

Equity, Morality and Law in *The Nature of the Judicial Process*

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INTRODUCTION

For equity lawyers over the big pond, Cardozo is hero: one of a few judges whose fame has survived the great rift that opened between English and American law when the latter embraced fusion between equity and law and the consequent decline in the study of equity as an independent body of law. Cardozo's extensive engagement with doctrines whose origins lie in equity (even if this has been long forgotten in his native country), the colorful language in which he immortalized them, and the bold ways in which he developed some of the central themes of modern equity—like the fiduciary relationship and the constructive trust—enshrined him as a force to be reckoned with in the field of equity. It is no wonder that a man of “[t]he most delicate conscience and the nicest sense of honour” like Cardozo, was drawn to equity as a major source of inspiration.¹ In this paper I wish to argue that the jurisprudence of equity is a key to understanding his treatise on the art of judging, *The Nature of The Judicial Process* (*NJP*). While the text is too nuanced and rich to be placed firmly in one tradition or school of thought, I argue that the jurisprudence of equity with its highly sophisticated engagement with the issues that are of concern to Cardozo, and the historical perspective it offers to the pragmatically-minded jurist, serves as an essential foil for the work he aims to do in the text.

For a careful reader of the *NJP*, the attempt of some diehard legal realists to recruit Cardozo and his famous text to their campaign is quite staggering; the way in which others of the same camp dismissed the text is no less surprising.² This paper kicks off by looking briefly into the attempts to portray the *NJP* as a pamphlet for militant legal realism, whose main

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1. Quote from BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 105 (2005). All page references in the text are to this edition.

2. For the wide acceptance and reverence towards the text, see Kim McLane Wardlaw, *Umpires, empathy, and activism: lessons from Judge Cardozo*, 85 NOTRE DAME L. REV. 1629, 1632 n.10 (2010). For review of critics, see John C. P. Goldberg, *Community and the common law judge: reconstructing Cardozo's theoretical writings*, 65 N.Y.U. L. REV. 1324, 1324-26 (1990).

strength lies in a fine rhetoric employed by a skilled author. I argue that such interpretation does a great injustice to the text, and can only be sustained by those who are willing to ignore large swaths of this fine piece. We can then move to the main subject of this paper: the role of equity in developing of ideas that Cardozo so carefully and beautifully lays down in the book. I will argue that Cardozo, in the manner of Chancery judges over the centuries, sees law and morality as separate but intimately connected normative systems; and like them (and unlike the realists) he believes that only an analysis that takes doctrine and legal concepts seriously is the way to establish the right link between law and morality.

Equity, as a veteran and sophisticated body of law that is geared towards the integration of legal and moral norms serves as rich repository of real-life cases and challenges that such project will inevitably face. By tapping onto it, Cardoso can add credibility, nuance and a sense of “can do” to the progressive agenda he promotes in the *NJP*. However, given the limited span of equity - which operates in the fields of private law and civil remedies—I will ask whether its jurisprudence can indeed support the much wider project that Cardozo promotes in the book.

I. CARDOZO BETWEEN REALISM AND PRAGMATISM

According to American Legal Realists, at least in novel cases, “legal rules, by themselves, are radically indeterminate as to the outcome of the cases.”³ Radical, albeit key figures of the movement believed that if you really want to know how a court decides a case, there is no point in consulting legal principles and rules that seem relevant to the facts; instead, you had better engage in sociological and psychological study of the court, its environment, and judges.⁴ In breaking off from the dominant view of their days—that logic and *a-priori* reasoning are tools that can and do serve the judge to discover the legal “truth”—early legal realists like Oliver Wendell Holmes aligned themselves with the pragmatism of William James and John Dewey.⁵ They followed in the philosophers’ footsteps in

3. Andrei Marmor & Alexander Sarch, *The Nature of Law* (Edward N. Zalta ed., 2019).

4. E.g., JEROME N. FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1950). Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 845-6 (1935). More benign interpretations of realism have been offered, notably in Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule Of Law*, 163 U. PA. L. REV. 1889 (2015). This is not the place to resolve the dispute between the picture of realism expounded by Dagan and other interpretations of the movement (and this may anyway be a mission impossible since, as Horwitz explains “[d]efining Legal Realism with precision is not all that easy,” for it “was neither a coherent intellectual movement nor a consistent or systematic jurisprudence.” MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 169 (1992)). Either way, if one purges this school of thought of the more revolutionary aspects, it will indeed help close the gap between them and Cardozo. *See, e.g.*, Dagan at 1900. Anyway, I am more interested in what Cardozo does say than in misalignments of his theory in the literature.

5. Neil Duxbury, *Patterns of American jurisprudence* 123, 128 (1995).

emphasizing the empirical knowledge that is necessary for finding solutions to the practical problems of people in society.⁶ Truth, for the pragmatists was measured against practical success in solving problems, not as a valid logical inference from axioms. Applying these insights to law, legal realists rejected the formalist picture of law as a closed system in which a right answer to every case can be deduced from former principles;⁷ taking to the other extreme, they conceived of the law as a mere prediction about what the court is likely to decide, and therefore as devoid of the normative baggage that dubious metaphysics laid on it.⁸

When Richard Posner says of the *NJP* that it is a “classic full-blown exposition of the pragmatic position,” he therefore purports to place it deep inside classic realist territory.⁹ In categorizing Cardozo as a realist, Posner follows others who took him to be “perhaps the premier Realist judge.”¹⁰ Neither the fact that his judgements clearly feature a careful reading of the rules, nor his great (sometime ingenious) effort to show how the decision can be deduced from precedents, were enough to absolve Cardozo of this classification as an arch-realist. Instead, he is being praised by one commentator as possessing the wit (and, mind you, the lack of integrity) that is necessary for embarking on a wide-scale enterprise of hiding from the messes the real nature of his decision-making process: “he was consistently able to determine which result in a given case would produce the most desirable economic and social consequences, and . . . [as] a savvy strategist, . . . [he] recognized that in order to be influential in an age of formalism, he had to ‘hide his light under a bushel.’”¹¹

This interpretation of Cardozo’s life enterprise, which takes to the extreme the attempt to “out” Cardozo as a realist, was rightly criticized. As Neil Duxbury notes, it ignores the many parts of the *NJP* where Cardozo treats the judicial function as “purely a matter of mechanical application of established rules and principles to specific factual instances.” Instead of reading the text as a whole, these commentators highlight Cardozo’s few “*sturm und Drang*” outbursts that presented him as “a revolutionary *malgré lui*” whose attacks on formalism were “widely regarded as a legal version of hardcore pornography.”¹² However, his cross-party nomination to justice of the Supreme Court suggests that this “image of Cardozo as a

6. William Twining, *Karl Llewellyn and the Realist Movement* 9 (2012).

7. See, e.g., WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND*, VOL. 1, at 69 (Wayne Morrison, ed., 2001).

8. Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 463 (1897).

9. RICHARD A. POSNER, *CARDOZO: A STUDY IN REPUTATION* 21, 28 (1990) (“Cardozo’s extrajudicial writing constituting fact the fullest statement of a jurisprudence of pragmatism.”).

10. William W. Fisher, et al., *American legal realism* 3 (1993).

11. Grant Gilmore, *The ages of American law* 75 (1977).

12. *Id.* at 69.

revolutionary is very much an exaggeration.”¹³

Setting conspiracy theories aside, a close reading of the caselaw he produced, as well as his extra-judicial writings reveals that “[n]o honest Realist can claim both to understand and endorse Cardozo’s jurisprudence.”¹⁴ In the many cases he decided during his long career on the bench, Cardozo was in fact reluctant to use policy analysis as a basis for deciding cases.¹⁵ That would be a betrayal of what, even according to the most cautious interpretations of realism, is a core tenet of the realist creed. One favorite theme of the realists which Cardozo did embrace is the need to be conscious of the complex relationship between the judge’s personal makeup and her judicial approach: “deep below consciousness are other forces . . . the predilections and the prejudices, the complex of instincts and emotions and habits and convictions, which make the men, whether he be litigant or judge.”¹⁶ But while realists like Jerome Frank made this insight into a cornerstone of their theory, for Cardozo, as Duxbury explains, it merely, “supplemented his observation that judges cannot always be taken straightforwardly to accept and operate on the basis of established precedents and statutes, but must at times be regarded as actual creators of law.”¹⁷ He was, in other words, willing to accept and grapple with a truth that is plain to see to anyone who is not captive of a conceptual structure which cannot contain the human nature of judges as a factor in their decision-making; but he allocated to this element the minor interpretative role it merits.

Cardozo also took great care to distance himself from extreme anti-formalism according to which the law is not and should not be developed by deduction from meaningful legal rules and principles.¹⁸ As he explains in a lecture he delivered in 1923:

What is wrong in neorealism is a tendency manifest at times to exaggerate the indeterminacy, and entropy, the margin of error, to treat the random or chance element as a good in itself and a good exceeding in value the elements of certainty and order and rational coherence—exceeding them in value, not merely at times and in places, but always and everywhere. In emphasizing the danger of extracting principles and formulas from an aggregation of specific cases and adhering to them blindly, we must be on our guard lest we be carried over to the other extreme and left with nothing more coherent than a mass of nebulous particulars.¹⁹

13. DUXBURY, *supra* note 6, at 47; Wardlaw, *supra* note 3, at 1658-62.

14. John C. P. Goldberg, *The Life of the Law*, 51 STAN. L. REV. 1419, 1423 (1999).

15. *Id.* at 1440.

16. CARDOZO, *supra* note 1, at 167.

17. DUXBURY, *supra* note 5, at 49.

18. CARDOZO, *supra* note 1, at 125.

19. Cardozo, *Jurisprudence: Address Before the New York State Bar Association Meeting* (Jan. 22.

This and other similar (if less explicit) statements in his extra-judicial writing support Duxbury's conclusion that Cardozo's "revolt against formalism" is "a myth," since on many jurisprudential issues he remained a resolute formalist.²⁰ If you have to put a name tag on Cardozo (at least *qua* the author of *NJP*), then Goldberg's "inclusive pragmatism" is particularly apt. Inclusive pragmatists share with Dewey and James the belief that the pursuit of truth does not necessarily come from "stripping away superstructure to get to base."²¹ But at the same time they recognize the value of conceptual investigation, seeing the concepts of right or duty as equal to that of policy. Similarly, they are happy to include in their definition of the law both conduct and conceptual thinking.²² In that sense, indeed, "the juristic philosophy of the common law is at bottom the philosophy of pragmatism."²³

The benefit of shoving Cardozo's enterprise under the banner of one school of thought is slight, if any. His scholarship, and the principles that underlie his work as a judge, are too rich and diverse to fit into one slot. But exploring the sources of intellectual inspiration for his admirable project is, I believe, worthwhile. In what follows, I argue that one key to understanding the picture of adjudication that Cardozo offers in the *NJP* is the recurring reference he makes to the law of equity. Cardozo's thought and jurisprudence are tied to equity by many strings. The theme I wish to focus on here is the relationship between decisions in the courts of law and moral values—an essential aspect of the law of equity that Cardozo explores in depth in his book. My argument is that the references to jurisprudence of equity lends support to the picture of jurisprudence that emerges from the *NJP* as they exemplify the viability of aligning law and morality as a project that judges can and ought to pursue. At the same time, the long history of equity is a fine example of the delicate balance between formalism and creative adjudication that Cardozo is so eager to find. I propose to study these claims on two levels: the place of equity in the legal system, and the characteristics of equity's interventions that aim to align the parties' moral and legal duties.

II. THE NATURE OF EQUITY AND THE JUDICIAL PROCESS

[Cardozo] is making an existing system work well in new cases as they arise. He is taking the past, indeed well-learned and well-respected,

1932), cited in MARCIA J. SPEZIALE, *THE EXPERIMENTAL LOGIC OF BENJAMIN NATHAN CARDOZO* 825 (1989).

20. DUXBURY, *supra* note 5, at 10. Goldberg goes as far as concluding that Cardozo's significance for American law lies in his having been one of the most sophisticated and accomplished anti-Realist judges of this century. Goldberg, *supra* note 15, at 1423.

21. Goldberg, *supra* note 14, at 1650.

22. *Id.* at 1651.

23. CARDOZO, *supra* note 1, at 98.

and moulding it to serve the ends that it has always served. It is true that he does not leave it unaffected and unchanged in the process. So it has always been with other judges, great and small. Such is indeed the *Nature of the Judicial Process*.²⁴

By the time Cardozo is writing the *NJP*, the process of administrative fusion between equity and law in the United States is mostly done and dusted. As a young lawyer in New York, Cardozo would have worked under the code of civil procedure, presented by David Dudley Field in 1848. One of its professed aims was to introduce a “perfect union of law and equity.” which was supposed to lead to a “complete obliteration of every distinction between them.”²⁵ Following the enthusiastic reception of the code, Equity as an independent feature of civil jurisdiction (often with separate courts) largely ceased to exist.²⁶ The long-standing neglect by law schools to teach equity as part of the curriculum got us to a point in which the majority of lawyers in a common law jurisdiction could not tell you when “we do this in Common Law but that in Equity.”²⁷ And this, as Laycock explained in the 1990s, is all good, since “[e]xcept where references to equity have been codified, as in the constitutional guarantees of jury trial, we should consider it wholly irrelevant whether a remedy, procedure, or doctrine originated at law or in equity.”²⁸

However, as Kellen Funk shows, while Field’s view of fusion has become dominant in theory, in practice, “the distinct traditions of law and equity continued to meaningfully structure day-to-day legal reasoning about remedies, not just in the special case of the right to jury trial, but in myriad other ways.”²⁹ The recent “American Revolution” in the area of civil remedies in which the equitable roots of a remedy is again making a big difference to the way it is deployed, is therefore less surprising than one could otherwise have thought.³⁰ The last decade or so has also seen a

24. Arthur L. Corbin, *Mr. Justice Cardozo and the Law of Contracts*, 52 HARV. L. REV. 426, 438-39 (1939).

25. SPEECHES, ARGUMENTS, & MISCELLANEOUS PAPERS OF DAVID DUDLEY FIELD, VOL. 1, at 578 (A.P. Sprague, ed. 1884). See also Kellen Funk, *Equity without Chancery: The Fusion of Law and Equity in the Field Code of Civil Procedure, New York 1846-76*, 36 J. LEG. HIST. 152 (2015).

26. With the glaring exception of the Court of Chancery in Delaware, which fiercely retained its (constitutionally protected) independent, and is highly regarded for its professionalism. On the Delaware Court of Chancery’s unique nature, see, for example, William T. Quillen, *Constitutional Equity and the Innovative Tradition*, 56 L. & CONTEMP. PROBS. 29 (1993); William T. Allen, *Speculations on the Bicentennial: What Is Distinctive About Our Court of Chancery*, in COURT OF CHANCERY OF THE STATE OF DELAWARE 1792 (1992).

27. As Andrew Burrows named his famous pro-fusion manifesto, *We Do This At Common Law But That In Equity*, 22 OXFORD J. LEG. STUD. 1 (2002).

28. Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 54 (1993).

29. Funk, *supra* note 24, at 47.

30. Samuel Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 999 (2015); Gergen, et al., *The Supreme Court’s Accidental Revolution? The Test for Permanent Injunctions* 112 COLUM. L. REV. 203, 204 (2012). See for example, *Grupo Mexicano de Desarrollo, SA v Alliance Bond Fund, Inc.* 527 U.S. 308, 312 (1999), and *US Airway, Inc. v McCutchen* 133 S. Ct. 1537 (2013). For a

resurrection of the debate in the United States around the value of substantial equitable doctrines to modern economic conditions.³¹ This debate, lively if still limited in scope, demonstrates that the doctrines of equity and their distinctive character are not completely lost to American jurisprudence.³²

Equity was certainly not lost to Cardozo; it features highly in the caselaw he is famous for and plays a particularly important role in the NPJ. Since equity has gone underground by the time he is writing, the sheer volume of references to equity in the text may not be immediately apparent to his countrymen. But lawyers who can identify the pedigree of rules and principles which were developed in the courts of Chancery, may be a little surprised to see just how many of the examples Cardozo employs are conceptually and historically rooted in equity. From Hardship³³ and specific performance³⁴ to “no one should benefit from their own wrongdoing,”³⁵ constructive trusts,³⁶ and express trusts.³⁷ For a book that is abstract in nature and generally avoids discussion of specific doctrines, the number of examples that are drawn from doctrines of equity is telling. Or so I will argue here.

Cardozo himself hints towards the end of the book at the importance of equity to the agenda he is promoting. The context is the difficult question whether judges who are authorized to interpret the law in light of moral standards would be able to do a good job at understanding and applying them. Cardozo is optimistic that this is indeed the case, and adds:

[I]n truth [this] message is not new. It is the method of the great chancellors, who without sacrificing uniformity and certainty, built up the system of equity with constant appeal to the teachings of right reason and conscience. It is the method by which the common law has renewed its life at the hands of the great masters- the method of Mansfield and Marshall and Kent and Holmes.³⁸

critique of the anti-fusion move see for example Caprice Roberts, *The Restitution Revival and the Ghosts of Equity*, 68 WASH. & LEE L. REV. 1027 (2011). And most recently papers in the symposium on *The Nature of the Federal Equity Power* in 97 NOTRE DAME L. REV. (2022).

31. See for instance, Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021). Paul B. Miller, *Equity as Supplemental Law*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk et al. eds., 2020). John C.P. Goldberg & Benjamin C. Zipursky, *From Riggs v Palmer to Shelley v Kraemer: Judicial Power and the Law-Equity Distinction*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (Dennis Klimchuk et al., eds., 2020). Samuel Bray, *Equity: Notes on the the American Reception*, in EQUITY AND LAW: FUSION AND FISSION (John C.P. Goldberg, et al. eds., 2019).

32. Jody S. Kraus & Robert E. Scott, *The Case Against Equity in American Contract Law*, 93 S. CAL. L. REV. 1323 (2020); Smith, *supra* note 30.

33. CARDOZO, *supra* note 1, at 40.

34. *Id.* at 34-35.

35. *Id.* at 37.

36. *Id.* at 38.

37. *Id.* at 105.

38. *Id.* at 133.

Cardozo does not develop the theme, and he leaves this allusion to equity as a form of adjudication at that. But in my view, this is an important, and (as far as I could find) hitherto missed key to unlocking the message of *NJP*. In what follows I argue that in recognizing and celebrating the occasions on which judges develop the law so as to calibrate law and morality, Cardozo taps into the methodology and ethos of equity. The appeal to equity provides him and his readers a segue into a vibrant, creative and highly-regarded body of law, thus enriching and supporting his understanding of an important aspect of the nature of the judicial process.

The success of equity, at least in the jurisdictions where it thrives, supports Cardozo's project in the *NJP* in two ways. First, it substantiates the anti-formalist stand of his position. Over the eight hundred years of its development, equity has been an exemplar of the positive contribution of bold judicial creativity to the health and flourishing of a sophisticated commerce-friendly legal system. But the reference to equity also helps Cardozo to posit himself, as he clearly wishes, in contrast with the radical core of legal realism according to which doctrinal and conceptual argumentation is not, and should not, be the method of developing the law. A study of equity's interventions with the common law rights of the parties reveals that the progressive nature of its judicial approach does not entail detachment from the legal past—the prejudices, blind spots and rigidity, together with the wisdom, experience and prudence. Like the Courts of Equity, I argue, Cardozo strives to find a balance between the need to preserve what is positive and helpful in following established legal rules, and the no-less-urgent need to reform and create a law that is expressive of the community's conscience.

A. Taking the Law Where Conscience Leads

1. The Vocation of Equity

“Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be troubled by a classification.”³⁹

The work which equity sets out to do is brilliantly captured by the reference to “conscience”—the term that is most associated with it, and (hence) serves as a lightning rod for its critics. Equity, I argued elsewhere, operates on the side of the common law to promote a legal virtue which I call “Accountability Correspondence”: When legal rules impose liability, it should ideally correspond to the pattern of moral duty in the circumstances to which the rules apply.⁴⁰ Barring unusual cases, the best way in which law

39. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (N.Y. 1921).

40. IRIT SAMET, *EQUITY: CONSCIENCE GOES TO MARKET* 10-17 (2018).

can serve morality is by complying with the Accountability Correspondence requirement, namely, by ensuring that where *legal liability* is attached to one's action (or omission) it closely follows the matrix of *moral accountability* for this action.⁴¹ Some of the major reforms which modern legal systems adopted in recent times were designed to achieve just that: to introduce a greater convergence between legal liability and our perception of moral accountability.⁴²

Equity, right from its inception in the 14th century, was the tool used by the Lord Chancellor to ensure that in areas of common law where formal rules are taken particularly seriously (namely, property and contract), the courts do not lose sight of the great importance of accountability correspondence. The target of the very first doctrine of equity—express trust (or, its predecessor, the Use)—were transferees of property who promised informally to hold it for the benefit of another person; as some of them sought to renege on their promise by relying on the common law rule according to which rights in land must comply with strict formalities, the Lord Chancellor felt compelled to step in. A declaration (enforced against the body of the defendant) that he must hold the land for the beneficiary of the informal arrangement realigned the moral obligation of the promisor with his legal obligation.

Equity remained active in those areas of private law in which the rules of common law have a tendency to revert to rigid formalism, namely property and contract.⁴³ In these areas in particular, the common law follows formal rules and takes no notice of what a person with a “tender conscience” would have done, or “whatever may be the case in a court of morals.”⁴⁴ The approach taken by the common law is summarized nicely in the words of Judge Bengall:

41. The principle of accountability correspondence does not take a stance in the question which actions should have legal liability attached to them, or what are the conditions for such attachment. It only delineates the relationship between legal liability and moral responsibility once we decided that agents of action X should bear legal consequences.

42. See, for example, the move from the traditional view that company directors' duty is to maximize shareholders' profits, to the idea that they need to advance the “company's success” which is measured also by reference to “the firm's impact on the community and the environment” and its “reputation for high standards of business conduct.” See The Companies Act 2006, UK Public General Acts c. 46, Pt. 10, Ch. 2, Sec. 172; Florian Wettstein, *The Duty to Protect: Corporate Complicity, Political Responsibility, and Human Rights Advocacy*, 96 J. BUS. ETHICS 33 (2010); and M. BLOWFIELD & A. MURRAY, *CORPORATE RESPONSIBILITY* (2011).

43. On the reasons why equity stirs clear from tort law see Benjamin C. Zipursky, *The Inner Morality of Private Law*, 58 AM. J. JURIS. 27 (2013). Irit Samet, *On Trusts, Angels, Morality and Fusion: Reply to My Critics*, 21 JERUSALEM REV. LEG. STUD. 59 (2020); Philip Sales, *Proprietary Estoppel: Great Expectations And Detrimental Reliance in MODERN STUDIES IN PROPERTY LAW*, Sect. 31 (Luke Rostill & Aruna Nair eds., 2022).

44. *Smith v. Hughes*, [1871] L.R. 6 Q.B. 597, 604, 607 (Cockburn, C.J.; Blackburn, J.) (discussing the lack of duty of disclosure in pre-contractual negotiations). The passage of time did not blunt the resolve of the Court of Common Law, and in *Walford v. Miles*, 2 A.C. 128 H.L. (1992) it is still said that “a duty to negotiate in good faith is . . . unworkable in practice as it is inherently inconsistent with the position of a negotiating party.” (Lord Ackner, at 138).

In any individual case the application of these propositions may produce a result which appears unfair. So be it . . . I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals . . . [is] justice which flows from the application of sure and settled principles.⁴⁵

Equity rejects this myopic view of the essence of legal virtue as encapsulated by formal justice. When equity intervenes in the proprietary or contractual rights of the parties it prevents dangerous cracks from opening between moral responsibility and legal liability. As Cardozo succinctly puts it: “the judge is under a duty . . . to maintain a relation between law and morals.”⁴⁶ Thus, instead of obsessing about “sure and settled” rules, equity pays close attention to the particularity of the situation, and employs open-ended principles that enable the judge to trace the pattern of moral responsibility in each case.⁴⁷ By the 16th century it was already established that the job of the “[o]ffice of the Chancellor is to correct Men’s consciences for Frauds, Breach of Trusts, Wrongs,” and that therefore, “[w]hen a Judgment [in common law] is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party.”⁴⁸

The mission that equity sets itself to achieve is one that echoes throughout the *NJP*. The unsustainability of a law that is far removed from the moral sensibilities of the people whose behavior it aims to guide is one of the main concerns Cardozo sets out to address in the text. “[N]ot for us,” he says emphatically, “the barren logomachy that dwells upon the contrasts between law and justice, and forget the deeper harmonies.” Indeed, one of the four leading principles for the development of the law is the line of “justice, morals and social welfare, the *mores* of the day” to which Cardozo gives the rather unhelpful name “the method of sociology.”⁴⁹ As he explains later, under social welfare he bundles “the good of the collective body”—“public policy,” the “*mores* of the community”—“ethics,” and “social sense of justice.”⁵⁰ He agrees that the term will not satisfy a philosopher, but should be, he believes, good enough for a lawyer.⁵¹ Posner and others who aim to enlist Cardozo to the realist camp size the term “sociology” and

45. *Cowcher v Cowcher*, [1972] 1 W.L.R. 425, 948 (*H.C.*) (Bagnall, J.).

46. CARDOZO, *supra* note 1, at 129.

47. As Cardozo explains, “[t]he plastic remedies of the chancery are moulded to the needs of justice,” with the flexibility serving equity’s ability to answer “the call of the occasion.” *Foreman v. Foreman*, 167 N.E. 428, 429 (N.Y. 1929), and *Adams v. Champion*, 294 U.S. 231, 237 (1935).

48. *Earl of Oxford’s Case*, [1615] 21 E.R. 485, 487.

49. CARDOZO, *supra* note 1, at 27.

50. *Id.* at 67-68.

51. *Id.* at 69. He was surely right about the former. See Goldberg, *supra* note 3, at 1335-42 (discussing critics and attempting to reconcile the different components of the definition).

mostly ignore the complexity of the definition which Cardozo actually offers. But when Cardozo expounds on this principle, he cites with agreement the view that ethical considerations are the “vital air” on which civil laws live. And later he stresses that “the judge in shaping the rules of law must heed the *mores* of his day.”⁵² The vocation of equity, namely, introducing an accountability correspondence between law and morality, is high up on Cardozo’s agenda in the *NJP*.

Unfortunately, I do not have the space here to address the questions how the judge is to find the morally right answer, or whether indeed such answer is in existence. I have argued elsewhere that we have good reasons to believe that, at least in the areas of private law in which equity operates, there is, in most cases, an objectively right answer to the question whether the defendant breached her moral duty, and that judges are in a good position to find it.⁵³ Cardozo clearly subscribes to this view.⁵⁴ What I would like to focus on here is perhaps a less exciting debate—but one to which Cardozo makes a more original contribution, namely, what is the best way to promote the legal virtue of accountability correspondence in the judicial process.

It is perfectly feasible to believe in the authority of the court to change the parties’ right in order to align moral with legal duty without subscribing to a “natural law” picture of the normativity of law. When Cardozo endorses equitable interventions of the kind we find in *Riggs v. Palmer*, he did not thereby become, as Posner thinks, “a precursor of Ronald Dworkin.”⁵⁵ The claim that law should serve morality does not entail the claim that the law takes its authority directly from universal moral principles which it embodies, or that the ideal law maps one on one with the system of moral rules.⁵⁶ A pragmatist who has little time for metaphysical theories should easily accept that judges should work hard to prevent a rift between moral and legal accountability. For a law in which the legal result is out of kilter with the community’s deep convictions about moral accountability is not only dubious from the perspective of justice, it is also bound to alienate its addressees—the judiciary as well as the citizens. In non-repressive regimes, failure to recognize and implement this legal virtue is likely to lead to a critical mass of disobedience that has a potential to eventually undermine the system itself.⁵⁷

Law, like any social institution, must rest on solid foundations of

52. *Id.* at 100.

53. SAMET, *supra* note 33, at 197-211.

54. CARDOZO, *supra* note 1, at 128-31.

55. POSNER, *supra* note 10, at 29. I therefore disagree with the position taken by Ben Zipursky in his paper in this volume. Benjamin C. Zipursky, *Benjamin Cardozo and American Natural Law Theory*, 134 *YALE J. OF L. & HUMANS.* 24 (2023).

56. Joseph Raz, *The relevance of coherence*, 72 *BOS. U. L. REV.* 273 (1992).

57. Janice Nadler, *Flouting the Law*, 83 *TEX. L. REV.* 1400, 1401 (2005).

legitimacy if it is to operate effectively. Recent studies suggest that deterrence, although it can significantly influence law-related behavior, will, at other times, have no such effect.⁵⁸ A decision to become “self-regulatory,” that is, adopt a proactive approach for rule following (rather than merely respond to external incentives) is much more likely to develop where the government and its institutions—like the police and the courts—are perceived as legitimate.⁵⁹ The case research makes for this observation is so strong that, at the end of their classic empirical study of the correlation between community views and criminal codes, Paul Robinson and John Darley state that “the moral credibility of the criminal code is its single most important asset.”⁶⁰ And so, when Cardozo maintains that “the judge in shaping the rules of law must heed the *mores* of his day,” he does not desert the metaphysical skepticism of the pragmatist to become a natural lawyer; he merely heeds Justice Marshall’s warning that “a decision contrary to the public sense of justice [would] . . . diminish respect for the courts and for law itself”—a warning that is now supported by ample empirical research.⁶¹

One may wonder, however, whether, in relying so heavily on examples from equity, Cardozo is making his work as an appellate judge in the United States look easier than it is in fact is. Equity, after all, engages a pretty narrow section of the moral law: only norms of inter-personal morality that revolve around the duties of honesty, respect for other people’s property right, staying true to voluntarily-assumed commitments and the like are likely to be the focus of an investigation into the parties’ actions and intentions in matters of contract and property law. In these areas of inter-personal morality, research has shown that even in multi-cultural societies we can identify a broad consensus as to the relevant moral standards.⁶² In England, as Lord Sales explains, “[t]he courts are particularly wary about changing the law . . . where the question involves an issue of current social policy on which there is no consensus within the community . . . [or] where the issue arises in a field far removed from ordinary judicial experience.”⁶³ But this is not necessarily the case in the United States, where the Supreme Court is asked to decide on issues that are subject to heated debates (like abortions and LGBT rights). The success of equity as a mechanism for incorporating moral norms into the law by the judiciary cannot support the viability and legitimacy of judicial decision in such controversial issues.

58. Daniel Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

59. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 57-70 (2006); Jonathan Jackson, *Why Do People Comply with The Law? Legitimacy and the Influence of Legal Institutions*, 52 BRITISH J. CRIM. 1051 (2012).

60. Paul H. Robinson & John M. Darley, Justice, liability, & blame: community views and the criminal law 202 (1995).

61. *Flood v. Kuhn*, 407 U.S. 258, 293 n.4 (1972) (Marshall, J., dissenting).

62. See, e.g., LUC BOLTANSKI, LAURENT THÉVENOT & CATHERINE PORTER, ON JUSTIFICATION: ECONOMIES OF WORTH (2006).

63. Philip Sales, *Common Law: Context and Method*, 135 L. QUART. REV. 47, 58 (2019).

And so, while the development and implementation of the law of equity can be used to exemplify and buttress the arguments of the *NJP*, Cardozo cannot call on equity to reinforce his position with regards to the full range of judicial decision making that an American appellate judge has to face.

2. *Equity Follows the Law*

The prayer Cardozo prescribes for moments when “the demon of formalism tempts the intellect” is one which every judge at the Chancery Court would recognize: “[b]e it my will that my justice be ruled by my mercy.”⁶⁴ It fits perfectly the method which equity developed for coping with the challenge that justice by formalism poses to lawyers. The Courts of Chancery found an ingenious way to reverse the damage caused by the obsession of common law with formal justice: they declare that the defendant’s *insistence* on his legal right is unconscionable and therefore can be ignored.⁶⁵

Thus, the holder of a property right who promised to hold it for the benefit of another was not told that her common law ownership rights are abolished; rather, she was not allowed to *rely* on the common law rule that recognizes only formalized rights to property as that would be unconscionable. While she remained the owner in common law, she had to acknowledge the informal rights of the beneficiary and hold the property for her on trust.⁶⁶ A similar structure underlies all equitable rights: the common law right of the defendant remains in place, but equity does not allow her to insist on it. In creating this double structure, equity echoes Aristotle’s definition of the “inequitable” person as “stickler for justice”—a person who insists on the rights given to her by law when justice would disallow it.⁶⁷ As an early 17th century judge put it, equity aims to “defend *the law* from crafty evasions, delusions and mere subtleties, invented and contrived to evade and elude the common law, whereby such as have undoubted right are made remediless.”⁶⁸

64. CARDOZO, *supra* note 1, at 63.

65. Wesley N. Hohfeld, *Relations Between Equity and Law*, 11 MICH. L. REV. 542 (1912). Henry Smith builds on this strand and offers an economic analysis of equity according to which it is a response to the problem of legal opportunism. Henry Smith, *Fusion of Law and Confusion of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY 210 (Dennis Klimchuk, et al. eds., 2019).

66. For instance Chudleigh’s Case [1594] 1 Co. Rep. 120a, 121b (cited in David Foster, *Historical Conceptions of the Express Trust*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TRUSTS (Simone Degeling, et al. eds., 2022)). If the claim in equity failed, e.g. if the claimant did not come with clean hands, the right in common law was (back) in force.

67. A term used by Aristotle to describe the contrast of the “equitable man” who “tends to take less though he has the law on his side.” ARISTOTLE, NICHOMACHEAN ETHICS, book 6, chapter 10 (in J. BARNES & A. KENNY, ARISTOTLE’S ETHICS: WRITINGS FROM THE COMPLETE WORKS (2014)). On the question to what extent the law of equity follows Aristotle’s discussion, see D. Klimchuk, *Aristotle at the Foundations of the Law of Equity*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF EQUITY (D. Klimchuk, et al. eds., 2020).

68. *Dudley v. Dudley* [1705] Prec. Ch. 241, 24 E.R. 118 (emphasis added).

This multi-layered structure of the equitable right allowed equity to introduce what Cardozo is so keen on in the *NJP*: a measured intervention to fix situations where a straightforward application of formal rules would create an intolerable rift between the solution offered by the *law* to the conflict, and the way *morality* would resolve it. The common law rule is left to stand—an acknowledgement of its status as the principal legal arrangement in the circumstances. Equity does not see itself as a source of primary rules, but rather as providing a fix where things go wrong.⁶⁹ This double-layered structure is encapsulated in the fundamental maxim “equity follows the law.”⁷⁰ The maxim is expressive of the way in which the equitable intervention is an exception—a break with an order that must be maintained in all but extraordinary cases. Cardozo acknowledges the expressive significance of the multi-layer structure when he says, in the context of *Riggs v. Palmer*, that “(l)ogic [i.e., the set of common law rules that squarely apply to the facts] received its tribute, by holding that the legal title passed, but [the murderous grandson] was subjected to a constructive trust.”⁷¹ This understanding of the creative mode of judgement as critical, but at the same time as reserved for unusual sets of facts in which the answer provided by doctrine is untenable is tirelessly pursued in Cardozo judicial and extra-judicial writings. As an English judge once put it: “the topography of legal doctrine is subject to movement, but at a slow rate and subject to a presumption in favour of inertia.”⁷²

Thus, Cardoso emphasizes that the four modes of adjudication he identifies in the *NJP* are not equal. Although he awards the “method of philosophy,” i.e., logical deduction from pre-set rules, only a “certain presumption in its favour,”⁷³ he sees the unexciting decision to follow precedent as “at least the everyday working rule of our law.”⁷⁴ The balance he wishes to strike between the methods is not an easy one to find, as the history of equity aptly demonstrates. For the first few centuries of equity’s existence Chancery Court resisted the shackles of *stare decisis*: its decisions were not recorded, and surely not followed as an authoritative precedent.⁷⁵ But history is teaching us a lesson here: a system of law that strives to govern vital spheres of human conduct must move on from the kicking radical early stage to a more somber mode in which the stability of the

69. Henry Smith therefore refers to equity as a “safety valve,” e.g. in *Equitable Defences As Meta-Law*, in *DEFENCES IN EQUITY* 18-19 (Paul S. Davies, et al. eds., 2018).

70. Cardozo explains this maxim as referring to way in which “Equity works as a supplement for law and does not supersede the prevailing law” (*Graf v. Hope Bldg. Corp.*, 254 N.Y. 1, 9 (N.Y. 1930)). On the maxims of equity see MICHAEL LEVENSTEIN, *MAXIMS OF EQUITY: A JURIDICAL CRITIQUE OF THE ETHICS OF CHANCERY LAW* (2013).

71. CARDOZO, *supra* note 1, at 38.

72. Sales, *supra* note 63, at 48.

73. CARDOZO, *supra* note 1, at 27.

74. *Id.* at 16.

75. Timothy S. Hasket, *The Medieval English Court of Chancery*, 14 L. & HIST. REV. 245 (1996).

precedent is ordinary, and ground-breaking creativity is the exception. The gradual descent of equity into a formalistic rigid body of law that reached its pick with the chancellorship of Lord Eldon, and the eventual emergence of a nimble jurisdiction that is at the forefront of developments in commercial and family law, is the best laboratory Cardozo could hope for in which to test his theories.⁷⁶

Thus, when Cardozo tells us that judges should not “set aside existing rules at pleasure in favour of any other set of rules which they may hold to be expedient or wise”⁷⁷ or that “when two cases are the same [adherence] to precedent must be the rule rather than the exception,”⁷⁸ he is not joining the formalists’ camp. Rather, he listens to the wisdom accumulated in the courts of equity over many centuries, and rightly concludes that “if litigants are to have faith in the even-handed administration of justice in the court” the moments in which the courts “bend symmetry, ignore history and sacrificed custom” must be exceptional, if not rare.⁷⁹ When equity conceives of itself as a “gloss on the law” it creates an ethos whereby judicial creativity is kept “within [the] interstitial limits which precedent and custom . . . have set” so as to preserve the horizontal justice that is essential for a healthy legal system.⁸⁰ It is an empowering stance, that enables the court to protect a well-functioning system from inbuilt deficiencies while preserving public trust in the rule of law on the one hand, and the moral uprightness of the courts on the other.

B. How to Use Discretion

Throughout the *NJP*, Cardozo is trying to assuage the doubts and concerns of formalists (of any generation) about empowering judges to develop the law beyond the path set by precedent. The jurisprudence and institutional history of equity help him to do so. Equity has an important lesson for people who are interested in the machinery of law: judges who are given discretion can be trusted to employ it in a bold yet measured manner if the ethos of the courts inspires them to do so. The Courts of Chancery always had the power to go beyond the answer that is clearly given by the relevant legal rules where this answer “shocks the conscience of the court.”⁸¹ When they use it, the courts of equity take a much more

76. In a famous confession Lord Eldon said that “nothing [!] would inflict on me greater pain in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this court varies like the Chancellor’s foot.” To save himself this pain he aspired to state of affairs where “[t]he doctrines of this Court [are] as well settled and made as uniform almost as those of the common law” (both quotes from *Gee v. Pritchard* [1818] 2 Swans 402, 414).

77. *CARDOZO*, *supra* note 1, at 61.

78. *Id.* at 30.

79. *Id.* at 62.

80. *Id.* at 99.

81. *Cobbe v. Yeoman’s Row Management Ltd.*, [2008] 1 W.L.R. 1752, para 92 (Lord Walker).

radical action than the one commanded by moderate realists. For, at least according to benign versions of realism, the indeterminacy of the law is rooted in the ambiguity of the answers provided by the applicable doctrine, or the inability to determine which doctrine is most relevant.⁸² But when equity intervenes in the parties' rights, it does so, in many if not all cases, in the face of a crystal clear answer supplied by property or contract law, such as "no property right can be created without writing." or "gifts upon death can only be given in a formalized will."⁸³ Can we learn something from equity about the checks and balances that are necessary to keep such a strong discretion in the adjudication tool bag without thereby destabilizing the system? I believe that Cardozo's grappling with this question of discretion in the *NJP* can take cue from equity, even while his decisions on the bench did not always maintain the delicate equilibrium that equity courts in England were so careful to establish and maintain.⁸⁴

In spite of the great freedom which the courts of chancery took for themselves to get off the trail clearly marked by the common law, they do not do so in a capricious way that threatens to undermine the rule of law (at least most of the time). Of course, the many opponents of equity still argue fervently that this is exactly what was and is done in equity. Elsewhere, I offered a detailed argument to show that this criticism is untenable.⁸⁵ It is easier to assess this critique by reference to the concept of the rule of law (ROL). For our purposes, we can define the ROL as an exemplary state of affairs wherein the government in all its actions is bound by legal norms fixed and announced beforehand so that people can foresee with fair certainty how the authority will use its coercive powers in given circumstances.⁸⁶ The vocation of equity we saw, was to balance the legal virtue of ROL with another important virtue which the courts of common law tend to forget: the alignment of moral and legal duties. But, unlike its denigrators argue, the doctrines of equity do not guide the court to pursue this goal in a partisan way. Equity's inbuilt discretion is not, and should not, be used to automatically prefer accountability correspondence over the rule of law; rather, they strive to strike a fine balance between these incommensurable legal ideals.⁸⁷

82. Dagan, *supra* note 4, at 1892.

83. As in the equitable doctrines of proprietary estoppel (*Thorner v. Major* [2009] U.K.H.L. 18), and secret trusts (*McCormick v. Grogan* [1869] L.R. 4 H.L. 82).

84. For a critique of Cardozo's contribution to equity as a judge which goes only half-way towards a functional (to distinguish from historical) interpretation of this body of law, see Henry Smith's paper in this volume. Henry E. Smith, *Cardozo and the Nature of the Equitable Process*, 34 *YALE J. OF L. & HUMANS*. 166 (2023).

85. SAMET, *supra* note 40, at 56-73

86. This is an adaptation of Hayek's definition (adopted by Joseph Raz), with "legal norms" replacing his "rules." FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1944); Joseph Raz, *The Rule of Law and its Virtue*, in *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 210 (1979).

87. The hard work that goes into defining what level of 'notice' is enough for establishing third

All claims in equity are rooted in the Court of Chancery's willingness to deny defendants the ability to enforce various rights which clearly resulted from formality requirements in the common law.⁸⁸ But even as they evolved beyond the embryonic stage to create a rich tapestry of precedent, they almost always contain a conspicuous element of discretion that can disrupt arrangements that are clearly set in the common law.⁸⁹ All the features of equity which are the target of recurrent attacks on the viability of such interventions in the parties' rights are encapsulated in the concept of "unconscionability," which "was and remains the fulcrum upon which entitlement to equitable relief turns."⁹⁰

As early as 1526 we can find Thomas Audley grumbling about "a law called 'conscience,' which is always uncertain, and depends on the greater part on the 'arbytrement' of the judge; by reason thereof no man is certain of knowing his title to any land."⁹¹ John Selden's more famous quip from a hundred and fifty years later is on the same page: "[f]or Law we have a measure . . . [but Equity judges purport to] make the standard for the measure, we call a Foot, a Chancellor's Foot"; this one solidified into an idiom that haunts equity to this day.⁹² The systematization of equity as a body of law that is constructed around precedent, and, following the 19th century Judicature Acts, litigated in the same High Court as the common law, failed to take the edge off the criticism: "Unconscionability, "declared

party's responsibility for a breach of trust is a good example—see e.g. *BCCI v Akindele* [2000] 3 WLR 1423.

88. See for instance *Courtman v. Convers*, Chancery Court [1601] in which one mortgagee, Mr. Courtman, who, when the day of repayment arrived "had repared to the defendant's house where the money was to have been paid at the very day . . . [only to find that] the defendant absented himself and would not be spoken withal." The same happened the day after. "And then after the defendant coming home about one of the clocke at night [the borrower] offered him his money which he refused to accept the money being due but the very day before the tender." In that way, since the common law courts strictly enforced rules like "pay on the day agreed or loose the house/land," the lender "hath caused himself to be admitted to the . . . lands being of good value"—a result that would struck most of us as patently unjust. But in the Chancery it was held that "this court holdeth [this behavior] to be very unconscionable and hard dealing and [the borrower] ought in equity to be relieved." The money lender was not allowed to insist on his right to take the mortgaged land. I am grateful to Dr. David Waddilove for sharing this case, which he unearthed and transcribed from the Chancery records.

89. For example, whether beneficiaries can void trustees' actions done in breach of fiduciary duty (*Pitt v. Holt*, [2013] UKSC 26, [93]-[94]); whether specific performance should be refused as it would cause excessive hardship (*Patel v. Ali*, [1984] 1 Ch 283); whether a charge is "fixed" or "floating" (*Agnew v Commissioner of Inland Revenue*, [2001] UKPC 28).

90. *Lift Capital Partners Pty Ltd. V. Merrill Lynch International* (2009) 253 ALR 482, 507 (Barrett, J.).

91. Cited by MARGARET MCGLYNN, *THE ROYAL PREROGATIVE AND THE LEARNING OF THE INNS OF COURT* 188 (2004). Interesting to know whether he changed his mind when he became Lord Chancellor in 1533.

92. 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* 43, 46 (London, J.M. Dent & Co., 3d ed. 1906) (1689). The Lord Chancellor offered a refuge from the vices bourn by common law's strict adherence to formalities as early as the late thirteenth century, when the old common law status-based property law could not cope with aftermath of the "black death." See Gary Watt, *Equity stirring: the story of justice beyond law* 49-51 (2009) and many primary and secondary sources cited there.

one fierce opponent of equity's resurrection in England in the 1980s, "[is] as vague and unstable a concept as could well be found."⁹³

The deepest concern in England was that the element of "conscionability" is abused by doctrinally lazy judges to "conceal private and intuitive evaluations" and present them as legal reasoning.⁹⁴ Cardozo shares this concern (without buying into the formalism that underlies the English version): when he advises the judge who acts "as a legislator," he emphasizes the difference between them as the judge must "disengage himself, so far as possible, of every influence that is personal,"⁹⁵ he must be careful not to "impose upon the community . . . his own idiosyncrasies of conduct or belief"⁹⁶; the method he recommends, we are being assured is not leading to a "cataclysm" in which rules are routinely substituted for an "individual sense of justice," "end to the reign of law," and "despotism."⁹⁷

In the field of equity, the heaviest fire is directed against the suggestion that unconscionability can be used as a general liability head, over and above what we find in specific doctrines such as assisting to a breach of trust or specific performance. Alas, in his hugely influential definition of constructive trust Cardozo created exactly this kind of unruly horse. The finding of a constructive trust—a proprietary relationship with dramatic results for the parties themselves as well as for strangers, which is established regardless of the parties' intention—should, arguably, be limited to well-defined sets of circumstances. Being reluctant to allow unconscionability to stand on its own as a basis for a claim in equity, this has always been the position English law.⁹⁸ While Roscoe Pound's distinction between "remedial" and "institutional" constructive trust (only the latter of which is recognized in England) is not very helpful, judges in England mostly limit the constructive trust to cases in which the defendant's "possession of the property is colored from the first by the trust and confidence by means of which he obtained it."⁹⁹ Of course, as is always the

93. Peter Birks, *Meagher, Gummow and Lehane's Equity Doctrines and Remedies*, 120 L. QUART. REV. 345 (2004). On the thirty-years' stagnation of equity in English law until the 1980s, see P.J. Millett, *Equity's place in the law of commerce* 114 L. QUART. REV. 214 (1998). Section 2-302 of the American UCC which allows the court to ignore unconscionable sections in contracts has also been heavily denounced as "nearly useless" and as demonstrating just how "easy [it is] to say nothing with words," JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 295 (1995); the authors went on to describe the official commentary as "a string of subjective synonyms covered with heavy value gravy." *Id.* at 298. See also Arthur A. Leff, *Unconscionability and the Code — the Emperor's New Clause*, 115 U. PA. L. REV. 485, 558 (1967).

94. Peter Birks, *Equity in the Modern Law: An Exercise in Taxonomy*, 25 U. W. AUS. L. REV. 1, 18 (1996).

95. CARDOZO, *supra* note 1, at 117.

96. *Id.* at 104.

97. *Id.* at 132.

98. "Remedial constructive trust" is "not seriously arguable in English law." See Mummery L.J. discussion in *Re Polly Peck International Plc* (No.2) [1998] 3 All E.R. 812, 829.

99. *Paragon Finance plc* [1999] 1 All E.R. 400, 409. For Pound's definition and its severe limitation, see Ying Khai Liew, *Reanalysing Institutional and Remedial Constructive Trusts*, 75 CAMBRIDGE L. J.

case with equity, the norms are formed as flexible principles that leave space for interpretation, but discretion is set in a fairly clear framework and factual matrix.¹⁰⁰

Cardozo, in contrast, adopted an expansionist interpretation of the constructive trust as an instrument for reversing unjust enrichment, which can be used whenever “property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest”; he continues to explain that the “court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief.”¹⁰¹ Cardozo remains faithful to this view in the *NJP* when he states that “constructive trust is nothing but the formula through which the conscience of equity finds its expression.”¹⁰² This broad definition determined the course of constructive trusts in the United States.¹⁰³ As expected, it attracted heavy fire as “an exhortation to moral decision,” “ambiguous,” “all-too-radical call for self-abnegation,” and “rhetorical in the negative, evaluative sense of the word.”¹⁰⁴ An attempt in England to develop broad judicial intervention in the name of conscionability, known as Lord Denning’s “constructive trust of a new model,” was swiftly rejected as “justice [being] consigned to the formless void of individual moral opinion.”¹⁰⁵ A recent, and much less ambitious, freehand use of unconscionability as an overarching category of responsibility has also been widely criticized as unleashing “a very unruly beast,” and been sidelined in subsequent cases.¹⁰⁶

Is Cardozo more faithful to the ethos of equity than judges in its birthplace? Was he, in other words, more successful in curbing a place from which strong discretion can be wielded without threatening the stability of the legal area in which it is lodged? I do not think so. In rejecting the idea of a conscionability-based discretion that floats over the law and attaches to the parties’ rights whenever this is deemed necessary by the judge, the English courts do not betray the vocation of equity. On the contrary, they are faithful to a strong undercurrent that sought to balance the ideals pursued by equity with the rule of law. Thus, Nottingham LC warns in the 17th

528, 529-32 (2016).

100. See further discussion in Terence Etherton, *Constructive Trusts: A New Model for Equity and Unjust Enrichment*, 67 *CAMBRIDGE L. J.* 265 (2018).

101. *Beatty v. Guggenheim Exploration Co.*, 122 N.Y. 380, 381 (N.Y. 1919).

102. CARDOZO, *supra* note 1, at 40.

103. H. Jefferson Powell, “*Cardozo’s Foot*”: *The Chancellor’s Conscience and Constructive Trusts*, 56 *L. & CONTEMP. PROBS.* 7, 18 (1993).

104. *Id.* at 20. But see Sect. IV there for the author’s defense of the definition when it is read in context of the case.

105. *Hussey v. Palmer* [1972] 3 All ER 744, 1290. The new model constructive trust was ousted one year after Lord Denning retired in *Burns v. Burns* [1984] CH 317II.

106. *Pennington v Waine* [2002] EWCA Civ 227. Margaret Halliwell, *Perfecting imperfect gifts and trusts: have we reached the end of the Chancellor’s foot?*, in *CONVEYANCER AND PROPERTY LAWYER* 202 (2003).

century that “it is infinitely better for the public that a trust . . . which is wholly secret, should miscarry, than that men should lose their estates by mere fancy and imagination of the Chancellor.”¹⁰⁷ “Conscionability” need not be an independent head of liability, nor a helicopter principle that descends on individual doctrines so as to disrupt their carefully crafted mechanism (as in *Pennington*). The rich experience of equity proves that it is enough if unconscionability takes the form of an integral element of specific doctrines, so that its meaning is developed in tandem with other parts of the doctrine as the courts go about deciding cases that fall under its heading. We see this in equitable doctrines like rescission, unconscionable bargain, or undue influence all of which incorporate an element of conscionability that fits into, and is interpreted in light of, the other elements of the doctrine¹⁰⁸; all of them revolutionized the areas of law in which they operate without undermining clarity and stability.¹⁰⁹

Such embeddedness in the doctrine alleviates the concerns that surround equity’s deployment of flexible, morally-sensitive principles, and a mode of legal reasoning that is *ex post* and discretionary in nature.¹¹⁰ For diehard formalists, a conscience-based element will always be a dangerous “sort of moral U.S. fifth cavalry riding to the rescue every time a claimant is left worse off than he anticipated as a result of the defendant behaving badly.”¹¹¹ Rootedness in a specific doctrine will not suffice to kosher it. But equity, like Cardozo in *NJP*, strives to find a “midway between the extremes,”¹¹² and therefore does not worry too much about the purists: the radical reformists who wish to see the courts empowered to break through the doctrinal mold whenever the judge believes this is the morally right thing to do, or formalists with a vending-machine picture of adjudication. But the long and successful history of equity can teach us that the equilibrium Cardozo was after can be struck closer to the formalist side of the continuum without thereby losing the spirit of innovation and independence that a truly reformist court must harbor.

Indeed, in creating this new powerful tool for reversing unjust enrichment that contains a very strong element of discretion in the form of a

107. *Coke v. Fountaine* [1676] 36 ER 984, 990 (Chancery). Beforehand, the Lord Chancellor states that there is “a general rule to which there is no exception . . . [that] the court never presumes a trust, but in case of absolute necessity . . . for if the chancery do once take a liberty . . . a way is opened to the Lord Chancellor to construe . . . any man out of his estate.” *Id.* at 987.

108. *Pitt v. Holt*, *supra* note 89, at [124]-[128]; *Kakavas v. Crown Melbourne Ltd.* [2013] HCA 25; *Royal Bank of Scotland plc v. Etridge (No 2)* [2002] 2 AC 773. See for example the discussion of detrimental reliance in *Sales*, *supra* note 36.

109. *SAMET*, *supra* note 33, at Chps. 1.3 & 1.4.

110. On the special characteristics of the equitable doctrines, see for example Miller, *supra* note 30.

111. David Neuberger, *The Stuffing of Minerva’s Owl? Taxonomy and Taxidermy in Equity*, 68 CAMBRIDGE L. J. 537, 543 (2009) (in the context of proprietary estoppel). For a careful and comprehensive review of the meaning of unconscionability in estoppel cases law, see BEN MCFARLANE, *THE LAW OF PROPRIETARY ESTOPPEL*, Chp. 5 (2014).

112. *CARDOZO*, *supra* note 1, at 120.

conscionability category, Cardozo implements what he preaches for in several places in the *NJP*: “uniformity ceases to be a good when it becomes uniformity of oppression, [it] must then be balanced against the social interest served by equity and fairness.”¹¹³ But when he allows every judge to introduce such a radical change in the rights of the parties whenever unjust enrichment is found—a change that goes well beyond monetary compensation for any damage caused—he seems to sidestep his own advice not to “throw to the winds the advantages of consistency and uniformity to do justice in the instance.”¹¹⁴

CONCLUSION

In the *NJP*, Cardozo, like all moderate wise pragmatists, fights on two fronts: “down with system” radicals on one end, and reactionary conservatives on the other. In this paper I wanted to show how the experience accumulated in the jurisprudence of equity helps Cardozo to gain the upper hand against both factions. Equity, being more radical in its intervention than proscribed by (at least) moderate realists, nevertheless found a way to structure its foray into the common law in a way that supports, rather than undermines, the rule of law. At the core of this body of law lies a masterclass in how to reform the law in a creative way without losing sight of the importance of conceptual analysis, *stare decisis* and horizontal justice. A man of his time, Cardozo had to face the tide of skepticism towards deductive reasoning as a way to make progress towards truth in science and ethics. By invoking, time and again, rich examples from the law of equity, Cardozo shows us that a legal system that wants to make a real progress in aligning legal and moral accountability must take such skepticism with a hefty pinch of salt.

As equity lawyers learned over the years, conservative formalists are too fixated on clarity and predictability to be content even with a careful deployment of discretion to close palpable rifts between legal and moral duties. At the other end, militant revolutionaries will pick on any restraints to prove secret adherence to the system. Cardozo is willing to face the dual challenge in search for the sacred equilibrium between overcautious sale along pre-determined course, and the necessary stir away to ensure that the waters of law and morals do not come disastrously apart. Neither the short text of the *NJP*, nor the extensive caselaw Cardozo left for us provide perfect answers. Sometimes, I argued, he stirred too early and too hard away from the clear rules of common law. But his writings, from the bench and extra judicially, are a milestone in the struggle that equity embodies throughout its long history: creating legal norms which guide the citizens in

113. *Id.* at 109.

114. *Id.* at 99.

their dealings, and yet, are flexible enough to enable the court to thwart efforts to utilize formal structures to achieve goals that are contrary to the moral values held dear by the community.