Cardozo and the Nature of the Equitable Process

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Benjamin Cardozo is associated with the common law, equity, judicial decision-making, and with a characteristic kind of proto-Realism. And in his day he was the most prominent expositor of the law of New York, a jurisdiction that had led the way in the merger of law and equity. So it is with equity. Equity pervades Cardozo’s work as a theme of the law and as a problem in judicial theory, in both his theoretical writings and in his decisions. In The Nature of the Judicial Process, Cardozo invokes equity when introducing the problem of reconciling the need for both certainty and flexibility in the law. And equity plays a large role in the modes of judicial decision-making he identifies—the philosophical, the historical, the customary, and the policy-oriented. This last, or sociological, method is the “arbiter” of the others in a way suggestive of equity’s role as meta-law. Because this approach to equity could only emerge from its application, it is not surprising that cases in the area of equity would receive his special attention as a judge. Most clearly in some headline equity cases but going far beyond them, Cardozo’s vision for the integration of equity and law was functional rather than primarily jurisdictional. Equity for Cardozo both kept the law to a high moral standard and supplemented and corrected the law in limited circumstances. Sometimes Cardozo’s reformulation of equity in this functional sense reformed the law so subtly as to be easy to miss. Seen in the light of later full-blown Legal Realism, Cardozo’s equity is easily mistaken for a version of Realism in its rhetoric but disappointingly cautious in its results. Cardozo’s equity was a genuine path not taken and one that perhaps still could bring equity into the modern age.

INTRODUCTION

By its nature, equity is associated with judging, and few judges are as well-known both for their judging and their ruminations on the process of

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judging itself as Benjamin Cardozo. In his writings, most prominently in *The Nature of the Judicial Process*, he frequently revisited the question of equity and the more general problem of flexibility versus certainty in the law. This functional problem of equity is only partially associated with equity jurisdiction in long-abandoned equity courts, and it is the problem of modes of judicial decision-making that makes equity one of the central themes of the Lectures. Cardozo’s own decisions in the area of equity, both in terms of equity jurisdiction and equitable reasoning, are very well known, some of the formulations in them becoming almost as aphoristic as the maxims of equity themselves.

And yet Cardozo’s relation to equity is neither simple nor transparent. Indeed, it is easily misunderstood. Cardozo saw the need for a functional blending of equity and law, necessitated both by the merger of law and equity and the decline of distinctions that could not demonstrate their practical worth. Cardozo saw better than most that law versus equity was a functional question and could not be coextensive with the traditional equitable jurisdiction. Unlike formalists, he saw the need for a functional equity. On the other hand, despite some promising hints, Cardozo was not able to bring out the function of equity clearly enough to make it a program for the law. He pointed the way toward equity as a process, but his first steps on the road to a modern equity did not bear the fruit they might have. Instead, his reliance on social sense and his gift for legal expression left an intriguing hint, and subsequent Realism obscured the structure Cardozo was devising for his new equity. As a result, his equity jurisprudence wound up looking like a somewhat ad hoc middle way that became a way station to full-blown Realism. Part of that Realism so familiar today was the “triumph” of equity, in which its identification with discretion and policy considerations led equity to be diffused throughout the law and to lose its special identity.2

That special identity is hinted at but not fully realized in Cardozo’s writings and judicial decisions. Equity is famously and sometimes notoriously open-ended and contextual, and it allows for a more direct invocation of morality than the common law typically does (which is not to say that the common law is not moral or that moral considerations do not come into play there). Equity does involve judicial discretion. And yet an important strand of equity stretching back to Aristotle was its relationship to the law: equity supplements and even corrects the law and does so in a more bespoke fashion. In Aristotle’s formulation, equity corrects law where law fails on account of its generality.3 When there were separate equity courts, this relationship of law and equity was built into the system. The

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relation between equity and law was not symmetric: equity presupposed law but not vice versa. As Frederic Maitland put it, without equity, “in some respects our law would have been barbarous, unjust, absurd,” and yet equity without law would have been “anarchy,” because “[a]t every point equity presupposed the existence of common law,” or more colorfully, “[e]quity without common law would have been a castle in the air, an impossibility.” In modern times, Oliver Rundell summed up the structural relation of equity to law:

The common-law courts, despite some testy complaint of equitable interference with the results of their judgments and some unsuccessful attempts to prevent such interference, 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.

Recently, drawing on the notion of systems, I have argued that equity in a functional sense is meta-law: law about law. Some problems involve complexity and uncertainty that makes specifying rules or standards directly very difficult. These problems have many interacting parts. They can involve conflicting rights with many interacting contextual factors (e.g. nuisance); they may involve many parties’ multipolar problems (e.g. customs surrounding a common pool resource); or they can involve “constructive fraud” or opportunism, in which someone takes unforeseen advantage of the law to someone else’s detriment (e.g. unconscionability). Instead of addressing these problems head on, sometimes the law sets up triggers based on combinations of good faith, disproportionate hardship and the like, to get into a second-order system that alters the results of the law and modulates its application. This second-order legal level was often but not always associated with equity. Hints of this “meta” aspect of equity can be found in Cardozo’s process of developing equity. Cardozo saw the need for some system to put equity and law together functionally. Law and equity for him were an aspect of reconciling or combining certainty and flexibility, letter and spirit. He saw

5. Id.
6. Id.
9. Id. at 1084-89. See also Samuel L. Bray & Paul B. Miller, Getting Into Equity, 97 NOTRE DAME L. REV. 1763 (2022).
this as a central problem in Constitutional Law, where it is perhaps better known, but it pervades all of the law. I will argue that Cardozo had a specific vision of law and equity within this larger picture, that he had some inkling of specific ways that certainty and flexibility could be achieved and law integrated with equity. He diagnosed the problem and gave hints at its solution, especially in his own decision-making. This is not surprising in that the way to reconcile law and equity was inherently difficult to capture in theory and most likely, like historical equity itself, needed to emerge from a process. That process was a concrete one of repeated application.

In this essay, I will first show in Part I how Cardozo diagnosed the problem of law versus equity in functional terms, as one of combining certainty and flexibility. His awareness of equity pervades his discussion of judicial methods, and his view is dynamic, with equity as a process. Part II will explore this process in Cardozo’s judicial opinions. Not only was Cardozo a giant in cases that are technically equitable, he started to develop a post-merger, functionally-oriented equity that could serve to temper the law in a constrained fashion. In Part III, I argue that this process was promising but the promise was unfulfilled. Cardozo’s emphasis on process and concrete incremental development made his equity easy to mistake for simple caution, while his emphasis on policy paved the way for a more pervasive and less distinctive kind of post-equity in Legal Realism and beyond. The essay concludes with some lessons that can be drawn from Cardozo on how to reinvigorate equity in our own day.

I. CARDOZO AND FUNCTIONAL EQUITY

The functional problem of equity sits close to the center of Cardozo’s *The Nature of the Judicial Process*. As in his other writings, Cardozo emphasizes the need to combine certainty and flexibility, which plays out in an ongoing way in the fusion of law and equity. More generally, the Lectures set out four modes of judicial decision making, and here too equity shows up at every turn. Each method captures an aspect of equity, and more importantly the combination of the methods presents the central problem throughout the history of equity: how to combine the methods and to place constraints on them. The one method that Cardozo sees as closest to equity, namely sociology, is the most pervasive and the “arbiter” of the other methods, which is a kind of meta method as well. Overall, Cardozo sees the strengths and limits of equity as grounded in equity as a process.

A. *The Problem of Fusing Equity and Law*

Equity presents some of the most difficult problems in judging and in the
justification of judging. It requires the reconciliation of certainty and flexibility, which at one time happened for better and for worse through the separate courts of law and equity. After merger, certainty and flexibility would have to be achieved in a new way, at least procedurally. Cardozo saw the fusion of law and equity as one aspect of a larger need to reconcile certainty and flexibility in the law:

“Law must be stable, and yet it cannot stand still.” Here is the great antinomy confronting us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue, must find some path of compromise. Two distinct tendencies, pulling in different directions, must be harnessed together and made to work in unison. All depends on the wisdom with which the joiner is effected. The subject has a literature that takes us back to Aristotle and earlier. Νόμος is to be supplemented by ἐπιείκεια; the tables by the edict; law by equity; custom by statute; rule by discretion.

. . . Fusion in due proportion is the problem of the ages.11

As Andrew Gold and I have shown, this concern about flexibility and certainty was a theme throughout his writing and speeches and played an important role in his involvement at the beginning of the American Law Institute and its Restatement projects.12

As an illustration of the issue of certainty and flexibility and an introduction to the function of equity, many have taken as a starting point the famous case of Riggs v. Palmer.13 The case has taken on a life as emblematic of judicial decision-making using principles, and Riggs has become a sort of touchstone for theoretical jurisprudence.14 Not surprisingly, Cardozo discusses this prominent New York case in his Lectures. Cardozo took Riggs v. Palmer as emblematic of equity, stating that “[t]he judicial process is there in microcosm.”15 First, Cardozo

11. Benjamin Nathan Cardozo, The Growth of the Law, in SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO: THE CHOICE OF TYCHO BRAHE 186, 186 (Margaret E. Hall ed. 1980) (citations to Pound and Vinogradoff omitted). Later in the same chapter, Cardozo extols the role that past commentators played in building up the common law, mentioning Kent and Story and currently Williston and Wigmore as encouragement for the ALI Restatements. Id. at 190. Using a troubling eugenic metaphor, of a kind all too common at the time, he goes on to state that “[t]hey have shown what can be done for law by a wise science of eugenics. If all this can be accomplished by individual initiative and endeavor, how much greater will be the authority of one who speaks, not merely in his own name, but in that of an organized profession.” Id.


15. CARDOZO, supra note 1, at 43.
summarizes the case as “decid[ing] that a legatee who had murdered his testator would not be permitted by a court of equity to enjoy the benefits of the will.” Cardozo says “court of equity” in the loose sense, because merger had happened earlier. Nevertheless, the court in Riggs explicitly tapped into the Aristotelian traditional of equity. Elsewhere I argue that the Riggs opinion itself shows a slightly misguided hyper-fusion. One aspect of that hyper-fusion is treating the transfer to the grandson as void.Later New York caselaw cited by Cardozo treated the will not as void but instead subjected the wrongdoer’s title to a constructive trust, as famously argued by James Barr Ames. (Cardozo also cites his own famous constructive trust formulation on this point, that a constructive trust is nothing but “the formula through which the conscience of equity finds expression.”) Cardozo sees in the case a conflict of principles, the finality of the will and the deeper and stronger principle that one cannot profit from one’s own wrong. The latter wins not by logic, but “[h]istory or custom or social utility or some compelling sense of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law[] must come to the rescue of the anxious judge, and tell him where to go.” The emphasis is on reconciling various modes of judicial reasoning and their different answers in the light of the social interest.

B. Equity as Mode of Judicial Decision Making

Equity also plays a role in all four of the judicial modes of deciding that Cardozo explores in the Lectures—the philosophical, the historical, the customary, and the policy-oriented. Perhaps most importantly, equity requires all of these modes to be integrated even where they do not point in the same direction. In the process, they have to be reconciled with the law and society’s institutions as a whole.

What makes Cardozo a proto-Realist is that where he sees a meta-level in law, it is one of policy. He argues that when the various modes have to be brought together and balanced, it is ultimately the measure of social utility or policy, i.e. the method of sociology, that is the standard. This can take the form of socially-informed moral thinking, or a social justification of a traditional rule and the like, but ultimately the decisive framework overall is sociology.

Cardozo believed that this was an organic process. Tellingly, he was not mythologizing the accretion of precedents:

16. Id. at 40.
17. See, e.g., 22 N.E. at 189 (quoting Aristotle on equity).
19. Id. at 42 (citing Beatty v. Guggenheim Exploration Co., 225 N.Y. 380, 386 (1896)).
20. Id. at 43.
I do not mean that precedents are the ultimate sources of the law, supplying the sole equipment, to borrow Maitland’s phrase “in the legal smithy.” Back of precedents are the basic jural conceptions which are the postulates of judicial reasoning, and farther back are the habits of life, the institutions of society, in which these conceptions had their origin, and which, by a process of iteration, they have modified in turn.21

What is striking about equity is that it partakes of all four of the judicial methods that Cardozo identifies in his Lectures. And in the modern age the last of these, policy, is the most important. The question of “how” is one we will return to. The four methods are philosophy (analogy); history (evolution); customs of the community (tradition); and justice, morals, and public welfare (sociology). Cardozo’s vision of equity wove all these strands together within an overall matrix of sociology. Cardozo even thought that equity in a static sense could get its content and its limiting principles from these modes, including sociology.22 Less than in his decisions, he emphasized the content of equity within equity itself rather than the relation of law and equity. In his writing he only hinted at such a relation of law and equity, and it was in the cases that he implicitly illustrated the process by which such limits and a systematic interface could emerge.

Of the four modes of judicial decision-making sociology is special, in that it is the ultimate arbiter between the other modes. In introducing his discussion Cardozo says:

But the truth is that there is no branch where the method [of sociology] is not fruitful. Even when it does not seem to dominate, it is always in reserve. It is the arbiter between other methods, determining in the last analysis the choice of each, weighing their competing claims, setting bounds to their pretentions, balancing and moderating and harmonizing them all. Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end.23

Interestingly, Cardozo sees equity as conceptually separate and as acting

21. Id. at 19 (citations to Gierke, Saleilles, Ehrlich, and Pound omitted).

22. Commentators have disagreed as to whether Cardozo was right in looking for limits there. See H. Jefferson Powell, “Cardozo’s Foot”: The Chancellor’s Conscience and Constructive Trusts, 56 LAW & CONTEMP. PROBS. 7 (Summer 1993) (seeing such limits as illusory especially in modern times); John C.P. Goldberg, The Life of the Law, 51 STAN. L. REV. 1419, 1472 (1998) (reviewing Andrew L. Kaufman, Cardozo (1998)) (offering a sympathetic account of Cardozo’s search for determinacy in historically rooted concept of equity); see also Irit Samet, Equity, Morality and Law in The Nature of the Judicial Process, 34 YALE J. L. & HUMANS. 136 (2023).

23. Cardozo, supra note 1, at 98. Cardozo continues with the kind of eugenic metaphor of which he was fond: “If they do not function, they are disease. If they are diseased, they must not propagate their kind. Sometimes they are cut out and extirpated altogether. Sometimes they are left with the shadow of continued life, but sterilized, truncated, impotent for harm.” Id. at 98-99.
on the law. At first, this looks intriguingly like equity as meta-law. After his discussion of Riggs and some equity cases, he summarizes by saying that “justice react[s] upon logic, sentiment upon reason, by guiding the choice to be made between one logic and another.” But then he says that reason in its turn reacted upon sentiment by purging it what of what is arbitrary, by checking it when it might otherwise have been extravagant, by relating it to method and order and coherence and tradition.” It sounds as if these other methods work on justice in the same way, but I think there is a subtle difference. As with law and equity, it is equity’s contact with the law and their relationship over time that constrains equity (both institutionally and doctrinally). Thus, there are hints here that equity and justice more generally have a meta function but one that is not isolated over time. There is a kind of dynamic feedback, and the constrained interface between law and equity is an emergent one. The constraint on equity does not only come from within equity but also, as it did historically, through its interface with the law.

C. Equity as Process

Thus, Cardozo may have had an inkling that equity is a kind of meta-law but that the traffic between equity and law is two-way over time. Equity has a way of migrating to law, and in the process, it can take on a new aspect. Thus, an equitable defense might be tried by a jury, as he held in one case. Justifying this reading of the relevant statute, he pronounced that:

> We think the principle that underlies our law of equitable defenses was stated long ago with precision and discernment. “The question now is, ought the plaintiff to recover; and anything which shows that he ought not is available to the defendant, whether it was formerly of equitable or legal cognizance.” The whole body of principles, whether of law or of equity, bearing on the case, becomes the reservoir to be drawn upon by the court in enlightening its judgment.

Allowing for juries to handle a traditionally equitable matter was a change not inconsistent with the function of equity and could be regarded as a natural development once the systems were merged.

Because he is sensitive to the dynamic process of fusion and its functional

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24. Id. at 45.
25. Id.
rationale over time, there is one easy way out that Cardozo does not take. He does not make equity’s limits a matter of history. It is true that in the Lectures he notes that the logic of a principle is often not taken to its limit because of history.28 And he is not alone. He quotes Holmes’s aphorism that “a page of history is worth a volume of logic.”29 And he assigns a large role for history in the categories of property. Conceivably one could do the same for equity, and it is well known that Maitland and others would reduce the notion of equity to what former equity courts did.30 But that is not Cardozo. He seeks a functional rationale, including functionally motivated limits on equity.

Not that history is irrelevant. For one thing, as a judge, Cardozo worked within the categories of equity like constructive trust. For another, he notes in the Lectures that custom, especially commercial custom, is a bridge between tradition on the one hand and morality and policy on the other:

The constant assumption runs throughout the law that the natural and spontaneous evolutions of habit fix the limits of right and wrong. A slight extension of custom identifies it with customary morality, the prevailing standard of right conduct, the mores of the time. This is the point of contact between the method of tradition and the method of sociology. They have their roots in the same soil. Each method maintains the interaction between conduct and order, between life and law. Life casts the moulds of conduct, which will some day become fixed as law. Law preserves the moulds, which have taken form and shape from life.31

What that interface is winds up being very elusive. Much of the time Cardozo gestures toward limits that come from within equity. On the other hand, consistent with the hints he offers in the passages above, Cardozo sought in his judicial opinions to give birth to the kind of relationship between law and equity that is consistent with equity as meta-law. I return to those opinions in the next Part.

Cardozo speaks of the method of sociology or policy in terms very reminiscent of equity, and he sees this as the meta method for reconciling the (first-order) methods (including itself). Cardozo goes further: he identifies the sociological method with the history of equity. The occasion for doing so is the point in his Lectures in which he (somewhat defensively) answers the charge that allowing judges to decide on the basis of social custom and commercial morality—and their sense of right—is to invite judicial activism:

28. CARDozo, supra note 1, at 51-55.
29. Id. at 55 (quoting Holmes J. in N.Y. Trust Co. v. Eisner, 256 U.S. 345, 349).
30. He even quotes Maitland extensively, including to the effect that the forms of action rule us from their graves. Id. at 53-54, 56.
31. Id. at 63-64 (footnote to Gény omitted).
You may say there is no assurance that judges will interpret the *mores* of their day more wisely and truly than other men. I am not disposed to deny this, but in my view it is quite beside the point. The point is that this power of interpretation must be lodged somewhere, and the custom of the constitution has lodged it in the judges. If they are to fulfill their function as judges, it could hardly be lodged elsewhere.\(^{32}\)

Almost as if responding to the Chancellor’s Foot criticism of equity,\(^{33}\) he goes on to say that:

The recognition of this power and duty to shape the law in conformity with the customary morality, is something far removed from the destruction of all rules and the substitution in every instance of the individual sense of justice, the *arbitrium boni viri*. That might result in a benevolent despotism if the judges were benevolent men. It would put an end to the reign of law. The method of sociology, even though applied with greater freedom than in the past, is heading us toward no such cataclysm. The form and structure of the organism are fixed. . . . All that the method of sociology demands is that within this narrow range of choice, he shall search for social justice.\(^{34}\)

Cardozo may also have been heading off a Realist-style critique, that courts had recently been too keen to issue injunctions in speech and labor cases.\(^{35}\) Instead, Cardozo takes his modern approach, with its partial affinity to Realism, to be the true heir to the tradition of equity:

Modern juristic thought, turning in upon itself, subjecting the judicial process to introspective scrutiny, may have given us a new terminology and a new emphasis. But in truth its method is not new. It is the method of the great chancellors, who without sacrificing uniformity and certainty built up a 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 its great masters—the method of Mansfield and Marshall and Kent and Holmes.\(^{36}\)

We can see here a nod toward fusion in the invocation of the common

\(^{32}\) Cardozo, *supra* note 1, at 135-36.

\(^{33}\) The “Chancellor’s Foot” refers to Selden’s famous critique of equity: 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 Foot, a Chancellor’s Foot; what an uncertain measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: ‘Tis the same thing in the Chancellors Conscience.


\(^{34}\) Id. at 136-37 (citation omitted).


\(^{36}\) Id. at 137-38.
law, and the choice of “masters” is an interesting one. Mansfield was noted for bringing equitable style to the common law. And Holmes, no friend of equity, was associated with the common law and a precursor of Realism. One might see this invocation of equity as being like the later Legal Realist enthusiasm for the equity of the statute: a historically limited device that was pressed into service to justify a more modern freewheeling purposivism and to give it a reassuring pedigree. That may be part of the story, and if all we had to go on were Cardozo’s Storrs Lectures, that might be a satisfying story. However, if we look at Cardozo’s opinions in equity and in cases of functional equity, we see an attempt to do something that is different from purely policy-oriented judging and that has a genuine tether, a functional one, to traditional equity.

Cardozo sees the restraint as an institutional one: many judges decide cases in a decentralized way, and the law emerges from their collective activity. And yet Cardozo’s skill at the judicial craft, especially its literary aspect, meant that his influence in the area of equity was more heroic if less easy to operationalize.

Some would argue that Cardozo’s moderation or even conservatism served as an unanalyzed bulwark against the sociological method sweeping the field all the time. And from a post-Realist viewpoint it appears so. In tort law, Cardozo is both famously reformist and moderate—pulling up short before the most extreme change. Consistent with this picture is Cardozo’s ambiguous relationship to the burgeoning Realist movement. He was no formalist and sympathized with the need for modernization in light of policy, but he considered what he termed the “neo-realists” to be overzealous, especially in seeing no value in traditional concepts and categories. Realism is no doubt a big tent and came in different strengths and emphases. And yet Cardozo expressed qualms with a central tendency of Realism: to disparage abstract concepts and system in the law and to prefer shallow and tailored concepts that stick close to the facts.

However, I will argue that Cardozo was doing more than this: he was trying to develop functionally motivated principles for the limitation of


39. Benjamin Nathan Cardozo, *Jurisprudence*, in *Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe* 7, 14 (Margaret E. Hall ed., 1980). In this symposium, Irit Samet argues that Cardozo should not be read as a Realist but as a judicial thinker tapping into the traditions of equity. Samet, supra note 22.

equity and for the triggering of equity itself. These harken back to the jurisdictional divide and its associated lore (inadequacy of remedy, trusts are in equity, etc.), but they are not simply a replication of those earlier devices.

II. CARDozo’S EQUITY IN ACTION

Cardozo’s discussion of equity in his Lectures is necessarily theoretical and aims at general statements. Equity, however, focuses on the particular situation and emerges from its application. And, as we have seen, Cardozo emphasizes the judicial process and nowhere more so than in its equitable aspect. Thus, it is to his decisions to which we should turn.

Although here is not the place to survey all of Cardozo’s opinions, we can discern hints in them of Cardozo’s program for equity. Cardozo’s equity can be regarded from three angles. First and most famously, he developed his own set of maxims that have taken on a life of their own. Second, in many of his opinions, especially those not technically involving equity jurisdiction, he implicitly treats equity as acting on the law. Finally, we can ask to what extent Cardozo’s vision of equity as a process is reflected in the process of his own judging.

A. Cardozo’s Equity Jurisprudence

As a judge first in the New York courts and then on the U.S. Supreme Court, Cardozo had many occasions to write opinions that fall squarely within the realm of equity in the jurisdictional or doctrinal sense. New York was the jurisdiction that more than any other led the way to the merger of law and equity in the nineteenth century,\(^41\) and New York lawyers and judges were still quite conscious of the possible implications of that merger.

Cardozo wrote many opinions in areas that are unquestionably equitable as a matter of jurisdictional pedigree. Cardozo is perhaps most famous for his equity cases in the area of fiduciary law.\(^42\) Fiduciary law grows out of trust law, and central to it is the duty of loyalty. In Meinhard v. Salmon,\(^43\) writing for the majority in 1928, Cardozo articulated a stringent and moralistic sounding standard for the duty of loyalty, which has been


\(^{42}\) Whether trust law and fiduciary law more generally is equity in more than a historic sense is a non-trivial question. Elsewhere I have argued that fiduciary law is equitable (in some of its aspects). See Henry E. Smith, *Why Fiduciary Law Is Equitable, in Philosophical Foundations of Fiduciary Law* 261 (Andrew S. Gold & Paul B. Miller eds., 2014).

\(^{43}\) 164 N.E. 545 (N.Y. 1928).
endlessly quoted since: “A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior.” What is particularly interesting from the point of view of equity is that he is unwilling to let the labels and boundaries of transactions limit the application of equity—which as meta-law ranges over such first-order input: “Equity refuses to confine within the bounds of classified transactions its precept of a loyalty that is undivided and unselfish.” When it comes to applying this standard to the case itself, he emphasizes all the aspects of disparate result, surprise, and suspected deception that classically feature in constructive fraud:

A managing coadventurer appropriating the benefit of such a lease without warning to his partner might fairly expect to be reproached with conduct that was underhand, or lacking, to say the least, in reasonable candor, if the partner were to surprise him in the act of signing the new instrument. Conduct subject to that reproach does not receive from equity a healing benediction.

This could be (and has been) regarded as Exhibit A for Cardozo’s moralism. In his magisterial biography of Cardozo, Andrew Kaufman terms the opinion in Meinhard “the culmination of Cardozo’s efforts to implant a sense of honorable conduct into law.” This is at least as much a matter of style as of stringency. In much of fiduciary law, the standard does not require a judge to apply personal or even community standards of morality. Instead, the rules are prophylactic, exactly where the standard is more exacting, sometimes requiring disgorgement from relatively innocent fiduciaries. Perhaps Cardozo flirted with a substantive moral standard of fiduciary law that would be filled in by judges reading the “social sense,” in keeping with his discussion in the Lectures.

Not surprisingly, this aspect of Cardozo’s equity has come in for the most criticism. H. Jefferson Powell argues that Cardozo was too confident in his own very socially conditioned sense of morality and that this ringing phrasing did not give sufficient guidance to other judges or to primary actors. And various law and economics commentators have accused Cardozo of distorting the underlying transaction to fit his preconceptions and adding nothing with the lofty rhetoric. However, as is sometimes the

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44. Id. at 546.
45. Id. at 548.
46. Id. On constructive fraud, see Smith, supra note 8.
47. KAUFMAN, supra note 22, at 241.
48. Powell, supra note 22, at 26-27; see also infra note 86 and accompanying text.
case (and as we will see with Cardozo’s non-equity equity decisions), he may be setting up a presumption here, that someone who wants to behave at more arm’s length and discretely in his role as co-venturer and his other business, has the burden of being clearer. If so, then it is not so much that Cardozo is trying to enact a high moral standard (or that he is only trying to do so), but that he is defining the relation of one mode of evaluation to another. Co-venturer relationships with dependence such as the one in Meinhard trigger greater scrutiny, and this second layer has to be opted out of by the sophisticated party.

Cardozo was more oriented toward equity than many other judges, and not surprisingly some of his pronouncements on equity appear in dissents. Let me take as emblematic of these—both in its superficial and deeper equitable meanings—Cardozo’s dissent in Graf v. Hope Bldg. Corp. At first glance this is a straightforward case of a mortgagee enforcing the mortgage, where the delayed payment was not de minimis. Foreclosure is equitable, but Cardozo brings in a functional and upon a closer look quite structured dose of equity. Cardozo begins with the extreme hardship to and the absence of fault in the defendant, who was late because of a clerical error and a problem in communication of which the plaintiff mortgagee was mostly or completely aware. (The debtor paid the missing amount as soon as he realized the mistake.) Cardozo invokes balancing of the hardships in equity: “When an advantage is unconscionable depends upon the circumstances...always the gravity of the fault must be compared with the gravity of the hardship.”

Cardozo then gives a litany of situations in which equity softens the application of mortgage law, at the end of which

52. 171 N.E. at 886 (N.Y. 1930) (Cardozo, C.J., dissenting).
53. Id. at 888. More particularly:
In this case, the hardship is so flagrant, the misadventure so undoubted, the oppression so apparent, as to justify a holding that only through an acceptance of the tender will equity be done. The omission to pay in full had its origin in a clerical or arithmetical error that accompanied the act of payment, the very act to be performed. The error was not known to the debtor except in a constructive sense, for the secretary, a subordinate clerk, omitted to do her duty and report it to her principal. The deficiency, though not so small as to be negligible within the doctrine of de minimis, was still slight and unimportant when compared with the payment duly made. The possibility of bad faith is overcome by many circumstances, of which not the least is the one that instantly upon the discovery of the error, the deficiency was paid, and this only a single day after the term of grace was at an end. Finally, there is no pretense of damage or even inconvenience ensuing to the lender.
Id. at 889.
54. The list is a long one:
There is no undeviating principle that equity shall enforce the covenants of a mortgage, unmoved by an appeal ad misericordiam, however urgent or affecting. The development of the jurisdiction of the chancery is lined with historic monuments that point another course. Equity declines to treat a mortgage upon realty as a conveyance subject to a condition, but views it as a lien irrespective of its form. Equity declines to give effect to a covenant, however formal, whereby in the making of a mortgage, the
he declares: “One could give many illustrations of the traditional and unchallenged exercise of a like dispensing power. It runs through the whole rubric of accident and mistake. Equity follows the law, but not slavishly nor always. If it did, there could never be occasion for the enforcement of equitable doctrine.”\textsuperscript{55} As I have argued, what makes fraud and accident important to equity as meta-law is partly the occasion to which they give rise for advantage taking and manipulation.\textsuperscript{56} And in his opinion, Cardozo emphasizes the lack of harm to the mortgagee, hinting that the mortgagee might be taking advantage of the situation, another theme of equity.\textsuperscript{57}

If this is right, then the majority in \textit{Graf}, upholding the foreclosure, is not on the mark when it finds fault with Cardozo’s supposedly expansive equity:

\begin{quote}
Plaintiffs may be ungenerous, but generosity is a voluntary attribute and cannot be enforced even by a chancellor. Forbearance is a quality which under the circumstances of this case is likewise free from coercion. Here there is no penalty, no forfeiture, nothing except a covenant fair on its face to which both parties willingly consented. It is neither oppressive nor unconscionable. In the absence of some act by the mortgagee which a court of equity would be justified in considering unconscionable he is entitled to the benefit of the covenant. The contract is definite and no reason appears for its reformation by the courts. We are not at liberty to revise while professing to construe. Defendant’s mishap, caused by a succession of its errors and negligent omissions, is not of the nature requiring relief from its default. Rejection of plaintiffs’ legal right could rest only on compassion for defendant’s negligence. Such a tender emotion must be exerted, if at all, by the parties rather than by the court. Our guide must be the precedents prevailing since courts of equity were established in this state. Stability of contract obligations must not be undermined by judicial sympathy. To allow this judgment to stand would constitute an interference by this court between parties whose contract is clear.\textsuperscript{58}
\end{quote}

Here we can see both a classic critique of equity (Chancellor’s Foot), and mortgagor abjures and surrenders the privilege of redemption. Equity declines, in the same spirit, to give effect to a covenant, improvident in its terms, for the sale of an inheritance, but compels the buyer to exhibit an involuntary charity if he is found to have taken advantage of the necessities of the seller. Equity declines to give effect to a covenant for liquidated damages if it is so unconscionable in amount as to be equivalent in its substance to a provision for a penalty.

\textit{Id.} at 886-87 (internal citations omitted).

\textsuperscript{55} 171 N.E. at 887.

\textsuperscript{56} Smith, supra note 8, at 1082-83.

\textsuperscript{57} The situation is reminiscent Carol Rose’s picture of a “wily creditor” taking advantage of strict foreclosure: “Littleton’s advice about the importance of specifying the precise place and time for repayment, for example, conjures up images of a wily creditor hiding in the woods on the repayment day to frustrate repayment; presumably, the unfound creditor could keep the property.” Carol M. Rose, \textit{Crystals and Mud in Property Law}, 40 STAN. L. REV. 577, 583 (1988) (citation omitted).

\textsuperscript{58} 171 N.E. at 885.
a foreshadowing of later views of equity as mere discretion or forbearance. Cardozo was not so much being tender-hearted as applying the disproportionate hardship and innocence of the defendant as a trigger for skepticism in the course of which the lack of injury to the plaintiff and perhaps even suspicions of motive then become licit.

What made Cardozo so attuned to the need for and potential of structured equity? Many commentators have made much of his emphasis on moral standards, and it is possible that his background, education, and the elite legal circles he traveled in had some influence in this regard. I suggest that one immediate reason has been identified by Andrew Kaufman when he notes that Cardozo was a litigator, and that “a good litigator gets to understand people, both their strengths and their weaknesses. His work gave him firsthand experience with the human condition, with human frailty, trickery, and deceit.” Kaufman argues that Cardozo saw the judge as a resolver of disputes and not as a dispenser of legal theory. In a sense this would make Cardozo’s orientation to equity a natural one. Even as a dispenser of theory, he believed that the right approach to equity would emerge from the bottom up, out of the decisions involving complex and often deceptive interactions between parties, like those we have just canvased.

B. Cardozo’s Functional Equity

As might be expected from the theory he set out in the Lectures, Cardozo did not limit his development of equity to those cases that fell under that rubric. Even more interesting are cases in which Cardozo applies a functionally equitable approach regardless of the law-equity divide or its after-effects. Here it is not the force of history or habit that pushes in an equitable direction. Instead, Cardozo’s project is doing the work.

Seeing some of Cardozo’s opinions as a functional equity makes them more understandable. Elsewhere I have argued that Jacobs & Youngs v. Kent, the famous pipe case, is a prime example. There the landowner, Kent, had contracted for a mansion with “Reading” pipe, and wanted to refuse the last payment because Cohoes pipe had been installed instead.

60. As Richard Posner notes, “[b]ut even more interesting are the case where the spirit of equity is brought into a case at law.” RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 105 (1990). Posner then discusses Jacob & Youngs v. Kent as an injection of morality. See infra at notes 61-68 and accompanying text.
61. 129 N.E. 889 (N.Y. 1921).
63. For a fascinating exploration of the factual and legal background that dovetails with the account offered here, see Victor P. Goldberg, Rethinking Jacob & Youngs v. Kent, 65 CASE W. RES. L. REV. 111, 115-16 (2015); see also Henry E. Smith, Is Equitable Contract A Pipe Dream?, New Private Law (June 9, 2016), https://blogs.harvard.edu/nplblog/2016/06/09/is-equitable-contract-law-a-pipe-dream-
Evidently Cohoes was of equal quality and “Reading” was often used as a shorthand for quality in the business. Kent was insisting on the Cohoes pipe being ripped out and replaced with Reading in order to be liable on the payment. Cardozo took the disparate result here—the great cost compared to the small benefit—not as a reason to preclude such contracting but to place the burden on someone wishing such an incongruous and idiosyncratic result:

Intention not otherwise revealed may be presumed to hold in contemplation the reasonable and probable. If something else is in view, it must not be left to implication. There will be no assumption of a purpose to visit venial faults with oppressive retribution.

. . . This is not to say that the parties are not free by apt and certain words to effectuate a purpose that performance of every term shall be a condition of recovery. That question is not here. This is merely to say that the law will be slow to impute the purpose, in the silence of the parties, where the significance of the default is grievously out of proportion to the oppression of the forfeiture. The willful transgressor must accept the penalty of his transgression. For him there is no occasion to mitigate the rigor of implied conditions. The transgressor whose default is unintentional and trivial may hope for mercy if he will offer atonement for his wrong.

Richard Posner takes this to be the moralizing Cardozo par excellence: “This is not only the language of equity; it is the language of equity when Lord Chancellors (the first equity judges in the Anglo-American legal tradition) were ecclesiastics.” I have argued that there is more than moralizing going on here: Cardozo is using the traditional triggers for toggling into equity and configuring them to create a structure for this type of contractual situation. Cardozo does so in a fashion very reminiscent of building encroachments, which likewise present extreme hold-up potential. As in building encroachments, the trigger for the safety valve in favor of the “transgressor” is a combination of good faith and disproportionate hardship. The opinion is neither purely anti-formalist nor hyper-

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64. RICHARD DANZIG & GEOFFREY R. WATSON, THE CAPABILITY PROBLEM IN CONTRACT LAW: FURTHER READINGS ON WELL-KNOWN CASES 111-12 (2d ed. 2004) ("It was the normal trade practice to assure wrought iron pipe quality by naming a manufacturer."); Carol Chomsky, Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts, 75 MINN. L. REV. 1445, 1447 (1991) ("The contract apparently specified Reading pipe only to provide a standard to ensure that Jacob & Youngs used pipe of the proper quality."); see also Goldberg, supra note 63. Contractual formalists make much of the fact that the architect had not signed off on the certificate of completion, but, as Victor Goldberg shows, that was not essential in New York law. Id. at 124-27, 138-40.

65. 129 N.E. at 891 (citations omitted).

66. POSNER, supra note 60, at 106. Interestingly, this attitude is very similar to that of Holmes, who dismissed equity as a clerical relic. Oliver Wendell Holmes, Jr., Early English Equity, 1 LAW Q. REV. 162, 173-74 (1885) (describing equity claims as “relics of ancient custom”).

moralist. It is of a piece with anti-forfeiture thinking in equity, which exhibits a special aversion to skewed results that might result from, or call forth, opportunism.

Like anti-forfeiture, equity makes a theme of a kind of reciprocity. This is reflected in the maxim “one who seeks equity must do equity.” Litigants will not be allowed to take inconsistent positions and have the court vindicate them simultaneously to another’s detriment. Reciprocity also animates decisions in which courts employ equity to hoist opportunists on their own petard. For example, someone manipulating the situation can be estopped from denying an earlier representation. Cardozo took a very functional approach to reciprocity in his equity and equitable decisions.

One aspect of this reciprocity is that equity applies to itself. That is, equity needs to make sure it itself does not become an engine for injustice. This is either a kind of meta-equity (meta-meta-law) or a certain kind of open-endedness. Indeed, it has almost attained the status of a maxim. Cardozo likewise takes this principle to heart and gives it a functional twist. For example, in Epstein v. Gluckin, Cardozo did not let the requirement of mutuality of remedies, a kind of crystalized reciprocity, get in the way of holding in favor of the right of an assignee to sue for specific performance in a sales contract dispute: “The assignee of such a contract succeeds by force of the assignment to the position of the original vendee as ‘the equitable owner’ of the subject of the sale. Equity, while recognizing his right, will not leave him powerless to vindicate it, by withholding the equitable remedies without which the right is ineffective.” Despite the general appeal of the technically equitable requirement for mutuality of remedy, “[w]hat equity exacts to-day as a condition of relief is the assurance that the decree, if rendered, will operate without injustice or oppression either to plaintiff or to defendant. Mutuality of remedy is important in so far only as its presence is essential to the attainment of that end. The formula had its origin in an attempt to fit the equitable remedy to the needs of equal justice. We may not suffer it to petrify at the cost of its animating principle.”

Likewise, equity is about adjustment and will keep adjusting in the face

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(68) Victor Goldberg has shown that the result here was not innovative under New York law. Goldberg, supra note 63, at 116-17.

(69) Smith, supra note 8, at 1128-30; see also 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). For a particularly interesting example in which litigants were trying to employ equitable doctrines to deprive a tenant of his business, see 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.”).

(70) 233 N.Y. 490 (N.Y. 1922).

(71) Id. at 492.

(72) Id. at 493.
of opportunism. This, in *Marr v. Tumulty*, Cardozo wrote an opinion reinstating a lower court judgment of rescission of a stock sale for the plaintiff despite the plaintiff’s inability to tender some of the stock in question as required by the doctrine of rescission. The inability to do so stemmed from the stock being owned by accused co-conspirators. Preserving the power of court to decree an equitable rescission of a stock sale, Cardozo wrote:

The omission does not avail to thwart a court of equity in decreeing a rescission. Rottenberg and McFadden were parties to a fraudulent conspiracy. The refusal of the conspirators to join in the undoing of the wrong may not be used as an excuse by partners in their guilt to keep the wrong alive. Equity is not crippled at such times by an inexorable formula. In exacting the return of benefits as a condition of rescission it proportions the exaction to the justice of the case before it. “The wrongdoer will be left in the toils of his duplicity.”

Cardozo stressed the importance of a fact-specific inquiry and the process of fine-tuning to his theory of equity: “A court of equity will mold the relief to the facts and circumstances of the particular case and provide in its decree for any adjustments of equities between the parties and the conditions upon which the rescission of a contract and the restoration of the status quo of the parties thereto shall be effected.”

Cardozo similarly sought to recast some of the technical aspects of equity in more vital functional terms. Thus, equity would employ fictions like splitting a depositor’s transaction with a bank into a fictitious withdrawal and return with application to debt and the imposition of a trust (with tracing). In *Adams v. Champion*, Cardozo refused to apply this more rule-like equity when the predicate wrongdoing was missing:

These fictions and presumptions may serve well enough in their application to one whose act is against equity and conscience at the time of its commission. They may be implements of justice in cases of theft or actual fraud. So, at least, we now assume. In circumstances less flagrant, they will be used more charily. They will not be so applied as to impose a trust by relation upon moneys that have entered into “the stream of the firm’s general property” (Holmes, J., in *National City Bank v. Hotchkiss*, 231 U.S. 50, 57), and are distinguishable no longer.

Here Cardozo gets at an oft-overlooked aspect of equity: the sliding scale

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73. 175 N.E. 356 (N.Y. 1931).
74. *Id.* at 357 (internal citations omitted).
75. *Id.*
76. 294 U.S. 231 (1935).
77. *Id.* at 237.
of its strength according to wrongdoing. Although equity does not punish, it does resolve doubt against wrongdoers and the more so the worse the wrongdoing is. (And especially so if the wrongdoing has created the uncertainty facing the court about the remedy.) This applies to attribution of gains in disgorge ment, and here Cardozo keeps this principle in sight even where the “formula” (to use a favorite term of Cardozo’s) might appear cut and dried.

Some of Cardozo’s non-equity reform efforts in areas like torts can be seen as part of his functional equity. John Goldberg and I have argued that this is true of his famous opinion in *MacPherson v. Buick Motor Co.*, which removed privity as a bar from a downstream customer suing an auto manufacturer for defects. Indeed, *MacPherson* is best seen as an equitable (or broadly speaking common law) modification in the spirit of the common law and its structure of duties, in a kind of “pragmatic conceptualism.”

One aspect of the opinion is the equitable theme of anti-evasion: the privity rule encouraged manufacturers to insulate themselves from liability for defects. In addition, modulating—not necessarily eliminating altogether—the bounds and effects of privity is a major theme of traditional equity; a prime example is the law of servitudes on real property.

**C. The Equitable Process in Action**

The hardest question is whether these strands of equity add up to more than the sum of their parts, and, if so, how? I think the answer turns on the notion of process. Cardozo saw a modern functional and constrained equity as emerging from the process of judging that he was describing.

Mostly that process had to be found in the cases, of which there was a limited supply. One other quasi-source that was more direct if less organic was the law reform process.

Cardozo combined the theory and practice of equity in his law reform work. Cardozo’s support of and involvement with the American Law Institute’s Restatement projects was of a piece with his attitude toward equity. He saw it as a way to “see whether our law has found a medium of expression that will solve or help to solve the age-long problem of uniting flexibility to certainty, that will give us the virtues of a code without the

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80. 111 N.E. 1050 (N.Y. 1916).


83. Smith, supra note 8, at 1090-92.
blighting pretension to literal inerrancy, a code that instead of repressing the forces and tendencies of growth by the imposition upon the law of a form forever fixed, will stir them to new life by its revelation of a harmony and an order till then unthought of and unseen.”

Here again we have all the elements and aspirations of Cardozo’s program. He sees a need for both flexibility and certainty, and he takes the fusion of equity and law as an opportunity for reconciling them. He also sees the reconciliation as involving some kind of system, but not a rigid and deductive one. Again, this separates Cardozo both from formalism and full realism. And yet he locates the solution in better verbal formulations.

Again, the problem is that the process would have to play itself out to be convincing. Cardozo had a limited chance to put his program into action. And even more poignantly, as we will see, the strands of early Realism he took as both inspiration and foil would engulf Cardozo’s equity and make it all but unintelligible today.

III. THE PROMISES AND LIMITS OF CARDozo’S EQUITY

Cardozo’s vision of equity opened up possibilities for reconciling equity and law in a prescient fashion. He saw the dangers not only of formalism but of untrammeled Realism. He worked on modernizing the principles of equity and to a lesser extent on the relation of equity to law, with hints of equity as meta-law. His emphasis on limits internal to equity and his skill in the literary art of opinion writing led him to rely on verbal formulations that captured his moral sense. These formulations took on a life of their own and became, somewhat like the equitable maxims, more obscuring than revealing to an audience not as primed to think as Cardozo was of the implicit system that regulated the relation of law and equity. That audience is now conditioned by Realism to think of Cardozo’s formulations as familiar policy-inflected rhetoric conjoined with seemingly cautious results.

The consensus is that Cardozo was a moderate reforming judge whose equity jurisprudence did not offer principled limits. In an article entitled “Cardozo’s Foot,” H. Jefferson Powell analyzes Cardozo’s cases on the constructive trust, an area of equity for which he was especially famous. In cases like Meinhard v. Salmon and Guggenheim, he invoked morality and honor and seemed to believe that these themselves furnished limits to


85. Some have argued that equitable maxims tend to hamper legal reasoning and its transparency. See, e.g., Melvin M. Johnson, Jr., The Spirit of Equity, 16 B.U. L. REV. 345, 346, 353-57 (1936). I have argued that the equitable maxims are not propositions from which to reason but signals that a court is in the equitable meta-law mode. Smith, supra note 8, at 1113-14.

86. Powell, supra note 22.
judicial discretion. Powell concludes that Cardozo was part of a moralistic strain of legal thinking that is no longer widely shared in either society or the legal profession.

Even where Cardozo pulled back from total reform, the cause is seen as more a sense of caution than an articulated set of limits. Andrew Kaufman demonstrates that Cardozo in his tort opinions did not always reach the most reformist result:

We have already seen a few cases where Cardozo ignored sympathetic circumstances in applying what he regarded as governing legal doctrine, and there are many more. Unless the case was one governed by the law of equity, Cardozo did not usually bend a rule for one case. He changed rules in a defined class of cases or else he upheld them and reached what he sometimes characterized as a harsh result.87

As John Goldberg notes, Cardozo differed in this respect from Judge Andrews. Whereas the latter believed that equity was too amorphous and thus had to be narrowly construed, Cardozo believed that the traditions of equity lived and were not indeterminate.88

In addition to seeing the need to combine certainty and flexibility, Cardozo did more than split the difference. As we have seen, he did have an inkling of equity as meta-law, and he did make some attempt to specify the mechanisms for toggling into equity and structuring its operation. He saw that functional triggers and presumptions could be employed to guide equity, and these triggers and presumptions need not be exactly those inherited from the equity courts. In this regard, the most interesting of Cardozo’s equity opinions are not “equity” opinions at all. And yet he spent a lot of effort on persuading the reader to focus on the limits of discretion within equity. This could be taken as characteristic of a fusionist who does not regard equity as second order in an interesting way.89 Cardozo’s stance on equity is ambiguous on this point, as are his decisions. What makes Cardozo stand out is that he saw more deeply into the structure of equity and its relation to law as the toggling between two modes.

And yet Cardozo’s efforts in this regard were almost doomed to be misinterpreted or overlooked. The meta-law mechanisms that he developed were couched in the method of sociology. That method in the hands of Realists was not associated with limits. Realists running the gamut were policy-oriented in a way that Cardozo was not, or at least not fully. Thus, Cardozo’s “social sense” and mores can be confused with the more freewheeling “situation sense” of Karl Llewellyn or even the judicial

87. Kaufman, supra note 38, at 297.
88. Goldberg, supra note 22, at 1472.
89. See, e.g., Laycock, supra note 2, at 77 (“The solution is not to confine the scope of equity, but rather to confine the discretion within equity.”).
“hunch” of Jerome Frank.90

It did not need to be so. One could have looked to the sociological method and considerations of policy to ask why the law was sometimes formal, sometimes sought certainty, and was sometimes loosely systematic—and when it was not.91 That did not happen, and so to our ears, Cardozo’s invocations of morality and policy sound paradoxically either old-fashioned or unbounded and even Realist-inflected. And Cardozo’s memorable aphorisms in his equity cases would be treated as formulas but not ones with a lot of determinate content. For the substance of equity, we need to excavate the process that Cardozo was groping towards, and the maxim-like formulations tend to get in the way.

Nonetheless, Cardozo did more than any other major judge or scholar of his time to begin the process of reconciling law and equity and creating a modern, functionally justified equity. In cases like Jacob & Youngs v. Kent, he started developing the kinds of presumptions that could help us toggle between modes, formalism and contextualism, law and meta-law. On a charitable reading, Cardozo was not so much advocating a reliance on heroic judging or the moral standards of his social set but rather showing that a judge embedded in that milieu and occupying a certain institutional role could develop a functional equity. And if that process had been allowed to play itself out, it is possible that a more robust set of triggers and presumptions governing the relation of law and equity, law and meta-law, might have emerged over time. That is, consistent with the title and tenor of his famous Lectures and the resultant classic book, the development of modern equity needed to be a process. If so, Cardozo cleared the way for it in his writings and more importantly demonstrated the first steps on that road in his decisions.

CONCLUSION

Cardozo’s equity is a road not taken. Cardozo saw that law and equity were our legal system’s fulcrum, for combining certainty and flexibility. He also saw that equity was inflected throughout all the judicial modes of

90. JEROME FRANK, LAW AND THE MODERN MIND 104 (1930) (“[T]he way in which the judge gets his hunches is the key to the judicial process. Whatever produces the judge’s hunches makes the law.”); KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 60-61, 122-23 (1960). What “situation sense” means has been the subject of much discussion. See, e.g., WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 216-27 (2d ed. 2012); STEVEN L. WINTER, THE COGNITIVE DIMENSION OF THE AGONY BETWEEN LEGAL POWER AND NARRATIVE MEANING, 87 MICH. L. REV. 2225, 2279 (1989). See also KARL LLEWELLYN, THE BRAMBLE BUSH 75 (1930) (“Nor, until you see this double aspect of the doctrine-in-action, do you appreciate how little, in detail, you can predict out of the rules alone; how much you must turn, for purposes of prediction, to the reactions of the judges to the facts and to the life around them.”).

decision-making and had a sort of arbitral or “meta” function. His attempts to bring out the exact relation of equity to law contain intriguing hints, but they are just that. These stirrings of equity as meta-law were engulfed by a Realism he only partially shared. When equity triumphed and so was everywhere and nowhere, Cardozo’s proto-version of a modern structured equity sounded like a flowery but fainthearted Realism. They were actually much more. We have a lot to learn from Cardozo’s efforts at making a modern equity—and from his insight that we need one.