Property, Equity, and the Rule of Law

Henry E. Smith*

June 14, 2013

[*in* Lisa Austin and Dennis Klimchuk (eds.) *Private Law and the Rule of Law* (Oxford: Oxford University Press, forthcoming]

Abstract

Formalism plays a major part in property law and in the rule of law. For many, the rule of law requires protection of property and the maintenance of its formal nature. And yet property and private law more generally exhibit no shortage of equitable doctrines, which call for infusions of ex post judicial discretion and invocations of fairness and morality. Property law and equity appear to be enemies. This paper argues that this tension is overblown, and that equity protects both property and the rule of law against opportunistic evasion. Equity helps maintain the general, stable structures within property called for by the rule of law. Likewise, the rule-of-law criteria themselves are formal and can be evaded opportunistically. Prevention of substantive evasion of the rule of law requires reference to norms outside the formal law, in a form of macro equity. Just as moral and information cost theories tend to converge at the level of legal doctrine, so too formal law and natural justice can be seen to point in similar directions at the level of the law as a whole.

Introduction

Property and the rule of law are often thought to be almost two sides of the same coin. The protection of property rights protects individuals from arbitrary state action, thereby giving substance to the rule of law. For those of a more procedural or formalist bent, the features of generality and stability often emphasized in property law are precisely at the core of the rule of law. Furthermore, property itself is in many ways more general and formal than other areas of private law, which again dovetails with the familiar rule of law criteria. Nevertheless, upon closer inspection, property law itself employs a variety of equitable standards, which give courts discretion, and appear to raise

* Fessenden Professor of Law and Director, Project on the Foundations of Private Law, Harvard Law School. Email: hesmith@law.harvard.edu. I would like to thank Lisa Austin, Lee Fennell, the participants at the Rule of Law and Private Law Workshop at the University of Toronto Faculty of Law, the Geneva-Harvard-Renmin-Sydney Conference on Property, and the Workshop on Property Law and Theory at the New York University School of Law for their helpful comments and discussions. All errors are mine.

concerns that property law might be undermining the rule of law. Is property the poster child for the rule of law or a Trojan horse of arbitrariness. Which is it?

Surprisingly, both, and in a surprising way. This paper will argue that private law, and property in particular, exemplifies the rule of law on two scales, partly for reasons of information cost. On a micro level, property itself implements the rule of law, which reduces the information costs of coordinating the actions of large and indefinite sets of persons with respect to things. Property is at its core in rem. Especially where it sets up in rem rights and duties, it needs to be general, stable, and give proper notice on the widest possible basis – the familiar formal rule-of-law criteria.[1] Property law must satisfy these criteria because it must manage information: facilitating coordination on this scale requires simplicity and a degree of formalism precisely because the audience is in rem. Furthermore, in order to serve this coordinating function property must draw on a simple type of everyday morality against stealing and other forms of gross violation.

But property cannot stop there. Property governs both the relations of people in general and in a variety of more personal interactions. Some of these interactions can be formulated somewhat generally, as in the law of nuisance or in zoning. But at the most particularist end of the spectrum of property doctrines are those dealing with individual behavior and whether it was done in good faith or with notice. Many of these doctrines trace back to the jurisdiction of the equity courts.

Equity protects the formal part of property that is congenial to rule of law proponents, or so I argue. The simple structures of the law are open to exploitation by opportunists. Formal law provides information about where the line exactly is, and evaders can use this information to take unforeseen advantage of the gap between the law's purpose and its literal terms. In order to prevent this opportunism, the law must employ a different set of moral standards that sound in anti-deception and anti-evasion. In previous work, I have argued that the equitable decision making mode can serve this function of protecting the law against opportunistic evasion.[2] Interestingly, next to the tradition of legal rules and their formality and certainty there has always coexisted the notion of equity, which itself can be explained as largely directed at the problem of opportunism. Actual historical equity has been subjected to a number of different interpretations. It is commonly thought that the purpose of equity is to soften or modify the law when it fails owing to its generality. Here particularism and discretion hold sway, because of the inherent difficulty of answering a host of questions before events as they occur. I will show that a constrained version of equity that focuses on opportunism does not undermine, but rather strengthens the formal law – and the rule of law that it implements. Situations of fraud, accident, and mistake – the traditional domain of equity

[1] For a familiar list, see LON FULLER, THE MORALITY OF LAW (1964).

[2] For an extended argument that equity can be partly explained and justified in terms of anti-opportunism, see Henry E. Smith, An Economic Analysis of Law versus Equity (Draft Mar. 27, 2012), http://www.law.uchicago.edu/files/files/Smith%20paper.pdf.

– give rise to the problem of near-fraud and exploitation of uncertainty, which call for the limited intervention of equity.

Equity helps maintain the structures within property called for by the rule of law, but something similar holds true of the legal system as a whole. The overall architecture of formal structures and equitable safety valves is replicated on a more macro level, in part for similar reasons of information cost. The rule-of-law criteria themselves are formal and can be evaded opportunistically. Evasion of the rule of law criteria is the most straightforward and thoroughgoing way in which a formal version of the rule of law is consistent with "bad law." Prevention of substantive evasion of the rule of law requires (limited) reference to norms outside the formal law, in a macro version of equity. Just as moral and information cost theories tend to converge at the level of legal doctrine, so too formal law and what used to be known as "natural justice" or "natural equity" can be seen to point in similar directions at the level of the law as a whole.

Information cost considerations shape the law of property consistently with the rule of law because both property and the rule of law itself respond to information cost constraints. In the following, by "rule of law" I will start with the thinner and more formal notions of rule of law and show how they must at least be supplemented with notions of equity in order to prevent evasion.[3] For this reason alone we have a reason to move one step toward thicker versions of the rule of law that incorporate morality and legitimacy. Anti-evasion requires the amount of intervention couched in moral terms that equity supplies.

Part I will show how information cost considerations lead private law, and property in particular, to exhibit the familiar features of the rule of law. It will also argue that a less formal safety valve, roughly identified with historical traditions of equity, is needed in order to protect formal law against evasion by opportunists. Part II will demonstrate that this micro equity and its functions scale up to the system of law itself: the rule of law is vulnerable to opportunistic evasion without some ability to invoke larger moral considerations in at least a limited way. This can be termed "macro equity." Part III draws out some implications of the convergence between the information cost theory and "natural equity."

I. Property and the Rule of Law

Property exemplifies the virtues and the perils of the rule of law. As I will show, considerations of information cost call for a high degree of formalism in property law, compared to contract. The in rem aspect of property in particular has to be communicated to a large and indefinite audience. However, a subset of that audience can be expected to take hard-to-foresee kinds of advantage of the system of bright-line rules by finding loopholes. Such opportunism calls for limited intervention traditionally associated with courts of equity and embodied in equitable maxims, defenses, and

[3] For a taxonomy of notions of rule of law divided into formal and substantive and along a spectrum from thinner to thicker, see BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 91 (2004).

remedial doctrines, all of which serve to bolster formal law in the face of misuse by opportunists.

A. Information Cost and the Rule of Law

There is a reason that property exemplifies so well the rule of law, both in its regularity and in its limited need for open-endedness. Property governs both the relations of people in general and in a variety of more personal interactions. Especially where it sets up in rem rights and duties, property needs to be general, stable, and give proper notice on the widest possible basis. Achieving generality, stability, and notice requires managing information: facilitating coordination on this scale requires simplicity and a degree of formalism precisely because the audience is in rem.[4]

A good place to start in discussing the formalism of property law is the *numerus clausus* principle. Merrill and I have argued that the *numerus clausus* can be explained as implementing a rough version of optimal standardization.[5] Property comes in a standard set of forms, and courts will interpret people's attempts to create forms as falling in the pigeonholes the law provides. Thus, a lease "for the duration of the war" will be taken to be a tenancy at will, and so on.[6] The catalog of estates (fee simple absolute, defeasible fees, life estate, various future interests) is but the most obvious aspect of this standardization. By contrast, the law of contracts is hardly standardized at all. Other than high-level housekeeping, like providing for what counts as offer and acceptance, the law of contracts allows parties to customize their relations. Parties can, with sufficient clarity, even create their own vocabulary – something that is somewhere between difficult and impossible in property.

The greater degree of standardization in property can be traced back to a fundamental difference between property and contract: property at its core sets up in rem rights and corresponding duties, whereas contract is in personam. The duty bearers in property are numerous and indefinite and much less likely to be able to process idiosyncrasy at reasonable cost. In property, the in rem nature of duties gives rise to an informational externality: parties to a property transaction who wish for their own reasons to create idiosyncratic property rights with third party effects – these are sometimes called "fancies" – will not take into account the costs these fancies pose for third parties.

---

[4] Henry E. Smith, *The Language of Property: Form, Context, and Audience*, 55 STAN. L. REV. 1105, 1148–57 (2003).

[5] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000); see also Henry E. Smith, *Standardization in Property Law*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 148 (Kenneth Ayotte & Henry E. Smith eds., 2011).

[6] *See, e.g.*, National Bellas Hess, Inc. v. Kalis, 191 F.2d 739 (8th Cir. 1951); Stanmeyer v. Davis, 53 N.E. 2d 22 (Ill. App. 1944); Lace v. Chantler, 2 All E.R. 369 (K.B. 1944); POWELL ON REAL PROPERTY § 16.03[4][b] at 16-68-16-69; Merrill & Smith, *supra* note 5, at 11-12; *cf.* Smith's Transfer & Storage Co. v. Hawkins, 50 A.2d 267, 268 (D.C. 1946) (redefining definiteness requirement of the term of years).

Those who encounter the property rights outside a contracting context – such as potential violators – will have burdens of processing information, which the transactors (unless altruistic) will not take into account. Furthermore, people transacting in similar property in general will have more types of information to be on the lookout for. There is no direct connection between these other market transactors and the creators of fancies. Thus, if A and B want to create a timeshare in watches, people transacting over other watches will have to make sure they are getting all the days they think they're getting, but will also have to be on the lookout for features of property rights that no one has even dreamed up yet – unless this open-endedness is cut off by the *numerus clausus*.

The *numerus clausus* is also a rule of thumb about institutional choice. It directs courts to avoid innovating in the basic menu of property forms and to let legislatures take the lead instead.[7] And in the history of property law, even in common law countries, legislatures have indeed been the main source of innovation in the menu of property forms, despite the common law nature of property law in the Anglo-American legal world. Thus, changes to the types of marital property stem from the married women's property acts, not from judicial modification of marital property.[8] Courts do innovate within the set of forms of property, but leave major changes in the menu like replacing dower and curtesy to legislation. The legislature has a number of advantages over courts as the source of innovation in property law, and these advantages stem in turn from the in rem nature of property rights. As Merrill and I noted, new property forms issuing from the legislature have a built-in advantage in terms of clarity, universality, comprehensiveness, stability, and prospectivity.[9] (They also can more easily be bundled with implicit compensation: the married women's property acts abolished dower and curtesy but also replaced them with the spousal elective forced share.) When the legislature announces a change, it is by its nature salient and locatable in one place, and thereby gains in clarity. Legislation applies across a jurisdiction, whereas courts' judgments apply to parties. And, depending on the court, judicial opinions may hold sway in only part of a jurisdiction. Legislatures, as is well known, can study a problem and take into account all sorts of factors and values bearing on a proposed change, in a way that courts cannot. Legislative change is difficult, and statutes might be expected to have more stability than court opinions. Finally, legislation tends not to be retroactive, whereas common law rule changes are often treated as having been the law all along.

Interestingly, these features of legislation in the property area are strikingly similar to the features on the typical list of criteria for the rule of law in its thinner versions. This is not to say that common law reasoning does not exemplify the rule of law.[10] But it does suggest that the rule of law gets an extra boost when the *numerus*

---

[7] *Id.* at 58-60.

[8] *Id.* at 15, 65.

[9] *Id.* at 60-68.

[10] Lisa Austin argues that common law reasoning can be explained in terms of the rule of law. Lisa M. Austin, Property and the Rule of Law (January 1, 2012), available at SSRN: http://ssrn.com/abstract=2061750 or http://dx.doi.org/10.2139/ssrn.2061750.

clausus principle directs major changes to the menu of property forms to legislatures. Legislative innovation is likely to possess Fuller's criteria of generality, clarity, non-contradiction, constancy, and non-retroactivity, than is innovation in the menu by judges.[11] His generality and our universality are similar: legislation that is meant to be universal will tend to be couched in general terms. Indeed, universality is tightly connected to the reasons that generality is prized in the rule of law. And clarity, stability, and prospectivity are identical criteria. Indeed, the main apparent difference between Fuller's list and ours is that we emphasize comprehensiveness and he speaks of non-contradiction (and not requiring the impossible). Even these remaining criteria are not unrelated. Taking a comprehensive approach to a problem requiring innovation in property forms is likely to avoid contradiction and the requiring of the impossible.

Why does the rationale of the *numerus clausus* as a principle of institutional choice converge with the rule of law on the same set of criteria? Both the *numerus clausus* and the rule of law are shaped by considerations of information cost. If property rights were not in rem, they would not burden third parties informationally and substantively, and there would be less reason to worry about how efficiently and fairly the law has this impact.

One can generalize this point about the *numerus clausus* to property law in general and the rest of private law. Private law sets up a general platform for individuals in their interactions with each other. Property does this through an initial definition of things, which depersonalizes certain interpersonal relations.[12] The person walking through the parking lot need not know anything about the owners of the cars – whether the owner is morally worthy, has lent the car to his sister-in-law, has given a security interest to a bank, etc. – in order for the actor to know that he has a duty not to steal or damage the car.[13] (The civilian tradition divides private law into the law of persons, the law of things, and the law of obligations. What counts as a legal person and the consequences of this helps manage interactions.) Even the law of torts, which does not have a *numerus clausus* in the way property does, employs modularity to reduce the costs of managing complex interactions between private actors.[14] Again, the tools employed by private law exhibit clarity, generality, and stability, in a fashion congruent with the rule of law. The rule of law as it plays out in private law helps contain information costs.

This aspect of private law – that it governs actors' relations in general – is sometimes referred to as the "omnilaterality" of private law. Omnilaterality is at the

---

[11] *See* Fuller, *supra* note 1, at 38-91.

[12] Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691 (2012).

[13] J.E. PENNER, THE IDEA OF PROPERTY IN LAW 75-76 (1997).

[14] Henry E. Smith, *Modularity and Morality in the Law of Torts*, J. TORT L., no. 2, art. 5, 2011.

heart of Kant's theory of private law.[15] For Kant, the content of people's rights stems from the "universal principle of rights," under which people have rights that maximize their freedom consistent with a like freedom in others.[16] This approach builds in a form of the rule of law. It rightly points to the public aspects of private law. But in pointing to public right, sometimes the further implication is drawn that private law is simply a branch of public law.[17] This is an overstatement: even though the law (whether one wants to call it public or private) is an essential underpinning for the successful interaction of private actors, omnilaterality does *not* require specification of each potential connection between each actor in every respect. On the contrary, the modular architecture of private law, and of property in particular, allows many of these interactions to be under- or un-specified. For private law to underpin the omnilateral interactions of actors, it has to be couched in fairly general terms and not in terms specific to particular parties. Again, doing the opposite would be intractable from an information-cost point of view.

Interestingly, information costs form a link between two concepts for which Fuller is most known: the rule of law and polycentricity.[18] The latter refers to tasks that involve a dense network of interactions. In such tasks the number of potential interactions increases much more than linearly, as is well known in complexity theory, the study of problems in terms of the minimum running time for programs to solve them. Fuller gives the example of a will that leaves paintings to two museums but does not specify which paintings are to go to which museum.[19] The problem is that to the museums each painting's value depends on which other paintings that museum gets. This

---

[15] Lisa M. Austin, Possession and the Distractions of Philosophy, *in* The Philosophical Foundations of Property Law (James Penner & Henry E. Smith, eds., forthcoming, Oxford University Press), available at SSRN: http://ssrn.com/abstract=2062289 (May 18, 2012) (arguing that omnilaterality of legal relations is at the core of the law dealing with issues of possession); *see also* Alan Brudner, *Private Law and Kantian Right*, 61 U. TORONTO L.J. 279 (2011) (arguing that need for omnilaterality swallows up private nature of private law for Kant); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535, 1556-62 (1996) (arguing that plural moral views undermines role of omnilaterality for Kant).

[16] IMMANUEL KANT, DOCTRINE OF RIGHT IN THE METAPHYSICS OF MORALS IN PRACTICAL PHILOSOPHY 230, 237 (Mary Gregor transl., Cambridge: Cambridge University Press, 1996); *see also* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 57-106 (2009) (explicating Kant's philosophy of acquired rights and property in particular); Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 801-10 (2003) (setting forth Kant's account of property); N.W. Sage, *Original Acquisition and Unilateralism: Kant, Hegel, and Corrective Justice*, 25 CAN. J.L. & JURIS. 119, 120-24 (2012) (arguing that ominlaterality is not needed to solve the "problem" of original acquisition).

[17] *See* Brudner, *supra* note 15; *see also* Ernest Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191 (2011) (arguing that for Kant omnilaterality is an aspect of public right that transforms private law into a community of rights).

[18] Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-95 (1978) (introducing the concept of polycentric tasks); *see also* MICHAEL POLANYI, THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS 171 (1951).

[19] *Id.* at 394.

is reminiscent of the Knapsack Problem of complexity theory. In the Knapsack Problem, out of a given set of *n* items, with given weights and values, one must choose the combination that has the maximum value but a weight under a given limit. This problem requires exponential time and is probably intractable, requiring approximate methods.[20]

Property and private law in general are in part a solution to a similar potentially intractable problem, and the type of solution required is congruent with the rule of law. Private law deals with the interaction of persons (as opposed to the relation of the individual to the state). This is a classic polycentric problem. It is also potentially intractable. We could in theory specify every relation between every person and every other person with respect to every aspect of every resource. A "complete" property system would be one in which each such relation is specified.[21] For a set C of all the possible claimants in the world, a set D of all the possible duty bearers, and a set A of all the possible actions with respect to a set R of all the possible resource attributes, a complete property system would take as its domain the set P of all the quadruples: $P = C \times D \times A \times R$. Then the complete system would be a function from this domain to the set $\{0, 1\}$. And the function to be useful would take into account the relation of many of the pairs with respect to each other: C_1 controlling R_1 with respect to D_1 over action A_1 will naturally go along with C_1 controlling R_2 (R_3, . . .) with respect to D_2 (and D_3, . . .) with respect to A_1 (and A_2, . . .). And some pairs will conflict, etc. Instead of proceeding in this fully articulated fashion, property employs a massive short cut over this complete system by defining lumpy things (clusters of *R*s) and providing for in rem rights (making a right in C_i correspond in the first instance to duties in all the *D*s other than D_i). With such an exclusion strategy in place, it is possible to focus in through governance strategies on particularly important modifications, by making exceptions for certain *A*s to C_1's rights (or the rights of all *C*s), through nuisance, zooming, covenants, and so on.[22]

Notice, though, that we are on the road to the rule of law. The shortening of the complete system through bunching provides for generality. The modularity it allows permits stability: we need not worry about run-away and hard-to-foresee ripple effects when the system consists of lumpy components that interact in simpler ways. Finally, we can even begin to think about giving people notice of the short-cut system, whereas the list-style system of property and private law is a nonstarter. Not coincidentally, our morality consists of broad-brush imperatives against stealing and injuring in impersonal contexts along with more articulated exceptions and affirmative obligations in more personal contexts. Morality itself is fully congruent with what a concern for information costs dictate. I do not argue that we can ground morality in information cost or vice versa, but they do reinforce each other. It is hard to see how human beings would adopt a morality that is too informationally demanding, and the fact that a system has been

[20] That is, the Knapsack Problem is NP-complete.

[21] Brian Angelo Lee & Henry E. Smith, *The Nature of Coasean Property*, 59 INT'L REV. ECON. 145 (2012).

[22] Henry E. Smith, *Exclusion Versus Governance: Two Strategies for Delineating Property Rights*, 31 J. LEGAL STUD. S453 (2002).

internalized and institutionalized as a moral system makes it easier to implement – in terms of generality, stability, and notice. In "in rem" contexts, satisfying the informational tradeoff involves piggybacking on a common denominator of morality. Thus, in the parking lot, "thou shalt not steal" is a good guide. Correspondingly, in more personal contexts, the law can either draw on more localized customs or take a page from the dealings of the parties themselves. It can require more in the way of affirmative duties instead of depending primarily on negative duties of abstention – as property law does in the in rem context. Thus, neighboring landowners can be subjected to duties of lateral support and the relatively complex governance regime of nuisance law, whereas trespasses, which can be committed potentially by anyone, are keyed to the *ad coelum* rule in an exclusionary strategy.Information cost, morality, and the rule of law work hand in glove.

Thus, the nature of the coordination provided by property law raises an informational problem that can be solved with the rule of law and its familiar formal features. The kind of morality needed likewise requires simplicity and publicity. Information costs provide a reason why the rule of law has at least some relation to morality.

It is often pointed out that the rule of law does not ensure the morality of the law. I return to this question later, but consider for a moment how the formality of property relates to its morality. As with the rule of law generally, we cannot say that property, merely by virtue of its being formal, is thereby ensured to be good property law. As with the rule of law in general, the generality, stability, and non-retroactivity serve the purpose of property can even be said to have a moral aspect. But this does not ensure that *any* formal property law would be desirable in terms of efficiency and autonomy, fairness, and distributional justice. The formality of property makes some demand on the type of morality which it can implement. In order to broadcast messages to duty holders who are far-flung, the law has to employ a basic everyday morality that is easy to communicate precisely because it is basic and everyday.[23]

B. Protecting the Law through Micro Equity

One limit to formalism is its vulnerability to evasion by opportunists. This is one reason to allow for equitable intervention.

The simple structures of the law are open to exploitation by opportunists. What is opportunism? Some notion of deception is somehow involved. Nobel laureate Oliver Williamson defines opportunism as "self-interest seeking with guile,"[24] but this includes all sorts of outright lying and cheating. Others define opportunism to be behavior that is

[23] Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007).

[24] OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 47 (1985).

not technically legal but contravenes the spirit of an agreement or a law.[25] This definition is narrow in the sense of requiring technical legality, but the notion of the spirit of an agreement is left fairly open. At what level of generality is an agreement's – or a law's – spirit supposed to be invoked? Traditionally, equity concerned itself with "near fraud," which is behavior that is close to the line of fraud or may well be fraud but cannot be proved as such.[26] Picking up on this notion, I have defined opportunism as "behavior that is undesirable but that cannot be cost-effectively captured – defined, detected, and deterred – by explicit ex ante rulemaking. . . . It often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others."[27]

Elsewhere I argue that a major theme of traditional equity was to counteract opportunism. To do so equity needs to go beyond ex ante bright line rules, because it is difficult to anticipate all the avenues of evasion. Plugging nine out of ten loopholes is useless if all the evaders can rush through the tenth. Equity employs ex post standards, emphasizes good faith and notice, couches its reasoning in terms of morals, and is sometimes vague rather than bright-line. To cabin such a powerful tool, equity courts were only supposed to act in personam and not in rem, and the substantive doctrines of equity counseled caution in undermining the law. Equity often consists of structured rules of thumb and shifting presumptions rather than broad-brush rules that would override the law. For example, contrary to the Supreme Court's recent strange four-factor "test" for injunctions starting with its opinion in *eBay Inc. v. MercExchange, L.L.C.*,[28] the traditional approach was to consider whether inadequacy of the legal remedy, in terms of well-known categories – like difficulty of valuation and repeated violation –

---

[25] *See, e.g.*, Cohen, *The Negligence-Opportunism Tradeoff in Contract Law*, 20 HOFSTRA L. REV. 941, 957 (1992) (defining "opportunism" as "any contractual conduct by one party contrary to the other party's reasonable expectations based on the parties' agreement, contractual norms, or conventional morality") (footnote omitted); Timothy Muris, *Opportunistic Behavior and the Law of Contracts*, 65 MINN. L. REV. 521 (1981) (opportunism is conduct that is "contrary to the other party's understanding of the contract, but not necessarily contrary to the agreement's terms"); *see also, e.g.*, Samuel W. Buell, *Good Faith and Law Evasion*, 58 UCLA L. REV. 611, 623 (2011) ("In common parlance, the evasive actor is one whose project is to get around the law. She seeks to avoid sanction while engaging, in substance, in the very sort of behavior that the law means to price or punish."). For a wider definition, see, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 4.1, at 103 (5th ed. 1998) (defining "opportunism" in the contracting context as "trying to take advantage of the vulnerabilities created by the sequential character of the contract").

[26] In the nineteenth century view, "unconscionability" referred to fraud that could not readily be proved, see, e.g., Seymour v. Delancey, 3 Cow. 445, 521-22, 15 Am.Dec. 270 (N.Y. Sup. 1824) ("Inadequacy of price, unless it amount to conclusive evidence of fraud, is not itself a sufficient ground for refusing a specific performance of an agreement") (citing cases); James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587, 1639 (1981). *See also* Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293, 293, 293-301 (1975).

[27] Smith, *supra* note 2, at 10-11.

[28] 47 U.S. 388, 390-91 (2006). *See also* Monsanto Co. v. Geertson Seed Farms, 130 S. Ct. 2743, 2756-57 (2010) (applying the four-factor test from *eBay* for injunctions in a NEPA case).

gave rise to a presumptive right to an injunction.[29] Then considerations like balance of the hardships – meaning not equipoise but gross imbalance – could overcome the presumption.[30] That is, if the injunction would be far more damaging to the defendant than it would benefit the plaintiff, the court could exercise its discretion and not enter an injunction. However, if the defendant had violated the right in bad faith, then the injunction would be near-automatic after all. This approach to injunctions was highly structured and designed to counteract opportunism, while dampening damage from the uncertainty of the discretion. The "*eBay* test," by contrast, is highly uncertain and on its face does not even take bad faith into account.[31]

Practically speaking, what is important is to find proxies for unforeseeable exploitation of rules. Situations of fraud, accident, and mistake give rise to the problem of near-fraud and exploitation of uncertainty. More particularly, proxies relating to bad faith and disproportionate hardship can be used to invalidate actions or to throw the burden of justification on a party who wishes to take advantage of them.

In order to prevent opportunism the law must employ a set of moral standards sounding in anti-deception that differ from the simple "do not steal" and "keep out." Situations of fraud, accident, and mistake give rise to the problem of near-fraud and exploitation of uncertainty. I have argued that historically equity courts and their special doctrines were loosely associated with anti-opportunism, such that it makes sense to identify countering opportunism as a function of the equitable decision-making mode (which is imperfectly correlated with equity jurisdiction of old).[32] What has been termed the "Grand Style" and freewheeling natural law jurisprudence can be seen as serving this more modest safety-valve function.[33] The limited open-textured quality of the law (through equity or otherwise) is required by the ability of some actors to consciously exploit the rules the law lays down, or as Justice Story put it, "[f]raud is infinite" given

---

[29] Mark R. Gergen, John M. Golden, & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203 (2012).

[30] See, e.g., Gergen et al., *supra* note 29; Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in* Boomer v. Atlantic Cement*)*, 4 J. TORT L., no. 3, 2012, at 1, 4-5; Smith, supra note 2.

[31] Gergen et al., *supra* note 29, at 240-41.

[32] Smith, *supra* note 2; *see also* Henry E. Smith, *Rose's Human Nature of Property*, 19 WM. & MARY BILL RTS. J. 1047 (2011).

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

the "fertility of man's invention."[34] Story was tapping into a long tradition of equity tracing back to Aristotle,[35] and this tradition does implicitly (and sometimes explicitly) sound in anti-opportunism. In the words of one court quoted by Story:

> Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth; it does also assist the law where it is defective and weak in the constitution (which is the life of the law) and defends the law from crafty evasions, delusions, and new subtilties, invented and contrived to evade and delude the common law, whereby such as have undoubted right are made remediless; and this is the office of equity, to support and protect the common law from shifts and crafty contrivances against the justice of the law. Equity therefore does not destroy the law, nor create it, but assist it.[36]

The law needs a safety valve to deal with opportunists. The correlation between the equitable decision-making mode and historical equity jurisdiction is not perfect. Sometimes the old common law side employed moral standards (e.g., quasi-contract), and sometimes the equity side was more rule-like (e.g., tracing rules for constructive trusts). Still, the Aristotelian notion of equity as carried forward by equity courts did have as a major theme the countering of opportunism.

An equitable safety valve does not require separate courts or even a separate jurisdiction, but the fusion of law and equity that reached its culmination in the Legal Realist era did lead to the polarized versions of both property and the rule of law we see today. On the one hand, equity in Legal Realism slipped its bounds and became a preference for contextualized standards and discretion, in opposition to traditional formalism within private law and to the liberal notion of the rule of law.[37] On the other

---

[34] 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, AS ADMINISTERED IN ENGLAND AND AMERICA 184 n.1 (9th ed. 1866) (quoting a Letter from Lord Hardwicke to Lord Kaims (June 30, 1759)). Or, as Chancellor Ellesmere put the point: "The Cause why there is a Chancery is, for that Mens Actions are so divers and infinite, That it is impossible to make any general Law which may aptly meet with every particular Act, and not fail in some Circumstances." The Earl of Oxford's Case, 21 Eng. Rep. 485, 486 (Ch. 1615).

[35] ARISTOTLE, THE NICOMACHEAN ETHICS 132-34 (David Ross; J.L. Ackrill & J.O. Urmsin rev. ed. Xford University Press 1980); THOMAS AQUINAS, SUMMA THEOLOGICA I-II, q. 96, art. 6.; CHRISTOPHER ST. GERMAN, DOCTOR AND STUDENT 94-107 (T.F.T. Plucknett & J.L. Barton, eds. 1974); *see also, e.g.*, Riggs v. Palmer, 22 N.E. 188, 189 (N.Y. 1889) (quoting Aristotle on equity); Eric G. Zahnd, *The Application of Universal Laws to Particular Cases: A Defense of Equity in Aristotelianism and Anglo-American Law*, 59 LAW & CONTEMP. PROBS. 263, 270-75 (Winter 1996) (documenting influence of Aristotelian equity on Anglo-American law); *but cf.* Darien Shanske, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053 (2005) (arguing that Aristotle's equity was not primarily legal).

[36] Dudley v. Dudley, (1705) 24 Eng. Rep. 118, 119 (Ch.) (U.K.), *quoted* in 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 18-19 (Arno Press Inc., reprint ed. 1972) (1836).

[37] *See, e.g.*, Robert G. Bone, *Mapping the Boundaries of the Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 78-114 (1989).

hand, the backlash against this freewheeling approach seeks to reinvigorate formalism to the exclusion of even the traditional role for equity.[38]

Thus, different versions of equity have always been a foil of proponents of the rule of law. The common-law lawyers accused the equity courts of exercising an intolerable level of arbitrary discretion, often associated with the notion that equity varied with the "Chancellor's Foot."[39] (Also, the need for consistency may have led to the understaffing that in turn caused the equity courts to become a Kafka-esque nightmare in nineteenth-century England.[40]) Equity courts were regarded with suspicion in America, partly for rule of law reasons: equity courts were associated with arbitrary royal prerogative.[41]

With the rise of Realism, one version of the context-sensitivity espoused by the Realists involved removing the jurisdictional and other restraints on equity. A proto-Realist like Pound was quite explicit in noting that modern twentieth-century strains in jurisprudence were in some sense expanding equity. The fusion of law and equity itself was a Realist project culminating in the federal rules of civil procedure in 1937. And the turn toward public law and court intervention with structural remedies was cast as a vindication or sympathetic expansion of traditional equity.[42] The structural injunction

---

[38] For a good example of this polarization, see *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999); Smith, *supra* note 2, at 52-53.

[39] The most famous critique is Selden's humorous one:

> "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 Chancellor's Conscience."

John Selden, *Equity*, *in* TABLE-TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 43, 43–44 (London, J.M. Dent & Co. 2d ed. 1689). *See generally* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 112-33 (3d ed. 1990).

[40] And a Dickensian one. CHARLES DICKENS, BLEAK HOUSE (Oxford: Oxford University Press 1978) (1853).

[41] Puritans had been on the common law and parliamentary side of the battles of the sixteenth century, and, according to Pound, "always been a consistent and thorough-going opponent of equity." Roscoe Pound, *Puritanism and the Common Law*, 45 AM. L. REV. 811, 825 (1911); [but cf. Zechariah Chafee, Jr., The Suffolk County Court and Its Jurisdiction, Introduction to 29 Publications of the Colonial Society of Massachusetts, Records of the Suffolk County Court 1671-1680: Part I, at l-lii (1933).]

[42] Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195, 226 (1913) ("Equity sought to prevent the unconscientious exercise of rights; today we seek to prevent the anti-social exercise of rights."); *id.* at 227 ("Equity imposed moral limitations. The law today is beginning to impose social limitations.").

was justified as part of a courts' roving commission to do good.[43] And administrative law, which skeptics of the welfare state saw as undermining the rule of law, was sometimes thought of as "the new equity."[44]

The Realists were suspicious of the rule of law, and in turn classical liberals and conservatives accused Legal Realism (and the administrative welfare state) of undermining the rule of law. On their view, policy-oriented judging, and by the same token government by administration, necessarily involved too much discretion to be consistent with the rule of law.[45] But to the unsympathetic ear, appeals to natural law or natural rights don't sound very determinate and consistent with the rule of law either. In the twentieth century, proponents of the rule of law tended to take an increasingly narrow proceduralist approach to the rule of law. And, to the extent that these proponents of the rule of law also opposed positivism and Realism, they would invoke a thin, or in Fuller's terms "internal," morality of the law, in a kind of procedural natural law.

The approach to micro (and macro) equity offered in this paper allows one a way out of these classic dilemmas of hyper-formalism and hyper-realism. The question then becomes which hybrid of law and equity – of formalism and safety valve – is best, keeping in mind that all form or all contextualism is not possible. I will argue that a limited equity based on equitable rules of thumb has great advantages but only so long as it rests on a common morality that cannot be captured within the law itself. It is no accident that traditional equity was identified with natural law or natural justice. It is an open question how much consensus there is about the common morality required for an equity to support the rule of law. I return to the relation of equity and natural law later.

II. The Rule of Law and the Need for Macro Equity

The literature on the rule of law shows, one level up, the same dilemmas as we face in property and private law. Formalistic versions of the rule of law offer a set of criteria, often requiring law itself to be formalistic, in order to satisfy the rule of law.

---

[43] *See* Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 2 (1979) ("The structural suit is one in which a judge, confronting a state bureaucracy over values of constitutional dimension, undertakes to restructure the organization to eliminate a threat to those values posed by the present institutional arrangements. The injunction is the means by which these reconstructive directives are transmitted."); *but see* Bisciglia v. Kenosha Unif. Sch. Dist. No. 1, 45 F.3d 223, 228 (7th Cir. 1995) (denying temporary injunction in suit over employment termination and stating: "[T]his court does not possess a roving commission to do good. It must make a decision based upon the record and the law."); Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53 (Summer 1993) (denying "that a court of equity has a roving commission to do good once it identifies a threshold violation of law that justifies its intervention").

[44] *See, e.g.*, Leonard J. Emmerglick, *A Century of the New Equity*, 23 TEXAS L. REV. 244, 255 (1945) ("The administrative court, found in both the federal and state legal systems, is a corresponding effort to meet the need for specialized judicial administration of equity."); Michael J. Hays, *Where Equity Meets Expertise: Re-Thinking Appellate Review in Complex Litigation*, 41 U. MICH. J.L. REFORM 421, 434-35 (2008) (noting the parallels between administration and equity in terms of both benefits and perils).

[45] *See* TAMANAHA, *supra* note 3, at 60-72.

Fuller's ways for the law to go wrong correspond to a list of features of the rule of law: generality, publicity, non-retroactivity/prospectivity, comprehensibility, non-contradictoriness, feasibility of compliance, stability, and administrability.[46] As others, particularly positivists like Raz and Hart, have pointed out, systems of law can satisfy these criteria and still be bad law.[47] For this reason, some theorists of the rule of law would move toward a more robust version of the rule of law that incorporates a substantive criterion of respect for human rights or a procedural requirement of democratic enactment.

So far so familiar. But I suggest that the rule of law faces an even more immediate threat, one that undermines it on its own narrow terms: the problem of opportunism. Those promulgating and enforcing law might evade the requirements of the rule of law in a fashion similar to someone who exploits the formal law of property or the formal terms of a contract to achieve a purpose unforeseeably at odds with the purposes of the law. Interestingly, Fuller hints at this problem with a couple of his examples. So, constitutional provisions against "private laws" and "special legislation" (which might be thought related to the generality criterion of the rule of law) have, according to Fuller, "produced much difficulty for courts and legislatures" because their requirements are met by such apparently disingenuous devices as a provision that a particular statute shall apply 'to all cities in the state which according to the last census had a population of more than 165,000 and less than 166,000.'"[48] Not willing to give up on formal legality, he strangely remarks that "[b]efore condemning this apparent evasion we should recall that the one-member class or set is a familiar and essential concept of logic and set theory."[49] Yes, but so what? The real question is whether courts can find proxies – like bizarrely and functionally unmotivated descriptions that pick out one city – that can be used to police the generality requirement. Fuller may be right that this particular rule cannot be policed – partly because it is not really a rule – but the problem of evasion here is clear. Or to take a better example invoked by Fuller and relating to retroactivity, a 1938 federal statute contained a rule that if a person meeting the description in the act received a firearm in interstate commerce, it would be presumed that the receipt was after the effective date of the act. As Fuller notes, "[t]his piece of legislative overcleverness was stricken down by the Supreme Court in *Tot v. United States*."[50]

---

[46] FULLER, *supra* note 1, at 38-91.

[47] H.L.A. HART, THE CONCEPT OF LAW 202 (1961) (arguing that rule-of-law principles are "compatible with very great iniquity"); Joseph Raz, *The Rule of Law and its Virtue*, *in* THE AUTHORITY OF LAW 210, 215 (1983).

[48] Fuller, *supra* note 1, at 47 & n.4. Perhaps for this reason, Fuller thought it better to view prohibitions on special legislation as not sounding in the generality criterion of the rule of law (his "internal morality of the law") but in external considerations of fairness.

[49] *Id.* at 47 n.4.

[50] *Id.* at 62, *citing* Tot v. United States, 319 U.S. 463 (1942). Fuller also notes that the same opinion also struck don the act's presumption that possession of a firearm by a person meeting the description in the act received the firearm after having been shipped in interstate commerce. *Id.* at 62 n.20.

The possibility of evasion suggests the need for some appeal outside the formal system itself. Even if theoretically every loophole could be closed, it is an empirical question whether it is better to prevent evasion ex ante with better rules, to rely relatively less on rules and use ex post standards to target evasion, or to tolerate evasion. If the history of areas of law like tax, criminal law, and a wide variety of equitable interventions is any guide, some combination of the three is best, and how to compromise is a complex empirical question that will require some guesswork.[51] But the history does suggest that some reliance on a safety valve will be necessary on the macro level, for reasons similar to those that push property on a more micro level to be formal much of the time – but tempered with the equitable safety valve directed at opportunism.

That some safety valve will be necessary is also suggested by the nature of formal systems in general, of which property and private law (micro) and the rule of law (macro) are but two examples. An expression or a system of expressions is formal to the extent that it is invariant to context.[52] If so, then formalism is a matter of degree. Formalism is a property of many systems, from mathematical notation to natural language. The interesting question is when formal expression makes sense, what its costs are, and hence where its limits lie. Francis Heylighen shows that formal systems ultimately have to invoke some context – no context is not possible – in order to serve their functions. That is, no formal system is completely formal.[53] Reasons why not abound. A completely formal system faces an infinite regress of definitions, and a system's primitive terms need to refer to context (something outside the system). Moreover, the process of interpretation of the expressions in a system cannot be completely described within that system.[54] Particularly interesting for present purposes are two of Heylighen's sources of the limits of formal expression. He points out that many systems rely on a sense of "normal conditions" as the background context. Specifying these completely is not possible. Likewise, the nature of causation in different realms makes some systems of description less formal. The law, on both the micro and macro scale, raises these problems to a large degree because it governs actors who can evade. The possibility of evasion will make rules based on ex ante specifications of context and cause inadequate.

---

[51] *See, e.g.*, Buell, *supra* note 25; David A. Weisbach, *Formalism in the Tax Law*, 66 U. CHI. L. REV. 860 (1999).

[52] *See, e.g.*, Francis Heylighen, *Advantages and Limitations of Formal Expression*, 4 FOUNDATIONS SCI. 25, 49-53 (1999) (equating formality of language with context independence); Smith, *supra* note 4, at 1112 ("[A]n expression is formal to the extent that its meaning is invariant under changes in context.").

[53] Heylighen sees Heisenberg's Uncertainty Principle and Gödel's Incompleteness Theorem as "special cases" of this general proposition. Heylighen, *supra* note 52, at 25, 37.

[54] Heylighen, *supra* note 52, at 37, *citing* Lars Löfgren, *Complementarity in Language: Toward a General Understanding*, *in* NATURE, COGNITION AND SYSTEM II: COMPLEMENTARITY AND BEYOND 73 (M. Carvallo ed., 1991); Lars Löfgren, *Towards System: From Computation to the Phenomenon of Language*, *in* NATURE, COGNITION AND SYSTEM I 129 (M. Carvallo ed., 1988).

I suggest that equity in private law and macro equity in the service of the rule of law anchor the formal systems of property and the rule of law, respectively.

Which is not to say that law cannot be formal. It is a common fallacy of Legal Realism and its progeny to argue that because the law is not – or cannot be – totally formal that it cannot be formal at all.[55] This would be true if formalism were all or nothing, but it is not. Formalism comes in degrees, and different parts of the law can be further towards the formal end of the spectrum than others. For functional reasons, we should expect – and do find – that the most in rem aspects of property are more formal than those that are closer to being in personam.[56] We can also hypothesize that parts of the law can be as formal as they are because they are backed up with a safety valve of anti-evasion equitable intervention.

III. Law as a Semi-Open System

It has often been remarked that respect for the rule of law ultimately has to be rooted in a culture of the rule of law. In this Part, I make a narrow (but strong) version of that argument: On the macro level as well as the micro level, law is too vulnerable to evasion by opportunists to succeed in its goals of providing definiteness and certainty and stability of expectation without some invocation of purpose outside the system.

Macro equity is necessary for scaled-up versions of the reasons for micro equity in private law. If so, law must be a semi-open system. The information cost theory converges with a thin version of natural law. As in previous work, I am not arguing that explanations in private law should be grounded in utilitarianism or non-consequential morality.[57] Instead, from within a (tactically chosen) version of high-level utilitarianism one can show that it converges with a limited version of the morality of law, something that used to be termed "natural equity" or "natural justice."[58] Perhaps the supposed conflict between equity and the rule of law is overblown.

---

[55] Smith, *supra* note 4, at 1180-82.

[56] Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001); *see also* Smith, *supra* note 4, at 1110-13, 1150-57; Smith, *supra* note 5.

[57] Merrill & Smith, *supra* note 23; Smith, *supra* note 14.

[58] *See, e.g.*, 2 HUGO GROTIUS, DE JURE BELLI AC PACIS ii.6, at 193 (Francis W. Kelsey transl., Buffalo, NY: Hein, 1995) (1646) ("We must, in fact, consider what the intention was of those who first introduced individual ownership; and we are forced to believe that it was their intention to depart as little as possible from natural equity."); GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS: BEING AN INQUIRY HOW CONTRACTS ARE AFFECTED IN LAW AND MORALS, BY CONCEALMENT, ERROR, OR INADEQUATE PRICE 37 (photo. reprint 1972) (1825) (Lord Mansfield made "the judgments of the law correspond with the actual practice of intelligent merchants, and with those universal usages, founded partly in convenience, and partly in natural equity, which might be considered as the common commercial and maritime law of the civilized world."); *see also* Bright v. Boyd, 4 F. Cas. 127, 132 (C.C. Me. 1842) (No. 1,875); Moses v. Macferlan, (1760) 97 Eng. Rep. 676, 681 (K.B.) (Mansfield, J.) ("In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."); *but see* 1 FRED F. LAWRENCE, A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE § 3 (1929) (arguing that it is fallacious to regard equity

In private law, when equity serves as a safety valve against opportunism, it employs moral language. This is no accident. As I have argued elsewhere, the reliance on a very basic and uncontroversial morality is one of the constraints on equity.[59] Furthermore, equity was not supposed to conjure up new property rights out of moral whole cloth. Instead, it used a procedurally and substantively limited version of morality to protect the structures of property in the common law. For example, rights to land defined by the *ad coelum* rule would be protected with injunctions, but the presumption would flip in cases of disproportionate hardship.[60] (The same approach can and should be applied to patent trolls.[61]) Broad versions of equity seem at first glance to animate the areas of misappropriation and unfair competition. But even here, there were limits: in addition to being called quasi-property, equity had a traditional role in enforcing custom.[62] Morality and good faith would be applied not directly but through the mediation of custom.[63] On the one hand, the reliance on custom should be appealing to positivists – because it is rooted in social conventions. On the other hand, custom has often been identified with natural law and reason. Indeed, one of the reasons for the decline in the invocation of custom in the law can be traced to the falling out of fashion of natural law and natural rights (and the blurring of the traditional limits on equity with its fusion into law culminating in the Realist era).[64]

Post-Realism has called forth a number of attempts to reconcile equity with the rule of law. Interestingly, the Legal Realists were both skeptics of the value of the rule of law and at the same time worked to extend equity, partly through fusion with the law. The Realists believed in context-sensitive decision-making but did not subscribe to the feasibility or the desirability of the traditional limits on equity. The extension of equitable procedural devices, remedies, and discretion beyond their historic limits led to a "triumph" of equity over law.[65]

---

as based on natural justice). Again, the correlation of jurisdictional equity with equity as a decision-making mode is not complete. As Joseph Story noted, even common law courts would "administer justice with reference to principles of universal or natural justice." JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA 26 (12th ed., J. W. Perry, ed., Boston: Little, Brown & Co., 1877).

[59] Smith, *supra* note 2, at 29-34.

[60] *Id.* at 34-36; see also Gergen et al., *supra* note 29, at 226-30.

[61] Gergen et al., *supra* note 29, at 243-47; Henry E. Smith, Institutions and Indirectness in Intellectual Property, 157 U. PA. L. REV. 2083, 2125-32 (2009).

[62] Henry E. Smith, Equitable Intellectual Property: What's Wrong with Misappropriation?, in Intellectual Property and the Common Law (Shyamkrishna Balganesh ed., forthcoming, Cambrdige University Press).

[63] Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEXAS L. REV. 1153, 1193-94 (2012).

[64] Henry E. Smith, Custom in American Property Law: A Vanishing Act (forthcoming, Texas J. Int'l L.).

[65] *See, e.g.*, Laycock, *supra* note 43, at 53 ("The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won.").

Nevertheless, there have been attempts to reconcile equity – or something very much like it – with the rule of law. Lawrence Solum has argued that equity and law are consistent despite their being in some tension.[66] Particularism and discretion that come from trying to do justice in an individual case might seem to undermine the rule of law. He attempts to reconcile equity with the rule of law through a theory of virtuous judging. Virtuous judges will exercise integrity and wisdom and this will make equity predictable. Solum notes that his account is somewhat related to Ronald Dworkin's, in which application of moral principles yields right answers that are in principle predictable. For Dworkin the stability comes from principles, and for Solum from the virtue of the judge. In response, Steven Burton argues that a direct aim for justice on the part of a virtuous judge is not constraining enough to lead to stability, predictability, and notice.[67] Simply put, this amount of discretion is incompatible with the rule of law. Similarly, Dworkin's account of right answers from principles and a heroic holistic legal-moral inquiry has met with a similar skepticism that morality can constrain to the degree asserted.[68]

Part of the problem of equity's impact on the rule of law traces all the way back to Aristotle.[69] In the *Nicomachean Ethics*, Aristotle calls equity (*epieikeia*) an invocation of justice where law fails on account of its generality.[70] Particularism is needed,[71] but why? One interpretation is that *epieikeia* calls for a totally open-ended gap filling wherever space opens up between the law and its purposes. But I think a narrower version of Aristotelian equity is possible. (Alternatively, one might say that equity as an all-purpose fixing up of the law in the name of justice might be the outer bound of the concern of equity, while within this broader domain, anti-opportunism is an especially compelling rationale for intervention in the name of equity.) Law can fail because its generality allows opportunists to evade it, subvert it, and misuse it. Dennis Klimchuk shows that a narrower interpretation of *epieikeia* based on this narrower focus on the problem of law's

---

[66] Lawrence B. Solum, *Equity and the Rule of Law*, NOMOS XXXVI: THE RULE OF LAW 120 (Ian Shapiro, ed. 1994).

[67] Steven J. Burton, *Particularism, Discretion, and the Rule of Law*, NOMOS XXXVI: THE RULE OF LAW 178 (Ian Shapiro, ed. 1994).

[68] For a discussion of a variety of views on Dworkin's Right Answer Thesis, see Robert Justin Lipkin, *Beyond Skepticism, Foundationalism and the New Fuzziness: The Role of Wide Reflective Equilibrium in Legal Theory*, 75 CORNELL L. REV. 811, 841-49 (1990).

[69] *See supra* note 35 and accompanying text.

[70] ARISTOTLE, *supra* note 35, at 133.

[71] Aristotle likens equity to the leaden rule of the builders of the island of Lesbos that unlike an iron meadure was molded to stones allowing a fitting next one to be chosen. *Id*. Later he notes that "What is called judgement, in virtue of which men are said to be 'sympathetic judges' and to 'have judgement', is the right discrimination of the equitable." *Id.* at 152.

generality is consistent with Aristotle's discussion.[72] This is especially true of the "stickler in a bad way" who exploits the law's generality for illegitimate purposes.[73] I have argued that a theme of anti-opportunism makes sense of much equity practice, and that a theoretical case can be made (in line with some traditional thought quoted above) that equity strengthens the law through its protection of the law against opportunists.[74] Equity is targeted at a certain kind of *intentionally created and hard-to-foresee gap* between the law and its purposes.

A good illustration of the stakes involved comes from the oft-discussed case of *Riggs v. Palmer*.[75] In that case, a grandson (Elmer) killed his grandfather because he knew that the grandfather was not pleased with him and had threatened to cut him (Elmer) out of his will. The court held that Elmer could not take under the will or as the grandfather's heir at law. Although the court invoked a "common law" principle, the case is taken as the classic formulation of the equitable principle that "[n]o one shall be permitted to profit by his own fraud, or to take advantage of his own wrong, or to found any claim upon his own iniquity, or to acquire property by his own crime."[76] To get there the court applied equitable reasoning directly and as a method of interpreting the wills statute. The dissent raised the classic formalist position that the statute did not call for any such exception and so should be applied according to its terms,[77] which is particularly important where stability and notice are important. The dissent on the surface is more consistent with classic formulations of the rule of law.

What can be said for the majority opinion, and the equitable mode of decision making for which it has come to stand? Many defenses of "equity" are quite expansive. As with equity in general, the usual anti-formalist position either celebrates context-sensitive decision-making, and downplays the rule of law, or it denies that basing decision-making on general notions like fairness or morality really involves discretion, instability, and arbitrariness. As we have seen, Dworkin's and Solum's approaches fall in

---

[72] Dennis Klimchuk, Is the Law of Equity Equitable in Aristotle's Sense? 4 (June 2011) (unpublished manuscript), available at http://www.law.ucla.edu/workshops-colloquia/Documents/Klimchuk.%20Is%C20the%C20Law%C20of%C20Equity%C20Equitable%C20in%C20Aristotles%ससense.pdf ("Correction is sometimes necessary because all law is universal and, owing to its universality, can lead to error in particular cases.").

[73] Dennis Klimchuk, Equity and the Rule of Law, This Volume. Broader versions of the equitable anti-opportunism depend on the notion of legitimate leverage and abuse of the law. Cf. These seem broader than the notion of opportunism I am employing, but they still fall short of equity as an all-purpose fix-it principle.

[74] Smith, *supra* note 2.

[75] 22 N.E. 188 (N.Y. 1889) (Earl, J.).

[76] *Id.* at 190. Perhaps the court labeled the principle a "common law" one in order to promote the fusion of law versus equity begun in New York in the Field Code of 1850.

[77] 22 N.E. at 191 (Gray, J., dissenting).

the latter camp. Dworkin sees in *Riggs* an exercise in morally informed legal decision-making that goes beyond a narrow model of rules. It is a holistic and heroic exercise, and very much opposed to the narrower view of rules put forth by positivists. Dworkin showcases *Riggs* (as well as *Henningsen v. Bloomfield Motors, Inc.*[78]) in his development of a principles-based approach to law in which morally informed inquiry leads to right answers.[79] But as the history of equity and the tenor of the rule-of-law literature indicates, a direct application of a potentially large set of principles is not very comforting from the point of view of the rule of law as classically formulated.

Riggs and the reasoning it exemplifies are subject to a narrower interpretation. Rather than being an invitation for a wide-open moral inquiry or an unconstrained exercise in ensuring fairness, *Riggs* stands for a version of the anti-opportunism principle. Courts will not aid people in profiting from their own wrongs. The wrongs involved are defined by criminal law, tort law, custom, and proxies for opportunism. This principle against profiting from one's own wrong is at work systematically in the law of unjust enrichment.[80] The wills statute did not need to state that murderers were not to take under a will or by intestacy, because the equitable safety valve could ensure it. But that is all it is: a safety valve. As the problem of the murdering heir became well known to legislatures, anti-slayer statutes were passed.[81] What was once an equitable problem has now been crystalized, or *sedimented*, into a well-known rule.[82] Equity still has a role to play if a bad actor tries to take unforeseen advantage of this or some other rule, but the core of the "slayer problem" has been solved. Equity is like a moving frontier: what was an equitable problem at one time is not unforeseeable anymore and so is no longer a proper matter for equity.

Does this mean that equity is just another version of the law, and nothing special? In this paper, all I argue is that equity points to something beyond the more formal parts of law. Whether it is part of the law in a positivist sense (pedigreed from the proper authority) or not, can be left open.[83] Elsewhere I argue that opportunism problem, based

---

[78] 161 A.2d 69 (N.J. 1960).

[79] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 17-45 (1977); Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI.. L. REV. 14 (1967).

[80] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 ("A slayer's acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim's death constitutes unjust enrichment that the slayer will not be allowed to retain."); *see also* Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793 (2012).

[81] *See* JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 149-51 (8th ed. 2009). The current rule is in part a matter of such statutes and partly a matter of well settled unjust enrichment, with equity in the sense of the equitable decision making mode left over for novel situations.

[82] Smith, *supra* note 32, at 1052-53.

[83] For a discussion of *Riggs* and positivism, see FREDERICK SCHAUER, PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE (1991). Positivists have defended positivism against Dworkin's use of *Riggs* by insisting that principles like "no one shall

as it is on an element of unforseeability from the opportunist's superior knowledge, cannot be a matter purely of rules.[84] Nonetheless, they do not lead to an all things considered approach in all cases, because thee presumptions are triggered by specific albeit fuzzy-edged proxies for opportunism that trigger the presumption against the possible opportunist.[85] The ex post discretion and other features of equity may be limited, but they cannot be done away with. Among these irreducible features is the moral flavor of equity.

Why is equity based on fairness and morality? Historically, equity grew out of traditions of Aristotelian justice and elements of canon law, and always was identified with natural law before it fell out of fashion. Indeed the phrase "natural equity" was often invoked when courts acted against opportunists.[86] Custom and equity have tended to be identified with "reason" in the natural law tradition.[87] By this was meant a minimum reason-based type of morality that would receive universal assent. Not profiting from one's own wrong (as defined by other relatively uncontroversial sources) would be a good example. Moreover, appeal to widely shared moral notions may not render equity determinate all on their own without equity's characteristic structure of proxies and presumptions, but they do make notice and acceptance easier to achieve.[88]

---

profit from his own wrong" can be regarded as a non-rule-like but pedigreed part of the law, *Id.* at 201-06. See, e.g., SCHAUER, *supra*, at 12-14; Joseph Raz, *Legal Principles and the Limits of Law*, *in* RONALD DWORKIN AND CONTEMPORARY JURISPRUDENCE 73, 82 (Marshall Cohen ed., 1984); Rolf Sartorius, *Hart's Concept of Law*, *in* MORE ESSAYS IN LEGAL PHILOSOPHY 131, 156 (Robert S. Summers ed., 1971); Frederick Schauer, *(Re)Taking Hart*, 119 HARV. L. REV. 851, 873-74 (2006). Schauer calls the question whether these principles are part of the law or not is both terminological and deep. SCHAUER, *supra* at 205-06.

[84] Smith, *supra* note 2.

[85] On presumptions, see JOSEPH RAZ, THE MORALITY OF FREEDOM 11 (1986); SCHAUER, *supra* note 83, at 204-05.

[86] *See, e.g.*, Moses v. Macferlan, (1760) 97 Eng. Rep. 676, 681 (K.B.) (Mansfield, J.).

[87] 2 JAMES BRYCE, STUDIES IN HISTORY AND JURISPRUDENCE 127-86 (1901) (discussing history of the notion of the Law of Nature); Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L.J. 617, 622 (1916) ("Natural justice, or the reason of the thing, which the common law recognized and applied was a direct outgrowth of the law of nature which the Romans identified with jus gentium and the mediaeval canon lawyers adopted as being divine law revealed through man's natural reason."); *cf.* James Q. Whitman, *Why Did the Revolutionary Lawyers Confuse Custom and Reason?*, 58 U. CHI. L. REV. 1321 (1991) (arguing that confusion of custom and reason was a seventeenth and eighteenth century development arising out of an evidentiary crisis of custom).

[88] Something similar may be true of property and torts. *See* Merrill & Smith, *supra* note 23; Smith, *supra* note 14. Larry Alexander and Emily Sherwin raise the concern that overriding rules, as in equity (versus law), involves objectionable and self-defeating deception. LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 88-91 (2011). For an account of how equity can appeal to multiple audiences without deception see Yuval Feldman & Henry E. Smith, Behavioral Equity (May 20, 2013), available at SSRN: http://ssrn.com/abstract=2267613.

Micro equity thus rested on a limited invocation of morality and fairness that come from outside the formal law. But what of macro equity? Let me suggest that in a somewhat similar fashion, the rule of law itself depends on the limited ability to invoke moral considerations against potential opportunism. In its need for an equitable safety valve on both the micro and macro levels, law demonstrates a familiar limit to formal systems. Even if we could create a wholly formal rule of law, might that meta-meta system itself be subject to opportunistic evasion? The potential regress of opportunism can only be broken by a shared culture and morality. In general, formal systems need to rest on something outside the system itself. In the case of law, where interests are often antagonistic, this appeal must happen in part because of the possibility of opportunistic misuse of the criteria set up by the law.

Legal culture is the backstop to the rule of law in a specific way: the rule of law depends on macro equity to counter opportunism.[89] But the possibility of a macro equity to prop up the rule of law in the face of potential opportunism depends on there being a sufficient consensus, enough of such a culture, to serve this function. Is there such a consensus? That is an empirical question to which I have no ready answer. Based on the argument of this paper, one can, however, make two predictions. One is that doing without any equitable safety valve will be very difficult, and the aspiration to be totally contextual or totally formal will not lead in the end to stability and the other rule of law virtues in practice.[90] We can make another prediction. If the consensus on morality or the overall legal culture shrinks, and particularly if disingenuous use of the system to further policy ends comes to be celebrated, one can expect a polarization in views about the rule of law. Either it will be discarded as an obstacle, or the reaction will be to emphasize formalism more than ever, to try to plug the loopholes on the micro and the macro levels as best one can. That can never be wholly successful, but if formalism is a matter of degree and the safety valve works less well for lack of consensus, more formalism is one of the possible responses. Perhaps the current polarization of views about the rule of law can be traced to the damage that lack of consensus is doing to the possibility of the equitable safety valve.

---

[89] *See, e.g.*, Oliver E. Williamson, *Calculativeness, Trust, and Economic Organization*, 36 J.L. & ECON. 453, 476 (1993) ("The main import of culture, for purposes of economic organization, is that it serves as a check on opportunism."); *but see* Richard Craswell, *On the Uses of "Trust": Comment on Williamson, "Calculativeness, Trust, and Economic Organization,"* 36 J.L. & ECON. 487, 495-96 (1993) (critiquing notion of noncalculative trust as a source of explanation and criticizing Williamson for not pushing calculative theories to explain emergence of norms).

[90] Replacing this cooperative element that involves context with a formal system completely would be analogous to a natural language trying to do without pragmatics and relaying solely on semantics. Again, there are limits to formal expression. One of these limits stems from evasion. At a high enough level, operation of a system of law has to be cooperative. It cannot be adversarial all the way up (down?). In this, law is a little like conversation. For conversation to work, the participants have to be cooperating at least in a general way, as in Grice's Cooperative Principle: "Make your conversational contribution such as is required, at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged." PAUL GRICE, STUDIES IN THE WAYS OF WORDS 22, 26 (1989). Aristotelian equity is the pragmatics (as opposed to semantics, in terms of context dependence) of the rule of law.

Conclusion

Law and equity are not so opposed after all, if equity acts as a safety valve aimed at preventing opportunism. Instead, an information-cost theory of property points to a limited role for equity to protect the formal rules of the law against opportunistic exploitation. Thus, within the law, micro equity need not undermine the rule of law, but rather reinforces it. And at the level of the legal system itself, the problem of opportunistic and disingenuous satisfaction of thin notions of the rule of law point to a similar need for macro equity – a limited invocation of standards outside the system of formal law. At both levels, the information-cost theory converges with a morality of the law that requires both formalism and equitable intervention against opportunistic evasion of formal systems.