-law enables a more targeted and ex post intervention against opportunism that leaves less room for sophisticated actors to take advantage of the rules or the legal system overall.

Even ex post, the law need not define opportunism directly. As we will see, it employs proxies and presumptions that are aimed at opportunism. The idea is to impose enough of a cost ex post on a somewhat hard-to-predict set of actors who are highly likely to be engaged in opportunism—and to send them a message. If successful, such a system can obtain more benefit in preventing rent seeking and the chilling effect of opportunists on other people's behavior than it imposes costs in deterring legitimate behavior and destabilizing expectations.

## 2. Equity's Structure

Equity as meta-law responds to problems of high complexity and uncertainty in a characteristic way. Within an overall domain of potential problems (fraud, accident, and mistake), it applies triggers or proxies for switching modes into meta-law. Neither the domain, nor the triggers, nor the principles applied once we are in equity should be mistaken for first-order rules or standards. Thus, when they serve as triggers for equity, notions like bad faith and disproportionate hardship are not direct descriptions of potential legal intervention but the occasion for beginning an evaluation of a new kind of intervention from equitable meta-law.

**(a) Traditional Definitions of Equity's Domain.** The equitable tradition has defined a domain of complex and uncertain problems using traditional formulations in the Aristotelian spirit. In these formulations, equity has always contained broader and narrower strands. As we have seen, Aristotle defined equity as an invocation of justice where law fails on account of its

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<sup>111</sup> See, e.g., Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 204-05 (1968); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887-96 (1998).

generality.<sup>112</sup> On one reading, this means that equitable decisionmakers will engage in all-purpose ex post fix-alls when a law does not seem to be furthering its purpose. Any gap between a law's letter and its purpose or spirit calls for intervention. The widest versions of the controversial "equity of the statute," especially those advanced by some of the Legal Realists, fit in this expansive mode.<sup>113</sup>

Other courts and commentators define the potential domain of equity more narrowly, invoking the triad of "fraud, accident, and mistake."<sup>114</sup> Thomas More, the first lawyer to serve as Chancellor, bridges the triad and the notion of conscience: "Three things are to be helpt in Conscience, Fraud, Accident and things of Confidence."<sup>115</sup> Equity does not always intervene where there is fraud, accident, or mistake, but it is these situations in which complexity and especially opportunism are a danger. Story made much of the open-endedness of fraud in explaining the nature of equity.<sup>116</sup> His writings reflect an awareness of what we would call opportunism and equity's role in countering it.<sup>117</sup> In the overview of equity in his treatise, he starts with trust (and confidences), working outward to "mistake, accident, and fraud," and then adding:

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<sup>112</sup> See ARISTOTLE, NICOMACHEAN ETHICS, *supra* note 12, at 316-17; see also *supra* notes 54-55, and accompanying text.

<sup>113</sup> Compare Landis, *supra* note 78, at 10 (arguing for broad purposivism as historically grounded in the equity of the statute), and Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 13-14 (1936) (same), with John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1, 22-23 (2001) (arguing that equity of the statute is incompatible with American separation of powers), and S.E. Thorne, *The Equity of a Statute and Heydon's Case*, 31 ILL. L. REV. 202, 210 (1936) ("The strict, literal meaning of a statute may be extended, but only slightly extended, through use of the doctrine of the statute's equity.").

<sup>114</sup> 47 AM. JUR. 2d *Judgments* § 680 (2020) (explaining that "[g]enerally, claimants seeking equitable relief from judgments through independent actions must meet three requirements," the third of which is that "they must establish a recognized ground, such as fraud, accident, or mistake, for the equitable relief" (footnotes omitted)); see also WILLIAM F. WALSH, A TREATISE ON MORTGAGES § 3, at 8, 11 n.30 (1934) (noting that relief in equity from mortgages requires fraud, accident, or mistake); Val D. Ricks, *American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate*, 58 LA. L. REV. 663, 717 & n.277 (1998) (speculating that Chief Justice Allen in *Swift v. Hawkins*, 1 U.S. (1 Dall.) 17 (1768), "considered 'mistake' to be representative of all categories of equity").

<sup>115</sup> 1 KNIGHTLEY D'ANVERS, A GENERAL ABRIDGMENT OF THE COMMON LAW, ALPHABETICALLY DIGESTED UNDER PROPER TITLES 751 (Savoy, rev. 2d ed. 1725) ("What Things shall be relieved in Equity."); see also *Coco v. A.N. Clark (Engineers) Ltd.* [1969] RPC 41 (Ch.) at 46 (Eng.) (Megarry J) (quoting More's couplet); ANTHONY LAUSSAT, JR., AN ESSAY ON EQUITY IN PENNSYLVANIA 67 (Philadelphia 1826) (same). William Blackstone, more a fan of the common law than of equity, gets a little defensive in making the legitimate point that the triggers for equity were not ignored by the common law. 3 WILLIAM BLACKSTONE, COMMENTARIES \*431.

<sup>116</sup> See *supra* note 98 and accompanying text.

<sup>117</sup> See Robert Lowry Clinton, *Classical Legal Naturalism and the Politics of John Marshall's Constitutional Jurisprudence*, 33 JOHN MARSHALL L. REV. 935, 948 (2000) (discussing Carl Dibble's identification of a "moderate Enlightenment" tradition of legal interpretation associated with Grotius, Blackstone, and Marshall, that emphasized the role of equity and located the need for interpreting laws not in the ambiguity of language but in the possibility "that corrupt, duplicitous persons will 'treat the law in a sophistical manner' in order to advance their own individual interests" (quoting Carl M. Dibble, *The Lost Tradition of Modern Legal Interpretation* 5 (1994) (unpublished essay prepared for delivery at the 1994 Annual Meeting of the American Political Science Association))).

[M]any cases of penalties and forfeitures; many cases of impending irreparable injuries, or meditated mischiefs; and many cases of oppressive proceedings, undue advantages and impositions, betrayals of confidence, and unconscionable bargains; in all of which Courts of Equity will interfere and grant redress; but which the Common Law takes no notice of, or silently disregards.<sup>118</sup>

Story is in general quite cautious, but he was willing to endorse the idea that equity protects the law against “crafty evasions.”<sup>119</sup> Moreover, he connects the nature of this domain to equity’s characteristic features as a response to general law:

Accident, mistake, and fraud, are of an infinite variety in form, character, and circumstances; and are incapable of being adjusted by any single and uniform rule. Of each of them, one might say, *Mille trahit varios adverso sole colores* [“Trails athwart the sun a thousand shifting tints”]. The beautiful character, or pervading excellence, if one may so say, of Equity Jurisprudence, is, that it varies its adjustments and proportions, so as to meet the very form and pressure of each particular case, in all its complex habitudes.<sup>120</sup>

Further, the rise of industry and the development of commerce create more multipolar problems and conflicting sets of rights, heightening the possibility for opportunistic invocations of the letter of the law.<sup>121</sup> Story goes on to elaborate on the notion of fraud, accident, and mistake:

[W]e may now turn to other subjects in which [equity jurisdiction] will forever operate with a constant and salutary influence. These are cases where relief becomes necessary from accident or mistake of the parties; cases of complicated accounts, whether between partners, or factors, or merchants, or assignees, or executors and administrators, or bailees, or trustees; cases of fraud, assuming myriads of vivid or of darkened hues, and as prolific in their brood, as the motes floating in sunbeams; cases of trust and confidence, spreading through all the concerns of society, and sinking their roots deep and firm through all the foundations of refined life and domestic relations; cases where bills of discovery are indispensable to promote public justice; and lastly,

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<sup>118</sup> See STORY, *supra* note 95, § 29, at 29.

<sup>119</sup> See *id.* § 17, at 19.

<sup>120</sup> *Id.* § 439, at 468. Story is evidently quoting the description of Iris’s (the goddess of the rainbow) descent in Virgil’s *Aeneid*. VIRGIL, *Aeneid*, in *ECLOGUES. GEORGICS. AENEID: BOOKS 1-6.*, at 261, 470 (H. Rushton Fairclough trans., Loeb Classical Library 1916) (bk. IV, l. 701).

<sup>121</sup> To this effect, Story quotes from a Report by a committee he chaired on equity courts:

These are a few . . . of the numerous cases in which universal justice requires a more effectual remedy than the courts of common law can give. In proportion as our commerce and manufactures flourish and our population increases, subjects of this nature must constantly accumulate; and, unless the legislature interpose, *dishonest and obstinate men may evade the law and intrench themselves within its forms in security.*

STORY, *supra* note 64, at 175 (emphasis added); see *id.* at 173 n.1.

cases where bills of injunction are the only solid security against irreparable mischiefs and losses.<sup>122</sup>

Story then goes on to say that while courts of law do sometimes take these matters into account, the equitable function is so special that it makes sense to have specialized courts to serve it.<sup>123</sup>

Thus, when equity's domain is announced to be fraud, accident, and mistake (or even opportunism), skeptics object that those are broad and ill-defined categories and trying to address them directly would be destabilizing. Just so. Equity need not "define" them directly because they are not part of equity: they are the domain within which equity may operate if triggered. The kind of definition that would be required for a first-order "rule" dealing with fraud, accident, and mistake would indeed require clearer boundaries and certainly be destabilizing. That is not equity on our account. Fraud, accident, and mistake—or polycentric problems, conflicting rights, and opportunism—are only the domain over which equity might apply, rather than the ills which equity seeks to cure directly.

**(b) Triggers.** Once we are in the domain of equity, there are certain triggers for shifting to meta-law. In this Section, I focus on three proxies: violation of a custom or other very clear tenet of commercial morality, good faith and notice, and disproportionate hardship.

First, equity has always been closely associated with custom, since ancient Rome.<sup>124</sup> While custom also informs equitable reasoning once one is in equity (in earlier times identified as "natural equity"),<sup>125</sup> it serves as a useful trigger because a violation of custom is a relatively

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<sup>122</sup> *Id.* at 163-64.

<sup>123</sup> *Id.* at 169-76.

<sup>124</sup> See CICERO, *Topica* § 23, in ON INVENTION. THE BEST KIND OF ORATOR. TOPICS 375, at 450-53 (H.M. Hubbell trans., Loeb Classical Library 1949) ("When, however, right and wrong are being discussed, the topics of equity will be brought together. These are of two kinds, the distinction being between natural law and institutions. Natural law has two parts, the right of every man to his own property, and the right of revenge. The institutions affecting equity are threefold: the first has to do with law, the second with compacts, the third rests on long continued custom.") (§ XXIII.90). Note that in the original, both nature (*natura*) and institution(s) (*institutio*) fall under equity.

<sup>125</sup> See, e.g., 2 HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES [ON THE LAW OF WAR AND PEACE: THREE BOOKS] 193 (Francis W. Kelsey trans., Clarendon Press 1925) (1625) ("We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity.") (ch. II, § 6); GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS, BY CONCEALMENT, ERROR, OR INADEQUATE PRICE 37 (New York, G. & C. Carvill 1825) ("[Lord Mansfield made] the judgments of the law correspond with the actual practice of intelligent merchants, and with those universal usages, founded partly in convenience, and partly in natural equity, which might be considered as the common commercial and maritime law of the civilized world."); see also Bright v. Boyd, 4 F. Cas. 127, 133 (C.C.D. Me. 1841) (No. 1,875) (Story, Circuit J.) ("I have ventured to suggest, that the claim of the bona fide purchaser, [in unjust enrichment for improvements made to real property], is founded in equity. I think it founded in the highest equity; and in this view of the matter, I am supported by the positive dictates of the Roman law. The passage already cited, shows it to be founded in the clearest natural equity. 'Jure naturae aequum

concrete signal that a party may be acting opportunistically or that unforeseen complications have arisen,<sup>126</sup> in a fashion related to bad faith (our next topic). Even equitable procedural devices like the class action originated as a way for groups (such as common-pool-resource users and parishioners) to enforce their customary rights.<sup>127</sup>

Custom alone is not a foolproof trigger. As with other equitable devices, custom could itself be used opportunistically by self-serving liars, especially those falsely claiming the existence of a custom.<sup>128</sup> Traditionally, though, custom was well defined, and equity courts had a special role in enforcing it.<sup>129</sup> Further, custom itself may be a ground-level solution to a complex multipolar problem.

Neither were equity courts all that unique in employing custom. The common-law courts did as well, and the common law at one time was thought of as a general custom.<sup>130</sup> Even today, parts of the law of negligence turn on custom. Moreover, sometimes even when courts appear to be taking a freewheeling and wholesale approach to adopting custom, what they are really doing is using it in a limited way to test good faith, our next proxy.<sup>131</sup>

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est.’ [‘By the law of nature it is equitable.’]); *Moses v. Macferlan* (1760) 97 Eng. Rep. 676, 681; 2 Burr. 1005, 1013 (Lord Mansfield) (“In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”). *But see* 1 LAWRENCE, *supra* note 22, § 3 (arguing that it is fallacious to regard equity as based on natural justice).

<sup>126</sup> In an earlier time, the expansive version of custom benefited from an association between custom and natural law or natural rights. In this older view, natural law is based on morality and reason. Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 617-20 (1916). Custom in turn was associated with reason through the notion of policy. 2 JAMES BRYCE, *STUDIES IN HISTORY AND JURISPRUDENCE* 563-68 (1901) (connecting the notion of beneficial social customs to the Law of Nature); *see* Haines, *supra*, at 622 (“Natural justice, or the reason of the thing, which the common law recognized and applied was a direct outgrowth of the law of nature which the Romans identified with *jus gentium* and the mediaeval canon lawyers adopted as being divine law revealed through man’s natural reason.”). For a famous formulation, see BLAISE PASCAL, *PENSÉES: NOTES ON RELIGION AND OTHER SUBJECTS* *pensée* 108, at 36 (Louis Lafuma ed., John Warrington trans., 1960) (c. 1670) (“Custom alone begets equity, for the sole reason that it is accepted. Custom is the mythical foundation of equity’s rule, but is destroyed by any attempt to trace it back to first principles.”); *cf.* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321, 1322 (1991) (arguing that confusion of custom and reason was an eighteenth-century development arising out of an evidentiary crisis of custom).

<sup>127</sup> Stephen C. Yeazell, *supra* note 76, at 868 (quoting CHAFEE, *supra* note 76, at 200-01).

<sup>128</sup> This becomes a greater danger to the extent that courts get deeply into the territory of the subtleties of custom, something that Lisa Bernstein has showed courts are reluctant to do in the area of contracts. Lisa Bernstein, *The Questionable Empirical Basis of Article 2’s Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 760-76 (1999) (distinguishing strong-form from weak-form customs and noting how the latter provide wide outer bounds, underinclusively signaling defection).

<sup>129</sup> Henry E. Smith, *Custom in American Property Law: A Vanishing Act*, 48 TEX. INT’L L.J. 507, 509, 521-22 (2013) (arguing that the fusion of law and equity has deemphasized the role of custom in contract law but that the violation of custom can be employed as a proxy for party opportunism).

<sup>130</sup> 1 WILLIAM BLACKSTONE, *COMMENTARIES* \*67-68 (“General customs . . . are the universal rule of the whole kingdom, and form the common law, in its . . . usual signification.”); *see also* CARLETON KEMP ALLEN, *LAW IN THE MAKING* 86-87 (1927) (asserting that English courts apply proven customs as operative law).

<sup>131</sup> Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153, 1193-95 (2012).

Second, as another trigger for equity, good faith can signal that equity as meta-law is an appropriate framework. This trigger too is subject to myriad interpretations.<sup>132</sup> Broader interpretations border on “do the right thing.” Other courts rely on an “excluder approach” in which they use the negative notion to identify instances of bad faith. There are those who think the notion has no content,<sup>133</sup> and those who argue the duty of good faith is underenforced.<sup>134</sup> In the following, I will not focus on the duty of good faith but on its role as a proxy that triggers presumptions against putative opportunists.

As a proxy for opportunism, good faith takes on different meanings depending on the type of situation and the presence of other proxies. As noted earlier, violation of a clear commercial custom is presumptive evidence of bad faith. Likewise, in situations of disproportionate hardship, knowledge of consequences adds to the probability that a party is acting in bad faith. Generally speaking, the more unambiguous the bad, the lower the threshold for bad faith. Thus, going over the boundary line in building encroachments is clear. If someone encroaches knowing where the line is, that is bad faith.<sup>135</sup> Slightly more complex is good faith purchase, where knowledge of a prior claim or certain forms of constructive notice (inquiry, record) can constitute bad faith (or defeat good faith).<sup>136</sup> In some situations, knowledge of another party’s mistake or their vulnerability to exploitation, for example as a result of drunkenness, will constitute a lack of good faith.<sup>137</sup>

Third, disproportionate hardship is a key, but much misunderstood, proxy for triggering equity. Often coupled with the vulnerability of another party, the idea was that very surprising and skewed results raised the danger of opportunism, triggering closer scrutiny.<sup>138</sup> Very skewed

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<sup>132</sup> Some of these are directly tied to evasion. Buell, *supra* note 109, at 616-17.

<sup>133</sup> See, e.g., Alan D. Miller & Ronen Perry, *Good Faith Performance*, 98 IOWA L. REV. 689, 690 (2013) (arguing that “all definitions of community standards are either theoretically unsound or impractical”).

<sup>134</sup> See, e.g., Paul MacMahon, *Good Faith and Fair Dealing as an Underenforced Legal Norm*, 99 MINN. L. REV. 2051, 2057-78 (2015) (discussing good faith requirement and the contrast between strong rhetoric and weak enforcement).

<sup>135</sup> See *Whitlock v. Hilander Foods, Inc.*, 720 N.E.2d 302, 307 (Ill. App. Ct. 1999) (“One who knows of a claim to land that he proposes to use as his own proceeds at his peril if he goes forward in the face of protest or warnings from the owner and places a structure on the land.”); *Renaissance Dev. Corp. v. Universal Props. Grp., Inc.*, 821 A.2d 233, 238 (R.I. 2003) (noting that “in situations . . . ‘where the [defendant’s] encroachment was intentional . . . the courts . . . have issued the mandatory injunction without regard to the relevant convenience or hardship involved” (quoting *Ariola v. Nigro*, 156 N.E.2d 536, 540 (Ill. 1959))); *Culbertson v. Bd. of Cty. Comm’rs*, 44 P.3d 642, 658 (Utah 2001) (“[W]here the encroachment is deliberate and constitutes a willful and intentional taking of another’s land, equity may require its restoration, without regard for the relative inconveniences or hardships which may result.” (quoting *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1259 (Utah 1975))).

<sup>136</sup> See, e.g., BENITO ARRUDA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE: THEORY AND POLICY OF CONTRACTUAL REGISTRIES 55 n.18, 62 (2012); Grant Gilmore, *The Good Faith Purchase Idea and the Uniform Commercial Code: Confessions of a Repentant Draftsman*, 15 GA. L. REV. 605, 611-13 (1981); Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 232-33 (1962).

<sup>137</sup> See *infra* notes 140-146 and accompanying text.

<sup>138</sup> Story encapsulates the proxies and presumptions relating to constructive fraud:

results can also be an indicator that complexity has gotten out of control (“surprise”): a meta-system is triggered when the primary system exceeds certain levels of key variables.

Because it is so associated with a targeted kind of unconscionability and often tags complex interdependent behavior, disproportionate hardship is related to the “constructive fraud” at the heart of traditional equity. Constructive fraud is central to Story’s account in his treatise, which provides a (partly-dated) near-definition:

In this class [of constructive or legal, as opposed to actual intentional, fraud] may properly be included all cases of unconscientious advantages in bargains, obtained by imposition, circumvention, surprise, and undue influence over persons in general; and, in an especial manner, all unconscientious advantages, or bargains, obtained over persons, disabled by weakness, infirmity, age, lunacy, idiocy, drunkenness, coverture, or other incapacity, from taking due care of or protecting their own rights and interests.<sup>139</sup>

In his classic treatment of unconscionability,<sup>140</sup> Leff put it this way:

[T]here are two separate social policies which are embodied in the equity unconscionability doctrine. The first is that bargaining naughtiness, once it reaches a certain level, ought to avail the practitioner naught. The second is directed . . . against results, and embodies the doctrine . . . that the infliction of serious hardship demands special justification.<sup>141</sup>

The disproportionate-hardship proxy was often keyed to the characteristics of the potentially exploited party. Leff correctly notes that equity courts focused their attention on stock characters like the old, the young, and the ignorant.<sup>142</sup> In such cases, courts would presume against the other party by refusing, in the absence of further justification, to enforce their deals

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There is always fraud presumed or inferred from the circumstances or conditions of the parties contracting, from weakness on one side, and usury on the other, or extortion or advantage taken of that weakness. There has always been an appearance of fraud from the nature of the bargain, even if there be no proof of any circumvention, but merely from the intrinsic unconscionableness of the bargain.

STORY, *supra* note 95, § 334, at 357.

<sup>139</sup> *Id.* § 221, at 244.

<sup>140</sup> Story makes the same point more abstractly:

The doctrine, therefore may be laid down, as generally true, that the acts and contracts of persons, who are of weak understandings, and who are thereby liable to imposition, will be held void in Courts of Equity, if the nature of the act or contract justify the conclusion, that the party has not exercised a deliberate judgment, but that he has been imposed upon, circumvented, or overcome, by cunning, or artifice, or undue influence.

*Id.* § 238, at 260.

<sup>141</sup> Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 539 (1967) (footnote omitted).

<sup>142</sup> *Id.* at 532; see also Jane P. Mallor, *Unconscionability in Contracts Between Merchants*, 40 SW. L.J. 1065, 1066 (1986) (noting that courts in equity generally used the unconscionability doctrine to favor “widows, orphans, farmers, sailors on leave, and the weakminded”).

with specific performance.<sup>143</sup> Once the triggers for unconscionability are activated, courts will take a closer and contextualized look at overall fairness. As Seana Shiffrin and Carol Rose note in their different defenses of ex post vagueness, often the focus is on the vulnerability of the victim.<sup>144</sup>

In other words, skewed results or shady dealings coupled with vulnerability are a proxy for opportunism that triggers a presumption against the putative opportunist. And, picking up on traditional notions of “near fraud,” Epstein points out that certain classes of transactions carry with them such great dangers of fraud and so few benefits on average that it makes sense to ban them entirely, or at least to subject them to stricter scrutiny.<sup>145</sup> As with the Statute of Frauds and the defense of incompetence, the question is whether refusing to enforce such transactions minimizes decision and error costs, including the costs of not enforcing legitimate deals.<sup>146</sup>

Which combination of these and other elements constitutes a trigger for equity depends on what type of situation is at issue. Thus, in building encroachments an injunction to tear down a building will issue unless there is disproportionate hardship—the encroachment is small and the injunction would harm the encroacher far more than it would benefit the movant. However, bad-faith encroachers cannot benefit from this defense and will be enjoined.<sup>147</sup> By contrast, the mix of bad faith and hardship required to merit relief is different in unconscionability; combinations of some hardship and minimal or suspected bad faith can trigger greater scrutiny.

**(c) Equitable Standards.** The last feature of equity is its most familiar. Once in equity, the style of legal reasoning is more open textured and more directly oriented to fairness and morality than is usually the case in the rest of law. As we have seen, the burden of justification is often on the party seeking to benefit from a lopsided or otherwise suspect result. How to address that burden and to engage in equitable decisionmaking will be illustrated in Part III, especially in conjunction with invocations of the maxims of equity.

If equity is meta-law, it involves a more articulated legal structure made up of its domain, its triggers, and the standards it applies within equity proper. Much of the misunderstanding about equity flows from focusing on one of these elements in isolation, rather than on all of them and their joint operation.

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<sup>143</sup> Leff, *supra* note 141, at 531-32.

<sup>144</sup> Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 597-601 (1988); Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, 29 PHIL. & PUB. AFF. 205, 205, 235 (2000).

<sup>145</sup> Epstein, *supra* note 95, at 293-301. On the nineteenth-century view that unconscionability referred to fraud that could not readily be proved, see, for example, *Seymour v. Delancey*, 3 Cow. 445, 532 (N.Y. Sup. Ct. 1824), finding that “inadequacy of price, unless it amounted to *conclusive evidence* of fraud, was not itself a sufficient ground for refusing a specific performance”; and Gordley, *supra* note 95, at 1639.

<sup>146</sup> Epstein, *supra* note 95, at 300-02.

<sup>147</sup> See *supra* note 135 and accompanying text.

The key is how we get to use the standard (triggers) and what goes into the standard (among other things, primary-level law and its results). Once we are in equity, it has a semifamiliar, semispecial character. That equity is *ex post* and based on fairness and morality is the most familiar. Again, if we leave the meta-law out of it, the standards used—the equitable principles—look a lot more far ranging and more destabilizing than they need to be.

#### **D. The State of Equity Today**

Equity occupies a kind of limbo in current law. The labels “equity” and “equitable” are still employed, and equity has not ceased to function as meta-law altogether. And yet in our post-fusion, post-Realist legal system, the sense of equity as meta-law is being lost in important areas of private law. Equity is now often associated with mere discretion or coercive remedies. In this Part, I will show how equity once explicitly helped overcome the limitations and misfirings of the law in situations involving uncertainty and complexity, and in particular at the property/contract interface where rights *in rem* (against others generally) and rights *in personam* (rights availing between specifically identified parties) interact in an uneasy fashion. These areas include privity, misappropriation and hot news, good faith purchase, and trusts. In each case, I will suggest that a greater attention to meta-law could improve the law in these areas. At the very least, as new problems turn up in such pockets of special complexity in private law, equity as meta-law can potentially do better than mono-level law alone.

##### **1. Privity and Its Discontents**

Privity is often perceived as having a bad formalist odor. Privity requirements, which still play a role in the law, have come to stand for a formalism that needs to be overcome in the name of justice, fairness, or good policy. Privity is not an unmitigated evil though, because it does reduce information costs. Like asset partitioning,<sup>148</sup> it allows private actors to focus on a subset of the world, for both good and ill. For present purposes, privity is a good case study for how equity as meta-law regulates the law when it fails on account of its generality—and how it might continue to do so if given a chance. In earlier times, equity served as the main tool for limited loosening of privity requirements. However, now when post-fusion and post-Realist courts and commentators seek to overcome privity, they tend to do it very differently—without meta-law and on one messy level, haphazardly and often based on notoriously amorphous multifactor balancing tests. The question of overcoming privity becomes one of balancing the policies for and against widening, using a multiplicity of incommensurate and often conflicting factors. This is notoriously true in the area of lawyer liability to third parties where multifactor balancing tests have been termed “equitable” even though they replace, rather than replicate,

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<sup>148</sup> See Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 393-94 (2000); Henry E. Smith, *Economics of Property Law*, in 2 THE OXFORD HANDBOOK OF LAW AND ECONOMICS: PRIVATE AND COMMERCIAL LAW 148, 152-54 (Francesco Parisi ed., 2017).

a more constrained meta-law style of equity.<sup>149</sup> These flattened solutions run the risk of misuse by opportunists (if the rules are spelled out) or of making the structure of liability highly uncertain. Although a full treatment of privity across areas is not possible here, I will suggest that equity as meta-law could even now provide better tools for modulating the effects of privity requirements.

Equity most famously overcame the limits of privity in real servitudes. Covenants at law could only be enforced against those with privity; in England this requirement was almost fatally strict.<sup>150</sup> Privity reduces information costs, because those outside the deal, such as subsequent purchasers, may not know what will bind them. But this informational convenience comes at a severe cost in terms of the usefulness of covenants, which can be easily dissipated or even evaded if they do not run to successors. The courts of equity stepped in to allow enforcement against a subsequent purchaser who had notice, as long as the servitude was intended to run and touched and concerned the land.<sup>151</sup> Here, the requirement of privity is overridden in a limited way that navigates between the purely in personam and in rem, to enforce a useful device in light of the circumstances and to prevent opportunistic violations of the original agreement.

Equity's procedural devices often facilitated suspension of the limits of privity. As time went on, interpleader and bills of peace could be used to establish connections where older notions of privity, even extended notions in older equity, would not have sufficed.<sup>152</sup> Indeed, the moderate strain of Realism used equitable-style reasoning to overcome privity in tort law as well.<sup>153</sup>

Equity could serve as meta-law in this area more explicitly. In his recent comprehensive treatment of privity problems in private law, Mark Gergen notices the inadequacy of various solutions when multiple parties are involved. When should an exculpatory term in a contract bind a third party? Interestingly, he reaches for the classic equitable solution—the doctrine of notice—and advocates employing it beyond the law of real-property servitudes.<sup>154</sup> While the

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<sup>149</sup> See Smith, *supra* note 53, at 188-91.

<sup>150</sup> For a summary and a Realist critique, see CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND," 111-43 (2d ed. 1947).

<sup>151</sup> See Ben McFarlane, *Tulk v. Moxhay (1848)*, in LANDMARK CASES IN EQUITY 203 (Charles Mitchell & Paul Mitchell eds., 2012) (analyzing the equitable line of decisions of which *Tulk* was a way station and how it came to stand for equitable enforcement of servitudes); see also CLARK, *supra* note 150, at 170-77 (discussing the development of equitable servitudes).

<sup>152</sup> Zechariah Chafee, Jr., *Bills of Peace with Multiple Parties*, 45 HARV. L. REV. 1297, 1306 (1932) (discussing bills of peace as a way to address multipolar problems which privity obscures); Zechariah Chafee, Jr., *Modernizing Interpleader*, 30 YALE L.J. 814, 828-30 (1921) (arguing that even the nineteenth century's extended notions of privity should be relaxed as consistent with the nature of equity).

<sup>153</sup> Goldberg & Smith, *supra* note 84, at 319-20 (discussing Judge Cardozo's opinion in *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916)).

<sup>154</sup> Mark P. Gergen, *Privity's Shadow: Exculpatory Terms in Extended Forms of Private Ordering*, 43 FLA. ST. U. L. REV. 1, 49-55 (2015).

kind of notice required will have to limit people's duties to be informed in order to prevent information costs from ballooning, the doctrine of notice from equity is a classic method of loosening up privity without going fully in rem.<sup>155</sup>

## 2. Misappropriation and Quasi-Property in Hot News

The doctrine of misappropriation and hot news exemplifies the misunderstandings that arise from combining in rem and in personam badly. It also highlights the potential for improvement by re-recognizing the role of equity. Misappropriation of hot news is an area in which equity played a crucial role which has become obscured over time. Many of the reasons subsequent judges and commentators have regarded the decision with suspicion stem from mistaking it as a case more about property than equity. Conversely, some of the doctrine's bad reputation might be alleviated by resuscitating the equitable meta-law strand of misappropriation, especially as technology develops further.

The leading case and fountainhead for modern misappropriation doctrine, *International News Service v. Associated Press*,<sup>156</sup> has been taken as a dangerous generator of intellectual property rights. The Supreme Court, however, drew from equity to hold that one news service misappropriated the other's hot news; which it characterized as "quasi-property," meaning something less than fully in rem.<sup>157</sup> As the Court summed up: "The transaction speaks for itself and a court of equity ought not to hesitate long in characterizing it as unfair competition in business."<sup>158</sup>

In affording a remedy here for a violation of commercial morality or custom, especially if the predicate sounds as well in unjust enrichment among multiple participants in the same industry,<sup>159</sup> equity is serving a limited role as meta-law. It is solving a multipolar problem among those directly competing in the same news business, and shoring up a vulnerable custom against potential opportunism by would-be-violators.<sup>160</sup> If taken seriously, this approach does not conflict with the cautionary themes in Justice Brandeis's dissent, especially the one about information being "free as the air to common use."<sup>161</sup>

In misappropriation we can also see the aftershocks of the fusion of law and equity. The fact that until very recently *International News Service* has been treated as a property case is

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<sup>155</sup> See Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 805 (2001).

<sup>156</sup> 248 U.S. 215 (1918).

<sup>157</sup> *Id.* at 236.

<sup>158</sup> *Id.* at 240.

<sup>159</sup> See Shyamkrishna Balganesh, "Hot News": *The Enduring Myth of Property in News*, 111 COLUM. L. REV. 419, 438-40 (2011).

<sup>160</sup> Henry E. Smith, *Equitable Intellectual Property: What's Wrong With Misappropriation?*, in INTELLECTUAL PROPERTY AND THE COMMON LAW 42, 49-55 (Shyamkrishna Balganesh ed., 2013).

<sup>161</sup> *Int'l News Serv.*, 248 U.S. at 250 (Brandeis, J., dissenting).

symptomatic of the effacement of equity.<sup>162</sup> Moreover, the first-order replacements for equitable meta-law show telltale strains.<sup>163</sup> To date, the best restatement of misappropriation in property-like first-order terms is Judge Winter's opinion in *National Basketball Ass'n v. Motorola, Inc.*,<sup>164</sup> which seeks to capture hot-news misappropriation in a five-prong test:

- (i) the plaintiff generates or collects information at some cost or expense;
- (ii) the value of the information is highly time-sensitive;
- (iii) the defendant's use of the information constitutes free-riding on the plaintiff's costly efforts to generate or collect it;
- (iv) the defendant's use of the information is in direct competition with a product or service offered by the plaintiff;
- (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened.<sup>165</sup>

This test requires a lot of information but does not key off custom and first-order law in an in personam way, as envisioned in *International News Service*. As is often the case post-fusion and post-Realism, economic policy at a single level substitutes for the two-tiered structure that could respond more indirectly to such concerns through the complex evasion of the first-order norms. Although well formulated, the *NBA v. Motorola* test is both complex and closer to a property right, rather than being targeted to opportunism where it is needed most.<sup>166</sup> The equitable approach would do better at cabining the attempts by news sites to shut down aggregators, given the relevant background customs of the internet.<sup>167</sup>

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<sup>162</sup> See, e.g., Balganesch, *supra* note 159, at 430 (discussing how subsequent courts and commentators treated *International News Service* as being about property). Much of the commentary uses "property rights" without making much of a distinction between legal and economic property rights or between in rem and in personam. See, e.g., Douglas G. Baird, *Common Law Intellectual Property and the Legacy of International News Service v. Associated Press*, 50 U. CHI. L. REV. 411, 428-29 (1983) (discussing *International News Service* as common-law intellectual property and as a source of property rights).

<sup>163</sup> A more extreme example is the ahistorical and misleading four-factor test for injunctions adopted by the Supreme Court in *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). See Gergen et al., *supra* note 82, at 204-14, 232-37.

<sup>164</sup> 105 F.3d 841, 845 (2d Cir. 1997). This restatement is true whether or not, as the Second Circuit suggested recently, there is a set of "sophisticated observations in aid" of an analysis of preemption. *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 901 (2d Cir. 2011). *But see id.* at 911 (Raggi, J., concurring) (arguing that the five-part test was necessary to the result in *National Basketball Ass'n*). One could say that the statement in the majority opinion in *Barclays* itself was dictum. See Shyamkrishna Balganesch, *The Uncertain Future of "Hot News" Misappropriation After Barclays Capital v. Theflyonthewall.com*, 112 COLUM. L. REV. SIDEBAR 134, 137 (2012), <https://columbialawreview.org/wp-content/uploads/2016/05/Balganesch.pdf> [<https://perma.cc/AH69-RNDS>].

<sup>165</sup> *Nat'l Basketball Ass'n*, 105 F.3d at 852 (citations omitted).

<sup>166</sup> The opinion is further distant from equity in disavowing "ethics": "*INS* is not about ethics; it is about the protection of property rights in time-sensitive information so that the information will be made available to the public by profit seeking entrepreneurs." *Id.* at 853.

<sup>167</sup> *Barclays Capital Inc. v. Theflyonthewall.com*, 700 F. Supp. 2d 310, 332 (S.D.N.Y. 2010) ("Thus, in *INS*, the misappropriation doctrine was developed to protect costly efforts to gather commercially valuable, time-sensitive information that would otherwise be unprotected by law."), *overruled by Theflyonthewall.com*, 650 F.3d 876.

### 3. Good Faith Purchase

Nowhere do problems of polycentricity, conflicting rights, and opportunism present themselves more systematically than in good faith purchase. Good faith purchase sits at the crossroads of contract, property, unjust enrichment, and even tort law, and the law's response to good faith purchasers has been profoundly shaped by equity as meta-law.

Good faith purchase presents structures of rights that involve multiple parties and their complex interactions with ample room for opportunism. If *B* steals *X* from *A* and then enters a transaction to sell *X* to *C*, *C* receives nothing. *B* had nothing to give: *nemo dat quod non habet* ("one cannot give what one does not have").<sup>168</sup> If, however, *B* obtains *X* from *A* by fraud and enters a transaction to sell *X* to *C*, *C* can obtain good title vis-à-vis *A* if *C* was in good faith and gave value. If *C* knew of the fraud or if *C* did not give value—was a donee, for example—then *C* does not get good title. These days, under the Uniform Commercial Code (UCC), a fraudster *B* is said to have voidable title, which means *A* can reverse the transaction but *B* can give good title to a good faith purchaser for value (GFPV).<sup>169</sup> The UCC entrustment provisions—where an owner entrusts goods to a merchant dealing in that type of good—are treated as largely superseding earlier notions of estoppel.<sup>170</sup>

In earlier times, and still sometimes in real-property law, good faith-purchaser doctrine was framed in terms of equity.<sup>171</sup> When *B* defrauds *A*, *A* retains an equitable interest in *X* such that *A* can force anyone who comes to possess *X* to reconvey to *A*. However, a good faith purchaser for value ("GFPV") takes *X* free of competing equities. Because of equity's unwillingness to act against a good faith purchaser, the good faith purchaser for value became known "equity's darling."<sup>172</sup> In his treatise, Joseph Story treats the good faith-purchase problem and its intersection with "constructive fraud" as a multipolar, and potentially multisided, problem in opportunism.<sup>173</sup>

As originally conceived, the good faith-purchase problem was not just a creature of equity jurisdictionally; it was also an example of meta-law. Problems of sequential possession and title involve multiple parties and conflicting potential rights,<sup>174</sup> and are rife with possibilities for opportunism. Is the purchaser really in good faith? Where does lack of notice end and willful

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<sup>168</sup> THOMAS W. MERRILL & HENRY E. SMITH, *THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY* 168-69 (2010).

<sup>169</sup> U.C.C. § 2-403 (AM. LAW INST. & UNIF. LAW COMM'N 2014).

<sup>170</sup> See, e.g., *Heinrich v. Titus-Will Sales, Inc.*, 868 P.2d 169, 173 (Wash. Ct. App. 1994).

<sup>171</sup> See, e.g., WALTER ASHBURNER, *PRINCIPLES OF EQUITY* 67-68 (1902); J. B. Ames, *Purchase for Value Without Notice*, 1 HARV. L. REV. 1 (1887).

<sup>172</sup> Aruna Nair & Irit Samet, *What Can 'Equity's Darling' Tell Us About Equity?*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY* 264, 278 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020). Nair and Samet argue that a rule favoring GFPVs is consistent with morality and conscience.

<sup>173</sup> STORY, *supra* note 95, §§ 381-396, at 409-24.

<sup>174</sup> ARRUÑADA, *supra* note 136, at 43-75.

blindness begin? When does the original owner's carelessness become so unavoidably misleading as to bring estoppel into play?

The concept and mechanisms of the good faith purchaser were also equitable. It was rarely thought to be just to take property from the GFPV when the GFPV had relied without any reason not to. By contrast, lack of giving value means no reliance (or change of position), and notice means that the purchaser is an opportunist. Outside this safe harbor, equity would apply: estoppel might prevent an owner from winning even when the title was void or voidable, as in the law of real property today.<sup>175</sup> After some equitable intervention in the earliest periods, the recording acts crystalized the good faith purchaser and have relatively stably interacted with notions like estoppel ever since.<sup>176</sup>

During the twentieth century however, good faith-purchase doctrine, especially in personal property, was significantly flattened. Legal Realists such as Karl Llewellyn, the drafter of the UCC, and Grant Gilmore, the drafter of Article 9, drew on earlier pressure campaigns by commercial interests to push for a sweeping rule in favor of good faith purchasers.<sup>177</sup> The UCC drafters pushed through ideas of good faith purchase even in the face of recalcitrant early twentieth-century case law that left the door open for equitable balancing.<sup>178</sup> Interestingly and also ironically for Realists, this throwback nineteenth-century approach resulted in a rather acontextual rule.

The quest for certainty in commercial law has contributed to the flattening of equity. This flattening of good faith purchase has shown some strains, just where we would expect. Even the UCC drafters, rule oriented as they were, nevertheless included a provision allowing

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<sup>175</sup> See, e.g., *Hauck v. Crawford*, 62 N.W.2d 92, 94 (S.D. 1953). Interestingly, with somewhat similar effects, courts will often deny an owner a fraud-in-the-factum claim if the owner was negligent. See, e.g., *Glascoe v. Bracksieck*, 85 N.W.2d 423, 424 (N.D. 1957) ("Where the signature of a grantor to a deed is obtained by fraud, a subsequent good faith purchaser, of a title derived through the fraudulent deed, will be protected if the fraud was made possible by the negligence of the defrauded grantor."); see also *Houston v. Mentelos*, 318 So. 2d 427, 430 (Fla. Dist. Ct. App. 1975) (affirming the trial court's decision to void the grantee's title for fraud in factum in part due to the implicit finding that "there was no negligence or inattention on the part of the [grantor]"). Particularly interesting is *Hoffer v. Crawford*, 65 N.W.2d 625 (N.D. 1954), which involves the same fraud spree as in *Hauck*.

<sup>176</sup> Rose portrays recording acts as oscillation, at least for the early periods. Rose, *supra* note 144, at 585-90, 596-97. For an argument that the law surrounding recording acts is better regarded as sedimentation, see Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047, 1052-53 (2011). For an argument that the problems involved with noncompete clauses are familiar enough to allow equitable estoppel and unclean hands to fuse into law in that area, see T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1 (2005).

<sup>177</sup> See Grant Gilmore, *The Commercial Doctrine of Good Faith Purchase*, 63 YALE L.J. 1057 (1954); K.N. Llewellyn, *The Modern Approach to Counseling and Advocacy—Especially in Commercial Transactions*, 46 COLUM. L. REV. 167 (1946).

<sup>178</sup> Gilmore, *supra* note 136, at 618. Indeed, Gilmore and Llewellyn assumed such a rule was needed in order to reflect what they saw as commercial reality. As Gilmore later noted, this was somewhat ironic for Realists, because it flew in the face of what the courts did and even what commercial actors were doing at the time. Purchases of commercial paper had been superseded by other forms of currency by the twentieth century. *Id.* at 612-13.

for background equity,<sup>179</sup> and recent commentators have taken the flattening out of equity further by criticizing the few cases that integrate equity within the GFPV rules.<sup>180</sup> For example, where the plaintiff is the ex-wife of a partner whose unrecorded security interest competes with that of a lead partner who knowingly commits a breach of fiduciary duty to sneak ahead in recording, equity has a clear answer.<sup>181</sup> Forcing the fiduciary to do the right thing is quite compatible with recording—without having to resort to litigation in tort or contract. Likewise, in the most spectacular recent misfire of equity, a simple error in discharging a security interest led to the loss of \$1.5 billion in the later-famous General Motors bankruptcy, when there had been no reliance by other creditors on the incorrect record. The numerous lawyers for the losing bank all framed the question in terms of the statute and authorization, rather than as a (garden-variety) mistake calling for reformation.<sup>182</sup> As a few voices in the wilderness have noted, the hyper-formalism of such an approach would have shocked earlier generations of lawyers and judges.<sup>183</sup>

Solving the good faith-purchase problem will not be attempted here. I will merely note that in the process of fusing law and equity, courts and commentators lost the thread of meta-

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<sup>179</sup> U.C.C. § 1-103(b) (AM. LAW INST. & UNIF. LAW COMM'N 2017).

<sup>180</sup> Cf. M. Stuart Sutherland, Note, *Circular Priority Systems Within the Uniform Commercial Code*, 61 TEX. L. REV. 517, 544 (1982) (defending the lack of regard for equities and the tolerance of harsh results in commercial litigation under the U.C.C.'s system of priorities).

<sup>181</sup> *Feresi v. Livery, LLC*, 182 Cal. Rptr. 3d 169, 176 (Ct. App. 2014) (“The application of equitable principles in this case strengthens the statutory scheme. Not rewarding the product of sharp practices in the creation of a security interest lends stability and security in commercial transactions among fiduciaries.”). A similar issue arises as to whether the mistaken payee of a debt is to be treated similarly to a bona fide purchaser for value where there is arguably no irreversible change of position. Notably, section 14(1) of the *Restatement (First) of Restitution* denies restitution, with the Reporters taking the view that “the rules as to bona fide purchase are not, as are the rules normally applicable to questions involving restitution, based upon the balance of justice between the parties, but merely upon technicalities.” WARREN A. SEAVEY & AUSTIN W. SCOTT, NOTES ON CERTAIN IMPORTANT SECTIONS OF RESTATEMENT OF RESTITUTION 7-8 (1937). *But see, e.g.,* *Wilson v. Newman*, 617 N.W.2d 318, 319 (Mich. 2000) (holding that detrimental reliance could be a defense to a mistaken payment claim).

<sup>182</sup> *In re Motors Liquidation Co.*, 777 F.3d 100, 103-04 (2d Cir. 2015); Official Comm. of Unsecured Creditors of *Motors Liquidation Co. v. JPMorgan Chase Bank, N.A.*, 103 A.3d 1010, 1012-14 (Del. 2014). For a summary of this saga and a skeptical bare mention of the possibility of reformation (and the fact that JPMorgan did not raise it), see Bruce A. Markell, *Oops: Official Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, N.A. (In re Motors Liquidation Co.)*, 35 BANKR. L. LETTER, No. 2 (Feb. 2015); *see also* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 12 (AM. LAW INST. 2010) [hereinafter R3RUE] (providing for reformation to prevent unjust enrichment). Even a mechanism as accepted as subrogation has been controversial. *See* Gregg H. Mosson, *Equitable Subrogation in Maryland Mortgages and the Restatement of Property: A Historical Analysis for Contemporary Solutions*, 41 U. BALT. L. REV. 709, 711-13 (2012). The Restatement’s approach to subrogation can be traced to Note, *Equitable Substitution of Mortgages*, 26 HARV. L. REV. 261, 262 (1913) (“It is not enough to justify equitable [subrogation] that the judgment creditor would be left in no worse position, but it is submitted that the doctrine should be applied to prevent the judgment creditor from enjoying an inequitable advantage.”).

<sup>183</sup> *See* ANDREW KULL & WARD FARNSWORTH, RESTITUTION AND UNJUST ENRICHMENT: CASES AND NOTES 560 (2018) (“The most significant aspect of ‘displacement’ in *Motors Liquidation* is found in the fact that the principles of law and equity most directly relevant to the case were entirely ignored.”); Bray, *supra* note 28, at 39-40 (discussing *In re Motors Liquidation* as a “striking example” of how “American lawyers and judges have almost entirely lost the sense of equity as an alternative and exceptional mode of decisionmaking”).

law, putting some potentially beneficial subtleties beyond the reach of private law. This Article challenges us to reconsider this move, and argues that the lens of equity as meta-law has the potential to diagnose some systematic and recurring problems with this controversial area of law and to reframe the institutional-design question.

#### 4. Trusts

If there is any legacy of equity that retains its salience it is the trust. Whether trust law retains an equitable flavor post-fusion is an open question. Its meta-law character, however, remains quite evident.<sup>184</sup>

The trust arose out of the two-court system. The law courts would only recognize legal title, and the equity courts would in addition recognize beneficial interests (sometimes misleadingly called “equitable title”).<sup>185</sup> This overlay was “meta”: without any conflict, the law courts could enforce legal title, and the equity courts took that as an input to the more complete and complex picture. The equity courts enforced duties in the legal titleholder, the trustee, to exercise the rights and powers associated with legal title for the benefit of the beneficiary, most prominently through the duty of loyalty. Such arrangements were both complex and multipolar, and were rife with dangers of opportunism. Unlike equity generally, this called for prophylactic rules that told the trustee not even to consider self-dealing or engaging in other conflicts of interest and duty.<sup>186</sup>

As with other parts of the law with origins in equity, trust law is ambiguous in the degree to which it retains a meta-law character. Often the beneficial interest is treated as “carved out” of ownership (in a version of the bundle-of-sticks picture of property), and often one hears of legal and equitable title. More recently, commentators have developed more appreciation of a structural version of meta-law in trusts. Ben McFarlane and Rob Stevens argue that equitable property is a right against a right: the beneficiary has no property in the asset except in the right of the trustee to the asset.<sup>187</sup> In a somewhat more orthodox vein, James

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<sup>184</sup> Corporate law is itself an outgrowth of trusts and equity, and retains an element of equity as meta-law. Andrew S. Gold & Henry E. Smith, *The Equity in Corporate Law* (Oct. 2019) (unpublished manuscript) (on file with author). It is perhaps no coincidence that the nonmerged Delaware Chancery Court has retained its equitable character in attaining its special role in corporate law. *Id.*; Paul B. Miller, *Equity, Majoritarian Governance, and the Oppression Remedy*, in *FIDUCIARY OBLIGATIONS IN BUSINESS* (Arthur Laby & Jacob Hale Russell eds.) (forthcoming 2020) (manuscript at 7-8, 30-31), <https://ssrn.com/abstract=3483563> [<https://perma.cc/L6G7-JUVH>]; see Rochelle C. Dreyfuss, *Forums of the Future: The Role of Specialized Courts in Resolving Business Disputes*, 61 *BROOK. L. REV.* 1, 5-8 (1995); Stephen J. Massey, *Chancellor Allen’s Jurisprudence and the Theory of Corporate Law*, 17 *DEL. J. CORP. L.* 683, 698-705 (1992).

<sup>185</sup> GEORGE T. BOGERT, *TRUSTS* 1-8 (6th ed. 1987).

<sup>186</sup> Henry E. Smith, *Why Fiduciary Law Is Equitable*, in *PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW* 261, 261-62 (Andrew S. Gold & Paul B. Miller eds., 2014); see also MATTHEW CONAGLEN, *FIDUCIARY LOYALTY: PROTECTING THE DUE PERFORMANCE OF NON-FIDUCIARY DUTIES* 67-75 (2010) (emphasizing the prophylactic nature of fiduciary duties).

<sup>187</sup> Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 *J. EQUITY* 1, 1 (2010). Ames offered a similar obligational analysis, which included some inkling of equity as meta-law. Ames, *supra* note 171, at 9-10.

Penner defends the view that the trustee has a legal title subject to duties to exercise the powers of title for the beneficiary—which at least sees trusts as two tier.<sup>188</sup> The trust combines aspects of in rem and in personam (despite efforts to flatten it into one or the other),<sup>189</sup> but the jury is still out on whether and to what extent trust law and fiduciary law more generally still present novel forms of uncertainty and complexity that call for meta-law in a robust sense.<sup>190</sup>

In all these areas—privity, misappropriation, good faith purchase, and trusts—equity served as meta-law at the creation of the doctrine. In all these areas, complexity and uncertainty had arisen through the interaction of incommensurate aspects of private law (in rem and in personam, property and contract), which equity helped reconcile through meta-law, especially against a background of changing commerce and technology. Whether and to what extent meta-law should remain a vital part of these areas—as opposed to a worked-out version of first-order rules and standards—is a question worthy of attention not generally received these days. I suggest that the optimal amount of meta-law here is greater than what we currently have. However, it is now time to evaluate meta-law in general and on its own terms.

## II. THE SPECIALIZATION OF LAW AND EQUITY

The real “fusion fallacy” has been to overlook how law is indeed a system of systems and to assume—wrongly—that law has to operate at a single homogeneous level. This Part offers a theory of a function of equitable meta-law and, by extension, a partial account of equity itself. On this theory, equity and law benefit from specialization of function. Law as relatively simple and general and equity as contextual and focused work in tandem and produce synergies not attainable by one component alone. This type of synergy is familiar from complex-systems theory (CST). CST posits that systems characterized by organized complexity can sometimes benefit from specialized subsystems.<sup>191</sup> This “systems of systems” theory allows us to consider when the benefits of subsystem specialization makes it worth the cost of

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<sup>188</sup> Penner, *supra* note 24, at 657-58, 664.

<sup>189</sup> Compare MAITLAND, *supra* note 1, at 29 (“[T]he Chancellor begins to enforce a personal right . . . which in truth is a contractual right, a right created by a promise.”), with Austin Wakeman Scott, *The Nature of the Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 289 (1917) (“[T]he rights of the *cestui que trust* . . . are treated like property rights rather than like obligations.”). For a more recent iteration of this debate, compare John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 627, 669 (1995), which acknowledges that “[t]rust is a hybrid of contract and property,” but maintains that at bottom “[t]rusts are contracts,” with Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 454-59 (1998), which argues for a property-based account of trusts.

<sup>190</sup> I have argued that it does. Henry E. Smith, *Fiduciary Law and Equity*, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, *supra* note 78, at 745; Smith, *supra* note 53.

<sup>191</sup> See, e.g., David L. Alderson & John C. Doyle, *Contrasting Views of Complexity and Their Implications for Network-Centric Infrastructures*, 40 IEEE TRANSACTIONS ON SYSS., MAN & CYBERNETICS—PART A: SYSS. & HUMS. 839, 841-42 (2010).

creating multiple systems, as well as provides a mechanism for the limited interaction of these subsystems.<sup>192</sup>

### A. Varieties of Specialization

Equity as meta-law sees law and equity as distinct and standing in a special relationship for a reason: by working in tandem they produce effects of efficiency, fairness, and justice, not feasible by either alone or any other single-tier system. This synergy should not be surprising as it arises in all sorts of economic, social, and political systems. Yet conventional views ignore the possible benefits of specialization in the case of equity.

How does specialization work in law versus equity? To begin with, law and equity do different things. Law provides general guidance over many cases in a simpler way. Equity bores in on specific problems and identified actors *ex post*, employing a great deal of contextual information. Law is a first cut at guiding behavior, and equity is the fine-tuning—the *ex post* adjustment where the first cut doesn't work well.

Where equity is contextual and targeted, law can be more formal and general, covering many cases at low cost to both law's creators and law's audiences. The benefits of equitable treatment are applied only where they are needed, thus interfering less with law than if equity were always applicable. A homogenous system saves the cost of toggling between the two modes, but it would tend toward some uniform level of formality. Moreover, without the specialization of equity, the contextualism in law has the potential to bleed out beyond where it is optimal. Further, by putting this equitable function in a modular system of meta-law, equity's benefits can be achieved in a more effective fashion. When a homogeneous single-level law tries to tackle problems of high uncertainty and complexity, it must either itself become complex and fragile, or it must fail to provide meaningful guidance (as with multifactor balancing tests).

Equity, then, contributes to specialization in the law. Specialization and division of labor are central to economics and the theory of production in particular.<sup>193</sup> There is a "greater than the sum of its parts" aspect to treatments of specialization and the division of labor going back to at least Adam Smith.<sup>194</sup> Most representative of the spirit of modern complexity theory is

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<sup>192</sup> See, e.g., James Anderson, John C. Doyle, Steven H Low & Nikolai Matni, *System Level Synthesis*, 47 ANN. REVS. CONTROL 364, 364-66 (2019) (describing an approach in which large-scale distributed control takes into account tradeoffs involving bandwidths and reliability by limiting the flow of information).

<sup>193</sup> See, e.g., Xiaokai Yang, *Endogenous vs. Exogenous Comparative Advantage and Economies of Specialization vs. Economies of Scale*, 60 J. ECON. 29, 29-32 (1994); Xiaokai Yang & Siang Ng, *Specialization and Division of Labour: A Survey*, in INCREASING RETURNS AND ECONOMIC ANALYSIS 3 *passim* (Kenneth J. Arrow, Yew-Kwang Ng & Xiaokai Yang eds., 1998).

<sup>194</sup> See, e.g., KENNETH J. ARROW, *THE LIMITS OF ORGANIZATION* 19 (1974); ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 3-16 (Edwin Cannan ed., Random House 1937) (1776); XIAOKAI YANG & YEW-KWANG

Allyn Young’s idea that complexity—“an increasingly intricate nexus of specialised undertakings . . . inserted . . . between the producer of raw materials and the consumer of the final product”—is the source of the gains from specialization.<sup>195</sup> The advantages of specialization come from a better combination of a wide array of interacting advantages, such that “[w]hat is required is that industrial operations be seen as an interrelated whole.”<sup>196</sup> In the same spirit, Xiaokai Yang pioneered an endogenous approach to specialization, which sees increasing returns as the result of decisions to specialize, with specialization being related not to economies of scale but rather to diseconomies of scope of activity.<sup>197</sup> In such models, sufficient transaction efficiency is a necessary condition, and one limit on specialization is the cost of coordination.<sup>198</sup> In the case of law and equity, such coordination costs arise from devising and maintaining the proxies for toggling between the two systems.<sup>199</sup>

Law-like systems dealing with particularly complex and opportunism-prone activities bear out the expectations of specialization models. Tax law presents a compelling example. It governs particularly well-informed actors, and because of the dangers of opportunism, some role for standards is inevitable.<sup>200</sup> These standards take the form of anti-avoidance doctrines, which back up formal rules against the possibility of their being gamed. The anti-avoidance

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NG, SPECIALIZATION AND ECONOMIC ORGANIZATION: A NEW CLASSICAL MICROECONOMIC FRAMEWORK *passim* (1993); 1 DAVID RICARDO, THE WORKS AND CORRESPONDENCE OF DAVID RICARDO: ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 134-41 (Piero Sraffa ed., 1951) (1817) (developing a theory of comparative advantage based on exogenous specialization); George J. Stigler, *The Division of Labor Is Limited by the Extent of the Market*, 59 J. POL. ECON. 185 *passim* (1951).<sup>195</sup> Allyn A. Young, *Increasing Returns and Economic Progress*, 38 ECON. J. 527, 538 (1928). It is in this sense that “the division of labour depends upon the extent of the market, but the extent of the market also depends upon the division of labour.” *Id.* at 539.

<sup>196</sup> *Id.* at 539.

<sup>197</sup> See, e.g., Yang, *supra* note 193, at 29-32 (setting out a model of specialization based on the scope of activity); Yang & Ng, *supra* note 193, at 9 (“This implies that each person’s decision on his level of specialization not only determines his productivity, but also determines the extent of the market for others’ produce, thereby setting a constraint for others’ decisions on their levels of specialization and productivity.”). Yang styles his approach “new classical” economics, and his model of specialization is closer to Smith than Ricardo. See XIAOKAI YANG, ECONOMICS: NEW CLASSICAL VERSUS NEOCLASSICAL FRAMEWORKS 3-15, 45-47 (2001) (discussing approaches to specialization). Complexity economics also builds on classical economics. See DAVID SIMPSON, THE REDISCOVERY OF CLASSICAL ECONOMICS: ADAPTATION, COMPLEXITY AND GROWTH 71-85, 105-30 (2013) (using complexity to revive classical economics); see also, e.g., David S. Wilson, Alan Kirman & Julia Lupp, *Introduction to COMPLEXITY AND EVOLUTION: TOWARD A NEW SYNTHESIS FOR ECONOMICS* 1, 1 (David S. Wilson & Alan Kirman eds., 2016) (describing complexity economics); Friedrich August von Hayek, *The Pretence of Knowledge*, 79 AM. ECON. REV. 3, 4 (1989) (Nobel address) (discussing the “essential complexity” of the economy and the importance of interconnections of elements in “organized complexity”).

<sup>198</sup> Gary S. Becker & Kevin M. Murphy, *The Division of Labor, Coordination Costs, and Knowledge*, 107 Q.J. ECON. 1137 *passim* (1992).

<sup>199</sup> A wide variety of economic and institutional settings show the benefits of this kind of specialization. Economic simulations provide suggestive evidence of the benefits of specialization. Getting a handle on the source and nature of synergies from specialization and the division of labor has not been easy. One strategy is to do various simulations with different levels of certain variables. In a simulated economy greater variability in the environment leads to greater specialization by (simulated) economic actors. Klaus Jaffé, *Agent Based Simulations Visualize Adam Smith’s Invisible Hand by Solving Friedrich Hayek’s Economic Calculus* 11 (Nov. 25, 2014), <https://ssrn.com/abstract=2695557> [<https://perma.cc/U29Z-B9HX>].

<sup>200</sup> See *supra* note 97 and accompanying text.

doctrines are couched in terms strikingly similar to equity, including substance over form, the step-transaction doctrine, and the sham-transaction doctrine. The triggers for anti-avoidance—skewed results and an inkling of intent—and the way they range over first-order results makes the parallels to equity even closer.<sup>201</sup>

Finally, we can get a sense of the role of specialization in equity from organizational theory on how to group tasks.<sup>202</sup> Organizational theory shows us that law and equity can be grouped together in the same court in such a way as to reap the benefits of specialization. Consider David Weisbach and Jacob Nussim’s analysis of whether spending through tax expenditures should be administered by the same agency that collects the taxes.<sup>203</sup> Among the relevant factors are those relating to specialization (promoting separation) and coordination (promoting bundling).<sup>204</sup> With some modification for what specialization and coordination mean, similar considerations apply to bundles of tasks, roughly law and equity, administered in one court with two hats, or more simply with two separate modes. As Weisbach and Nussim’s work implies, tasks can be grouped together even if they are not assigned to separate divisions of economic agents.<sup>205</sup>

Grouping of tasks is pervasive in legal design. The regulatory literature provides other examples of specialization in the face of polycentric, complex, or opportunism-prone areas. Some argue that principles (standards) create more certainty when the activity is complex in a changing environment.<sup>206</sup> Standards can counteract the problem of compliant noncompliance, that is, satisfying the letter but not the purpose of a rule; illustrations come from the regulation of industries like nursing homes.<sup>207</sup> Moreover, where a complex action comes with high stakes, a hybrid of rules and principles can be better than rules or principles alone.<sup>208</sup> For example, the accounting industry, which is closely related to tax, has long featured a debate about rules and

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<sup>201</sup> In England, with more of a doctrinal residue of equity, the connection is closer to the surface, as when Graeme Macdonald argues that courts are forced away from rules in tax for familiar reasons involving the need for generalization, the lack of “an omniscient rule-designer capable of anticipating all the possible combinations of circumstances which might conceivably bear on the rule” and “a recalcitrant audience able to learn and respond to every change in specification,” leading to an introduction of substance through equity. Graeme Macdonald, *Substance, Form and Equity in Taxation and Accounting*, 54 MOD. L. REV. 830, 834 (1991) (quoting CHRISTOPHER HOOD, *ADMINISTRATIVE ANALYSIS: AN INTRODUCTION TO RULES, ENFORCEMENT, AND ORGANIZATIONS* 33 (1986)).

<sup>202</sup> See generally *THE HANDBOOK OF ORGANIZATIONAL ECONOMICS* (Robert Gibbons & John Roberts eds., 2013) (providing an overview of the field, including a focus on defining boundaries of organizations).

<sup>203</sup> David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 957 (2004).

<sup>204</sup> See *id.* at 985 (discussing the tradeoffs between specialization and coordination).

<sup>205</sup> See *id.* at 960 (discussing how organizations are “devices . . . for separating production processes into tasks or divisions”).

<sup>206</sup> See, e.g., Braithwaite, *supra* note 96, at 52 (“As the complexity, flux and the size of regulated economic interests increase, certainty progressively moves from being positively associated with the specificity of the acts mandated by rules to being negatively associated with rule specificity.”).

<sup>207</sup> *Id.* at 61-65.

<sup>208</sup> *Id.* at 65 (“When the type of action to be regulated is complex, changing and involves large economic interests, principles or rules alone are less certain than a prudent mix of rules and principles.”).

principles, with some arguing that principles are needed as part of the mix because of complexity and the dangers of opportunistic compliant noncompliance.<sup>209</sup>

Among the more explicit treatments of synergy in legal doctrine itself is Einer Elhauge's analysis of the sale-of-control doctrine in corporate law.<sup>210</sup> Normatively, disagreement centers on whether minority shareholders should share in the gains of the sale of a controlling block of shares. Descriptively, the doctrine is a muddle. Elhauge argues that the no-sharing or sharing approaches "are good at *different* things."<sup>211</sup> He then shows how the doctrine triggers sharing when the sale of control is likely to lead to abuses. Indeed, we might say that the sharing approach is an analogue of equity in that it shows second-order features.<sup>212</sup> Other areas of law that show such toggling include administrative law and even tort law.<sup>213</sup> Again, the special connection of equity to administration and the theme of the system of equity that it requires a more managerial approach are strongly suggestive of the benefits of specialization.<sup>214</sup>

## B. Synergies and Meta-Law

The specialization of law and equity is complementary and structured. Equity makes it possible for law to be more general and law makes it possible for equity to focus. The partial separateness of the two modes allows this joint effect to be achieved with less cross-talk. And higher-order standards are a way to control uncertainty without introducing more ambiguity in the process. Systems theory captures benefits of specialization that go beyond the basics: structuring tasks in a hierarchy can be better than putting them on the same plane.

Systems theory emphasizes emergence and feedback, both of which are important in equity. The benefits to a hierarchical task structure with different modules for each system are not reducible to the separate benefits of the two systems. In modular systems, the point is to organize a system so that interactions are intense within modules and sparser (but not zero) at

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<sup>209</sup> See, e.g., Doreen McBarnet & Christopher Whelan, *The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control*, 54 MOD. L. REV. 848, 873 (1991) (discussing "formalism," "anti-formalism," and "creative compliance" in the finance context); see also Mark W. Nelson, *Behavioral Evidence on the Effects of Principles- and Rules-Based Standards*, 17 ACCT. HORIZONS 91, 91 (2003) (assessing "research relevant to predicting how the behavior of various participants in the financial reporting process is affected by principles-based and rules-based standards").

<sup>210</sup> Einer Elhauge, *The Triggering Function of Sale of Control Doctrine*, 59 U. CHI. L. REV. 1465 (1992).

<sup>211</sup> *Id.* at 1466.

<sup>212</sup> The traditional rule of lawyer liability is justified in a similar manner. See Stephen McG. Bundy & Einer Elhauge, *Knowledge About Legal Sanctions*, 92 MICH. L. REV. 261, 323-27 (1993) (arguing that the crime-fraud line serves as a trigger from one mode of legal control to another).

<sup>213</sup> See Thomas W. Merrill, *The Mead Doctrine: Rules and Standards, Meta-Rules and Meta-Standards*, 54 ADMIN. L. REV. 807 (2002) (discussing the rule for choosing forms of deference to agencies); Cristina Carmody Tilley, *Tort Law Inside Out*, 126 YALE L.J. 1320 (2017) (analyzing tort law as responsive to two kinds of communities, the local and the national).

<sup>214</sup> See Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 579-80 (2016). For a discussion on equity and administration, see *supra* notes 74, 78 and accompanying text.

the interfaces between modules.<sup>215</sup> Changes in a module can then be tracked more easily than if everything were in principle interconnected. Equitable meta-law is highly interconnected within itself, but the interface between it and law is stylized through the triggers and their proxies. Because of this structure, we can predict the effects of equity better than if it were a ubiquitous wild card or *deus ex machina*.

Treating the choice between formalism and contextualism as a homogeneous mix of elements at one level is unlikely to make either element as effective as it could be. For these purposes, formalism is relatively invariance to context (a notion of formalism useful across many domains, from natural language to artificial languages to scientific theorizing to law).<sup>216</sup> The benefits of formalism increase with generality. The point of formalism is to capture generalizations with the minimum contextualized apparatus.<sup>217</sup> The rule of law sees a simple general set of rules as an ideal. Unfortunately, the costs of inaccuracy also increase with generality. So, taken only on one level, the question is how far to push formalism in light of diminishing net benefits. On the other hand, contextual rules usually sacrifice breadth to achieve depth. For contextual rules to achieve benefits, often part of the context must be misleading.

Putting contextualism in law at a second order may allow these tradeoffs to be managed better than they could be all at one level. By placing contextual parts of the system at a higher level, formalism at the primary level can be more general than it otherwise would be. And contextualism at the second level can be deeper because it can target contextualized intervention where it is needed most. The remaining question is whether the benefits from specialization at two levels exceed the costs of setting up a second level which targets contextualized intervention. This is the true tradeoff that should inform the choice of what scope to give the second-order equitable function.

One aspect of the specialization of law and equity is their characteristic—and different—modes of communication. Equity strikes a version of the communicative tradeoff faced by all law—between the intensity of the message and the extensiveness of the audience.<sup>218</sup> The modularity of equity permits a special hybrid of formalism and contextualism. Like other social practices dependent on communication, law strikes an informational tradeoff between intensiveness and extensiveness. The information intensiveness of a communication is

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<sup>215</sup> See, e.g., 1 CARLISS Y. BALDWIN & KIM B. CLARK, DESIGN RULES: THE POWER OF MODULARITY 63-92 (2000) (discussing modularity as a concept and modularity's role in managing complexity); SIMON, *supra* note 6, at 195-98 (discussing the near decomposability of systems).

<sup>216</sup> Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUND. SCI. 25, 49-53 (1999); Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105 (2003).

<sup>217</sup> See, e.g., Heylighen, *supra* note 216, at 26-28, 49-53; Smith, *supra* note 216, at 1148-57.

<sup>218</sup> See Smith, *supra* note 216, at 1109-12, 1126-33.

the amount of information conveyed per unit of production cost, the former measured by the metrics of information theory and the latter by more conventional economic metrics.<sup>219</sup>

This communicative tradeoff is pervasive in the law<sup>220</sup> and can be illustrated by natural language. Sociolinguists have long known that speech styles vary in formality depending on social context and that the factors characterizing more formal styles—more pausing, more editing, and greater explicitness—involve higher production costs.<sup>221</sup> Indeed, speakers shift their style depending on the social distance between them and their audience.<sup>222</sup> One aspect of informal speech is implicature, as where someone can make a request like, “because you are standing close to the window and I am uncomfortable, please close the window” by saying “it’s cold in here.”<sup>223</sup> The key is the shared knowledge that comes from a common social context. Various measures quantify reliance on context, based on the relative frequency of nouns, determiners, and prepositions versus pronouns and adverbs, with a high ratio of the former to the latter indicating formality. Linguists have shown that such formality correlates systematically with the social distance of audiences.<sup>224</sup>

Law and equity show something like this tradeoff as well, in terms of formality and generality versus context sensitivity and particularity. Law aspires to generality and explicit rules.<sup>225</sup> In comparison, equity leaves more implicit. This is partly what is meant by discretion and is one reason why equity courts for a long time did not have any doctrine of *stare decisis*.<sup>226</sup> The whole idea of discretion, while not unbounded, is one dimension of the context dependence and consequent lack of formalism in equity.

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<sup>219</sup> See C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 379, 382-420 (1948) (developing a theory of information based on quantity), reprinted in CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION 3, 7-48 (1949); C.E. Shannon, *A Mathematical Theory of Communication*, 27 BELL SYS. TECH. J. 623, 623-36 (1948), reprinted in CLAUDE E. SHANNON & WARREN WEAVER, THE MATHEMATICAL THEORY OF COMMUNICATION 3, 49-63 (1949); see also R.V.L. Hartley, *Transmission of Information*, 7 BELL SYS. TECH. J. 535 (1928) (developing the notion of “amount of information”).

<sup>220</sup> See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4, 33 (2000); Merrill & Smith, *supra* note 155, at 849-51; Henry E. Smith, *Community and Custom in Property*, 10 THEORETICAL INQUIRIES L. 5, 6-7, 32 (2009); Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1175-79 (2006); Henry E. Smith, *Standardization in Property Law*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 148 (Kenneth Ayotte & Henry E. Smith eds., 2011).

<sup>221</sup> See, e.g., Paul Kay, *Language Evolution and Speech Style*, in SOCIOLOGICAL DIMENSIONS OF LANGUAGE CHANGE 21, 28-29 (Ben G. Blount & Mary Sanches eds., 1977); see also Basil Bernstein, *Elaborated and Restricted Codes: Their Social Origins and Some Consequences*, 66 AM. ANTHROPOLOGIST 55, 57 (1964).

<sup>222</sup> Allan Bell, *Language Style as Audience Design*, 13 LANGUAGE IN SOC'Y 145, 158-61 (1984); see also Herbert H. Clark & Thomas B. Carlson, *Hearers and Speech Acts*, 58 LANGUAGE 332, 342-47 (1982) (analyzing discourse in terms of audience design).

<sup>223</sup> See PAUL GRICE, *Logic and Conversation*, in STUDIES IN THE WAYS OF WORDS 22, 24-26 (1989).

<sup>224</sup> Jean-Marc Dewaele, *How to Measure Formality of Speech? A Model of Synchronic Variation*, in APPROACHES TO SECOND LANGUAGE ACQUISITION 119, 126 (Kari Sajavaara & Courtney Fairweather eds., 1996).

<sup>225</sup> See *supra* notes 12, 54-61 and accompanying text.

<sup>226</sup> See, e.g., BAKER, *supra* note 1, at 118-19; Klinck, *supra* note 20, at 711-14.

In specialization models, intensiveness and extensiveness can be traded off in different combinations, allowing the value of overall production to increase in this respect in particular.<sup>227</sup> Similarly, a hybrid of law and equity can be superior to homogeneous law. Doing so requires recognizing that the communicative tradeoff can be improved and partially overcome by allowing parts of the legal system to specialize. In personam aspects of law (those holding between identified persons) tend to be less formal than those involving in rem (impersonal and anonymous) audiences.<sup>228</sup> Law and equity—or more precisely first- and second-order law—are directed at different audiences and can accomplish their goals in different ways.

This model captures a special kind of “acoustic separation” in equity. Meir Dan-Cohen developed the idea of acoustic separation for areas of law that send one message to primary actors and a different one to legal decisionmakers.<sup>229</sup> Criminal law might send a tough message against would-be criminals but direct judges to show leniency.<sup>230</sup> The separation comes in where the message to judges does not make it out to the public: the lenient message does not undermine the tough one, so the law can maximize deterrence without punishing as much as its letter would seem to require.<sup>231</sup>

Equity’s audiences may show a different kind of acoustic separation.<sup>232</sup> Equity sends the same message, sounding in commercial norms and conventional morality, to two audiences. For those not seeking to exploit the law, this is reassuring to the extent such people pay attention to the details of the law. By contrast, the opportunists will hear the same message as a threat: deviation from basic moral norms can lead to countermeasures from courts of equity.<sup>233</sup>

The relationship of the workings of equity to the features of the legal system as a whole is less than immediate or direct. Rather it is the interaction between levels—and the structure of that interaction—that determines the features of the system as a whole. Again, in systems

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<sup>227</sup> The model here is like that developed by Xiaokai Yang, *see* Yang, *supra* note 193, at 29-32, with the addition that the informational tradeoff provides an additional reason for the endogenous specialization.

<sup>228</sup> Merrill & Smith, *supra* note 155, at 849-51; Smith, *supra* note 216, at 1150-51. And, as we will see, one need not accept equity’s self-conception as “in personam” in all its implications to see that it contains a germ of truth from an informational-design perspective. *See infra* Section III.A.1(b).

<sup>229</sup> Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625 (1984).

<sup>230</sup> *See id.* at 632-34.

<sup>231</sup> *See id.*

<sup>232</sup> *See* Yuval Feldman & Henry E. Smith, *Behavioral Equity*, 170 J. INST. & THEORETICAL ECON. 137, 137-40 (2014).

<sup>233</sup> *Id.* Our increasing understanding of behavioral psychology reinforces this potential role for equity. People, even or especially those who think of themselves as good, use certain cues and prompts as a basis to rationalize self-serving bad behavior. YUVAL FELDMAN, *THE LAW OF GOOD PEOPLE: CHALLENGING STATES’ ABILITY TO REGULATE HUMAN BEHAVIOR* 1-4 (2018) (arguing that people who see themselves as fundamentally “moral, unbiased, and law abiding” are less likely to react to “classical legal signals, which they view as directed to other, ‘bad’ people.”).

theory, the use of meta-systems in a “system of systems” is the subject of rules of thumb and incremental tinkering, itself made possible by the modular structure.<sup>234</sup>

### C. The Dynamism of Equity

Finally, another emergent phenomenon has to do with feedback and evolution in the combined system of law and equity. Because of its modular structure, equity can respond rapidly to new conditions without destabilizing the system. This, more than raw discretion, may be the real source of equity’s flexibility. Equity is an open-ended system that responds to an open-ended set of problems. Opportunism in particular is inherently open ended: evasion can take new forms. Even multipolar problems and conflicting rights can present new problems with minor but kaleidoscopic changes in background conditions, because of the complex interactions involved. Once equity has tamed a problem, however, it may be suitable for first-order treatment. If so, there is no reason at that point not to specify first-order law in the form of a rule or standard that addresses the problem directly. As is often noticed, equitable interventions have often become crystalized into law, as happened with certain kinds of good faith purchase and responses to categories of fraud.<sup>235</sup> This then becomes the new law for equity to act upon.<sup>236</sup>

By dealing with a swath of cutting-edge problems, equity is a moving frontier even if its function remains constant. Thus, while rules and standards—or crystals and mud—may oscillate, equity sometimes solves a problem and passes it along to law, resulting in sedimentation.<sup>237</sup> Once sedimented, equity is no longer open ended and is not meta-law in an active sense, which makes equity’s function that much harder to discern.

The kind of complexity faced by equity includes efforts by actors to evade it, and we see from software that evasion sometimes requires extraordinary meta-responses. Thus, traffic control for self-driving vehicles can be evaded by compliant noncompliance, which could be met by better first-order constraints or by going meta to adapt.<sup>238</sup> More generally, this

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<sup>234</sup> See, e.g., David L. Alderson & John C. Doyle, *Contrasting Views of Complexity and Their Implications for Network-Centric Infrastructures*, 40 IEEE TRANSACTIONS ON SYSS., MAN, AND CYBERNETICS—PART A 839, 839 (2010) (seeking to create “a minimal but universal taxonomy” of “[c]omputing, communication, and control theories and technologies”); J.M. Ottino, *Engineering Complex Systems*, 427 NATURE 399 (2004) (“Despite significant recent advances in our understanding of complex systems, the field is still in flux, and there is still a lack of consensus as to where the centre is.”).

<sup>235</sup> See *supra* Section I.D.3; *infra* Section III.B.

<sup>236</sup> PETER W. YOUNG, CLYDE CROFT & MEGAN LOUISE SMITH, ON EQUITY § 3.170 (2009).

<sup>237</sup> For a model of legal oscillation, see Rose, *supra* note 144, at 580. For the dynamic of legal sedimentation, see WILLIAM W. BILLSON, EQUITY IN ITS RELATIONS TO COMMON LAW 7 (1917), noting that “[c]onceptions of right which by the equity jurisprudence had been made familiar to the popular and professional mind, and proven practicable and wholesome, had a constant tendency to find their way by degrees into the common law even unavowedly and illicitly”; and Smith, *supra* note 176, at 1052.

<sup>238</sup> Thanks to Ted Sichelman for suggesting this example. See, e.g., Paweł Gora & Piotr Wasilewski, *Adaptive System for Intelligent Traffic Management in Smart Cities*, in ACTIVE MEDIA TECHNOLOGY 10th INTERNATIONAL CONFERENCE 525

dimension of equity is reminiscent of adversarial machine learning, in which the AI has to be able to handle efforts at fooling it, in a meta-process of improving itself.<sup>239</sup>

The widespread use of meta-systems in software is an analog for equity. Some of the same considerations come into play: a meta-system can control variation at the primary level while introducing less variation in the process. Furthermore, using a higher-order module to diagnose problems and make repairs at the first order is easier than trying to disentangle the function at the primary level. This is especially true for a distributed function like equity, which ranges over the entire legal system.

More general considerations suggest complex-systems theory is the right set of tools for equity. The kind of complex polycentric problems that face equity fall between two familiar poles. At one end, systems with few elements or very homogenous elements are susceptible to direct analytical methods. At the opposite extreme are large numbers of elements, especially operating randomly, which can be dealt with using statistical methods. For “middle *n*” problems the methods of complex-systems theory are most apt (if not easy to apply).<sup>240</sup>

The effects of specialization cannot be isolated in either law or equity but in their structured interaction. The features of the system, in terms of (un)certainty, (in)efficiency and (un)fairness, only apply at the system level, i.e. the legal system as a whole, even though they arise out of local applications of equity to law.<sup>241</sup> That is, they are emergent properties. This emergence is relevant when we return to how equity supports the rule of law.

In another form of feedback, equity is itself recursive. It applies to itself. Part of equitable analysis is making sure that equity does not produce inequity. Equitable rules of thumb must be set aside in a case if they produce the kind of injustice equity aims to prevent. When we consider the maxims and their associated equitable reasoning, we will encounter courts explicitly applying equitable considerations to the application of equity itself. We could call this “meta-meta-law” and so on. There is nothing vicious about this regress, as long as the

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(Dominik Ślęzak, Gerald Schaefer, Son T. Vuong & Yoo-Sung Kim, eds., 2014); see also *Engineers Unveil New Driverless Car Capable of Committing Hit-And-Run*, ONION (Apr. 2, 2015), <http://www.theonion.com/article/engineers-unveil-new-driverless-car-capable-of-com-38358> [<https://perma.cc/VW49-J5P5>] (describing an “advanced Culpability-Evasion-System”).

<sup>239</sup> See, e.g., ALEXEY KURAKIN, IAN J. GOODFELLOW & SAMY BENGIO, *ADVERSARIAL MACHINE LEARNING AT SCALE 1-2* (2017), <https://arxiv.org/pdf/1611.01236.pdf> [<https://perma.cc/2XBM-UV2>] (“[N]eural networks and many other categories of machine learning models are highly vulnerable to attacks based on small modifications of the input to the model at test time.”); Christian Szegedy, Wojciech Zaremba, Ilya Sutskever, Joan Bruna, Dumitru Erhan, Ian Goodfellow & Rob Fergus, *Intriguing Properties of Neural Networks*, ARXIV (Feb. 19, 2014), <https://arxiv.org/abs/1312.6199> [<https://perma.cc/5UKG-Z4W5>]; see also AJAY AGRAWAL, JOSHUA GANS & AVI GOLDFARB, *PREDICTION MACHINES: THE SIMPLE ECONOMICS OF ARTIFICIAL INTELLIGENCE 187-88* (2018) (describing how DeepMind’s AlphaGo AI was trained using another AI as a partner and a third AI as an adversary).

<sup>240</sup> GERALD M. WEINBERG, *AN INTRODUCTION TO GENERAL SYSTEMS THINKING 20* (1975).

<sup>241</sup> See Andrew S. Gold & Henry E. Smith, *Sizing up Private Law*, 70 U. TORONTO L.J. 489, 504, 514-16 (2020).

system is an open one and we know on what to draw. This, I will argue, is how equity fits into the rule of law.<sup>242</sup>

#### D. Comparisons

Whether equity as meta-law is justifiable depends on how it compares to realistic alternatives. These possibilities can be single level or bilevel and can be more formal or more contextualist.

Single-level models of law posit a system that applies directly to fact situations and eschews context and open-endedness. If further tailoring is desired, the law must change from without through legislation or common-law judicial decisionmaking. More contextual versions of the single-level approach are less determinate and typically employ concepts like reasonableness and balancing to tailor results to situations. This is the familiar rules-versus-standards debate.<sup>243</sup> After the fusion of law and equity, notions of unconscionability, good faith, and the like have exactly this feature.<sup>244</sup> Equitable areas of law are captured as multifactor tests, as with “hot news” misappropriation.<sup>245</sup> All of these operate on one level: there is no need for one component of the law to refer to another. The allowance of meta-level intervention makes the system more powerful, but without more, unconstrained. An unconstrained system may not accord with the rule-of-law virtues of stability and consistency. I return to the concern of unbounded equity in Part III.

Other critics of a dual equity-and-law system have proposed other reasons a meta-law system would be inferior to the status quo. This framework allows us to see which of those problems with equity are real and which are only pseudoproblems at best. Among the latter is the False Generalization, which posits that all equity in the legal system might well be worse than all law. In effect this is what the New Formalists in contract are arguing.<sup>246</sup> This, however, is a false comparison. The real question is whether some hybrid of equity and law is better than equity or law alone. And, as we have seen, there is good reason to think that some such hybrid is indeed superior to homogeneous law.

Another related misfire is the Domain Fallacy. Opponents of equity misinterpret equity as bearing directly on the problems it addresses. By missing the second-order aspect of equity,

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<sup>242</sup> See *infra* notes 367-368 and accompanying text.

<sup>243</sup> See Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 559-68 (1992); Emily Sherwin, *Equity and the Modern Mind*, in EQUITY AND LAW: FUSION AND FISSION, *supra* note 28, at 353; see also FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE 10-12 (1991) (describing the relationship between rules and law).

<sup>244</sup> See *supra* Section I.D.

<sup>245</sup> See *supra* Section I.D.2.

<sup>246</sup> See, e.g., Alan Schwartz & Robert E. Scott, *Contract Interpretation Redux*, 119 YALE L.J. 926, 926 (2010); see also David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842 (1999) (describing the formalism of private trade organizations).

they treat equity as a clumsy version of law. Thus, when it comes to combatting opportunism they interpret equity as a *rule*—or, rather, a first-order standard—amounting to *don't be opportunistic or else*.<sup>247</sup> This ignores the need for a proxy trigger to get us into equity and the various self-limiting aspects of equity itself. Equity is not designed to root out every last bit of opportunism, nor is it meant to displace clear instructions from informed contracting parties (or legislators). It is designed to work in tandem with law to tamp down the problem of unforeseen, and sometimes, unforeseeable, complexity and opportunism. This can take the form of interventions to keep in check bilateral opportunism in the contracting process itself.<sup>248</sup>

A more sophisticated version of the Domain Fallacy focuses on the margin. It posits that the costs and errors of the last application of equity compared with the last application of law reveal equity to be inferior to law. This is related to the counsel of despair about judges' inability to root out opportunism. While there is no reason to be complacent about equity, this pessimism about equity is based on a false comparison as well. Equity and law should not be evaluated in isolation, because they work in tandem. At the current margin of law and equity, law may be more effective than equity or vice versa, but the real point is this: if pushing equity to a certain point garners benefits not just in its direct application but in allowing law to be more formal, it is worth incurring the administrative and error costs of doing so. Again, the optimal combination of law and equity is an empirical question that we can confront only indirectly, by some combination of analogy and evolutionary arguments, if not rough guesses. No amount of seemingly rigorous measurement at the margin obviates these difficult decisions.

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Equity is a response to complexity, but it is the complexity of equity that allows it to be a response. Equity does not capture complexity by mirroring the world piece by piece. Instead, the pieces of equity—its domain, its triggers, its contextualism—work together to produce something greater than the sum of its parts. This is the paradox of equity: to understand it as a whole requires a nonreductive account of its moving parts. By contrast, conventional views on equity are either vacuously holistic (mystic discretion)—or myopically technical (just a label for historic courts). If equity is to function as meta-law, we may not need separate courts, but we do need separate equity.

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<sup>247</sup> See Robert E. Scott, *Contract Design and the Shading Problem*, 99 MARQ. L. REV. 1, 11-12 (2015) (citing Kenneth Ayotte, Ezra Friedman & Henry E. Smith, *A Safety Valve Model of Equity as Anti-Opportunism* (Nw. Law & Econ., Research Paper No. 13-15, Mar. 30, 2013), <http://ssrn.com/abstract=2245098> [<https://perma.cc/MK9Z-VAQF>]).

<sup>248</sup> For a theory of bankruptcy in which the prime role for courts is to shape the ex post bargain by foreclosing opportunism, see Anthony Joseph Casey, *Chapter 11's Renegotiation Framework and the Purpose of Corporate Bankruptcy*, 121 COLUM. L. REV. (forthcoming), <https://ssrn.com/abstract=3353871> [<https://perma.cc/HJ5J-KLPQ>]. On how the standard for injunctions in patent law can be used to police potential opportunism among both patent owners and potential licensees, see Henry E. Smith, *Property as Platform: Coordinating Standards for Technological Innovation*, 9 J. COMPETITION L. & ECON. 1057, 1084-85 (2013).

### III. EQUITY IN ACTION

In this Part, I address some central but apparently challenging aspects of equity. The aspects of equity elucidated here are selected exactly because they are either difficult for existing approaches to equity or because they are so characteristic of equity—or often both. These include the maxims of equity, varieties of fraud, defenses, and remedies. Each of these aspects looks empty or arbitrary if they are taken to be rules or standards at the primary level of law. As meta-law, they can be seen as doing something much more important.

#### A. The Maxims of Equity

We begin with the equitable maxims.<sup>249</sup> The maxims are familiar, if not as familiar as they once were,<sup>250</sup> but they are easily misunderstood. Most commentators now see little value in them, and a few courts even deny they exist or that they operate in any meaningful sense.<sup>251</sup> The criticism is that, like the canons of statutory interpretation,<sup>252</sup> they are too vague and uncertain, that they sometimes conflict, and that they don't constrain judicial decisionmaking.<sup>253</sup> The maxims are variously regarded as inadequate rules or empty and contradictory aspirations.<sup>254</sup> But such criticisms misunderstand the nature of maxims. They are not designed to be rules or standards like the prudent-person standard in torts or the foreseeability rule for contract damages. Instead, they are signals that we are in equity land, and as such they relate to the equitable decisionmaking mode as a whole.<sup>255</sup>

I will show that the maxims are best seen not as rules of law but rather as indications of equity as meta-law at work. The following is a reconstruction of the maxims, or perhaps a gloss

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<sup>249</sup> See, e.g., JOHN NORTON POMEROY, REMEDIES AND REMEDIAL RIGHTS § 45, at 51 (Boston, Little, Brown & Co. 1876); 1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 97, at 80-81 (San Francisco, A.L. Bancroft & Co. 1881). For the earliest systematic treatment of the maxims, see RICHARD FRANCIS, MAXIMS OF EQUITY, COLLECTED FROM, AND PROVED BY CASES OUT OF THE BOOKS OF THE BEST AUTHORITY, IN THE HIGH COURT OF CHANCERY (London, E. & R. Nutt & R. Gosling 1727).

<sup>250</sup> See Howard W. Brill, *The Maxims of Equity*, 1993 ARK. L. NOTES 29 (explaining the maxims of equity and describing their applications in court); Young & Spitz, *supra* note 16, at 177 (listing nine equitable principles used by the South Carolina courts, including “[e]quity follows the law” and “[e]quity acts in personam, not in rem”).

<sup>251</sup> For an argument that the maxims hold little sway in the United States while in Canada they have become a generalized device for keeping the distinctiveness of equity's methodology and maintaining a dialogue on law and morality, see Jeff Berryman, *Equity's Maxims as a Concept in Canadian Jurisprudence*, 43 OTTAWA L. REV. 165, 182-83 (2011).

<sup>252</sup> Llewellyn, *supra* note 16, at 401-406.

<sup>253</sup> See, e.g., Melvin M. Johnson, Jr., *The Spirit of Equity*, 16 B.U. L. REV. 345, 346, 353-57 (1936) (identifying equity as reasoned discretion and maintaining a source of social policy innovation, and arguing that pursuing traditional equitable maxims on their terms “would confuse us even more. We know that equitable maxims do not always apply. We know that many equitable rules are exceedingly elastic”).

<sup>254</sup> For a summary of the maxims, see YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.90-3.690.

<sup>255</sup> See Howard L. Oleck, *Maxims of Equity Reappraised*, 6 RUTGERS L. REV. 528, 528 (1952) (“[T]he maxims of equity provide a broad, general view of equity as a working system of jurisprudence. They must be understood to be generalities, not ordinarily intended for direct, literal application.”).

on them, which brings out their potential as meta-law—a potential they probably once served and could serve better by being brought to the surface. Their status as meta-law is implicit in their operation, and they substantively address polycentricity, conflicting rights, and opportunism. As meta-law they should work as an integrated whole—earlier commentators likened the maxims to proverbs and saw them as “interdependent” and as presupposing a wisdom in application.<sup>256</sup> Taken as a whole in the light of meta-law, the maxims can be part of a revitalization of equity. If, as I have argued, more explicit attention to meta-law can add focus and contextualism to the law’s current muddled approach to combining generality and formalism, then the maxims could play more of a role in shaping the hybrid law-equity system.

In this Section, I also provide a novel organization of the maxims into categories. Organizing the maxims into categories is a little artificial because, as I am arguing, the various features of equity work together holistically to act as a system of meta-law in solving complex and uncertain problems. Nevertheless, certain themes relate to the structure of equity and how we get into it, and others characterize the style of reasoning once we are there. Individual maxims can partake of more than one theme, and multiple maxims can overlap.

### 1. Cabining Maxims

In this and the next subsection, we start with maxims that limn equity itself. The starting point is to recognize that equity is exceptional and supplements the law when the law falls short. Thus, the list of maxims often begins with what equity is *not*. These limits express how equity is targeted, and are crucial for meta-law to be exceptional rather than routine.

(a) *Equity follows the law*. The maxim, “equity follows the law” often leads the list of maxims, and it theoretically constrains the domain of equity.<sup>257</sup> Because much of equity is meta-law, the threshold question is whether we are in the domain.<sup>258</sup> In the days of separate equity courts, this threshold question had jurisdictional implications.

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<sup>256</sup> NORMAN FETTER, HANDBOOK OF EQUITY JURISPRUDENCE § 7, at 20 (St. Paul, Minn., West Pub. Co. 1895) (“The student should bear in mind that, like proverbs, the practical value of these maxims lies in the skill and judgment with which they are applied to the facts of each particular case; that they do not express in each and every case an exhaustive statement of some independent truth, but that they are interdependent . . . .”); see, e.g., 1 H. ARTHUR SMITH, A PRACTICAL EXPOSITION OF THE PRINCIPLES OF EQUITY 10-11 (5th ed. 1914) (explaining the maxims similarly); cf. Roscoe Pound, *The Maxims of Equity—I: Of Maxims Generally*, 34 HARV. L. REV. 809, 809-16 (1921) (tracing the history of maxims back to Roman proverbs).

<sup>257</sup> For instance, equity acting in personam “follows the law,” especially with respect to property rights. See, e.g., 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA §§ 26-27, 30, 64 (Melville M. Bigelow ed., Fred B. Rothman & Co. 13th ed. 1988) (1853) (differentiating between courts of law and equity and explaining the various interpretations of equity “follow[ing] the law”).

<sup>258</sup> See, e.g., G.W. KEETON, AN INTRODUCTION TO EQUITY 95-97 (6th ed. 1965); YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.140-3.170; see also, e.g., Laura S. Fitzgerald, *Is Jurisdiction Jurisdiction?*, 95 NW. U. L. REV. 1207, 1245-46 n.163 (2001) (“[W]hen equity was administered in a separate court of chancery . . . unless the bill averred some reason for coming into equity [i.e., a basis for seeking particular equitable remedy], that court had no business at all to do anything about the case.” (quoting CHAFEE, *supra* note 76, at 306)).

At first blush, it would seem that equity follows the law is no limiting principle at all. If one pairs “equity follows the law” with “equity will not suffer a wrong to be without a remedy,” a court can reach any result it wants. But if equity is meta-law, “equity follows the law” acquires a different gloss. If the law is clear and the legal rule anticipated the bad behavior, there is no need for equity to backstop the law. Conversely, if an opportunist has outsmarted the law, especially in a novel way or one made possible by an unanticipated change in conditions, then equity strengthens the law by not following its letter. Recall the commentators and judges, including Story, whom we surveyed earlier: equity protects the law against crafty evasions and artful contrivances by not following the law exactly. It is a way of following the law, but loosely.

Conversely, the comprehensiveness of a statutory scheme may displace equity. For example, consider a statute that specifies remedies where a public authority exercises eminent domain but then abandons the planned project for lack of funds. Even if the former owners wish to repurchase at the price agreed to under threat of condemnation six months earlier, equity will not supply a duty to reconvey to the old owners.<sup>259</sup> The statute has created a new ownership with no such strings attached, even though the public authority is acting very shabbily—and one suspects, spitefully.<sup>260</sup>

The maxim that “equity follows the law” is also reflected in the notion that injunctions were not to be granted unless the legal remedy was inadequate—equity begins when law ends. Some commentators such as Douglas Laycock have questioned whether irreparable injury is truly a requirement.<sup>261</sup> Per Laycock, the irreparable injury cases—in which damages are found to be inadequate, thus paving the way for an injunction—are all over the lot. It is hard to point to a type of situation that would be worth litigating that some court or other has not found to meet the criteria for irreparable injury.<sup>262</sup> But if equity is, as I argue, a decisionmaking mode that is directed against hard-to-prove opportunism and complex problems involving conflicting rights, we should not be asking for an ex ante rule in the first place. The irreparable-injury rule is best understood not as a rule, but as a marker for the toggle between law and equity which need not be fully spelled out with precedential force in appellate decisions.

Even more interestingly, Laycock’s proposed replacements for the irreparable injury “rule” are implicitly second order—they are meta-law. Based on his reading of the cases,

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<sup>259</sup> *Indigo Realty Co. v. Charleston*, 314 S.E.2d 601, 601 (S.C. 1984); see Young & Spitz, *supra* note 16, at 178-79. Cf. Charles M. Gray, *The Boundaries of the Equitable Function*, 20 AM. J. LEGAL HIST. 192, 202-06 (1976) (illustrating how courts of equity were prohibited from addressing real estate disputes).

<sup>260</sup> This is not to say that a statutory scheme of eminent domain should displace all aspects of equity. For example, if someone seeking eminent domain for a “public use” on the basis of blight has contributed to the blight, one could argue that such an entity is trying to profit from its own wrong.

<sup>261</sup> See, e.g., DOUGLAS LAYCOCK, *THE DEATH OF THE IRREPARABLE INJURY RULE* [hereinafter *THE DEATH OF IRREPARABLE RULE, Book*] (1991); Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687, 688-701 (1990).

<sup>262</sup> In a sense, Laycock shows the irreparable injury rule is very much alive in the courts. Gene R. Shreve, *The Premature Burial of the Irreparable Injury Rule*, 70 TEX. L. REV. 1063, 1063-65 (1992) (reviewing Laycock’s 1991 book).

Laycock suggests that courts should be clear about what they are trying to accomplish. Laycock sets out standards for injunction based on, for example, “[u]ndue [h]ardship,” “[b]urden on [i]nnocent [t]hird [p]arties,” and “[i]mpracticality,” which all make reference to the law and adjust it, often using context involving complex interaction and multiple parties.<sup>263</sup>

If “equity follows the law” is indeed functioning as a maxim rather than a rule, this presents an obvious empirical challenge. How do we know that two cases, one in which the legal remedy is found inadequate and the other in which it is found adequate, differ in that the former contains, say, opportunism or complexity-induced surprise and the latter does not? In some cases, there are hints of opportunism, and we might be able to design test scenarios. But by and large, the evidence for equity as meta-law will have to rely on something more indirect: does the pattern of principles and cases, and in particular the system of proxies and presumptions, fit the theory of equity as meta-law as a whole?

*(b) Equity acts in personam, not in rem.* Another maxim that distinguishes equity from the common law and originally had a jurisdictional dimension is the in personam character of equity.<sup>264</sup> The focus on the individual allows for moral evaluation of personal conduct, even more so than in parts of the law like negligence that turn on reasonableness. In contrast to the “reasonable person” standard, equity can zoom in on opportunism in its hard-to-foresee guises. Thus, seeing equity as directed towards multipolar problems, conflicting rights, and especially opportunism is consistent with Ames’s further observation that “[e]quity lays the stress upon the duty of the defendant, and decrees that he do or refrain from doing a certain thing because he ought to act or forbear. It is because of this emphasis upon the defendant’s duty that equity is so much more ethical than law.”<sup>265</sup>

Equity courts could order a person within its geographical jurisdiction to do something under threat of being held in contempt.<sup>266</sup> Originally courts of equity could not give remedies other than in personam. Injunctions themselves cannot be in rem, and generally can only bind those who were specifically named and those acting in concert with them.<sup>267</sup> Gradually this principle was loosened for certain categories of cases and trivial ministerial acts that the court could then perform directly. For example, statutes were enacted to give courts power to

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<sup>263</sup> LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE, Book, *supra* note 261, at 268-69 (proposing alternative test for injunctions); *see also* Shreve, *supra* note 262, at 1070-71 (critiquing Laycock’s treatment of irreparable injury rule).

<sup>264</sup> *See, e.g.*, KEETON, *supra* note 258, at 89-93; MCCLINTOCK, *supra* note 25, § 34, at 84-86; YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.580-3.610. Indeed, Ames claimed that “time has strengthened the conviction of the present writer that the principle ‘Equity acts upon the person’ is, and always has been, the key to the mastery of equity.” James Barr Ames, *The Origin of Uses and Trusts*, 21 HARV. L. REV. 261, 261 (1908).

<sup>265</sup> Ames, *supra* note 264, at 261-62.

<sup>266</sup> *See* Int’l Union, United Mine Workers v. Bagwell, 512 U.S. 821, 841 (1994) (Scalia, J., concurring).

<sup>267</sup> *See, e.g.*, Rigas v. Livingston, 70 N.E. 107, 108 (N.Y. 1904).

transfer property within the jurisdiction, with in rem effect,<sup>268</sup> and courts have made creative use of equitable liens.<sup>269</sup>

Nonetheless, there are functional reasons for not losing sight of the maxim that equity acts in personam. We would expect that in personam effects give rise to lower third-party information costs than in rem commands, and a version of equity that did not hesitate to produce in rem effects would be destabilizing, complex, and present higher information costs. The interventions discussed in Section I.E—in privity, misappropriation, good faith purchasers, and trusts—all make use of the in personam mechanism to achieve a wider effect.

Equity acting in personam also reinforces its meta-law nature. Equity does not act directly against the law writ large, but from without, through orders to the person upon which the law also acts.

*(c) Equity will not aid a volunteer.* This maxim is related to the officious intermeddler and what counts as unjust enrichment.<sup>270</sup> Again, the presence of a legal obligation is important. The officious intermeddler, such as the proverbial person who paints your house while you are on vacation, is likely to be an opportunist.

Consider the well-known equitable doctrine of the “common fund.”<sup>271</sup> If someone, often a lawyer, sues on behalf of another to recover on a right, whether they can benefit from the common fund can be conditioned on their paying a proportionate share of the costs. Because the fund would not exist but for these costs having been incurred, a person who partakes without contributing would be unjustly enriched. But equity courts will also prevent officious actors from using a common fund to thrust benefits on others, to prevent the possibility of unjust enrichment in the other direction.<sup>272</sup> Likewise, someone who pays a liability for someone else (for example, an insurance company) is subrogated to the claim, but not if she paid officiously or as a volunteer.<sup>273</sup>

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<sup>268</sup> 4 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 1317, at 3161-65 (4th ed. 1919); *see also* FED. R. CIV. P. 70(a)-(b) (providing that a federal court has power to order another person to transfer title in the face of a wrongful refusal and the power to vest title in another with the effect of a conveyance).

<sup>269</sup> *See* Young & Spitz, *supra* note 16, at 182-83 (citing Thornton v. Thornton, 492 S.E.2d 86, 92-93 (S.C. 1997)).

<sup>270</sup> R3RUE, *supra* note 182, § 10.

<sup>271</sup> *Id.* § 29, at 428. The maxim also relates to imperfect gifts, as where a donor has died before the transfer. *See* YOUNG, CROFT & SMITH, *supra* note 236, § 11.160.

<sup>272</sup> *See, e.g.,* Wyser-Pratte v. Van Dorn Co., 49 F.3d 213, 218 (6th Cir. 1995) (citing the maxim in a case involving proxy solicitation undertaken as a volunteer, giving recipients no reason to think they would be liable for expenses).

<sup>273</sup> Hill v. Cross Country Settlements, LLC, 936 A.2d 343, 355 (Md. 2007) (“It is undisputed that once properly yoked with the label of ‘mere volunteer’ or ‘officious payor,’ a plaintiff is prohibited from recovering under theories of unjust enrichment or subrogation.”). There has been a tendency to relax this approach and allow restitution more freely. *See* R3RUE, *supra* note 182, § 24 cmt. d; *cf.* RESTATEMENT (FIRST) OF RESTITUTION § 2, at 15-16, § 162 cmt. b, at 654-55 (AM. LAW INST. 1937) (stating that one who officiously confers benefits is not entitled to restitution and describing what qualifies as officiousness).

## 2. Disproportionate-Hardship Maxims

Disproportionate-hardship maxims are one of equity's main proxies for opportunism and an entrée to considering conflicting rights.<sup>274</sup> Situations of disproportionate hardship correlate with opportunism because one party may be using extreme leverage against the other. What makes this problematic is when this happens in a way that would be contracted away (or, alternatively, that one would not approve of behind the veil of ignorance). Disproportionate hardship is especially problematic if it occurs unexpectedly, as we therefore suspect that one party is simply taking unfair advantage of the other. A highly skewed result may also reflect polycentricity gone awry.

*(a) Equity abhors a forfeiture.* Here too the focus is on unjust-looking results, but opportunism or unforeseen complexity may be the real culprit. The antiforfeiture maxim comes in broader and narrower versions. The broader one is the familiar ex post effort to rescue people from dire consequences. The narrower and more targeted version sees the core of the antiforfeiture maxim as those cases in which extreme consequences—disproportionate hardship—are the result of sharp dealing, misleading behavior, and other forms of opportunism. As Carol Rose notes, forfeitures are situations of disproportionate hardship that often involve “mopes” or “ninnies” on one side and “sharp dealers” on the other, waiting to “take advantage.”<sup>275</sup> If the virtue of the maxim is that such opportunism need not be proved or spelled out in an opinion, that is also its weakness: it gives judges a lot of discretion, it is easily misunderstood as broader than it is, and it is difficult to test empirically.

If so, another hypothesis worth exploring is that mistake and fraud, which are also triggers for equity, are related to the antiforfeiture doctrine. All three target unforeseen complexity and its exploitation from different angles.<sup>276</sup> Unexpected ex post situations featuring disproportionate hardship also tend to call forth self-serving, overreaching behavior.

*(b) Between equal equities the law will prevail.* Equity is not about balancing and near equipoise, but rather concerns itself with problems where the law is unlikely to be adequate for reasons of complexity and uncertainty.<sup>277</sup> In cases of equal equities, there is no opportunist.<sup>278</sup>

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<sup>274</sup> See *supra* Section I.C.2.

<sup>275</sup> Rose, *supra* note 144, at 587, 600; see also Smith, *supra* note 176, at 1049-53 (discussing Rose's scholarship).

<sup>276</sup> It might also form the basis for a theory of the penalty doctrine. See *Truck Rent-A-Center, Inc. v. Puritan Farms 2d, Inc.*, 361 N.E.2d 1015, 1018 (N.Y. 1977).

<sup>277</sup> See, e.g., YOUNG, CROFT & SMITH, *supra* note 236, § 3.210.

<sup>278</sup> Thus, in *Price v. Neal*, (1762) 97 Eng. Rep. 871; 1 Bl. 390, Lord Mansfield held that in a situation of a forged bill of exchange, as between parties who had both given value, a court would not permit recovery of the one from the other, *id.* at 872; 1 Bl. at 391. This is a complex problem at the intersection of negotiable instruments and unjust enrichment, and an argument can be made that the drawer is the cheaper cost avoider, as between the drawee and the indorsee. Cf. JAMES STEVEN ROGERS, *THE END OF NEGOTIABLE INSTRUMENTS: BRINGING PAYMENTS SYSTEMS LAW OUT OF THE PAST* 116-24 (2012) (noting that although the result in *Price v. Neal* could be argued for based on negligence

### 3. Direct-Operation Maxims

The in personam aspect of equity also relates to another important feature: its direct action upon the person, tailored to a particular problem. Injunctions, the quintessential equitable remedy, act against named parties (and those acting in concert with them) and can be finely tailored, both in their specificity and their breadth, to the problem at hand. Several maxims express the direct nature of equity's interventions.

(a) *Equity will not suffer a wrong to be without a remedy.* This maxim captures much of the nature of equitable intervention.<sup>279</sup> And, to the extent it is a maxim of the common law, it expresses its creative, even “meta”-aspect. This equitable maxim was especially important historically, when the complexities and technicalities of the common law often left remedial gaps.<sup>280</sup> Opportunists could take advantage of gaps in the common-law system of remedies. More recently and more controversially, it is problems of extreme complexity, and often advantage taking, that prompted courts to develop the structural injunction.<sup>281</sup>

(b) *Equity regards as done that which ought to be done.* This applies where one person is under an obligation to act but has failed or refused to do so.<sup>282</sup> Under this maxim, a court can combat opportunism by undoing it directly. Some cases involve the opportunistic refusal to perform an act. If the court can use a fiction that the act has been done, the opportunism will not have its

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principles, ordinary notions of property and unjust enrichment more aptly explain why the bank always loses). This part of negotiable instruments law, including check fraud, is now partly covered by the Uniform Commercial Code. U.C.C. § 3-418 & cmt. 1, at 385-86 (AM. LAW INST. & UNIF. LAW COMM'N 2002) (indicating that § 3-418 is “consistent with . . . the rule of *Price v. Neal*” (typeface altered)). There is the familiar disagreement among courts as to how much the Code displaces the common law. *Morgan Guar. Tr. Co. v. Am. Sav. & Loan Ass'n*, 804 F.2d 1487, 1496 (9th Cir. 1986) (“We conclude that [U.C.C. §] 3-418 does not displace a [common-law] restitutionary action by a payor bank for recovery of a mistaken payment to a payee with knowledge of the bankruptcy of the maker of the instrument in question.”); see also Melissa Waite, *Check Fraud and the Common Law: At the Intersection of Negligence and the Uniform Commercial Code*, 54 B.C. L. REV. 2205, 2225-27 (2013) (describing how the U.C.C. attempts to strike a balance between uniformity and respect for traditional common-law rules). Mansfield was well known for a functionally equitable approach on the law side of the jurisdictional divide. See J.B. Ames, *The Doctrine of Price v. Neal*, 4 HARV. L. REV. 297, 299 (1891) (“The true principle, it is submitted, upon which cases like *Price v. Neal* are to be supported, is that far-reaching principle of natural justice, that as between two persons having equal equities, one of whom must suffer, the legal title shall prevail.” (typeface altered)); see also *supra* note 71 and accompanying text (discussing common-law areas that were legal in jurisdiction but equitable in style). This is functional rather than jurisdictional equity.

<sup>279</sup> See, e.g., KEETON, *supra* note 258, at 93-95; YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.100-3.130.

<sup>280</sup> YOUNG, CROFT & SMITH, *supra* note 236, § 3.100.

<sup>281</sup> See Owen M. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 1-3, 23-24, 49-50 (1979).

<sup>282</sup> See, e.g., *Simonds v. Simonds*, 380 N.E.2d 189, 191 (N.Y. 1978); 27A AM. JUR. 2D *Equity* § 10 (2020); KEETON, *supra* note 258, at 116-17; YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.450-3.500.

effect. Thus, the equitable reformation of a deed can be ordered where a divorced wife's name had not been listed as joint tenant because she was underage at the time of the conveyance.<sup>283</sup>

The maxim also expresses a method of dealing with complexity by recharacterizing a situation in terms of a final result. It is closely associated with the doctrine of equitable conversion.<sup>284</sup> In a land-sale contract, title does not pass immediately. During the executory period, between the signing of the contract and the closing, the seller is the legal owner of the real estate and the purchaser is the legal owner of the money, but in equity the purchaser is the owner of the land and the seller is the owner of the funds. This has far reaching consequences in situations of death, and reflects the importance of specific performance in real-estate transactions.

*(c) Equity imputes an intent to fulfill an obligation.* This maxim is related to the one that declares that equity regards as done that which ought to be done.<sup>285</sup> Again, it allows courts to deny bad faith a scope for action.

By the same token, this maxim can be used to restrain equity by not getting involved in anticipating opportunism too early.<sup>286</sup> Thus, a court will not entertain a claim of preferential treatment by a receiver if no distributions have yet occurred.<sup>287</sup> Equity reserves the threat for truly imminent harm.

#### 4. Contextualizing Maxims

Within its domain, equity is less formal and more open to contextual information than is the common law. This helps it deal with complex problems not suitable for single-tier treatment. Multipolar interactions, conflicting rights, and opportunism require more context and more interrelations among pieces of context than regular law can readily provide. Further, equity seeks individualized justice in which opportunism has no scope to exploit the defects of the law that stem from its generality.

*(a) Equity regards substance rather than form.* One tactic of opportunists in environments of high complexity is to invoke form over substance.<sup>288</sup> This is very familiar from tax law, where

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<sup>283</sup> See, e.g., *Pleasants v. Pleasants*, 277 S.E.2d 170, 172 (Va. 1981) (citing the maxim “[e]quity will decree that as done which by agreement is agreed to be done”).

<sup>284</sup> Brill, *supra* note 250, at 33.

<sup>285</sup> It is also closely related to estoppel. See YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.560-3.570.

<sup>286</sup> 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 418, at 169 (Spencer W. Symons ed., 5th ed., Bancroft-Whitney Co. 1941) (1881) (“The principle embodied in this maxim . . . operates throughout the entire remedial portion of equity jurisprudence, but rather as furnishing a most important rule controlling and restraining the courts in the administration of all kinds of reliefs . . . .” (footnote omitted)).

<sup>287</sup> See, e.g., *In re Liquidation of United Am. Bank in Knoxville*, 743 S.W.2d 911, 920-21 (Tenn. 1987).

<sup>288</sup> The maxim is sometimes couched as “[e]quity looks to the intent rather than the form.” See YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.410-440; see also KEETON, *supra* note 258, at 116 (describing the maxim’s application to contracts, mortgages, and bonds).

one antiopportunity device is the doctrine of substance over form.<sup>289</sup> This often occurs in tandem with other equitable maxims, as where an installment sale of land is interpreted as a mortgage to prevent forfeiture.<sup>290</sup> The idea is that substance is less manipulable than form. As mentioned earlier, in a simple modular structure, form will diverge from substance, giving rise to opportunism.<sup>291</sup>

Courts are well aware that technicality is the friend of the opportunist, Aristotle's "stickler in a bad way."<sup>292</sup> As one court put it, "it is said that equity looks to the substance and not the shadow, to the spirit and not the letter; it seeks justice rather than technicality, truth rather than evasion, common sense rather than quibbling."<sup>293</sup>

While substance over form is most interestingly applied against opportunism, it is worth pointing out that it is a method of dealing with uncertainty and complexity more generally. Multipolar problems and conflicting rights can benefit from recharacterization as well, which becomes clearer in conjunction with closely related maxims.

*(b) Equity delights to do justice and not by halves.* This maxim is even harder to classify than the others, because it relates to several themes at once.<sup>294</sup> Conventionally it is thought to reinforce the idea that a wrong will not be without a full remedy. It also resonates with equity procedure which aimed at getting all interested parties before the court and addressing the entire conflict: think interpleader and class actions as well as the ability of equity courts to hear legal claims

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<sup>289</sup> Weisbach, *supra* note 97, at 861; see also Sarah B. Lawsky, *Probably? Understanding Tax Law's Uncertainty*, 157 U. PA. L. REV. 1017, 1032 (2009) (arguing that tax law uses probabilistic doctrines because "the essence of a tax shelter is that it technically complies with the law while nonetheless violating the substance or intent of the law, which is no easy thing to determine"); Kyle D. Logue, *Tax Law Uncertainty and the Role of Tax Insurance*, 25 VA. TAX REV. 339, 363-68 (2005) (describing how the complexity of the tax regime requires a mix of strict rules and more flexible standards); Stanley S. Surrey, *Complexity and the Internal Revenue Code: The Problem of the Management of Tax Detail*, 34 LAW & CONTEMP. PROBS. 673, 707 n.31 (1969) (discussing several practical matters which might arise from the implementation of "a generalized anti-tax avoidance statutory provision"). For further background, see sources cited *supra* note 97.

<sup>290</sup> See, e.g., *Skendzel v. Marshall*, 301 N.E.2d 641, 645-46, 650 (Ind. 1973); *Coleman v. Volentine*, 201 S.W.2d 592, 593 (Ark. 1947) ("We have frequently held . . . that where a deed or other contract, in form an absolute conveyance, is shown to have been intended by the parties thereto as mere security for debt, it will be so treated by a court of equity.").

<sup>291</sup> See Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 969, 988 (2009).

<sup>292</sup> Aristotle identifies such a person as a problem for equity: "And from this it is clear what the equitable man is: he is one who by choice and habit does what is equitable, and who does not stand on his rights unduly, but is content to receive a smaller share although he has the law on his side." ARISTOTLE, *supra* note 12, 1138a, at 316-17; see Dennis Klimchuk, *Aristotle at the Foundations of Law and Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 172, at 32, 34-35 (discussing Aristotle's "stickler in a bad way").

<sup>293</sup> *Fed. Land Bank of Omaha v. Bollin*, 408 N.W.2d 56, 62 (Iowa 1987) (citing 27 AM. JUR. 2D § 127, at 655-56 (1966)).

<sup>294</sup> Brill, *supra* note 250, at 30-32; W. Hudson R. Unger, *Equity Delights to Do Justice and Not by Halves*, 33 DICK. L. REV. 248, 248-49 (1928).

incidental to equitable ones.<sup>295</sup> It thus resolves polycentric problems as a whole and does not allow opportunists to promote a partial and misleading picture.

Finally, the limits of this maxim can be prescribed by legislation. If a statute explicitly sets out a different procedure for a given problem, there is no scope for equity jurisdiction, or for functional equity—the problem has been foreseen.<sup>296</sup>

## 5. Moralizing Maxims

As is well known, equity relies directly on basic morality. Historically the courts of equity were “courts of conscience,” and the early Chancellors were clerical officials.<sup>297</sup> As we will see, notions of right and fairness are not totally freeform. Rather, equity receives much of its substance from everyday moral disapproval of deceptive behavior.

(a) *Equity will not allow a wrongdoer to profit from his own wrong.* Equity will not apply a remedy that furthers wrongdoing, and will apply other equitable remedies to find alternatives to the wrong-furthering remedy that is now off-limits. This maxim is almost a statement of the antiopportunism principle.<sup>298</sup>

The maxim is best illustrated with *über*-chestnut *Riggs v. Palmer*,<sup>299</sup> the case of the murdering grandson. Francis Palmer, a widower, had two years earlier made a will leaving bequests to his daughters, with the rest of his estate to go to his grandson Elmer, subject to the support of the testator’s mother.<sup>300</sup> When Francis remarried, he entered into a prenuptial agreement that obligated him to amend the will to provide lifetime support from his farm (in lieu of dower) for his new wife.<sup>301</sup> Wanting to prevent these changes, Elmer killed his

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<sup>295</sup> See, e.g., Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 471-74 (2003); Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 923 (1987); see also AMALIA D. KESSLER, *INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877*, at 19-23 (2017) (tracing roots of modern procedure in the United States to the resurgence of equity in the late eighteenth and early nineteenth centuries).

<sup>296</sup> See *United Drug Co. v. Kovacs*, 123 A. 654, 656 (Pa. 1924) (“We are aware that when a court of equity has once obtained jurisdiction, it will ordinarily round out the whole circle of controversy, but this principle cannot be extended to permit, in equity, a recovery based solely upon a statute, clearly specifying an entirely different jurisdiction for establishing the liability.” (citations omitted)); Unger, *supra* note 294, at 253.

<sup>297</sup> See, e.g., BAKER, *supra* note 1, at 107, 111, 114-16; Hedlund, *supra* note 18, at 21. *But cf.* Mike Macnair, *Equity and Conscience*, 27 OXFORD J. LEGAL STUD. 659 (2007) (arguing that equity as a court of conscience originally meant that the judge knew and could draw on facts not in evidence).

<sup>298</sup> Leigh Anenson, *Announcing the “Clean Hands” Doctrine*, 51 U.C. DAVIS L. REV. 1827, 1865 (2018).

<sup>299</sup> 22 N.E. 188 (N.Y. 1889).

<sup>300</sup> *Id.* at 188. The will also provided that if Elmer predeceased the daughters, they would receive the estate subject to the support of Mrs. Palmer. *Id.*

<sup>301</sup> *Id.* at 189.

grandfather by poisoning him.<sup>302</sup> The sisters sued for an injunction to prevent title from passing to Elmer.

The court applied principles of equity both to the interpretation of the wills statute and to the will itself, and resoundingly stated that “[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime.”<sup>303</sup> The problem was not just that the grandson committed an evil act, but that he did so with a view to how it would redound to his advantage under the laws of wills and inheritance.<sup>304</sup> Elmer’s act was both evil and opportunistic: he murdered his grandfather so that no new will could be written, in order to get his full inheritance in accordance with the law.

The dissent argued that the statute made no such exception and should be applied according to its plain terms, especially in the area of wills, where stability and notice are important. Criminal law would take care of Elmer. The dissent has remained a rallying cry for formalists to this day.<sup>305</sup>

*Riggs* illustrates how historically and aspirationally—and, I argue, functionally—equity applies in a narrow domain, but potentially stringently within that domain. This no-profit maxim relates not just to when equity will intervene, but also how. The remedial arsenal of equity is keyed to wrongdoing. Under the constructive trust, the wrongdoer is treated as if she is a trustee for the victim of the wrongdoing.<sup>306</sup> The sometimes extreme rules of tracing, giving the victim every benefit of the doubt vis-à-vis the wrongdoer, operate in furtherance of this moralizing maxim.<sup>307</sup>

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<sup>302</sup> *Id.*; see also Daniel A. Farber, *Courts, Statutes, and Public Policy: The Case of the Murderous Heir*, 53 SMU L. REV. 31, 31-33 (2000) (describing the scenario in *Riggs*).

<sup>303</sup> *Riggs*, 22 N.E. at 190. The court labeled the principle a “common-law” one in order to promote the fusion of law versus equity begun in New York in the Field Code in 1848. See Note, *Can a Murderer Acquire Title by His Crime?*, 4 HARV. L. REV. 395 (1890) (attributing decisions like *Riggs v. Palmer* to the confusion of law and equity as a result of their jurisdictional fusion).

<sup>304</sup> By contrast, where the evil act is done without such advantage in view and where the advantaged party did not commit the act there is no scope for the principle to apply. Thus in a later New York case in which a husband killed his wife, the husband’s parents were allowed to take under the residuary clause of the son’s will. *In re Estates of Covert*, 761 N.E.2d 571, 575-76 (N.Y. 2001).

<sup>305</sup> See *infra* Section III.A.

<sup>306</sup> Courts sometimes modulate the attribution of gain in unjust enrichment depending on the degree of wrongdoing. See *Olwell v. Nye & Nissen Co.*, 173 P.2d 652, 653 (Wash. 1946) (measuring gain from flagrantly wrongful repeated use of an egg-washing machine as money saved by not hiring hand washers rather than the presumably lower saved price of renting a machine); *Edwards v. Lee’s Adm’r*, 96 S.W.2d 1028, 1033 (Ky. 1936) (measuring gain from underground cave trespass in building up a tourist site by looking to receipts from the cave attraction but not profits from an associated hotel business.)

<sup>307</sup> See, e.g., R3RUE, *supra* note 182, § 59.

*(b) Equality is equity.* This maxim sounds in fairness.<sup>308</sup> Opportunists can be regarded as trying to undermine equality, although what constitutes equality may be context-specific. One virtue of equality as a presumptive baseline is that if people share widespread intuitions about what equality requires in given situations, it is less open to manipulation than more artificially-constructed benchmarks.<sup>309</sup> Also, if an opportunist has to share gains proportionally with others as mandated by an “equal” system, there will be less incentive to engage in opportunism.

But as is often the case, the potential for opportunism is two sided. In the case of an ex ante unanticipated windfall, there is reason not to use all-or-nothing rules, especially ones keyed to manipulable variables, in light of the danger that multiple parties will try to capture the windfall.<sup>310</sup> In the end, this maxim gives courts some leeway for intervening against opportunism without having to justify itself in detail. The advantages and disadvantages of deciding this way are characteristic of equity.

*(c) Between equal equities the first in order of time shall prevail.* As we saw in Section II, multipolar problems and conflicting rights require reconciliation, and this maxim combines the balance of justice with deference for law.<sup>311</sup> Like equality, priority is a focal point, and in many situations—but not all—it is less susceptible to manipulation. So prior in time wins, as long as there is no imbalance of equities.

This maxim also relates to a highly complex body of law dealing with the priorities of various equitable estates, interests, and liens.<sup>312</sup> The idea that the earlier equity wins can be regarded as a tie breaker based on the probabilities of opportunism or as a rule that minimizes the temptation to engage in it. It also resolves complexity in a broad class of situations.

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<sup>308</sup> See, e.g., KEETON, *supra* note 258, at 114-16; YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.220-250. Equality exerts a gravitation pull in our instincts about what is “fair.” See, e.g., John B. Van Huyck, Ann B. Gillette & Raymond C. Battalio, *Credible Assignments in Coordination Games*, 4 GAMES & ECON. BEHAV. 606, 621-62 (1992) (showing results reflecting participants’ orientation towards equality); see also Richard H. McAdams, *A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649, 1676-78 & n.70 (2000) (discussing equality orientation as a basis for focality).

<sup>309</sup> See Young & Spitz, *supra* note 16, at 184; see also Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1851 (2007) (arguing that, “given the communication problems associated with creating and maintaining” in rem rights that are good against the world, the content of the norms governing these rights “must remain correspondingly simple”).

<sup>310</sup> Cf. Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1514 n.75 (1999) (discussing legal rules prohibiting suits by subsequent purchasers of shares or land and noting that these rules are “highly formalistic and hence manipulable”).

<sup>311</sup> See, e.g., KEETON, *supra* note 258, at 103-05; YOUNG, CROFT & SMITH, *supra* note 236, § 3.190.

<sup>312</sup> See Frederic Putnam Storke, *Priority Between Equitable Interests*, 8 ROCKY MNTN. L. REV. 1, 6-7 (1935). The recording statutes reflect the interplay of the maxim with notice. See 14 POWELL ON REAL PROPERTY § 82.02(3)(c) (2020); Ralph W. Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 406 (1924).

(d) *She who seeks equity must do equity.* This maxim relates obviously to opportunism but is also a principle governing the whole mechanism of equity.<sup>313</sup> It is related to estoppel and clean hands and can be found in very early sources.<sup>314</sup>

One method of dealing with opportunism is to deny equitable remedies and defenses to those whom the court views as opportunists. For example, one cannot ask for the equitable remedy of a resulting trust where the purpose and effect is to defraud creditors.<sup>315</sup> Requiring one who seeks equity to do equity helps prevent equitable remedies from themselves becoming tools of opportunism.

This maxim served at one point to deal with an important class of opportunists: husbands seeking to take advantage of the common law of marriage to the detriment of their wives. Before the mid-nineteenth century, the common law regarded husband and wife as a unit, with the husband as decisionmaker.<sup>316</sup> This led to all sorts of possibilities of misfeasance by the husband, not remediable by the common-law courts. Courts of equity got around the form of the common law by allowing women to hold equitable interests and to bring suits in equity for constructive fraud by the husband. The maxim “equity regards as done that which ought to be done” was frequently invoked to force a result that the husband could otherwise avoid at common law.<sup>317</sup>

One might conjecture that this maxim is also a high-level expression of a hydraulic aspect of equity: not allowing equitable intervention on behalf of one who will not do equity moves behavior to a better equilibrium overall, even if opportunism is not directly involved.

(e) *He who comes into equity must come with clean hands.* “Unclean hands” is a fairly direct proxy for opportunism, and the proposition is also considered an equitable defense.<sup>318</sup> It is worth noting that unclean hands, like other equitable determinations, is far less of a balancing test than one might think. While some assessment of the severity of the opportunistic behavior

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<sup>313</sup> KEETON, *supra* note 258, at 105-12; YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.260-3.310.

<sup>314</sup> Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 *FORDHAM L. REV.* 23, 27 & n.21 (1951) (noting the widespread nature of this principle and its presence dating back to Ancient Mesopotamia (first quoting 1 HENRY SMITH WILLIAMS, *THE HISTORIAN’S HISTORY OF THE WORLD* 495 (1904); and then citing JOACHIM MENANT, *DÉCOUVERTES ASSYRIENNES: LA BIBLIOTHÈQUE DU PALAIS DE NINIVE* (Paris, Ernest Leroux 1880)); see also 1 WILLIAMS, *supra*, at 495 (“Trials are inherent to human nature and to all epochs. Pleading took place in Nineveh, Assyria, and Chaldea. On this subject the following axiom used by the judges and the pleaders, holds perfectly to-day: ‘He who listeneth not to his conscience, the judge will not listen to his right.’”).

<sup>315</sup> Hayne Fed. Credit Union v. Bailey, 489 S.E.2d 472, 476 (S.C. 1997); Young & Spitz, *supra* note 16, at 187.

<sup>316</sup> See, e.g., JOAN HOFF, *LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN* 119-21, 127-35 (1991); LEE HOLCOMBE, *WIVES AND PROPERTY: REFORM OF THE MARRIED WOMEN’S PROPERTY LAW IN NINETEENTH-CENTURY ENGLAND* 18-19 (1983); Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 *GEO. L.J.* 1359, 1361 (1983).

<sup>317</sup> STORY, *supra* note 95, § 271; H.G. Hanbury, *The Field of Modern Equity*, 45 *LAW Q. REV.* 196, 219 (1929).

<sup>318</sup> ANENSON, *supra* note 51, at 119-20; KEETON, *supra* note 258, at 112-14; YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.320-3.370; Anenson, *supra* note 298, at 1847-51.

may be occurring *sub rosa*, the unclean hands maxim and the unclean hands defense are complete obstacles to using equity. In this it is very similar to (but potentially broader than) “she who seeks equity must do equity” and is often cited in tandem. Again, the danger is letting equity itself become a tool in the hands of opportunists.<sup>319</sup> For example, someone near the age of majority who repudiates a contract opportunistically is under no legal obligation, but a court will not afford the repudiator an injunction against interference with the new contract.<sup>320</sup>

Also limiting the maxim is the principle that opportunism in the transaction in question is all that counts.<sup>321</sup> Thus, if someone lies to another and seeks specific performance, the defense applies. If someone is a liar, a thief, or a notorious bad actor in general but not in a given transaction, equity is still available to that person. This keeps equity more cabined, as a safety valve or refinement of the modular structure of rights.

*(f) Equity aids the vigilant and diligent.* Like unclean hands, this maxim is related to a defense—that of laches.<sup>322</sup> It is characteristic of equity to try to match the consequences of uncertainty and complexity with the party who created them. Opportunism may be at the edge of the picture here too.<sup>323</sup> Unreasonable delay in asserting one’s rights calls forth reliance on the part of others. The danger is that the delay may be deliberate, i.e. opportunistic. Again, courts do not like to become instruments of oppression, which brings us to our final and in some ways most intriguing category.

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<sup>319</sup> The concept of unclean hands is also related to the potential for someone to profit from his own wrong by brazenly enlisting the court’s aid. The Second Circuit recently captured this relationship well:

“Chutzpah” as a legal term of art is analytically similar to “unclean hands,” though not necessarily coterminous with that concept as understood in Chancery. The “classic definition” of chutzpah has been described as “that quality enshrined in a man who, having killed his mother and father, throws himself on the mercy of the court because he is an orphan.” Courts in this Circuit have employed the “classic definition” and contemporary variations where a party’s conduct is especially and brazenly faulty.

*Motorola Credit Corp. v. Uzan*, 561 F.3d 123, 128 n.5 (2d Cir. 2009) (citations omitted). Examples of chutzpah include a former state senator serving a sentence for selling stolen bonds attempting to sue the purchasing bank for negligence in accepting the bonds leading to his conviction, and a person mauled by the 450-pound Siberian tiger he was illicitly raising along with an alligator attempting to sue the city and police for trying to rescue the animals by entering his apartment without a search warrant. *Id.*

<sup>320</sup> *Carmen v. Fox Film Corp.*, 269 F. 928, 931 (2d Cir. 1920); see R3RUE, *supra* note 182, § 67.

<sup>321</sup> See, e.g., *Scattaretico v. Puglisi*, 799 N.E.2d 1258, 1261-62 (Mass. App. Ct. 2003) (“A person is not to be deprived of civil justice merely because he has sinned in the past; his wrongdoing must have been related directly to the present situation to justify his being barred.”); *id.* at 1262 n.16 (“Chief Baron Eyre who, according to Chafee . . . first uttered the maxim, ‘A man must come into a Court of Equity with clean hands,’ was well aware of the point: ‘it does not mean a general depravity; it must have an immediate and necessary relation to the equity sued for.’” (alteration in original) (quoting *Dering v. Earl of Winchelsea* (1787) 29 Eng. Rep. 1184, 1185; 1 Cox Eq. 318, 319)).

<sup>322</sup> See KEETON, *supra* note 258, at 114 (describing the equitable doctrine of laches); YOUNG, CROFT & SMITH, *supra* note 236, §§ 3.380-3.400.

<sup>323</sup> Cf. Saul Levmore, *Strategic Delays and Fiduciary Duties*, 74 VA. L. REV. 863, 868, 890 (1988) (analyzing strategic delay as “waiting-with-advantage”); *id.* at 912 (noting that the foregoing analysis suggests that the doctrine of laches is alive and well).

## 6. Maxims as Meta-Meta-Law

As I have alluded to above, these maxims can feed into each other in their applications. The maxim “she who seeks equity must do equity” is recursive in the sense that equity depends on an application of equity. We might then ask: is there any evidence that maxims reflect meta-meta-law (and higher)? Can equity as a whole be subject to (meta-)equity?

Even in terms of maxims, we do find such meta-meta-law. It is sometimes proposed as a maxim that “[a]n equitable principle should not be invoked to defeat equity.”<sup>324</sup> Or even more generally, “[a] court of equity is not to be made an instrument of wrong,”<sup>325</sup> or “[t]he function of courts of equity is to do justice, not injustice.”<sup>326</sup>

Thus, when someone raises the unclean hands defense against someone asking for cancellation of a deed, a minor falsity on the petitioner’s part will not lead unclean hands to apply if that would produce an injustice overall.<sup>327</sup> Likewise, this is a check on granting specific performance.<sup>328</sup> And in general, the procedures of equity will themselves be modulated by equity to prevent the court from itself being made into an instrument of injustice.<sup>329</sup> This is meta-meta-law.

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<sup>324</sup> Bacon v. Bacon, 77 A.2d 802, 807 (N.J. 1951); see also Griffin v. Johnson, 75 N.W.2d 898, 902 (Mich. 1956) (“The function of courts of equity is to do justice, not injustice.” (quoting Fox v. Jacobs, 286 N.W. 854, 856 (Mich. 1939))); 30A JAMES BUCHWALTER & JOHN KIMPFLER, C.J.S. EQUITY § 99 (2020) (“Equity seeks to do justice and equity between all parties. It does not act unless justice and good conscience demand that relief should be granted, and it will not do unjust or inequitable things.”).

<sup>325</sup> Miller v. Cornwell, 38 N.W. 912, 914 (Mich. 1888). Some modern theories of unconscionability are based on the idea that courts should not allow themselves to become instruments of injustice. See Shiffrin, *supra* note 144, at 227-28 & n.30.

<sup>326</sup> Fox v. Jacobs, 286 N.W. at 856. We could interpret as meta-meta-law “SUEM” (Spitz’s Ultimate Equitable Maxim), that “in equity, good guys should win and bad guys should lose.” Young & Spitz, *supra* note 16, at 175. Note that Young and Spitz assume implicitly that the domain of this maxim is equity, not only in the formulation of the maxim but throughout their article. Cf. *id.* at 176 (“SUEM suggests a method to check whether or not the case fits a common sense model of what equitable cases are supposed to do, but SUEM only works for certain types of cases, and only in certain specific circumstances.” (emphasis added)).

<sup>327</sup> See, e.g., Jones v. Jones, 30 Haw. 565, 571 (1928) (“But this maxim has its limitations. It was formulated and is applied by courts in order to effectuate justice, not injustice.”); see also Shinn v. Edwin Yee, Ltd., 553 P.2d 733, 744 (Haw. 1976) (dismissing, in the context of a business dispute, a defense based on the doctrine of unclean hands and asserting that “[t]he doctrine of ‘unclean hands’ will not allow a party to profit by his own misconduct”).

<sup>328</sup> See, e.g., Fudge v. Byrom, 215 N.W.2d 71, 73 (Neb. 1974) (“The discretionary remedy of specific performance should not be granted by a court of equity if it operates with injustice and oppression . . .”).

<sup>329</sup> See, e.g., Hamilton-Brown Shoe Co. v. NLRB, 104 F.2d 49, 56 (8th Cir. 1939) (“A court of equity will not do useless, unjust, or inequitable things.” (citing *In re Hawkins Mortg. Co.*, 45 F.2d 937, 940 (7th Cir. 1931))); State ex rel. Att’y Gen. v. Lake Superior Court, 820 N.E.2d 1240, 1256 (Ind. 2005) (“The jurisdiction of a court of equity extends no farther than is necessary to do some equitable thing; it has no jurisdiction to do useless, unjust, and inequitable things.” (quoting *In re Hawkins* 45 F.2d at 940)); Bresnehan v. Price, 57 Mo. 422, 424 (1874) (“Nothing is better settled than that where, by mistake or fraud, a party has gained an unfair advantage in proceedings in

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In sum, the maxims are neither first-order rules nor empty moralistic slogans. They are guides and expressions of what happens after equity is triggered, within the realm of meta-law. They are, after all, at the heart of equity.

## B. Legal and Equitable Fraud

The notion of fraud is a particularly instructive illustration of how law and equity relate in a two-level system. As we have seen, much of substantive equity went under the heading of “constructive fraud,” which was wider and more contextualized than regular fraud.<sup>330</sup>

Equitable fraud is nothing if not protean. It relates to all aspects of transactions. In *Earl of Chesterfield v. Janssen*, Lord Hardwicke listed kinds of equitable fraud as: fraud “arising from facts and circumstances of imposition,” fraud “apparent from the intrinsic nature and subject of the bargain,” fraud “presumed from the circumstances and condition of the parties contracting,” and fraud “from the nature and circumstances of the transaction” which deceives third parties.<sup>331</sup> We can see in this catalog the kind of combination of bad faith and disproportionate hardship that are the triggers for equity. And the moral concepts involved are not irrelevant to the evaluation in equity once we get there. Indeed, equitable fraud is both the superset of unconscionability and, as noted earlier, a more constrained approach to it.<sup>332</sup>

The development of some kinds of equitable fraud into categories of legal fraud confirms that equitable fraud is suited to meta-law treatment. Meta-law is best at dealing with new and creative forms of fraud and those kinds of fraud that for whatever reason the law has difficulty handling. Such at one time was fraud in the inducement, in which the fraudster deceives another as to the context of the transaction—in contrast to fraud in the execution, in which someone deceives another as to the nature of a document she is signing. Over time, the law started to recognize known types of fraud in the inducement.<sup>333</sup> As fraud in the inducement

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courts of law, which must operate to make that court an instrument of injustice, courts of equity will interfere and restrain him from reaping the fruits of the advantage thus improperly gained.”); *Patsourakos v. Kolioutos*, 26 A.2d 882, 885 (N.J. Ch. 1942), *aff’d*, 30 A.2d 27 (N.J. 1943) (“A court of equity should not lend itself to the accomplishment of any . . . inequitable purpose.”); *Ogden v. Straus Bldg. Corp.*, 202 N.W. 34, 48 (Wis. 1925) (“A court of equity in its effort to do substantial justice between the parties, will not endeavor to commit a wrong, even to a wrongdoer.”).

<sup>330</sup> See generally L.A. SHERIDAN, *FRAUD IN EQUITY: A STUDY IN ENGLISH AND IRISH LAW* 1-9 (1957) (contrasting legal and equitable fraud).

<sup>331</sup> *Earl of Chesterfield v. Janssen* (1750) 28 Eng. Rep. 82, 100; 2 Ves. Sen. 125, 155-56; see also *Hume v. United States*, 132 U.S. 406, 411 (1889) (drawing on the *Janssen* taxonomy); YOUNG, CROFT & SMITH, *supra* note 236, § 5.30 (summarizing the *Janssen* taxonomy).

<sup>332</sup> See *supra* notes 138-146 and accompanying text.

<sup>333</sup> IBBETSON, *supra* note 46, at 208-09.

became a familiar problem, the regular law began to treat it at the first order, and equity remained on the lookout for new forms of fraud.

### C. Defenses

Equity is associated with an array of defenses, some of which, like laches and disproportionate hardship, feature in related maxims. What is often controversial about equitable defenses is their persistent pairing up with equitable remedies and doctrines. On one view of the fusion of law and equity, a defense is a defense to liability and should not track the old jurisdictional divide. And yet, defenses are associated with equitable remedies like injunctions and reformation (and doctrines like unconscionability). What about any of these “equitable” remedies justifies their being paired with certain defenses, and why are certain “equitable” defenses limited to aspects of the law identified with equity instead of being generalized? Equity as meta-law contributes to a clearer picture of which equitable defenses should be generalized in the process of substantive fusion, and which should not.

The reasons for special equitable defenses are related to the specialness of equity, both in its exceptional quality and its specialized function. Equitable defenses can be shown to mirror the rest of equity in acting as meta-law.<sup>334</sup> If equity as meta-law involves free use of context and severe methods, equitable defenses are likewise contextual and soften the hard edge of the equitable remedy. For example, an injunction can cause harm to the enjoined party out of all proportion to the rights violation. Moreover, the equitable defenses themselves respond to problems of polycentricity, conflicting rights, and opportunism that are characteristic of equity as meta-law.

Take as one example the defenses to an injunction. The problem with injunctions is that opportunism can occur on both sides. The one seeking an injunction may be trying to exploit holdup power. On the other hand, someone trying to evade an injunction may be trying to exploit the inadequacy of remedies, as by cherry-picking an asset that will be undervalued by a court or by dragging their feet in a negotiation over a license. The various defenses of disproportionate hardship, laches, and unclean hands police the potential for bad behavior on both sides. Moreover, the traditional approach to injunctions was well suited to polycentric problems, conflicting rights, and interdependent behavior, because an injunction is itself multidimensional and can be tailored to context.<sup>335</sup> It can be delayed or conditioned on other behavior—one who seeks equity must do equity—and the like.<sup>336</sup>

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<sup>334</sup> Henry E. Smith, *Equitable Defences as Meta-Law*, in DEFENCES IN EQUITY 17, 18-27 (Paul S. Davies, Simon Douglas & James Goudkamp eds., 2018).

<sup>335</sup> See, e.g., Bray, *supra* note 214, at 563-72 (surveying equitable managerial devices and the flexibility of injunctions themselves).

<sup>336</sup> This multipolar process of adjustment is also characteristic of the defense of set-off in its equitable mode, which can involve intricate interdependencies. See Robert Stevens, *Set-Off and the Nature of Equity*, in DEFENCES IN EQUITY, *supra* note 334, at 41, 46-51 (showing how equitable set-off was traditionally not about netting claims or searching

Where equitable defenses have become or could be made less second order than they once were, there is a strong case for assimilating them to the rest of the law. Thus, where estoppel can remedy the opportunistic use of jurisdictionally legal remedies, there is no reason not to apply estoppel outside of “equity.”<sup>337</sup> Unclean hands is a closer case, with some courts allowing it in damages actions.<sup>338</sup> As with estoppel, with which it partially overlaps, there is a moderate fusionist case to be made that unclean hands can provide positive benefits when applied to certain damages actions. Here, disagreement focuses on whether the modulation inherent in damages and the danger of equity slipping its bounds (including the invasion of the province of the jury) would counsel against such a step.<sup>339</sup>

By contrast, laches largely responds to problems inherent in the equitable remedies and so is better kept paired with them.<sup>340</sup> More generally, the equitable function can give us some purchase on otherwise hidden patterns in equitable defenses.<sup>341</sup>

#### D. Remedies

Equity’s relationship to remedies is its most familiar, and contested, aspect. As with defenses, the question is whether there is anything special about equitable remedies. And for the question of meta-law: is there anything particularly meta about equitable remedies?

Because equitable meta-law is targeted in the application of law to a particular situation, it is naturally paired with remedies. This has led some commentators to reduce equity to its arsenal of remedies. But equity is effaced when it is regarded as merely remedial.<sup>342</sup>

Equitable remedies are often severe and blunt in some ways and finely tuned in others. It is no accident that equitable defenses often soften the severity and allow for fine tuning

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for a transactional nexus but looking for causation and establishing complex interdependencies); *see also* RORY DERHAM, *DERHAM ON THE LAW OF SET-OFF* 79-162 (4th ed. 2010) (setting forth the traditional version of equitable set-off).

<sup>337</sup> Smith, *supra* note 334, at 31-33. For the development and state of estoppel in the United States, see T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 *REV. LITIG.* 377 (2008).

<sup>338</sup> ANENSON, *supra* note 51, at 59-103.

<sup>339</sup> *See, e.g.*, Smith, *supra* note 334, at 34-35 (setting out criteria for when courts should equitable defenses such as laches); *see also* Bray, *supra* note 214, at 572-78 (providing various examples demonstrating that equitable remedies “can be costly . . . [and] susceptible to abuse . . . by a wily litigant”).

<sup>340</sup> Smith, *supra* note 334, at 34-35.

<sup>341</sup> *See id.* at 36-39. For another largely compatible approach to systematizing equitable remedies, see Bray, *supra* note 214, at 551-92.

<sup>342</sup> Paul Miller also argues that equity should not be regarded as exclusively remedial. *See generally* Paul B. Miller, *Equity as Supplemental Law*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY*, *supra* note 172, at 92. For Miller, it is important that equity is a source of substantive rights. *Id.* At the very least, equity as meta-law can in effect alter first-order entitlements.

when necessary—something not needed for damages, which have their own built-in sliding scale.<sup>343</sup>

As Samuel Bray has shown, equitable remedies often involve complex directions to parties, adjustments, and a general managerial aspect often not shared by legal remedies, especially damages.<sup>344</sup> These managerial devices are well suited to problems of uncertainty and complexity in general and to problems of polycentricity, conflicting rights, and opportunism in particular. A court considering injunctions must consider the effect on third parties and the intricate possibility of two- (or more-) sided opportunism.<sup>345</sup> Other remedies, like accounting and (as we have seen) reformation for mistake, share these features.<sup>346</sup> Most dramatically, we have seen that the open-endedness of equity in the presence of complexity and potential misuses is entwined with equitable remedial meta-law.

To illustrate the meta-law of equitable remedies, consider another dichotomy that often replaces law and equity: property rules and liability rules.<sup>347</sup> A liability rule sets an official price on an entitlement, whereas a property rule provides a remedy that is intended to be robust enough to force a duty holder to respect an entitlement or bargain for a consensual transfer. Liability rules are often associated with compensatory damages and property rules with both injunctions and supracompensatory remedies like punitive damages. This already says a great deal: in the law-and-economics framework, remedies are aimed at deterrence (and to a lesser degree compensation) and property rules are treated as a bigger stick for entitlement holders along a single dimension of liability. What this leaves out are all the ways in which injunctions are keyed to different aspects of behavior (such as good faith and disproportionate hardship) and can be tailored to achieve specific remedial goals (such as timing and conditions). Injunctions can be used to guide behavior and come down hard on opportunists while giving a break to good faith actors.<sup>348</sup> Thus, while it is true that liability rules prevent a kind of strategic behavior on the part of holdouts who can use “property rules” to extort or otherwise prevent valuable transactions,<sup>349</sup> actual injunctions leave room for a defense of undue hardship on the part of those who violate a right in good faith. Further, the system of damages (liability rules)

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<sup>343</sup> See Yorio, *supra* note 52, at 1228-40; see also Bray, *supra* note 214, at 544-50 (describing the special defenses associated with equitable remedies).

<sup>344</sup> Bray, *supra* note 214, at 563-72.

<sup>345</sup> Gergen et al., *supra* note 82, at 237-41.

<sup>346</sup> Bray, *supra* note 79, at 451-457; see *supra* note 182 and accompanying text (describing lawyers’ failure to identify a reformation issue in the now-famous General Motors bankruptcy case). See also *supra* notes 182-183 and accompanying text.

<sup>347</sup> Calabresi & Melamed, *supra* note 81, at 1092.

<sup>348</sup> See Gergen et al., *supra* note 82, at 204-14, 237-41 (discussing the role of good faith).

<sup>349</sup> For a thorough exploration of the benefits of liability rules, see generally IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* (2005).

can itself be manipulated by the unscrupulous, as where would-be takers of entitlements will search out assets likely to be undervalued by courts.<sup>350</sup>

To see how the notion of property rule misses what's important about injunctions, consider the gloss that meta-law places on another recent framework for thinking about remedies. This framework classifies remedies as replicative, reflective, or transformative.<sup>351</sup> A replicative remedy simply orders that a duty be carried out and so does not involve discretion as to either the goal or the content of the remedy. A reflective remedy, often in the form of damages, requires a court to exercise discretion as to the content but not the goal of the remedy. Neither of these first two remedies presents problems that cannot usually be handled by single-tiered law. By contrast, the transformative remedy requires a court to exercise discretion over both the content and the goal of the remedy, thereby creating "a legal relation that significantly differs from any legal relation that existed before the court order was made."<sup>352</sup> What is most striking in Rafal Zakrzewski's survey of remedies in common-law systems is that all of the transformative remedies he identifies trace back to equity. While some historically equitable remedies may not be second order, all second-order remedies are equitable, even in the technical sense.

This typology of remedies has been applied to the constructive trust, and here too the role of meta-law is apparent. Ying Khai Liew finds that constructive trusts potentially come into play in all three types of remedies, the replicative, reflective, or transformative.<sup>353</sup> The transformative version of the constructive trust (often known as the remedial constructive trust<sup>354</sup>), is more accepted in the United States (as well as Canada and Australia) than it is in England.<sup>355</sup> If, for example, someone commits a wrong or would be unjustly enriched, a court can exercise discretion to impose a remedy in the form of a trust on the subject matter or in contravention to the property rights that would normally hold. In second-order fashion, the court reworks the primary entitlement employing a wide range of context, including proportionality, protection of third-party creditors, and the prevention of wrongful gains.<sup>356</sup> The remedial regime shapes the primary level of law.

#### IV. EQUITY REVISITED

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<sup>350</sup> Thus, where average harm is a good benchmark for liability because it gives correct incentives ex ante, opportunists can operate in such a way that the average does not apply to them by finding arbitrage opportunities. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1764-68, 1774-85 (2004); see also Smith, *supra* note 248, at 1078-88 (discussing opportunism). More generally, meta-law can police for such behavior to keep the generalizations and categories on which the law relies from breaking down under the pressure of misuse.

<sup>351</sup> YING KHAI LIEW, *RATIONALISING CONSTRUCTIVE TRUSTS* 250 (2017); RAFAL ZAKRZEWSKI, *REMEDIES RECLASSIFIED* 3 (2005).

<sup>352</sup> *Id.* at 203.

<sup>353</sup> See LIEW, *supra* note 351, at 250.

<sup>354</sup> See Roscoe Pound, *The Progress of the Law, 1918-1919 Equity*, 33 HARV. L. REV. 420, 420-21 (1920).

<sup>355</sup> LIEW, *supra* note 351, at 31.

<sup>356</sup> *Id.* at 245.

The fusion of law and equity leaves us plenty of unfinished business. Picking up the thread of meta-law can shape the course that fusion takes. Historically, equity's role of correcting law when it is out of whack on account of its generality was close to the surface of judges' and commentators' awareness. After fusion and waves of Legal Realism, equity retained only a loose association with discretion and injunctions, with proponents and opponents lining up for or against judicial power. At the same time, as the residue of equity has sometimes been translated into substitutes for meta-law—multifactor balancing tests, complex rules, and standardless discretion at the primary level of law—equity has, to some extent, been flattened. The equitable distinctions and formulas are still there, but they are invoked like incantations unmoored from this major theme of equity. And yet the meta-role of equity was there for a reason: all legal systems have to address different audiences, combine elements of formalism and contextualism, achieve some generality without exploitation and unfairness, and keep things humming while being ready for the unexpected. Meta-law should be part of the toolkit for addressing these questions, and the fragments of equity can be reassembled to do the job.

### A. Distortions of Equity

Equity's twilight existence threatens the coherence and effectiveness of the law. Addressing uncertainty and complexity without meta-law is sometimes, perhaps often or always, possible, but the substitutes employed tend to be worse overall. The advantages of specialization captured in the model of Part II cannot be achieved as effectively. With a submerged or suppressed element of meta-law, the legal system will face a worse tradeoff between formalism and contextualism, and between generality and individualized justice, than it would if equity clearly maintained its status as meta-law. In this Section, I draw out some particular downsides of flattening through fusion: the proliferation of multifactor balancing tests and the polarization of formalism and contextualism.

First, misbegotten fusion has contributed to the rise of the notorious multifactor balancing test. An overemphasis on multifactor balancing shows up exactly where equity as meta-law has traditionally addressed complex and uncertain problems.<sup>357</sup> Recent reformulations of the hot-news misappropriation doctrine, which was explicitly equitable and designed to deal with opportunism and conflicting rights, have inevitably taken the form of multiprong tests.<sup>358</sup> Even the Supreme Court's *eBay* decision can be seen as a multiprong test if not a multifactor balancing test of sorts.<sup>359</sup>

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<sup>357</sup> See Smith, *supra* note 53, at 188-91.

<sup>358</sup> *Id.* at 188-93.

<sup>359</sup> *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 390 (2006); see Gergen et al., *supra* note 82, at 204-14, 233-37. The multifactor balancing test is not the only way that flattening can occur. England has seen a fair amount of fusion, but without the rise of the multifactor balancing test. Instead, great effort is put into a different kind of flat, first-order alternative to equity as meta-law: the elaboration of highly detailed formal doctrine. Getzler, *supra* note 45, at 192-93.

Second, Realist-inspired contextualism has led to a formalist backlash in private law. From the New Formalism in contract to textualism in statutory interpretation, some courts and commentators have advocated for restricting the kinds of context that judges can use.<sup>360</sup> For contracts, prohibited context includes course of dealing and commercial custom, and for legislation, background information and especially legislative history. Because equity tends to be associated with discretion and its limits (triggers, presumptions, and self-imposed restraint) have been obscured, formalism has appeared more attractive than it would be if it had to compete with a more measured employment of context, filtered through the structures of equity as meta-law. From unconscionability to the equity of the statute, an earlier generation of Realist-inspired contextualists invoked equity to give their approach the patina of history.<sup>361</sup> So when the backlash to contextualism comes, the formalist's rallying cry includes the familiar anti-equity rhetoric, replete with references to the Chancellor's Foot.

The polarization between formalism and contextualism is characteristic of the U.S. Supreme Court's "new equity" jurisprudence.<sup>362</sup> The starkest example is the set of dueling opinions in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*,<sup>363</sup> which showcased diametrically opposing approaches to federal equity. In an opinion by Justice Scalia, the majority held that a federal court lacked power to issue preliminary injunctions to freeze unrelated assets where the plaintiffs were only seeking money damages.<sup>364</sup> For Justice Scalia, such preliminary injunctions were outside the federal equity power, because equity courts did not issue such injunctions at the time of the Federal Judiciary Act of 1789.<sup>365</sup> In dissent, Justice Ginsburg offered the fully contextualist and potentially unbounded version of equity. She argued that preliminary injunctions to freeze assets should be available because they solve a problem by employing equity's flexibility and generativity.<sup>366</sup> Her opinion at most gestured to the test of injunctive relief without giving much sense of any limits. Employing equity only when it can be justified is not much of a restraint.

On the account offered here, we can chart a different path. Like Justice Ginsburg, we recognize equity's generativity, but without throwing the doors wide open. The preliminary injunction deals with a gap in complex procedural devices and their vulnerability to opportunism. It also preserves the integrity of the litigation, especially against judgment-

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<sup>360</sup> See *supra* notes 246-247 and accompanying text.

<sup>361</sup> See *supra* note 113 and accompanying text.

<sup>362</sup> For a sympathetic survey and reconstruction, see Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1008-1036 (2015).

<sup>363</sup> 527 U.S. 308 (1999). See generally Stephen B. Burbank, *The Bitter with the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study*, 75 NOTRE DAME L. REV. 1291 (2000) (analyzing the *Grupo Mexicano* case).

<sup>364</sup> Such freeze orders are known as *Mareva* injunctions in the U.K. See *Grupo*, 527 U.S. at 328-29; *Mareva Compania Naviera SA v. Int'l Bulkcarriers SA* [1980] 1 All ER 213.

<sup>365</sup> *Grupo*, 527 U.S. at 332-33. Freezing orders are familiar in Commonwealth jurisdictions. David Capper, *The Need for Mareva Injunctions Reconsidered*, 73 FORDHAM L. REV. 2161, 2162 (2005) ("The only major common law jurisdiction where the *Mareva* injunction has not flourished is the United States.").

<sup>366</sup> *Id.* at 342 (Ginsburg, J., dissenting).

proofness—traditional targets of equity—in a focused way. Indeed the traditional equity as meta-law approach covers the problem in *Grupo* without having to generalize very far. A similar dichotomous dynamic is playing itself out now in the controversy over nationwide injunctions, with the arguments leading to all-or-nothing results and the analysis not making full use of the content of equity itself.<sup>367</sup>

More generally, as I have argued elsewhere, there is a version of equity that undergirds the entire legal system, and these large uses of equity raise a question that is in a sense beyond the Constitution itself.<sup>368</sup> Equity has never and can never do more than people can stomach politically; the pushback from other courts, legislatures, and the people has been in a sense the ultimate check on equity courts. Equity draws on the same Fullerian morality as the rule of law itself and can survive only as long as that culture permits.<sup>369</sup>

## B. Equity Reductionism

Because equity has been distorted, it is commonly regarded as something—almost anything—else. As a result of this reductionism, equity is variously treated as being solely about standards, discretion, publicness, or remedies. Reducing equity to any of these plausible but inadequate single-level substitutes impairs or even effaces its function as meta-law.

First, while standards bear many similarities to equity, they are not central to equity. Standards can be first- or second-order. The classic standard—“drive reasonably under the circumstances”—does involve a lot of context. Accounts of standards indirectly get at something about equity but cannot capture its meta-law aspect.

Standards are *ex post*. Under Louis Kaplow’s formulation, a standard calls for content to be filled in later than it would be under rules, often at the point of application, after a relevant event occurs.<sup>370</sup> As we have seen, equity does this, but also much more. Like standards, equity

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<sup>367</sup> See, e.g., Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 479-81 (2017) (arguing for a rule rather than a standard against nationwide injunctions on second-best grounds); Amanda Frost, *In Defense of Nationwide Injunctions*, 93 N.Y.U. L. REV. 1065, 1118-19 (2018) (arguing that nationwide injunctions are an essential tool for courts); Michael T. Morley, *Nationwide Injunctions, Rule 23(b)(2), and the Remedial Powers of the Lower Courts*, 97 B.U. L. REV. 615, 656-57 (2017) (arguing for a limited and determinate role for nationwide injunctions and nationwide class actions); Zayn Siddique, *Nationwide Injunctions*, 117 COLUM. L. REV. 2095, 2148-49 (2017) (arguing that nationwide injunctions should be available whenever needed for complete relief); Mila Sohoni, *The Lost History of the “Universal” Injunction*, 133 HARV. L. REV. 920, 1007-08 (2020) (arguing that the history of injunctions counsels against limits on courts’ power to issue universal injunctions as part of affording complete relief); Howard M. Wasserman, *“Nationwide” Injunctions Are Really “Universal” Injunctions and They Are Never Appropriate*, 22 LEWIS & CLARK L. REV. 335, 335-40 (2018) (arguing that universal injunctions are never appropriate). Equity’s principles of both complete relief and self-restraint traditionally referenced the possibilities of opportunism on both sides and the alternative avenues available to parties.

<sup>368</sup> Henry E. Smith, *Property, Equity, and the Rule of Law*, in PRIVATE LAW AND THE RULE OF LAW 224, 224-25 (Lisa M. Austin & Dennis Klimchuk eds., 2014).

<sup>369</sup> LON L. FULLER, *THE MORALITY OF LAW* 95-145 (1964); Smith, *supra* note 368, at 237.

<sup>370</sup> Kaplow, *supra* note 243, at 568-70.

is contextual and ex post much of the time. This is because many of the problems equity solves cannot be well anticipated, due to the inherent uncertainty to which complexity gives rise. In the case of opportunism, the problems equity solves *should not* be anticipated, as anticipation will give rise to fresh opportunism. Deciding something later and using more information allows courts to meet opportunists on the larger playing field they inhabit and thereby gain the second-mover advantage. And the more targeted the intervention, the less that equity messes up ex ante incentives. We are not worried about chilling opportunism, only what might mistakenly be taken for opportunism. The easier it is to get into equity the more likely such false positives become.

Equitable standards are closely associated with fairness and interpersonal morality. Duncan Kennedy in his *Form and Substance in Private Law Adjudication* also gives an account of standards based on moral visions.<sup>371</sup> According to Kennedy, rules are more individualistic and standards more altruistic. American law has moved since the earlier nineteenth century through waves of formalism, realism, and beyond. While some doctrines like unconscionability are cited to support this picture, Kennedy never invokes equity as such. Kennedy's insight about standards captures equity's concern for fairness and its focus on justice between the parties. But equity as meta-law allows us to see what Kennedy's picture leaves out. Standards may seem more altruistic if invoked for reasons of fairness, but they can be navigated by the well-heeled and well-advised in an inegalitarian way. By contrast, equity's domain allows it to tailor its response more carefully. Law is the general case and equity is meta-law (sometimes as a safety valve) when it is called for. The law is neither formalism nor contextualism all the time. It is not even a *mélange* of the two, but rather a hybrid with its own structure of triggers and rules of thumb. It is possible that equity can be more effective in promoting morality and fairness, precisely because it is focused where it is needed the most.

Even less promising as an interpretation of equity is to identify it with judicial discretion. It is certainly the element of judicial discretion that gets the most attention, and it is not surprising that, once equity's limits were removed in our Realist-inspired version of the fusion, judicial discretion would loom even larger. The identification of equity and discretion is so prevalent that courts and commentators will identify discretion as being equitable and assume that anything "equitable" involves almost unbridled discretion.<sup>372</sup> On the reconstruction of equity here, discretion is important, even essential, but not unbridled. Instead it is filtered through the structures of meta-law.

A related but theoretically distinct version of standards and discretion traces to Ronald Dworkin's theory of legal decisionmaking.<sup>373</sup> Dworkin was not interested in legal categories, but

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<sup>371</sup> Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695-96 (1976).

<sup>372</sup> See, e.g., ANDREW KULL & WARD FARNSWORTH, *RESTITUTION AND UNJUST ENRICHMENT* 26 (2018) (quoting *Glover v. Metro. Life Ins. Co.*, 664 F.2d 1101 (8th Cir. 1981)); see also Andrew Kull, *Ponzi, Property, and Luck*, 100 IOWA L. REV. 291, 293 (2014) (noting the common view that "equitable discretion" meant an "overriding authority to reallocate whatever entitlements might exist [in property cases]").

<sup>373</sup> RONALD DWORIN, *TAKING RIGHTS SERIOUSLY* 22-45 (1977).

many of the precedents he drew on as protoexamples of what he had in mind are equitable in some sense. Consider again *Riggs v. Palmer*,<sup>374</sup> the case of the murdering heir. Dworkin, like many others who have made *Riggs* into a Rorschach blot of jurisprudence,<sup>375</sup> makes this a central case study in legal decisionmaking and interpretation.<sup>376</sup> The debate between the opinions in that case has become a touchstone for theories of statutory interpretation,<sup>377</sup> tracing back to the Legal Process School and beyond.<sup>378</sup>

The reasoning in the case is equitable in the meta-law sense, and what's more striking is that second-order classic remedial solutions would have accorded better with that reasoning, as James Barr Ames was among the first to point out.<sup>379</sup> One advantage is that the constructive trust better solves the multipolar problem of potential good faith purchasers from the wrongdoer. Broadly speaking, the theories and the cases reflect an enthusiasm for an equity shorn of its limits and traditional preoccupation with opportunism on the one hand, and on the other a formalist backlash that would seek to do away with the remnants of equity altogether. *Riggs* is a cautionary tale about the semieffacement of equity rather than high theoretical disagreement or the proper common-law rule.

From a very different perspective, it has been doubted whether equity is part of private law at all. For Ernest Weinrib, private law is inherently bipolar (right-holder and duty-bearer, plaintiff and defendant).<sup>380</sup> Coming from a Canadian perspective, Weinrib is attuned to the

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<sup>374</sup> 22 N.E. 188 (N.Y. 1889).

<sup>375</sup> BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 40-43 (1921) (treating *Riggs* as evidence of the need for judges to choose among competing principles); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 105-07 (1990) (seeing *Riggs* as an instance of extralegal means-end reasoning); Farber, *supra* note 302, at 32 (analyzing *Riggs* in terms of the Hart-Dworkin debate); see also FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISIONMAKING IN LAW AND IN LIFE* 196-206 (1993) (discussing the role of the statute in Dworkin's approach to *Riggs*); Brian Leiter, *Explaining Theoretical Disagreement*, 76 U. CHI. L. REV. 1215, 1217-20, 1232-36, 1240-47 (2009) (arguing that *Riggs* was about punishment and more consistent with positivism than Dworkin's theory); Roscoe Pound, *Spurious Interpretation*, 7 COLUM. L. REV. 379, 382-83 (1907) (arguing that spurious interpretation by courts in cases like *Riggs* used to be unavoidable but would become less needed in an era of increased legislation). Pound seems to have later come to agree with Ames that the constructive trust is a simple solution to the problem in cases like *Riggs*. Pound, *supra* note 354, at 422 ("If one bears in mind the purely remedial nature of constructive trust, the results which courts have reached in this sort of case are attained with much less difficulty.").

<sup>376</sup> DWORKIN, *supra* note 373, at 28-29 (analyzing *Riggs* as a case of a principle determining a legal result); see also RONALD DWORKIN, *LAW'S EMPIRE* 15-20, 121-23 (1986) (analyzing *Riggs* as a search for legislative intent); Ronald Dworkin, *Reflections on Fidelity*, 65 FORDHAM L. REV. 1799, 1815-16 (1997) (seeing in *Riggs* a judicial search for law).

<sup>377</sup> JOHN F. MANNING & MATTHEW C. STEPHENSON, *LEGISLATION AND REGULATION* 29-34 (2d ed. 2013) (presenting an excerpt of *Riggs* and discussing the opinion as an example of a court allowing the spirit of a law to trump its letter); CALEB NELSON, *STATUTORY INTERPRETATION* 5-26 (2011) (presenting an excerpt of *Riggs* and discussing the opinion as an example of imaginative reconstruction).

<sup>378</sup> HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 75-102 (tent. ed. 1958); see also William N. Eskridge, Jr. & Philip P. Frickey, *The Making of the Legal Process*, 107 HARV. L. REV. 2031, 2043 (1994).

<sup>379</sup> James Barr Ames, *Can a Murderer Acquire Title by His Crime and Keep It?*, 45 AM. L. REG. & REV. 225, 229 (1897).

<sup>380</sup> ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 19 (1995).

jurisdictional origins of equity and sees it as an intervention from outside. So far so good. But then for him the idea is that equity is a public-law wild card because it does not fit his bipolar model of private law. It is no different from policy-infused regulation or any other extrinsic institution that might bear on private law.<sup>381</sup> This view of equity obscures as much as it illuminates. While equity bears some similarity to administrative law—as noted earlier, the pioneers of administrative law sometimes styled it as the new equity<sup>382</sup>—regarding equity as purely public law ignores its institutional setting in courts. Equity is neither purely private nor purely public law. It cross-cuts both, and works somewhat differently in public than it does in private law.<sup>383</sup>

Perhaps the most fundamental misunderstanding of equity is to label it remedial. The term “remedial” itself is highly misleading. Equity was indeed associated with particular remedies because equity had different powers (contempt) and because intervening in law without “disturbing it” called for that set of powers (and vice versa). And yet, as we have seen, equity is not simply a set of remedies but a whole structure and style, a system, of law itself. Paul Miller shows how thinking of equity in overly remedial terms has obscured its role as a supplement of law.<sup>384</sup> Indeed, it is by labeling equity as remedial that the strong antiformalist emphasis in Langdell’s teaching and scholarship has been overlooked in favor of the caricature of a wooden deductive formalism.<sup>385</sup>

To be sure, equity is tightly interwoven with remedies, and remedial considerations certainly impinge on substantive equity. Thus, for example, unconscionability is at its strongest when an equitable remedy is in view. And yet strikingly, despite much effort to assimilate legal and equitable remedies, certain fundamental differences persist.

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<sup>381</sup> Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191, 195 (2011).

<sup>382</sup> See Smith, *supra* note 78, at 343-50 (discussing history and sources); *supra* note 78 and accompanying text.

<sup>383</sup> And yet there are deep similarities. Although they raise many other issues than in private law, structural injunctions are still injunctions, and as such courts must be on the lookout against opportunistic invocation of injunctions in both public law and private contexts. Indeed, local authorities in the Jim Crow South and employers locked in labor disputes overreached and sought injunctions in bad faith, putting all of equity under a cloud for much of the early twentieth century. See *supra* note 33 and accompanying text. The potential for opportunism (and worse) in “state the law” injunctions is illustrated in *Walker v. City of Birmingham*, 388 U.S. 307 (1967), where Birmingham officials were using the injunction to suppress a march to be led by the Rev. Martin Luther King. The injunction there did no more than state the law, and it would warrant great skepticism under traditional equitable principles, one of which is that “state the law” injunctions are suspect (in all areas of law). For an intriguing similarity in public law to the account offered here, consider how the reconciliation of conflicting rights is one way to characterize a class of problems in constitutional law. Interestingly, the Canadian Supreme Court has developed a jurisprudence of rights that is explicitly two-tier. Weinrib, *supra* note 381, at 206 (describing the public right/private right tiers).

<sup>384</sup> Miller, *supra* note 342, at 93.

<sup>385</sup> Henry E. Smith, *Fusion of Law and Confusion of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY, *supra* note 172, at 210, 216-21.

### C. The Road Ahead

Equity as meta-law helps clear up lingering confusions about what equity is. Now the question remains: What at this late date is to be done? One might think that reestablishing equity courts would be the answer to our current confusions and discontents resulting from fusion gone wrong. Besides being utterly impractical—and inadvisable for all the reasons that fusion was so attractive (if oversold) in the first place—bringing back equity courts is unnecessary.

The great attraction of reconstructing equity partially and along functional lines is that it suggests feasible solutions. As we have seen, that part of equity that served as a meta-level check and supplement on the law is not gone. The precedents, the doctrines, the maxims—they are all there, if somewhat misunderstood. Understanding them better can help complete fusion the way it was meant to be.

What this does require is a nontrivial effort to infuse the law with some structure. After Legal Realism and its offshoots—which still form the bulk of our conventional wisdom—seeing law, especially private law, as having a structure goes against the grain. Nevertheless, we have the resources. From antidiscrimination law to antitrust, we have familiarity with shifting presumptions and triggers to toggle between modes of legal decisionmaking.<sup>386</sup> And equally importantly, the meta-law nature of much of equity has been underplayed rather than abolished.

The bigger challenge for equity is not whether it can serve as meta-law but how much it can do so. Behind the “production frontier” for equity is some degree of consensus on commercial morality, fairness, and a culture of the rule of law. Whether commercial morality and fairness is subject to less consensus than it was in earlier eras of equity—or whether it is simply a different consensus—will determine how far equity can be pushed. There is good reason to think that the kind of morality and fairness behind equity is still fairly established socially. But even if it were not, what consensus exists could form the basis for equity as meta-law.<sup>387</sup> It is unlikely that society is so close to the state of nature that a corner solution of no equity is optimal. And as I have argued elsewhere, the problems of equity never disappear. Ultimately rule-of-law values require a spirit of equity as part of a culture of the rule of law, whether we realize it or not.<sup>388</sup>

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<sup>386</sup> For a proposal to implement federal equity as a system of shifting presumptions, see Jeffrey Steven Gordon, *Our Equity: Federalism and Chancery*, 72 U. MIAMI L. REV. 176 (2017).

<sup>387</sup> For an optimistic take, see Lawrence B. Solum, *Equity and the Rule of Law*, in *THE RULE OF LAW* 120 (Ian Shapiro ed., 1994).

<sup>388</sup> Smith, *supra* note 368, at 239-46 (arguing that equity promotes the rule of law by offering a safety valve to deter opportunism); see also Matthew Harding, *Equity and the Rule of Law*, 132 LAW Q. REV. 278 (2016) (arguing that equity serves the rule of law by contributing to conditions that lead citizens to respect the law).

For these reasons, we should regard equity's twilight not as an occasion for nostalgia or dread but as one for hope—for a new dawn for equity.

## CONCLUSION

Shedding light on equity will be essential. For now, equity is the dark matter of our law. It is barely visible, and yet exerts a gravitational pull on many aspects of the legal system. Equity often appears to be a collection of historical curiosities on the one hand and a catch-all justification for contextualism and judicial discretion on the other. It has led in this country to a proliferation of multifactor balancing tests and provoked a formalist backlash.

There is a better way. Fusion went off the rails when equity lost some of its character as being meta-law. Under the banner of fusion, law became increasingly homogeneous, without triggers and second tiers. The idea that equity might contain within it a functional theme became harder to discern as equity diffused—and dissipated—throughout the law.

Among its many facets, equity is meta-law. It solves problems of high complexity and uncertainty that law, owing to its aspirations to generality, cannot easily handle at one level. These problems include polycentricity, conflicting rights, and opportunism. Using defined triggers based on deception, bad faith, vulnerability, and hardship, equity prescribes a closer look using more context, based on widely accepted notions of fairness and morality. It is not a roving commission to do good but rather a specialized and therefore highly targeted and effective supplement and corrective to the regular law. Indeed, "law" itself has pockets of meta-law, from a functional point of view. By having specialized structures to achieve formality and generality sometimes, and contextualism and focus at other times, the legal system can achieve important synergies and perform better than can an undifferentiated and homogeneous law—the kind that is usually assumed to be the only one possible. Because the problems that equity as meta-law can best address will always be with us, we need to bring equity back to center stage.