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Comment

THE RULE OF LAW IS DEAD, LONG LIVE THE RULE: AN ESSAY ON LEGAL RULES, EQUITABLE STANDARDS, AND THE DEBATE OVER JUDICIAL DISCRETION

Kelly D. Hine

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1769
I. INTRODUCTION

At this moment the King, who had been for some time busily writing in his note-book, called out “Silence!”, and read out from his book, “Rule Forty-two. All persons more than a mile high to leave the court.”

Everybody looked at Alice.
“I’m not a mile high,” said Alice.
“You are,” said the King.
“Nearly two miles high,” added the Queen.
“Well, I sha’n’t go, at any rate,” said Alice; “besides, that’s not a regular rule: you invented it just now.”
“It’s the oldest rule in the book,” said the King.
“Then it ought to be Number One,” said Alice.
The King turned pale, and shut his notebook hastily.
—Lewis Carroll from Alice’s Adventures in Wonderland, 1901

Alice was wise beyond her years. In this obstinate child’s bombast, we find an implicit understanding of a jurisprudential principle that has confounded legal academics, judges, and practitioners for ages—that of the “Rule of Law.” To her, an arbitrary judicial pronouncement did not require obedience; a rule was not really a rule if “invented.”

The idea that laws, not individuals, govern our society is at the core of most citizens’ understandings of the American judicial system. We elect legislatures to enact laws, rather than depend solely on judge-made common law. Furthermore, we like to believe that courts impartially apply these knowable and known legislative directives in the controversies that come before them. Idealized judicial decision making, like the goddess Justice, is blind.

In practice, however, courts appear to deviate from this ideal. The law does not seem to provide determinate rules for reaching systematically neutral outcomes. Judges manipulate facts, distinguish precedent, and ignore or “discover” legislative intent to reach desired ends. In many cases, the judicial system appears to be nothing more than a conduit through which judges further their personal conceptions of “justice.”

This apparent lack of determinacy in the law has led some scholars to conclude that the rule of law may have never truly existed anywhere. Ambiguity in the law, they argue, provides judges with unfettered discretion in deciding the cases that come before them. If judges are bound only by the limits of their conscience, they become the ultimate repositories of legal rights, and the rule of law becomes a naive fantasy.

2. Some judges have even been so bold as to admit this—after leaving the bench, of course. See, e.g., Hon. Robert Satter, Doing Justice: A Trial Judge at Work 63-79 (1990).
Despite their tremendous breadth, these arguments are exceedingly shallow. They assume a unidimensional system of justice wherein "the law" provides the only tool for judicial decision making. The Anglo-American legal tradition is binary—divided into the distinct realms of "law" and "equity." Although we have largely abandoned the physical separation of the courts and the chancery, vestiges of the ideological separation remain. Perhaps it is the presence of this second factor, rather than a general failure of the rule of law, that best explains the lack of rigid rule application in judicial decision making.

What exactly is the "Rule of Law?" Does it exist in our system now? Has it ever truly existed in the Anglo-American courts? If not, what are the ramifications to our legal institutions?

This essay reexamines the jurisprudence of judicial discretion adding the view of the law's often neglected sibling, equity. First, I explore the historical development of law and equity in the Anglo-American judicial system, tracking law and equity from the fourteenth century decrees of the King's secretary to the twentieth century merger in the Federal Rules of Civil Procedure. Next, I utilize the ideological distinctions of our historically binary judicial system to examine the rule of law and critique three of the major modern theories of judicial decision making—Realism (including CLS), Neo-Positivism, and Dworkinianism. Finally, applying the foregoing critiques and historical understanding, I suggest the return to a more honest (and perhaps better) framework for judicial decision making based on the ideological separation of the realms of law and equity.

II. ON LEGAL RULES AND EQUITABLE STANDARDS

A. A Tale of Two Systems

1. The Rule of Law

The science of the law is our great security against the maladministration of justice. If the decision of litigated questions were to depend upon the will of the Judge or upon his notions of what was just, our property and our lives would be at the mercy of a fluctuating judgement [sic], or of caprice. The existence of a system of rules and conformity to them are the essential conditions of all free government, and of republican government above all others. The law is our only sovereign. We have enthroned it.

—David D. Field at the opening of the Law School of the University of Chicago, September 21, 1859.4

Like most American laymen, I grew up with an implicit understanding of the basic principles underlying the rule of law. Impartiality was an essential element of fairness; fairness was an essential element of the law.

From mandatory nap time to minimum age requirements, I was socialized to accept properly promulgated rules because they were rules, regardless of whether they fit particular instances.

This layman's understanding of the rule of law has been repeatedly challenged during the course of my legal education and is surely too simplistic for use in a scholarly paper. A more exacting definition is in order. To this end, I will adopt the defining characteristics set forth in a recent article by Professor Cass Sunstein:

A system committed to the rule of law seems to require (1) clear, general, publicly accessible rules laid down in advance; (2) prospectivity and a ban on retroactivity; (3) a measure of conformity between law in the books and law in the world; (4) hearing rights and availability of review by independent adjudicative officials; (5) separation between law-making and law-implementation; (6) no rapid changes in the content of law; and (7) no contradictions or inconsistency in the law.

A commitment to the rule of law, then, requires knowable and known law, applied prospectively and consistently, and promulgated and reviewed by individuals other than those charged with applying it.

The history of the courts of common law is a history of movement toward this end. The writ, trial by jury, and single-issue pleading, each of which evolved in the English courts during the thirteenth through sixteenth centuries, were attempts to move toward a confined, rational, and regular system of rules for governing human conduct. Professor Subrin characterized this movement as an attempt to ensure determinacy in the law: "[i]n short, a goal of the common law was predictability by identifying fact patterns that would have clearly articulated consequences." Following the American Revolution, the former British colonies briefly flirted with the idea of a civil law system modeled on that of France. But ultimately, the respective states and the federal government adopted the English system almost intact. The British system of writs, single-issue pleading, and jury trials persisted in the American courts of law, though less formal and less developed than their Anglican counterparts. Similar to their English forebearers, the states and the new Republic structured the law courts to maximize determinacy and reduce the incidence of unwarranted judicial discretion.

5. See, e.g., George A. Martinez, Civil Procedure Lecture at SMU School of Law (Oct. 5, 1994) (concerning the propriety of jury nullification of the law) (notes on file with the author).
7. Subrin, supra note 4, at 914-17.
8. Id. at 921.
10. See id. at 95-96.
12. See, e.g., Akhil R. Amar, The Bill of Rights as a Constitution, 100 YALE L.J. 1131, 1183 (1991) ("The dominant strategy to keep agents of the central government under control was to use the populist and local institution of the jury.").
The nineteenth century saw the American courts of law come into their own. Judges shouldered the sole responsibility for interpreting and applying the law,\textsuperscript{13} relegating the jury to its modern role of mere fact finder in an attempt to promote more uniform adjudication.\textsuperscript{14} As the century drew to a close, tightly constrained statutory law making grew increasingly popular, while judicial rule making fell into increasing disfavor. This trend culminated early in the next century in Justice Holmes's famous dissent to Southern Pacific Co. v. Jensen,\textsuperscript{15} and in the Court's subsequent repudiation of federal common law in Erie Railroad v. Tompkins.\textsuperscript{16}
The result of this evolution of Anglo-American law was a slow, steady movement toward determinacy. It was a movement toward independently promulgated, consistently applied, knowable and known law. It was a movement toward the rule of law as rule number one.

But beginning in the mid-1800s, changes to the basic structure of the American judicial system would create a cancer in the corpus of legal determinacy; a cancer that would ultimately result in the practical death of the rule of law. But before hazarding an explanation of the foregoing statement, a brief history of the workings of the law's companion system, equity, is required.

2. Remedy in Context: The Roots of Equity

[L]aw is always a general statement, yet there are cases which it is not possible to cover in a general statement.

—Aristotle from Nichomachean Ethics\textsuperscript{17}

Where there is injustice, we should correct it.

—Former Chief Justice Earl Warren, 1972\textsuperscript{18}

Equity is the exercise of the sovereign's prerogative to mitigate the severity of the sovereign's laws. It is an exercise in sovereign grace necessitated by the inherently overinclusive nature of legal rules. In short, equity exists to grant relief in the specific cases where blind application of the law would work an injustice.\textsuperscript{19}

Equity, in the Anglo-American legal tradition, traces its roots to the King's secretary, the Chancellor. Chancellors, originally priests and later trained lawyers, served as the King's administrators. In the course of

\begin{itemize}
  \item \textsuperscript{13} See Subrin, \textit{supra} note 4, at 929.
  \item \textsuperscript{14} See Note, \textit{The Changing Role of the Jury in the Nineteenth Century}, \textit{74 Yale L.J.} 170, 170-71 (1964) (traditional function of interpreting law minimized in favor of fact finding).
  \item \textsuperscript{15} 244 U.S. 205, 222 (1917) (Holmes, J., dissenting) ("The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi-sovereign that can be identified . . . ").
  \item \textsuperscript{16} 304 U.S. 64 (1938).
  \item \textsuperscript{17} \textit{Quoted in} Peter C. Hoffer, \textit{The Law's Conscience} 8 (1990).
  \item \textsuperscript{18} Earl Warren, \textit{A Republic, If You Can Keep It} 6 (1972), \textit{quoted in} Hoffer, \textit{supra} note 17, at 5.
  \item \textsuperscript{19} This is equity in the broad sense. Scholars have recognized the existence of two "equities:" (1) the broad concept delineated above; and (2) the narrow conception of maxims and procedures seen in practice. \textit{See, e.g.}, Hoffer, \textit{supra} note 17, at 21. I do not rely heavily on this distinction.
\end{itemize}
their administrative duties, the Chancellors would hear pleas from the King's subjects requesting the King's assistance in settling disputes.

In most cases, the Chancellor would issue an order authorizing the complaining party to seek redress in the law courts of the King's Bench. But in exceptional cases, for example, those requesting relief from the overharsh application of law or those where legal remedies were insufficient or non-existent, the Chancellor could take in personam jurisdiction. Through the exercise of this power, the Chancellor could compel the parties to behave in accordance with the dictates of conscience. At first, the parties' consciences were determinative. But as the Chancellors became more comfortable in their role, they began relying more on their own consciences and less on that of the parties to the disputes.

This new self-reliance raised concerns for the proper exercise and scope of the Chancellor's discretion. As Professor Hoffer points out, without some form of constraint, the chancery's adjudicative freedom could easily slide into judicial oppression: "There is a fine line between the chancellor who exercises the full scope of his powers to do justice and one who combines ideological perversity with tyrannical license."

To safeguard against such perversion, the chancery drew on the principles underlying one of its own devices—the trust. This metaphor viewed the sovereign as the trust "settlor," depositing the "corpus" of its power with the Chancellor/trustee to be exercised for the benefit of the citizenry. In this way, the Chancellor's power was limited. He could no more properly act in contravention of the sovereign's will or act to the detriment of the public than could any similarly situated fiduciary.

Over the years, equity grew interstitially, filling the gaps left by the common law. By the sixteenth century, the English courts of chancery were well established—their procedures had become formalized and their jurisdiction clear. A binary judicial system had emerged. This system of

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20. In time, these routine orders became the formalized writs of English common law. Subrin, supra note 4, at 915.
21. In the words of Professor Subrin: "[t]he main staples of Chancery jurisdiction became the broader and deeper reality behind appearances, and the subtleties forbidden by the formalized writ, such as fraud, mistake, and fiduciary relationships." Id. at 918 (footnote omitted).
22. HOFFER, supra note 17, at 26.
23. Subrin, supra note 4, at 918. Consider for example the maxim, "He who would have equity must perform equity."
24. HOFFER, supra note 17, at 26; see also Subrin, supra note 4, at 919.
25. As one 17th century common lawyer pointed out: Equity is according to the conscience of him that is Chancellor, and as it is larger or narrower so is equity. Tis all one as if they should make the Standard for the measure wee call A foot, to be the Chancellors foot; what an uncertain measure would this be; one Chancellor has a long foot another A short foot a third an indifferent foot; tis the same thing in the Chancellors Conscience. JOHN SELDEN, TABLE TALK OF JOHN SELDEN 43 (Frederick Pollock, ed. 1927), quoted in HOFFER, supra note 17, at 17.
26. HOFFER, supra note 17, at 20.
27. Id. at 33.
28. Subrin, supra note 4, at 920.
law courts and chancery strove to provide adjudication that was both determinate and flexible, neutral, and just.

Similar to their courts of law, equity in the American colonies roughly copied that of Great Britain. At first, the physical dispersion of the populace and lack of a solid judicial and social infrastructure prevented the duplication of the binary English system. Local courts, lacking manpower and expertise, tended to mix legal and equitable proceedings. But as the colonies became more settled, true courts of chancery appeared. By the turn of the nineteenth century, equity was firmly established in the new Republic.

The evolution of equity, here and abroad, was the evolution of moralistic discretion. The antithesis of law, equity developed as a necessary complement to its sibling system. The Chancellor was "the law's conscience," constrained by the will of the sovereign and the needs of the people, but free to act when required to prevent injustice.

B. MERGER: DAZED AND CONFUSED

The day will come when lawyers will cease to inquire whether a given rule be a rule of equity or a rule of the common law: suffice it that it is a well-established rule administered by the High Court of Justice.

—Frederick W. Maitland's prediction of the effect of Supreme Court of Judicature Act of 1873.

As noted earlier, the lack of manpower and physical dispersion of the populace hampered the early establishment of equity in the American colonies. It was a matter of simple economics—communities could not support the two separate courts. The result was a merger of necessity, wherein the duty of enforcing both legal and equitable rights fell on unitary courts. Perhaps this early experience with a unified system indelibly marked the American settlers, providing fertile ground for the seeds of true merger, sown without success for years in Great Britain, to take

29. HOFFER, supra note 17, at 52.
30. New York established a central court of equity in 1701, New Jersey in 1702. Id. at 51. In many outlying areas, however, the mongrelization of law and equity persisted. It was this mongrelization that would seed the cancer of indeterminacy alluded to above. Supra Part II.A.1.
31. As evidence of equity's establishment, see the U.S. CONST. art. III, § 2, cl. 1. The framers felt it necessary to expressly extend the judicial power of the United States "to all Cases, in Law and Equity." THE FEDERALIST No. 80, at 479-80 (Alexander Hamilton) (William R. Brock ed., 1992); see also A. J. PEELER, LAW AND EQUITY 3-5 (1883). For a detailed discussion of the inclusion and significance of this phrase in the Constitution, see id. at 1-37. But see PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 750 (3d ed. 1988) ("in 1789 equity was either non-existent or undeveloped in the courts of many of the states") [hereinafter HART & WECHSLER].
33. See HOFFER, supra note 17, at 48.
34. English commentators had unsuccessfully pushed for the merger of the law courts and the chancery since at least the 1650s. Id. at 36.
root in the United States.

1. Early Attempts at Merger

a. The Field Code

By the mid-nineteenth century, most states had established true courts of equity. But a movement was afoot to merge these chancery courts with the courts of law. This movement "grounded first in liberalism and then in laissez faire economics and Social Darwinism" culminated in 1846 with the ratification of a new state constitution in New York.

This new constitution made no provision for courts of chancery. Therefore, to maintain equity within its system, New York enacted a new Code of Civil Procedure two years later. Commonly known as the Field Code, after its principal draftsman David Dudley Field, the Code of 1848 merged legal and equitable procedure in the New York courts of law. Despite counsel from many legal notables against merger, the Field Code was adopted in some form by about half the states, covering the majority of the country's population.

The ultimate effect of this merger was then and remains now, unclear. Some judges viewed the Field Code as freeing them to apply any and all jurisprudential tools available. For them, a substantive union of law and equity naturally flowed from a physical and procedural one. Other judges, however, held steadfastly to ideological distinctions despite the physical and procedural merger of the systems. In the legal academy at least, it appears that the former judges won out. What is clear after the Field Code was that law and equity were one for much of the American population.

35. Subrin, supra note 4, at 1000.
37. Id.
38. Joseph Story, for one, was concerned that merger would endanger the confining quality of law and the creative force of equity. See GARY L. McDOWELL, EQUITY AND THE CONSTITUTION: THE SUPREME COURT, EQUITABLE RELIEF, AND PUBLIC POLICY 76-81 (1982).
39. Subrin, supra note 4, at 939.
40. For example, consider Judge Cardozo's statement that: "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." Susquehanna S.S. Co. v. A.O. Anderson Co., 146 N.E. 381, 384 (N.Y. 1925) (citation omitted).
41. See, e.g., Jackson v. Strong, 118 N.E. 512 (N.Y. 1917) ("where some ground of equitable jurisdiction is alleged in the complaint but fails, . . . the court will not retain the action and grant purely legal relief . . . .") and progeny discussed in Kharas, supra note 32 at 194-195.
42. See, e.g., Kharas, supra note 32, at 186 (noting the trend among law schools to abolish separate courses in equity in favor of sprinkling equity within courses on substantive law); see also, SCHEDULE OF CLASSES: SCHOOL OF LAW OF SOUTHERN METHODIST UNIVERSITY, Fall 1996 (failing to list a separate course on equity) (on file with the author).
b. The British Merger

In the late nineteenth century, concerns for abuse of discretion within the Chancery led to a similar transformation of law and equity in Great Britain.\(^43\) During the later part of the eighteenth and early part of the nineteenth centuries, the British began to introduce equitable procedures and doctrines into the common law courts.\(^44\) The Supreme Court of Judicature Act of 1873 finalized the British merger process.\(^45\)

The British movement relied heavily on the Field Code,\(^46\) but unlike the Field code, the British merger was clearly intended to be substantive as well as physical and procedural.\(^47\) The resulting system, based primarily on equity, was simpler and less constraining.\(^48\) Early in the next century, American commentators would point to this British system as a model for procedural reform in the United States.\(^49\)

2. The Federal Rules of Civil Procedure

In the early years of the twentieth century, the United States federal courts continued to adhere to the traditional procedural distinction between law and equity.\(^50\) They formed the only major judicial system to do so.\(^51\) This would soon change.

Shortly after the turn of the century, the American Bar Association, led by Roscoe Pound, began a push for procedural reform in the courts of the United States. Pound argued that the then existing procedural rules hampered the judges' ability to "search independently for truth and justice."\(^52\) This, coupled with concerns for public confusion caused by over-technical rules, led to the passage of the Enabling Act in 1934. Four years later, the United States Supreme Court would promulgate the modern Federal Rules of Civil Procedure.\(^53\)

The result was an open and flexible system. As Professor Subrin notes, the "procedure was to step aside and let the substance through. In short, judges were to have discretion to do what was right."\(^54\) The intent was to create an entirely new jurisprudential animal, based largely on equity,

\(^43\) See Hoffer, supra note 17, at 28.
\(^44\) Subrin, supra note 4, at 957.
\(^45\) Kharas, supra note 32, at 186.
\(^46\) See Subrin, supra note 4, at 942-43.
\(^47\) See, e.g., Frederick W. Maitland, quoted above and in Kharas, supra note 32, at 186.
\(^48\) See Subrin, supra note 4, at 943.
\(^49\) See id.
\(^50\) The Constitution and Congress had bestowed joint legal and equitable jurisdiction on the federal courts from inception, but the courts maintained a strict dichotomy in pleading, proof, and remedies. See Hart & Wechsler, supra note 31, at 750-51.
\(^51\) A few states, including Rhode Island, maintained separate courts of chancery, but they were by far the minority.
\(^54\) Subrin, supra note 4, at 944.
purposely lacking any means of restraint. They succeeded. And with their success, the rule of law died.

III. TOWARD A MORE FORTHCOMING SYSTEM

A. CONUNDRUMS AND EMANATIONS: LAW, EQUITY, AND THE JURISPRUDENCE OF JUDICIAL DISCRETION

By what process can these two modes of relief be made identical? It is possible to abolish one or the other, or both, but it certainly is not possible to abolish the distinction between them.

—Reubens v. Joel

The mergers of the nineteenth and early twentieth centuries succeeded in their attempts to abolish the facial distinctions between law and equity. The courts unified, the procedures wed, and the substance of equity scattered among the law.

But scratching the surface reveals a different story. Equity did not merge with the law so much as it subsumed it. Because the modes of relief could not be made identical, law qua law was abolished.

Take, for example, the classic case of Riggs v. Palmer, decided in the Court of Appeals of New York forty-one years after the adoption of the Field Code. In Riggs, the beneficiary under a will murdered the testator in an attempt to accelerate enjoyment of the gift. The New York high court held that the otherwise proper gift was null and void to the murdering beneficiary. An “equitable construction,” reasoned the court, brought this case out from under the Statute of Wills. The “fundamental maxim[] of the common law” that “[n]o one shall be permitted . . . to take advantage of his own wrong” justified denying the gift as a matter of law.

“Equitable construction?” “Maxim of the common law?” As the dissent to Riggs points out, and as I agree, the majority was terribly confused. Couching an argument in legal terms does not make its resolution a matter of law. This was not a decision based on law at all, but a clear and obvious exercise of equitable discretion.

The kind of muddled reasoning and mongrelized logic exhibited by the Riggs majority is archetypical of court opinions following merger. Be it because of confusion or of calculation, constructing this kind of legal facade for an exercise of equitable discretion and calling it “law” appears

55. See id. at 975.
56. 13 N.Y. 488, 493 (1856) (Selden, J.).
57. As Professor Subrin points out, by moving to an equity-based procedure “the tail of historic adjudication [is] now wagging the dog.” Subrin, supra note 4, at 922.
58. 22 N.E. 188 (N.Y. 1889).
59. Id. at 191.
60. See id. at 189.
61. Id. at 190.
62. See id. at 193.
to be the judicial norm. The current jurisprudence of judicial decision making is the child of this systemic confusion. As detailed below, each of the major modern theories of judicial decision making blurs the ideological distinction underlying law and equity. The result of this blurring is an unchecked discretion and an end to the rule of law as traditionally conceived.

1. A Quadrantial Approach

The modern jurisprudential theories of judicial decision making may be broken down into four basic elements: positivism, moralism, formalism, and realism. Positivism and moralism are diametrically opposed. Likewise, formalism and realism are polar opposites.

To the positivist, the "law" is what the law says and nothing more. It is the black letter command of the sovereign; it is "rules." To the moralist, the "law" is what is right. It is inexorably intertwined with morality; it is "justice." For the formalist, the application of law is mechanical. Plug in the facts to the given law and the outcome is automatic. For the realist, the application of law is dynamic. Outcomes are indeterminate given the law and the facts because decision making is open to discretion.

Much of the early literature views positivism and formalism as necessarily coupled ideas, but recent articles have challenged the mandatory nature of this pairing. Similarly, positivism was thought for years to be ideologically inconsistent with realism, but modern scholarship has also challenged this idea. The reasoning underlying these traditional pairings should become apparent momentarily, but the modern ideological distinction between each element is clear.

Laying out these basic building blocks into quadrants, four possible jurisprudential theories of judicial decision making become apparent:

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63. See, e.g., Satter, supra note 2, at 72-75 (providing an example of molding legal rules to fit a choice based on the judge's personal values).
64. Infra part III.A.2.b-d.
66. See Lon L. Fuller, The Law in Quest of Itself 46-47 (1940).
67. See infra note 68 and accompanying text.
Note that “naturalism” or “natural law” theory, is not included among the basic elements on the chart. This is not to discount the view of natural law theorists, but rather because natural law by its own definition is beyond the scope of this essay. Natural law is defined as encompassing the entirety of human law. Therefore, natural law, if accepted, would provide the backdrop upon which the four quadrants lie.

2. The Application of Quadrant Theory to the Existing Jurisprudence

The norms and attitudes borrowed from equity define our current legal landscape . . . .

—Professor Stephen N. Subrin

a. Traditional Law and Equity

Traditional conceptions of law and equity occupy quadrants three and two respectively. As detailed above, traditionalists viewed law as the command of the sovereign. Whether expressed through the judicial common law or through legislative statutory enactment, the law was a set of positive rules for ordering human conduct. Application of these rules was to be straight forward and mechanical. Legal structures and rules of interpretation evolved to constrain decision making.

Equity was the realm of the conscience, the realm of the exception to the general rule, the realm of morality. Traditionalists understood that the application of equity would vary, hence the concern for the size of the Chancellor’s “foot.” Equity was necessarily dynamic and constrained only by the bounds of the public trust.

68. See, e.g., THOMAS AQUINAS, SUMMA THEOLOGICA in 2 BASIC WRITINGS OF SAINT THOMAS AQUINAS 784-85 (Anton C. Pegis ed. 1945) (answering the question “Whether every human law is derived from the natural law?” in the affirmative).
69. Subrin, supra note 4, at 925.
70. See supra Section II.A.1.
71. See supra Section II.A.2.
This is the perspective of most pre-merger theorists.\textsuperscript{72} John Austin’s “command theory,” for example, is based on an implicit understanding of the different realms of “positive law” and “positive morality.”\textsuperscript{73} Similarly, Oliver Wendell Holmes, Jr. in his famous article “The Path of Law” exhibits a learned grasp of the legal/equitable dichotomy.\textsuperscript{74}

But most post-merger theory fails to separate these concepts.\textsuperscript{75} The merger of law and equity has blurred the distinction between equity \textit{in} the system (provisions authorizing equitable relief) and equity \textit{of} the system (the diffuse concept of fairness).\textsuperscript{76} Each of the major modern theories of judicial decision making crept out of the resulting jurisprudential fog.

b. Traditional Realism and CLS

To proponents of traditional realism and Critical Legal Studies, the “law” is what the law says. Judicial pronouncements and legislative directives provide the building blocks for judicial decision making. But what the law “says” is unclear. Ambiguities, contradictions, and exceptions in the positive law leave room for (and indeed invite) selective interpretation.\textsuperscript{77} For these scholars, the ultimate application of law is dynamic and indeterminate.\textsuperscript{78} A positivist view of the law coupled with discretionary

\textsuperscript{72} This is also the perspective of most modern Americans. \textit{See} Ronald Dworkin, \textit{Taking Rights Seriously} vii (1977) (describing Benthamite legal positivism and utilitarianism as the “ruling theory of law” in America).

\textsuperscript{73} \textit{See} John Austin, \textit{A Positivist Conception of Law} (1832), \textit{reprinted in The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence} 11-12 (H.L.A. Hart ed. 1954).

\textsuperscript{74} \textit{See} Oliver W. Holmes, \textit{The Path of Law}, 10 Harv. L. Rev. 457, 460-62 (1897) (discussing the problem of confusion between legal and moral ideas in contract law). \textit{See also} id. at 466-68 (discussing the need for indeterminacy and consideration of social policy outside of the law).


\textsuperscript{76} One might argue that this makes traditionalism outdated as a means for describing the judicial decision making process. I agree. Following merger, traditionalism no longer provides an accurate description of judicial reasoning. As stated above, theories based on the conceptual muddling of law and equity more accurately describe the present workings of the unified judicial system. But these workings are themselves problematic. As discussed below, just because traditionalism no longer “\textit{is}” does not mean that its concepts no longer “\textit{ought}.” \textit{See infra} part III.B.

\textsuperscript{77} Stated more eloquently,

\begin{quote}
\textit{[L]aw constrains as a physical medium constrains—you can’t do absolutely anything you want with a pile of bricks . . . . On the other hand, the constraint a medium imposes is relative to your chosen project—to your choice of what you want to make. . . . How my argument will look in the end will depend . . . on the legal materials—rules, cases, policies, social stereotypes, historical images—but this dependence is a far cry from the inevitable determination of the outcome in advance by the legal materials themselves.}
\end{quote}


\textsuperscript{78} \textit{See} Lawrence B. Solum, \textit{On the Indeterminacy Crisis: Critiquing Critical Dogma}, 54 U. Chi. L. Rev. 462, 470 (1987) (“in every case any result can be derived from the preexisting legal doctrine”).
This belief in the indeterminacy of legal decision making leads "realist" scholars to reject the rule of law. One scholar summarized the "realist" argument as follows: (1) all values except personal liberty are subjective; (2) to maximize personal liberty (the only universal value), the legislature promulgates general laws; but (3) because all values are subjective, judges cannot neutrally interpret and apply the law. This discretionary application prevents the "law" from being prospectively knowable. Rather, legal decision making results in a retrospective promulgation of the law by those charged with applying it.

But just because scholars can make the ideological distinction between positivism and realism does not mean that this pairing works. Although positivism and realism are ideologically distinct, they are logically inconsistent. How can rules guide decisions if the content of the rules is unknowable until after the decisions are made? Even the most adamant proponents of merger understood this conundrum: "to say that law is expansive, elastic, or accommodating, is as much to say that it is no law at all." Realist application destroys the positivist nature of the law.

If there is no positive law, then personal morality, in one form or another, provides the only standards available for judicial decision making. Thus, the first quadrant pairing of positivism and realism results in the collapse of positivism into morality. As a practical matter, "Realist" theory shifts from quadrant one to quadrant two, and the "law" collapses into the traditional purview of equity.

c. Lon Fuller and Neo-Positivism

Classifying the ideology of Professor Lon Fuller presents a special challenge. His post-merger jurisprudential theories are cloaked in the language of traditional positivism, but their application is far from traditional. This semantic shroud requires the reader to look beyond what Professor Fuller says to discover what it is he truly means. And what he means attempts to place Professor Fuller's "neo-positivism" within the moralist/formalist realm of quadrant four.

79. In this regard, CLS theory may be viewed as the most recent incarnation of traditional realism. Compare Jerome Frank, Law and the Modern Mind 42-47 (1935) (the "law" is what courts decide in fact) with Kennedy, supra note 77, at 530-35 (as a judge, the "law" is "How-I-Want-To-Come-Out"). For this reason, I refer to both traditional realists and CLS theorists as "realists."

80. See, e.g., Singer, supra note 3, at 14.


82. See Frank, supra note 79, at 46.

83. David D. Field, 1 Speeches, Arguments, and Miscellaneous Papers of David Dudley Field 323, 330-31 (Sprague ed. 1884), reprinted in Subrin, supra note 4, at 934.
Fuller's "neo-positivism" is, in fact, neither new\(^{84}\) nor positivist. For Professor Fuller, the "law" encompasses much more than merely what the law says.\(^{85}\) In his opinion, the law must incorporate notions of morality: "law must represent some general direction of human effort that we can understand and describe, and that we can approve in principle even at the moment when it seems to us to miss its mark."\(^{86}\) Not to play semantic games of my own, but this infusion of morals into the law is "moralist" thought by definition, and the notion of a "positivist/moralist" is oxymoronic.

Although Fuller decries the formalism of traditional positivists, his "neo-positivist" theory also strives for a formalist application. Fuller professes that the fusion of morality and law makes legal outcomes self-determinative. To be morally sound, a legal system must do justice in the performance of its duties. To do justice, the system must be properly ordered.\(^{87}\) Proper order requires reference to "good" morality.\(^{88}\) And because good morality is more coherent than evil morality, rational "neo-positivist" judges will always find the good.\(^{89}\) Therefore, given a set of facts and the proper moral "law," the just outcome is assured.

At this point, however, Professor Fuller encounters problems similar to those plaguing the "realists" above—the distinct ideologies of moralism and formalism do not work when paired. Fuller makes the assumption that "good" morality will always win out over "evil," but he then fails to define what is "good."\(^{90}\) He fails in this regard because the relative nature of morality makes such a definition impossible.\(^{91}\) If it is impossible to define "good" morality, then the formalist syllogism breaks down, and judges must rely on their own conceptions of justice. Formalism collapses into realism, quadrant four collapses into quadrant two, and the law, again, collapses into the realm of equity.

d. Dworkinian Analysis

The jurisprudential theories of Professor Ronald Dworkin ultimately suffer the same fate as those of Professor Fuller. Professor Dworkin is a formalist in the sense that his theories strive to prove determinacy in the

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\(^{84}\) Roscoe Pound, for one, believed in weighing social policies rather than applying law amorally. See Subrin, supra note 4, at 947.

\(^{85}\) See Lon L. Fuller, Positivism and Fidelity to Law—A Reply to Professor Hart, 71 HARV. L. REV. 630, 636-37 (1958) (denouncing the "law-is-law" mentality of Austin, Gray, Holmes, and Hart).

\(^{86}\) Id. at 632; see also id. at 639-43 (claiming that "fundamental rules" require the merger of law and morality).

\(^{87}\) See id. at 657 (discussing the problem of restoring respect for law in post-Nazi Germany).

\(^{88}\) See id.

\(^{89}\) See id. at 636 ("[C]oherence and goodness have more affinity than coherence and evil.").

\(^{90}\) See id.

\(^{91}\) Professor Fuller tacitly recognizes this fact. See id. ("[T]he effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are.") (emphasis added).
system. He is also a moralist in the sense that he views legal decision making as requiring reference to the moralistic "principles" underlying the law. In this manner, Dworkinian theory attempts to place judicial decision making within the bounds of quadrant four.

For Professor Dworkin, one party to a dispute, even in "hard" cases, is always entitled to judgment. This entitlement is the product of existing political rights. The role of the legal decision maker is to formulate the "best" (most correct and principled) legal argument available in defense of these pre-existing rights.

Unlike Professor Fuller, Professor Dworkin attempts to delineate a process by which a legal decision maker may discover this "best" moral theory. When the law in an area is clear, the "best" argument is the one that most closely follows the existing legal precedent. But in a complex legal system such as ours, it is common to have cases in which the legal rules conflict, so called "hard cases." In the face of conflicting legal rules, the Dworkinian judge must formulate the argument that best explains and harmonizes existing precedent, gives effect to the most weighty underlying principles (morals), and then writes off the least possible precedent as mistake. Upon completion of this Herculean task, the judge applies this "best" legal argument to the facts. Application is straightforward. If the judge's analysis was correct, he mechanically vindicates the pre-existing right.

But despite this exceedingly well-reasoned procedure, Dworkinian analysis falls victim to the same basic problem undercutting "neo-positivism"—it assumes that a "best" moral theory exists. To be more exact, Professor Dworkin assumes, first, the existence of a normative "best" morality and, second, that this normative "best" morality is empirically significant. He assumes that in every hard case a judge can not only discover the "proper" harmonizing of precedent, weighting of morality, and discounting of mistake, but also that enough of society would agree with the judge's formulation to make the formulation worthwhile.

These assumptions are at best troubling and at worst completely bogus. First, although the esoteric concept of a normative "best" morality is not without merit, Professor Dworkin fails to provide a practical procedure

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92. See Ronald M. Dworkin, The Model of Rules, 35 U. CHI. L. REV. 14, 23 (1967) (asserting that a principle is a standard observed because of its moral worth). 93. See generally Ronald M. Dworkin, Hard Cases, 88 HARV. L. REV. 1057 (1975). 94. See id. at 1058-60. Professor Dworkin terms this his "Rights Thesis." 95. See id. at 1057. 96. See id. at 1059-60 ("[U]noriginal judicial decisions that merely enforce the clear terms of some plainly valid statute are always justified . . ."). This would be the traditional positivist/formalist approach to law—the law is what the law says and what the law says determines the outcome in a case. 97. See id. at 1087-93 (discussing equal treatment as the rationale underlying the binding force of precedent). 98. See id. at 1093-96. 99. See id. at 1096-1101. 100. For example, the Socratic/Platonic concept of the "forms." See generally PLATO, THE REPUBLIC 122-212 (G.M.A. Grube trans., 1992).
for discerning it.101 Dworkinian theory lacks an overriding “metaprinciple” for use in determining the proper relative weights of competing principles.102 Lacking ultimate guidance, a Dworkinian judge is forced to rely on personal morality to determine these relative weights. And because judicial outcomes rest on the balance of these weights, Dworkinian analysis slips into the void of moral relativism.

Second, even assuming the existence of a normative “best” theory, there is no guarantee that such theory would be empirically meaningful. Like a line of best fit through a scattergram of random dots, the Dworkinian theory may be the finest explanatory device available and still be irreconcilably poor.103 Nothing guarantees the social or judicial acceptance of any theory and Professor Dworkin admits as much in his assertion that “judges often disagree not simply about how some rule or principle should be interpreted, but whether the rule or principle one judge cites should be acknowledged to be a rule or principle at all.”104 If the best possible theory is, for all intents and purposes, no better than any other theory, application of all theory becomes arbitrary.

In this way, Dworkinian formalism fails in the same sense “neo-positivist” formalism fails—morally based judicial decision making is necessarily dynamic. In the end, Dworkinian analysis, like the other modern jurisprudential theories of judicial decision making, collapses into moralist realism. What Professor Dworkin and the others would term an exercise in legal determination amounts to nothing more than an exercise of equitable discretion.

B. IF IT WALKS LIKE A DUCK

Equity was not a self-sufficient system, at every point it presupposed the existence of common law . . . [If] the legislature said, “Common Law is hereby abolished,” this decree if obeyed would have meant anarchy.

—Frederick W. Maitland105

1. . . . AND QUACKS . . .

I anticipate the foregoing discussion of the major modern theories of judicial decision making will leave the reader with one question: Why does this matter? Why does it matter if what we currently call legal decision making really amounts to no more than an exercise of equitable dis-

101. Professor Dworkin recognizes this criticism early on but then curtly dismisses it without discussion. See Dworkin, supra note 93, at 1057.
102. See Andrew Altman, Legal Realism, Critical Legal Studies, and Dworkin, 15 PHIL. & PUB. AFF. 205 (1986) (discussing the CLS attack on Dworkinian theory).
104. Dworkin, supra note 93, at 1089 (discussing the importance of following the “gravitational force” of established precedent).
105. Quoted in Subrin, supra note 4, at 983.
cretion? For nearly half a millennium, equity evolved as the law's companion system, and during that time it was always understood that an exercise of equitable discretion could trump the positive law. Even assuming that your analysis is correct, how is this any different?

The problem with the current state of the jurisprudence of judicial decision making is not the embrace of discretion per se, but rather, the embrace of discretion couched in terms of the "law." Obviating the distinction between the equitable and legal realms blurs the distinction between doing what the law says and doing what the law permits. This blurring is problematic because these two ideas are not coextensive. Universal affirmatives are only partially convertible—all that the law commands, the law allows, but not all that the law allows is mandatory. This obfuscation of direction and permission makes it impossible to know when a judicial pronouncement is in fact endorsed or when it is merely sanctioned.

If it is impossible to discern between these two ideas, the metaphorical trust of traditional equity fails. So long as the will of the sovereign/settlor remains discernible, the chancellor/judge/trustee must conform to it. A failure to conform would provide grounds for the citizen/beneficiaries to call for an "accounting" of the judge's stewardship. Such an "accounting," in whatever form, would provide an opportunity to evaluate, and if need be, to correct the judge's performance.

But if the will of the sovereign is unknowable, it becomes impossible to determine what the "trustee" has been directed to do. The judge is left solely and absolutely to the dictates of conscience.106 Without a definite and certain purpose, the "trust" fails,107 and if the trust fails, the judge is no longer empowered to act as the agent of the law giver. Stripped of agency, the judge no longer commands the power to grant exception from the blind application of the positive law. The judge no longer commands equitable jurisdiction.

This is the great paradox of the modern theories discussed above. By embracing discretion in the "law," these theories make the true scope of the positive law incomprehensibly vague. The resulting vagueness eviscerates the very basis of the court's power to exercise discretion. By embracing discretion, they forestall its legitimate use. Because they appeal to the "law" while embracing discretion, these modern theories are no more than jurisprudential Potemkin villages erected to mask the jurisdictional poverty of the courts.

106. Judges are no longer limited to exercising discretion in the "weak" sense; they are now free to exercise the "strong" discretion of purely autonomous decision making. Cf. Dworkin, supra note 92, at 32-33 (discussing the difference between "weak" and "stronger" discretion).

107. See JOHN RITCHIE ET AL., DECEDENTS' ESTATES AND TRUSTS 521 (8th ed. 1993). It is true that a general charitable trust will not fail for want of a specific purpose because of the doctrine of cy pres. Id. at 740-41. But because the sovereign/settlor intended this res to be used only for the specific purpose indicated, the doctrine of cy pres would not apply here. Cf. Application of Syracuse University, 148 N.E.2d 671 (N.Y. 1958) (failure of a specific charitable gift), cited in RITCHIE, supra, at 742 n.76.
2. . . . Call It a Duck

_Le Roi est mort. Vive le Roi!_

—Ancient French proclamation upon the death of a monarch.

Considering the foregoing, it should be easy to see why I have said the rule of law is dead: "[a] rule is not really a rule if decision-makers feel free to disregard it." A repeal of the Federal Rules of Civil Procedure or a physical resegregation of the law courts and Chancery might revive our fallen sovereign, but these remedies are both improbable and impracticable. Just as every sovereign must pass, however, every sovereign must have its successor. In this case, the simple return to a jurisprudence embracing the original _ideological_ distinction between legal rules and equitable discretion would suffice.

Recent scholarship suggests that a modern conception of the rule of law requires only "that the public [have] reasonable notice of what the law requires" and that the system "place real limitations on arbitrary judicial decision making." A system of positivist/formalist law permitting occasional excursions into moralist/realist equity satisfies these requirements. Bringing the exercise of discretion back into the open would clear the waters of judicial decision making. With the bounds of legally permissible and legally mandated actions clear, the system would regain the ability to gauge the propriety of discretionary exercises of judicial power.

A return to the rule of law under such a system would provide both tangible and esoteric benefits to society. Consistently applied rules make the law knowable within society, and known rules eliminate the need to advert to basic principles during judicial decision making. The judicial economies resulting from formalist application of the positive law would reduce transaction costs to the public. Likewise, a knowable law would enable citizens to plan their affairs efficiently.

Recognizing and permitting the exercise of equitable discretion would mitigate the problem of over inclusiveness in the positive law. Preserving the ability of judges to treat the differently situated differently would ensure fairness within the system. Keeping the exercise of discretion in the open ensures the ability to monitor discretion and to keep the exercise of discretion above board.

108. Sunstein, _supra_ note 6, at 972.
110. _See_ Sunstein, _supra_ note 6, at 973.
111. _See_ id. at 969.
112. _See_ id. at 972.
113. That is, so as to take advantage of legal incentives and to avoid legal sanctions. _See id._ at 973, 976. _Compare_ Justice Clarence Thomas, Address Before the Federalist Society and the Manhattan Institute (May 16, 1994), _in WALL ST. J._, May 26, 1994, at A14 ("If people know that they are not going to be held accountable because of a myriad of excuses, how will our society be able to influence behavior and provide incentives to follow the law?").
114. Professor Sunstein terms this as "structural due process." Sunstein, _supra_ note 6, at 996 n.156.
This last point is really the most important. Having "neither purse nor sword," the judiciary depends on the voluntary compliance of those who come before it. All that ensures compliance is a finite reservoir of respect for our legal institutions and for the people running them. Honesty and candor in judicial decision making are essential to maintaining this respect—the trustee who is less than truthful is undeserving of the trust. A system, wherein judges apply only the positive law in the name of law and wherein the exercise of judicial discretion is express and limited, would allow a return to the rule of law. And a return to the rule of law in some form is necessary to ensure the continued integrity and efficacy of our system of justice.

IV. CONCLUSION

The rule of law as traditionally known is dead, but its essence survives in the ideological distinction of law and equity. Law and equity are companion systems. Standing alone, each is incomplete and unworkable, but together they form a whole that is both determinate and flexible. Intended to exploit and refine this complementary nature, the merger of law and equity instead destroyed it.

The modern jurisprudential theories of judicial decision making echo the muddled understanding of discretion and determinacy that resulted from merger. The espoused positivism of the modern "Realist" collapses into moralism and the formalism of the "neo-positivists" and "Dworkinians" collapses into realism because of this confusion.

This collapse into a jurisprudence of moralist realism undermines the very rationale that initially empowered the courts to exercise discretion and override the positive law. Because of this, the legitimacy of any exercise of judicial discretion becomes questionable. To ensure the legitimacy of the courts and respect for the judicial system, a rebirth of the rule of law is necessary. The new rule, based on the traditional positivist/formalist understanding of the law but allowing restricted excursions into moralist/realist equity, would accomplish the task. Under this new rule, the positive law would again provide the legal rules of decision, and the exercise of judicial discretion would be open, express, and encouraged within the bounds of the public trust. But until such a system arrives, the rule of law is dead, long live the rule.