

FROM THEORY TO PRACTICE: ANALYZING EQUITABLE
ESTOPPEL UNDER A PLURALISTIC MODEL OF LAW

by
T. Leigh Anenson*

This Article applies new legal theory to the old topic of equity as a method for understanding equitable estoppel. It explains the pluralistic model of law popularized by legal theorists and then applies that method of legal reasoning to equitable estoppel. In particular, precedent, tradition, and policy analysis are used to evaluate the defense and offer insight into its application. This Article concludes that studying equitable estoppel from the perspective of a pluralistic model of law helps develop the defense and transition it into the twenty-first century.

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I. INTRODUCTION

This Article applies new legal theory to the old topic of equity as a method for understanding equitable estoppel. The five hundred year old defense¹ is a

* University of Maryland Robert H. Smith School of Business and Of Counsel, Reminger & Reminger Co., L.P.A. The author's law firm represented parties in the case of *UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc.* mentioned in this Article. Thanks to the participants of the 2006 Annual Conference of the Academy of Legal Studies in Business for their helpful comments on an earlier draft of this article and to Evan Llewellyn for his invaluable research assistance. This Article was written as part of the my doctoral thesis in conjunction with fulfilling the writing requirement for a Doctor of Philosophy at Monash University. I am especially grateful to Wilson Huhn for inspiring my interest in jurisprudence and for encouraging me to teach.

¹ Both plaintiffs and defendants may use equitable estoppel to block claims and defenses. While equitable estoppel falls within the family of "equitable defenses," it is an affirmative defense *or* an affirmative avoidance in response to an affirmative defense. *E.g.*, *Hoag v. McBride & Son Inv. Co., Inc.*, 967 S.W.2d 157, 171 (Mo. Ct. App. 1998). For a discussion of its origins, see HENRY L. MCCLINTOCK, *HANDBOOK OF EQUITY* 44 (1936) (hornbook series) [hereinafter *MCCLINTOCK ON EQUITY*]; ROBERT MEGARRY & P.V. BAKER, *SNELL'S PRINCIPLES OF EQUITY* 11, 561–62 (27th ed. 1973); 3 JOHN NORTON POMEROY, *A*

variation of the golden rule erected into law.² Based primarily on principles of ethics and morality,³ it bars the contradictory conduct of litigants that works to their advantage in a case or to the disadvantage of the adverse party.⁴

Few fields of law have aroused more interest and discussion lately than equitable estoppel. In the last two years, a majority of the supreme courts of the several states has addressed the doctrine.⁵ Since its inception in American law, moreover, courts (including the U.S. Supreme Court) have been disseminating derivative theories of estoppel and expanding its application to new areas.⁶

Given its amorphous nature, critical commentary on the subject of equitable estoppel has been confined to concrete contexts with continuing confusion in the cases.⁷ No attempt has been made to examine the underlying

TREATISE ON EQUITY JURISPRUDENCE AS ADMINISTERED IN THE UNITED STATES OF AMERICA § 802 (5th ed. 1941) [hereinafter POMEROY'S EQUITY JURISPRUDENCE].

² 28 AM. JUR. 2D *Estoppel and Waiver* § 29 (2000).

³ Laura M. Burson, Comment, A.C. Aukerman and the Federal Circuit: *What is the Standard of Review for a Summary Judgment Ruling on Laches or Equitable Estoppel?*, 32 LOY. L.A. L. REV. 799, 831 (1999) ("The primary principle governing equitable estoppel . . . is ethicality, i.e., morality."); see also *Dezell v. Odell*, 3 Hill 215, 225 (N.Y. 1842) (Bronson, J., dissenting) ("It is a question of ethics."); *Frost v. Saratoga Mut. Ins. Co.*, 5 Denio 154, 157 (N.Y. 1848) (same); *Wills v. Kane*, 2 Grant 60, 63 (Pa. 1853) ("It is against good morals to permit such double dealing in the administration of justice."); *Strong v. Ellsworth*, 26 Vt. 366, 373 (1854) ("The doctrine of [equitable estoppel] lies at the foundation of morals . . .").

⁴ E.g., *Weiss v. Rojanasathit*, 975 S.W.2d 113, 120 (Mo. 1998) (en banc) ("The purpose of the doctrine of equitable estoppel is to prevent a party from taking inequitable advantage of a situation he or she has caused."); *Horn v. Cole*, 51 N.H. 287, 289 (1868) (explaining that estoppel was used to bar the establishment of a legal right that would be contrary to good conscience on account of the plaintiff's prior declarations or conduct); POMEROY'S EQUITY JURISPRUDENCE, *supra* note 1, § 802 (equitable estoppel is intended to promote "equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience").

⁵ A search of Westlaw and LEXIS shows that thirty-three state supreme courts decided cases of equitable estoppel in the last two years.

⁶ See *Glazer v. Dress Barn, Inc.*, 873 A.2d 929, 947 (Conn. 2005) ("Equitable estoppel is a doctrine that operates in many contexts to bar a party from asserting a right that it otherwise would have but for its own conduct."); see also *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1033 (Fed. Cir. 1992) (listing examples of equitable estoppel in patent infringement litigation); *Manker v. Manker*, 644 N.W.2d 522 (Neb. 2002) (using equitable estoppel to prevent fraudulent or inequitable resort to statute of limitations). Equitable and other estoppels have been recognized by the U.S. Supreme Court. See generally *Kirk v. Hamilton*, 102 U.S. 68 (1880) (equitable estoppel); see also *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (collateral estoppel); *Simmons v. Burlington, Cedar Rapids & N. Ry. Co.*, 159 U.S. 278 (1895) (quasi-estoppel); *Sturm v. Boker*, 150 U.S. 312, 334 (1893) (judicial estoppel).

⁷ See, e.g., Jeff G. Carchidi, Comment, *California Oral Will Contracts: The Decline of Testator Intent in the Shadow of Equitable Estoppel*, 39 SANTA CLARA L. REV. 1187 (1998); R.A. Duff, "I Might Be Guilty, But You Can't Try Me": *Estoppel and Other Bars to Trial*, 1 OHIO ST. J. CRIM. L. 245 (2003); John R. Hinrichs, Note, *Weston v. Jones: Using State Court Subject Matter Jurisdiction by Estoppel to Undermine Tribal Sovereignty*, 45 S.D. L. REV. 345 (2000); Note, *Real Property—Application of the Doctrine of Equitable Estoppel*, 40

structure of the defense from the inside out in order to identify its unifying qualities. This Article undertakes such an examination pursuant to a pluralistic model of law. It exposes estoppel's core values through an inductive method of case analysis as enlightened by estoppel's ancient lineage.⁸ It also recasts the relationship between law and equity as one of formalism and realism.⁹ Looking at estoppel through the lens of these competing legal philosophies reveals parallels among principles of equity and public policy with theoretical and practical implications.¹⁰

Part II explains the pluralistic model of law popularized by legal theorists a decade ago.¹¹ It adopts the model outlined by Wilson Huhn in his recent book titled *The Five Types of Legal Argument*.¹² Parts II through IV then apply Huhn's method of legal reasoning to equitable estoppel. In particular, these parts use precedent, tradition, and policy analysis to evaluate the defense and offer insight into its application.

Part III portrays the precedent type of argument. It analyzes equitable estoppel along the rules-standards continuum and illustrates how cases close the divide between them. This Part considers how courts have removed the rule-like elements of estoppel through realistic analogies. These comparisons evade the stabilizing effect of precedent by harmonizing prior cases based not on surface facts, but on underlying values.

Part IV depicts legal reasoning by tradition. The tradition type of argument supports the stability of law through concern for community customs. Equitable estoppel law, however, turns tradition on its head because social coherence means change characteristic of the split system. During the centuries of separate law and equity courts, equity was administered as a discretionary check on the strict law.

TENN. L. REV. 526 (1973); Charles G. Stinner, Note, *Estoppel and In Pari Delicto Defenses to Civil Blue Sky Law Actions*, 73 CORNELL L. REV. 448 (1988); see also *infra* notes 94–99 and accompanying text.

⁸ See discussion *infra* Part V.

⁹ See discussion *infra* Part V.

¹⁰ See discussion *infra* Part V.

¹¹ The pluralistic approach to legal analysis was popularized by Philip Bobbitt, a Constitutional scholar, who identified six heuristic devices of interpreting the Constitution. PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991). Others have adapted Bobbitt's forms of argument (that he calls "modalities") outside the constitutional law discussion. See Dennis Patterson, *The Pseudo-Debate over Default Rules in Contract Law*, 3 S. CAL. INTERDISC. L.J. 235 (1993); Mark P. Gergen, *Tortious Interference: How It Is Engulfing Commercial Law, Why This Is Not Entirely Bad, And a Prudential Response*, 38 ARIZ. L. REV. 1175, 1178 n.16 (1996); see also William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 322 (1990) (outlining an analogous model of statutory interpretation).

¹² WILSON HUHNS, *THE FIVE TYPES OF LEGAL ARGUMENT* (2002). Huhn's paradigm resembles Bobbitt's multidimensional matrix for interpreting the Constitution. See generally BOBBITT, *supra* note 11; see also Wilson R. Huhn, *Teaching Legal Analysis Using a Pluralistic Model of Law*, 36 GONZ. L. REV. 433, 453–57 (2001) [hereinafter *Teaching Legal Analysis*] (comparing various models of legal reasoning).

Part V validates policy analysis in assessing equitable estoppel. The concepts of “equity” and “policy” foster fairness and flexibility in the development of the law. Both also stem from Aristotelian ideas that consider the consequences of any legal decision. Because a proper policy argument aligns those consequences with the purposes of estoppel law, the elusive ideal of justice along with an array of instrumental aims are explored. This Part then shows how courts have promoted these policies even at the expense of the defense’s doctrinal determinants. It further recommends that policy be preferred over other types of arguments, should their interpretation of estoppel command contradictory conclusions.

The Article concludes that studying equitable estoppel from the perspective of a pluralistic model of law assists in arguing and applying the defense. Learned authors have commented that no other doctrine is “‘at once so potentially fruitful and so practically unsatisfying.’”¹³ The objective of this Article is to provide an appreciation of equitable estoppel so that the defense may live up to its expectations.

II. EQUITY MEETS LEGAL THEORY

Scholars have advised that no other subject “offers as rich an opportunity to delve into problems of jurisprudence and the philosophy of law as does equity.”¹⁴ Nowhere are the pathologies of the law—for equity or otherwise—better described than in the recent book by Wilson Huhn.¹⁵ In it, Huhn proposes a pluralistic model of law that explains the techniques of legal reasoning encountered in everyday law practice.¹⁶ It will be these techniques, or “tools of the trade,”¹⁷ that will be used below as a key to comprehending the equitable defense of estoppel.¹⁸

In this regard, Huhn’s text doubles as a primer for practitioners and an important contribution to the field of legal theory. Once confined to celestial navigation in the name of God and natural law,¹⁹ equity is particularly in need

¹³ J.F. Wilson, *Recent Developments in Estoppel*, 67 LAW Q. REV. 330, 330 (1951) (quoting G.C. Cheshire & C.H.S. Fifoot, *Central London Property Trust Ltd. v. High Trees House Ltd.*, 63 LAW Q. REV. 283, 286 (1947)).

¹⁴ See Edward D. Re, *Introduction to SELECTED ESSAYS ON EQUITY* xii (Edward D. Re ed., 1955).

¹⁵ See generally HUHNS, *supra* note 12.

¹⁶ See generally *id.*

¹⁷ Dennis Patterson, *Conscience and the Constitution*, 93 COLUM. L. REV. 270, 294 (1993) (reviewing PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991)).

¹⁸ This Article does not cover all of the types of argument outlined by Huhn nor does it describe the arguments discussed in the detail provided in the book. Those who are interested in further study of legal theory, or who are simply lovers of the law, are encouraged to read Huhn’s book cover to cover.

¹⁹ See *The Earl of Oxford’s Case*, (1615) 21 Eng. Rep. 485, 486 (Ch.) (Lord Ellesmere stating that “[e]quity speaks as the Law of God speaks”); see also Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 WASH. L. REV. 429, 500 (2003) (discussing equity’s association with natural law); Roscoe Pound, *The Theory of Judicial*

of a compass to ground it in current ways of thinking and chart its course in today's litigation.²⁰ "Theory," of course, is a dirty word in the vocabulary of most litigators who speak in terms of "tactics," "strategies," or even "tricks."

Lawyers, however, may be surprised to learn that scholars are advocating a theory of jurisprudence that, ironically, says there is no theory. As Dennis Patterson put it, "Theory is banished not because it is wrong, but because it is irrelevant."²¹ In place of the idea of law as an absolute discovery of truth is the pragmatic acknowledgment that law is a process of persuasion.²² Truth in the legal sense is not attainable because law reflects societal values which are always conflicting.²³ To paraphrase a famous aphorism of Oliver Wendell Holmes: law is not logic, but experience.²⁴ The post-Holmesian universe is filled with followers of legal realism that have provided precision to his

Decision, 36 HARV. L. REV. 641, 657 (1923) [hereinafter *Theory of Judicial Decision*] (discussing the classic creative eras of law that included when law was guided by a philosophical theory of natural law with comparative law to provide content to abstract ideals).

²⁰ See *Theory of Judicial Decision*, *supra* note 19, at 647–48 (noting how "modes of looking at and handling and shaping legal precepts" have a "decisive effect upon the administration of justice").

²¹ Patterson, *supra* note 17, at 295; Patterson, *supra* note 11, at 253 (stating that the justification of law is not accomplished by the political theorist, the economist, or the moral philosopher).

²² The goal is not to describe a true state of affairs but to persuade others to adopt your view of the law. See, e.g., HUHNS, *supra* note 12, at 88 ("[L]egal reasoning is not deductive, but rhetorical"); DENNIS PATTERSON, LAW AND TRUTH 144 (1996) (advocating that the practice of law is not the discovery of the truth but the art of persuasion); Donald H.J. Hermann, *Legal Reasoning as Argumentation*, 12 N. KY. L. REV. 467, 507 (1985) (explaining that "legal reasoning entails a practice of argumentation" and that such arguments "are to be measured by their persuasiveness, not by reference to some established true state of affairs"); Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 SANTA CLARA L. REV. 813, 828 (2002) [hereinafter *Syllogistic Reasoning*] (recognizing that "truth" in the legal sense of that word is indeterminate in that "legal reasoning seeks to persuade that one complex of values is more compelling than another"); see also RICHARD A. POSNER, OVERCOMING LAW 405 (1995) (rejecting "the idea that law is something grounded in permanent principles and realized in logical manipulations of those principles" rather than "an instrument for social ends").

²³ See BOBBITT, *supra* note 11, at 181 ("[T]he values society labors to preserve are contradictory."). H.L.A. Hart's criticism of legal formalism was not due to its reliance on logic, but because it failed to acknowledge the ambiguity of rules. HUHNS, *supra* note 12, at 57 n.149 (citing Douglas Lind, *Logic, Intuition, and the Positivist Legacy of H.L.A. Hart*, 52 SMU L. REV. 135, 152–57 (1999)). Oliver Wendell Holmes urged educators to train lawyers to consider the "social advantage" of the rule and to educate them to see that "they were taking sides upon debatable and often burning questions." Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 61 (1897), reprinted in 110 HARV. L. REV. 991, 1000 (1997).

²⁴ OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (Little, Brown & Co. 1938) (1881) ("The life of the law has not been logic: it has been experience."). For articles describing the ideology of Justice Holmes, see generally Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Catherine Wells Hantzis, *Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr.*, 82 NW. U. L. REV. 541 (1988).

prose.²⁵ Huhn and his contemporary colleagues of legal theory define law as a combination of logic, experience, and a host of other things, including morals.²⁶ It is in serving, and often times reconciling, the various morals or values of society that legal actors develop their arguments and decide their cases.²⁷ The message, therefore, is that law is a practice and an appropriate methodology or “theory” of law must describe what lawyers do.²⁸

Huhn’s description divides what lawyers do into “five types of legal argument” in his book of the same name.²⁹ Of the five, three are applicable to an allegation of equitable estoppel. They are precedent, tradition, and policy analysis.³⁰ Each type of argument is based on a different source of law and, as such, has different evidence to discern its meaning.³¹ Law may be conceived as judicial opinions (precedent), as the traditional customs of the community (tradition), or as an expression of the underlying interests or purposes it is meant to serve (policy).³² Proof of law, correspondingly, would come from cases, historical beliefs and behavioral patterns, or any fact deemed worthy of

²⁵ Morton J. Horwitz, *The Changing Common Law*, 9 DALHOUSIE L.J. 55, 64 (1984) (comparing the pre-Holmesian vision of law where each legal event was assigned to its correct category to the post-Holmesian universe where legal reasoning resorted to balancing and line drawing). Zechariah Chafee, Jr., a practitioner, professor, and scholar of equity jurisprudence, looked at law as a “kit of tools” to repair, sharpen, or redesign. Edgar N. Durfee, *Foreword to ZECHARIAH CHAFEE, JR., SOME PROBLEMS OF EQUITY*, at x (1950).

²⁶ See HUHNS, *supra* note 12, at 4 (reason plus morals). As discussed *infra* Part V, their brand of “legal sociology” came to be called legal realism. Michael Ansaldi, *The German Llewellyn*, 58 BROOK. L. REV. 705, 748–49 (1992) (quoting Karl Llewellyn). Legal realism recognized that moral values had a place in legal discourse. It became the middle path between the analytical school of jurisprudence that failed to account for morals and natural law theory that only looked to them. See *Theory of Judicial Decision*, *supra* note 19, at 660 (criticizing the analytical school of jurisprudence that considered law as separate from morals and provided only “superficial certainty” that blinded us “to factors of the first moment in the actual working of the legal order”). Speaking of the law generally, Oliver Wendell Holmes stated: “The law is the witness and external deposit of our moral life. Its history is the history of the moral development of the race.” Holmes, *supra* note 23, at 992.

²⁷ See HUHNS, *supra* note 12, at 13, 83; see also BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 35 (1921) (stating that the justification of judicial decisions ultimately depends on the judgment of lawyers).

²⁸ Holmes said that “[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.” Holmes, *supra* note 23, at 994; see also BOBBITT, *supra* note 11, at 24 (stating that law is “something we do”); Patterson, *supra* note 11, at 285.

²⁹ Legal arguments are based upon text, intent, precedent, tradition, and policy analysis. HUHNS, *supra* note 12, at 13. Scholarly depictions of the multiple kinds of legal reasoning techniques have been full of imagery. They have been portrayed as the separates lens for reading text, Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 801 (1999), the tributaries that feed a wild river, HUHNS, *supra* note 12, at 3, and the different voices in a choir, *id.*

³⁰ The remaining two—text and intent—can still be used indirectly in the precedent mode of analysis. See *Horn v. Cole*, 51 N.H. 287 (1868).

³¹ HUHNS, *supra* note 12, at 13.

³² *Id.*

judicial notice considered in light of the law's policies.³³ Each method of argument also embodies the underlying values of our legal system. Precedent supports the stability and predictability of law as a guide to future action,³⁴ tradition reflects social cohesiveness and coherence,³⁵ and policy analysis furthers the flexibility of law to adjust to the changing conditions of society.³⁶

No doubt these processes of legal reasoning have become second nature to most lawyers and judges.³⁷ Nevertheless, an exploration of their characteristics in the area of estoppel may identify arguments that may otherwise be overlooked.³⁸ The strength of any argument depends on its interplay with other forms of argument. The "hard cases" that make up the bulk of the law school curriculum occur when two or more types of argument lead to different interpretations of law.³⁹ To the extent that the types of argument all lead to the same interpretation, the claim for that version of the law is stronger.⁴⁰ Because the confluence of these methods of interpretation gives an argument its persuasive force, they are often used in tandem.⁴¹

³³ Huhn compares the types of legal argument to the rules of evidence that bind attorneys when calling witnesses or offering exhibits to persuade the judge or jury in proving disputed facts at trial. HUHNS, *supra* note 12, at 15. As discussed *infra* Part V, the purposes of the law must be ascertained from the other sources (text, intent, precedent, tradition). See also RUGGERO J. ALDISERT, *LOGIC FOR LAWYERS: A GUIDE TO CLEAR LEGAL THINKING* 139–228 (3d ed. 1997) (identifying fallacies that are sometimes offered as legal argument); M.B.W. Sinclair, *Statutory Reasoning*, 46 *DRAKE L. REV.* 299, 331 (1997) (concluding that purely intuitive reasons are not acceptable as justifications in judicial opinions).

³⁴ HUHNS, *supra* note 12, at 16; see also *id.* at 41–43.

³⁵ HUHNS, *supra* note 12, at 16; see also *id.* at 45–50.

³⁶ HUHNS, *supra* note 12, at 16; see also *id.* at 51–68.

³⁷ See, e.g., James Boyle, *The Anatomy of a Torts Class*, 34 *AM. U. L. REV.* 1003, 1051 (1985) (explaining that "thinking like a lawyer" means learning a method of argument and not the content of rules); *Teaching Legal Analysis*, *supra* note 12, at 480 (describing the purpose of legal education as training students "to think like a lawyer" and be adept at legal analysis); Kevin H. Smith, *Practical Jurisprudence: Deconstructing and Synthesizing the Art and Science of Thinking like a Lawyer*, 29 *U. MEM. L. REV.* 1 (1998) (providing a roadmap for attorneys to follow in solving complex legal problems).

³⁸ Familiarity with the types of arguments, in addition to an understanding of their ability to withstand the two basic attacks on them, is critical for a successful case outcome. HUHNS, *supra* note 12, at 91–93. What Huhn calls "intra-type" attacks come from within the type of argument itself and are based on its characteristic strengths and weaknesses. *Id.* "Cross-type" attacks pit one type of argument against another in a competition for mastery. *Id.*; see also J.M. Balkin & Sanford Levinson, *Constitutional Grammar*, 72 *TEX. L. REV.* 1771, 1796 (1994).

³⁹ HUHNS, *supra* note 12, at 144; see also Ronald Dworkin, *Hard Cases*, 88 *HARV. L. REV.* 1057, 1089 (1975); David Lyons, *Justification and Judicial Responsibility*, 72 *CAL. L. REV.* 178, 182 (1984). For further discussion of the "hard cases," see generally *Syllogistic Reasoning*, *supra* note 22.

⁴⁰ HUHNS, *supra* note 12, at 85; Patterson, *supra* note 11, at 278.

⁴¹ Huhn's five types of legal argument are really a "system" of legal reasoning techniques because they are interrelated. HUHNS, *supra* note 12, at 81–82. In a single argument, one may utilize two, three, or cover all five arguments at the same time and in such a way that they may be distinguishable from each other. *Id.*

III. PRECEDENT

The best case scenario for the application of equitable estoppel is when the “law” of equity is with you. In other words, the elements of estoppel are supported by the facts that match precisely a prior precedent. Equitable estoppel comprises three basic elements: (1) conduct, acts, language or silence constituting a representation or concealment, (2) that is relied upon by the other party, (3) to the other party’s detriment.⁴² An additional element may include a requisite state of mind of one or both parties.⁴³ Courts have discretion to deny the defense⁴⁴ and, correspondingly, to apply it despite the failure of one or more elements.⁴⁵ They justify the application or denial of equitable estoppel in these situations in the name of “justice.”⁴⁶

⁴² See *Markey v. Carney*, 705 N.W.2d 13, 21 (Iowa 2005); *Reichs Ford Rd. Joint Venture v. State Rds. Comm’n of the State Highway Admin.*, 880 A.2d 307, 321 (Md. 2005); see also Eugene R. Anderson & Nadia V. Holober, *Preventing Inconsistencies in Litigation with a Spotlight on Insurance Coverage Litigation: The Doctrines of Judicial Estoppel, Equitable Estoppel, Quasi-Estoppel, Collateral Estoppel, “Mend the Hold,” Fraud on the Court” and Judicial and Evidentiary Admissions*, 4 CONN. INS. L.J. 589, 633 (1998) (stating that “privity of the parties, reliance, and prejudice, [are] generally recognized elements of equitable estoppel” (footnotes omitted)).

⁴³ Some jurisdictions divide the defense into more detailed determinants that include an intent element. In Tennessee, estoppel is established against the opposing party when:

- (1) Conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert;
- (2) Intention, or at least expectation that such conduct shall be acted upon by the other party;
- (3) Knowledge, actual or constructive of the real facts.

Osborne v. Mountain Life Ins. Co., 130 S.W.3d 769, 774 (Tenn. 2004). Additionally, equitable estoppel requires the following elements with respect to the party asserting estoppel:

- (1) Lack of knowledge and of the means of knowledge of the truth as to the facts in question;
- (2) Reliance upon the conduct of the party estopped; and
- (3) Action based thereon of such a character as to change his [or her] position prejudicially.

Id.; accord *Honeywell v. Workers’ Comp. Appeals Bd.*, 105 P.3d 544, 550 (Cal. 2005); *State v. Harris*, 881 So.2d 1079, 1084 (Fla. 2004); *Christensen v. Pocatello*, 124 P.3d 1008, 1015 (Idaho 2005); *Wurl v. Polson Sch. Dist. No. 23*, 127 P.3d 436, 443 (Mont. 2006); *Rauscher v. City of Lincoln*, 691 N.W.2d 844, 851 (Neb. 2005).

⁴⁴ Even when a party has established the elements of the defense, a court may still decline to apply it to the case if it believes that equity so requires. See *Burson*, *supra* note 3, at 802. The Federal Circuit Court of Appeals in *A.C. Aukerman Co. v. R.L. Chaides Construction Co.* explained:

[T]he trial court must, even where the three elements of equitable estoppel are established, take into consideration any other evidence and facts respecting the equities of the parties in exercising its discretion and deciding whether to allow the defense of equitable estoppel to bar the suit.

960 F.2d 1020, 1043 (Fed. Cir. 1992).

⁴⁵ For cases removing the reliance requirement, see *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 268 (5th Cir. 2004); *Chem. Leaman Tank Lines, Inc. v. Aetna Cas. & Sur. Co.*, 89 F.3d 976, 992 (3d Cir. 1996); *AIG Haw. Ins. Co. v. Smith*, 891 P.2d 261, 266 (Haw. 1995); *Filipo v. Chang*, 618 P.2d 295, 300–01 (Haw. 1980); *Morton Int’l, Inc. v. Gen.*

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Because equitable principles are a product of judge-made law, the doctrinal argument is often a busy practitioner's first and last choice. However, the technique of developing grounds of decision based on reported judicial experience is an art.⁴⁷ The art of analogy, or case analysis, depends on what points of similarity and dissimilarity are deemed important.⁴⁸ How the judge answers the question of importance determines whether the prior decisional rule will be distinguished or applied.⁴⁹ Likeness in the cases can be measured at the level of facts or values.⁵⁰ Consequently, cases of equitable estoppel must be the mirror image of each other with respect to facts *and* values to ensure application of the defense.⁵¹

There are few such precedents on point.⁵² Cases of estoppel are often complex,⁵³ confusing,⁵⁴ and complicated by conflicting precedents.⁵⁵ The chaotic state of equity jurisprudence makes such cases easy to distinguish.⁵⁶

Accident Ins. Co. of Am., 629 A.2d 831, 873 (N.J. 1993); UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc., 770 N.E.2d 1068, 1080 (Ohio Ct. App. 2001), *appeal denied*, 766 N.E.2d 1002 (Ohio 2002). *See also infra* Part V. "Discretion" in the above text refers to the appropriateness or legitimacy of the court to deviate from existing law. *See generally* Kent Greenawalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges*, 75 COLUM. L. REV. 359, 380 (1975). The term is not being used to designate the level of appellate review for the decision. *See* T. Leigh Anenson, *The Triumph of Equity: Equitable Estoppel in Modern Litigation*, 27 REV. LITIG. (forthcoming Spring 2008) [hereinafter *Triumph of Equity*] (arguing that the policy choices of the judge be given a liberal abuse of discretion review on appeal).

⁴⁶ *See, e.g., Rauscher*, 691 N.W.2d at 852 ("Equity is determined on a case-by-case basis when justice and fairness so require."); *Ohio St. Bd. of Pharmacy v. Frantz*, 555 N.E.2d 633 (Ohio 1990) (explaining that the purpose of equitable estoppel is "to promote the ends of justice"); *see also* *Straup v. Times Herald*, 423 A.2d 713, 720 (Pa. Super. Ct. 1980) (describing equitable estoppel as a flexible doctrine subject to a balancing of the equities between the parties).

⁴⁷ Horwitz, *supra* note 25. For a description of the basic pattern of legal reasoning by analogy, see EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING 1-2 (1949); *see also* Larry Alexander, *The Banality of Legal Reasoning*, 73 NOTRE DAME L. REV. 517, 523 (1998) (referring to Levi's book as a "classic" work on legal reasoning).

⁴⁸ HUH, *supra* note 12, at 120; STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING 83 (1985).

⁴⁹ *See* BURTON, *supra* note 48; *see also* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 1016 (1996) (explaining grounds to apply cases by analogy and to distinguish them).

⁵⁰ HUH, *supra* note 12, at 43, 139.

⁵¹ *See* HUH, *supra* note 12, at 116-18 (discussing intra-type attacks against precedent as including distinguishing cases on their facts or for policy reasons).

⁵² HUH, *supra* note 12, at 116 (noting that in difficult cases, the factual similarity or dissimilarity is not clear).

⁵³ *See* MEGARRY & BAKER, *supra* note 1, at v (preface) (calling equity "unavoidably a complex and referential subject"); John B. Campbell Jr., *A Decade of Aukerman: An Analysis of Laches and Estoppel in the Federal Circuit*, 43 IDEA 299, 299 (2003) ("[E]stoppel can be very complicated and there are as yet unsettled issues in [this area] of the law." (citations omitted)); HAROLD GREVILLE HANBURY, *ESSAYS IN EQUITY* 32 (1934) ("[E]quity cases generally contain very complicated facts, and the facts of one case may be

Moreover, a risk in equity, or in any other area of law with abstract concepts like justice, is that the rules of decision become a free-for-all for the courts and make the identification of decisional patterns difficult.⁵⁷ Viewing the role of precedent from the perspective of rules and standards explains why. “Rules” are applied formalistically and depend on factual determinations.⁵⁸ “Standards” are applied realistically and depend on value judgments.⁵⁹ As rules

at first sight exactly similar to those of another, and yet, on closer examination, reveal just one little element which will prevent the complete coincidence of the two cases.” (citing cases)); *see also* DiMauro v. Pavia, 492 F. Supp. 1051, 1056 (D. Conn. 1979) (describing case for equitable relief as one of “Dickensian complexity”).

⁵⁴ *Cf.* Walter Wheeler Cook, *Equitable Defenses*, 32 YALE L.J. 645, 657 (1923) (reviewing case confusion concerning the pleading of equitable defenses after the merger and concluding that clear legal analysis is “absolutely essential if we are ever to blend common law and equity law into a single, harmonious, and self-consistent system”).

⁵⁵ *See, e.g.*, Grigson v. Creative Artists Agency, L.L.C., 210 F.3d 524, 527 (5th Cir. 2000) (discussing expanded application of equitable estoppel in enforcing arbitration clause). *Contra* Ervin v. Nokia, Inc., 812 N.E.2d 534, 541–42 (Ill. App. Ct. 2004).

⁵⁶ *See* HANBURY, *supra* note 53, at 34–36 (reporting that respect for precedent did not paralyze the old ideals due to the fine distinctions in the cases).

⁵⁷ Courts may pick up the broad phraseology but not the broad sentiments underlying them. *See* MCCLINTOCK ON EQUITY, *supra* note 1, at 29 (noting that the “brevity and generality” of the maxims of equity “prevent them from having much utility” in predicting court action in a certain situation). After reviewing the American scene as it related to collateral estoppel, Robert Millar made the following remarks:

What thus appears in the Anglo-American law is the case of a basically simple matter which by an indiscriminating adherence to traditional dogma, coupled with lack of attention to historical evolution, has become complicated in the extreme. There is no good reason why a state of affairs so at variance with every consideration of directness and certainty should continue to be maintained.

Robert Wyness Millar, *The Premises of the Judgment as Res Judicata in Continental and Anglo-American Law (Part III)*, 39 MICH. L. REV. 238, 262 (1940); *cf.* Whitacre P’ship v. Biosignia, Inc., 591 S.E.2d 870, 891 (N.C. 2004) (“We are confident that our trial courts will apply the doctrine judiciously, and not in a reflexive or technical manner that would defeat its underlying purpose.”).

⁵⁸ HUHNS, *supra* note 12, at 51–52.

⁵⁹ *Id.* The subject of rules and standards has received a great deal of scholarly attention. *See, e.g.*, Larry Alexander, *Incomplete Theorizing: A Review Essay of Cass R. Sunstein’s Legal Reasoning and Political Conflict*, 72 NOTRE DAME L. REV. 531, 541 (1997) (“Rules are often described as ‘bright-line’ (clear and easy to follow), ‘formal’ (to be applied without regard to substance of the results but only with regard to the rule’s terms), and ‘opaque’ (to the rules’ background justifications). Standards are norms that have the opposite characteristics. . . . Standards are thus vague, substantive (as opposed to formal), and transparent (to background values.)”); Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58 (1992) (“Rules aim to confine the decisionmaker to facts. . . . A legal directive is ‘standard’-like when it tends to collapse decisionmaking back into the direct application of the background principle or policy to a fact situation.”). Of course, law takes many forms and falls along a continuum between rules and standards. Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 26 (2000); *see also* David L. Faigman, *Constitutional Adventures in Wonderland: Exploring the Debate Between Rules and Standards Through the Looking Glass of the First Amendment*, 44 HASTINGS L.J. 829, 831 (1993) (denying any concrete categories of rules and standards); James G. Wilson, *Surveying*

age, courts question their validity.⁶⁰ As standards age, courts incrementally determine their meaning.⁶¹ While the debate between rules and standards is usually framed as a dichotomy,⁶² Huhn places them within a dialectical relationship.⁶³ He proposes that cases are the common denominator that move the law from one end of the spectrum to the other.⁶⁴ Hence, the analogical process of reasoning predominant in precedent is a never-ending cycle of learning and unlearning, then learning again. In law and in life, it is an essential rhythm.

To eliminate the uncertainty in the progression from standards to rules, however, courts are prone to harden such principles into a doctrine that is applied too mechanistically.⁶⁵ In fact, the English Court of Chancery during the eighteenth and nineteenth centuries came to be called a court of “crystallized conscience.”⁶⁶ Though the clarification of equitable principles in some areas was considered a positive improvement on equity’s administration,⁶⁷ their

the Forms of Doctrine on the Bright Line—Balancing Test Continuum, 27 ARIZ. ST. L.J. 773, 825 (1995) (describing various forms of legal commands such as multi-factor tests and totality of the circumstances tests).

⁶⁰ Wilson Huhn, *The Stages of Legal Reasoning: Formalism, Analogy and Realism*, 48 VILL. L. REV. 305, 376–79 (2003) [hereinafter *Stages of Legal Reasoning*].

⁶¹ *Id.*

⁶² See Larry Alexander, *Can Law Survive the Asymmetry of Authority*, in RULES AND REASONING: ESSAYS IN HONOUR OF FRED SCHAUER 39, 42 (Linda Meyer ed., Hart Publishing 1999) (viewing rules and standards from the standpoint of fairness); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992) (viewing rules and standards for their economic efficiency).

⁶³ *Stages of Legal Reasoning*, *supra* note 60, at 307 (proposing that precedent bridges the transition between formalism and realism and vice versa).

⁶⁴ *Id.*; accord Korobkin, *supra* note 59, at 26. In terms of the stages of development of the law, the endless alteration of standard and rule can be understood as a choice between equity and law. Cf. HUHNS, *supra* note 12, at 53 (noting similarity between policy analysis and standards as both interpret law by reference to its consequences). See generally Roscoe Pound, *The End of Law as Developed in Legal Rules and Doctrines*, 27 HARV. L. REV. 195 (1914) [hereinafter *End of Law*].

⁶⁵ Mark Gergen describes the same phenomena in the area of tortious interference with contract and business relations where case results have become the panacea in the search for a semblance of certainty. See generally Gergen, *supra* note 11. Justice Cardozo criticized the practice of drawing analogies to the facts of the case without also considering the policies involved:

Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule.

CARDOZO, *supra* note 27, at 20; see also Cass R. Sunstein, Commentary, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 756–57 (1993).

⁶⁶ HANBURY, *supra* note 53, at 35.

⁶⁷ *Id.* at 32 (describing the “golden age” of equity as beginning during the time of Lord Nottingham, who began the transformation of equity “from a heterogeneous medley of isolated, empirical reliefs into a stable and increasingly rigid system of rules,” until the first years of the nineteenth century). After the creation of the English Court of Chancery during the fourteenth century, the organization of equitable rules began under Lord Ellesmere (1596–1617), Lord Nottingham (1673–82), Lord Harwicke (1737–56), culminating with

uncompromising character in other areas was criticized as too rigid.⁶⁸ This rigidity, or *rigor aequitatis* as it was called, emitted equitable precepts that came to suffer the same fate as the rules of the common law.⁶⁹ The court's inability or unwillingness to account for the surrounding circumstances was denounced as defeating the ultimate purpose of the legal system to provide just results.⁷⁰ Today, human nature and heavy dockets press present purveyors of the past protective doctrines of equity to look for easy answers to difficult questions with the same unfair and potentially *inequitable* outcomes.

As standards move to rules, moreover, problems arise when the formal rules announced in the cases no longer account for the operative rules actually applied. So it is with equity. In many cases involving equitable principles, judges are mimicking medieval mottos but adopting modern means that determine the result.⁷¹ Equitable remedies⁷² and defenses outside of estoppel⁷³ have come under scrutiny.

In the middle of the twentieth century, for example, Zechariah Chaffee undertook the arduous task of grouping cases according to their particular

Lord Eldon (1801–27) . MEGARRY & BAKER, *supra* note 1, at 9–10; *see also* Main, *supra* note 19, at 439–40.

⁶⁸ *See, e.g.*, MEGARRY & BAKER, *supra* note 1, at 7–9. The systemization of equity principles began when non-clerical chancellors were drawn from the ranks of the common lawyers. *Id.* at 9–10; *see also* John L. Garvey, *Some Aspects of the Merger of Law and Equity*, 10 CATH. U. L. REV. 59, 63 (1961) (attributing the systemization of equity to the role of lawyers, the improved methods of collecting and distributing precedents, and the establishment of limitations on the sovereign); Garrard Glenn & Kenneth Redden, *Equity: A Visit to the Founding Fathers*, 31 VA. L. REV. 753, 779 (1945) (noting that St. Thomas More was the first lawyer to be Lord Chancellor in 1529).

⁶⁹ Upon the retirement of Lord Eldon in the early nineteenth century, he stated:

The doctrines of this Court ought to be as well settled and made as uniform almost as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed with every succeeding judge. Nothing would inflict on me greater pain, in quitting this place, than the recollection that I had done anything to justify the reproach that the equity of this Court varies like the Chancellor's foot.

Gee v. Pritchard, (1818) 39 Eng. Rep. 670, 674 (Ch.); *cf.* Douglas Laycock, *The Triumph of Equity*, LAW & CONTEMP. PROBS. 53, 71 (1993) (stating his suspicion that the historical stereotype of law as rigid and equity as flexible was an exaggeration).

⁷⁰ *See, e.g.*, Garvey, *supra* note 68, at 63 (“[E]quity became just as legal, just as strict, as the common-law itself.”).

⁷¹ For example, equity once required an interest in property as a condition of equity jurisdiction (in addition to the irreparable injury requirement). WILLIAM Q. DE FUNIAK, HANDBOOK OF MODERN EQUITY 123 (2d ed. 1956). Courts, however, frequently asserted the requirement at the very moment they evaded it. *Id.* Einstein remarked that “[m]ost mistakes in philosophy and logic occur because the human mind is apt to take the symbol for the reality.” ALBERT EINSTEIN, COSMIC RELIGION 101 (1931); *see also* *Theory of Judicial Decision*, *supra* note 19, at 660–61 (attributing the phenomena of formal and operative rules to our changing picture of the law).

⁷² *See* DOUGLAS LAYCOCK, THE DEATH OF THE IRREPARABLE INJURY RULE (1991) (reviewing 1400 injunction cases); *see also* Douglas Laycock, *The Death of the Irreparable Injury Rule*, 103 HARV. L. REV. 687 (1990).

⁷³ CHAFFEE, *supra* note 25, at 2 (discussing unclean hands).

factual circumstances in an attempt to understand the equitable defense of clean hands.⁷⁴ He concluded there was no overarching principle of clean hands, only “a bundle of rules relating to quite diverse subjects.”⁷⁵ Chafee further reasoned that the use of the clean hands maxim does harm by sometimes distracting judges from the basic policies of the situation.⁷⁶

In researching equitable remedies more recently, Douglas Laycock found evidence that courts were employing oblique operative rules that explained the case outcomes while outwardly offering other formal rules of decision.⁷⁷ The prevalence of covert reasoning led to confusion in the cases and errors in judgment.⁷⁸ The point of both examples is that judges are human, and like human relationships, judicial slips will be less frequent if courts say what they mean and mean what they say.⁷⁹

Estoppel has not had the benefit of a comprehensive analysis on the relationship between the expressed rules or reasons for the decisions and the results.⁸⁰ Even if the law *in action* is consonant with principles expressed in the cases, abstractions found in the defense of estoppel force attorneys to look to particular fields of law to assess how courts are resolving these equitable issues.⁸¹ No different than other equitable defenses, estoppel will absorb the

⁷⁴ See Zechariah Chafee, Jr., *Coming into Equity with Clean Hands: I*, 47 MICH. L. REV. 877 (1949); Zechariah Chafee, Jr., *Coming into Equity with Clean Hands: II*, 47 MICH. L. REV. 1065 (1949).

⁷⁵ CHAFEE, *supra* note 25, at 2.

⁷⁶ *Id.* at 94–95. For an analysis of unclean hands in the twenty-first century, see T. Leigh Anenson, *Treating Equity Like Law: A Post-Merger Justification of Unclean Hands*, AM. BUS. L.J. (forthcoming Spring 2008).

⁷⁷ See *supra* note 72.

⁷⁸ Laycock, *supra* note 72, at 693 (“rules . . . have become obstacles to decision instead of guides”); K.N. Llewellyn, *Book Reviews*, 52 HARV. L. REV. 700, 703 (1939) (reviewing O. PRUSNITZ, *THE STANDARDIZATION OF COMMERCIAL CONTRACTS IN ENGLAND AND CONTINENTAL LAW* (1937)) (emphasizing that “[c]overt tools are never reliable tools”); see also CHAFEE, *supra* note 25, at 303 (“One of the chief troubles with the frequent preoccupation of judges with questions of power is that it makes them slide over much more important questions of wisdom and fairness which ought to receive careful attention.”).

⁷⁹ See, e.g., HUHNS, *supra* note 12, at 63 (“The disclosure of the true reasons for a decision performs a valuable function: the stated premises of the law will over time be empirically tested.”).

⁸⁰ The Supreme Court of Connecticut in *Preston v. Mann* opined:

The doctrine of *estoppel in pais*, notwithstanding the great number of cases which have turned upon it, and are reported in the books, can not be said even yet to rest upon any determinate legal test, which will reconcile the decisions, or will embrace all transactions, to which the great principles of equitable necessity, wherein it originated, demand that it should be applied. In fact, it is because it is so purely a doctrine of practical equity, that its technical application is so difficult, and its reduction to the form of abstract formulas is still unaccomplished.

25 Conn. 118, 128 (1856).

⁸¹ See McCLINTOCK ON EQUITY, *supra* note 1, at 45 (“The true scope and effect of the doctrine [of equitable estoppel] in any particular field of the law can only be understood in connection with the problems to which it has been applied in that field.”); see also Williams v. Williams, 129 P.3d 428, 430–33 (Alaska 2006) (equitable estoppel tolling of statute of

qualities of the substantive law against which it is applied.⁸² To be sure, the defense depends not only on the nature of the plaintiff's conduct, but also on the nature of the defendant's conduct as well as the case itself. Like a chameleon, equitable estoppel will take its color from the surrounding circumstances.⁸³

It becomes doubly important to define and apply estoppel with reference to a particular context where there is precedent announcing its inherent unpredictability.⁸⁴ Even the seemingly rule-like collateral⁸⁵ or judicial⁸⁶

limitations); *Glazer v. Dress Barn, Inc.*, 873 A.2d 929, 949 (Conn. 2005) (describing equitable estoppel with additional element of part performance when used as exception to statute of frauds); *State v. Harris*, 881 So.2d 1079, 1084–85 (Fla. 2004) (analyzing estoppel in criminal context); *Markey v. Carney*, 705 N.W.2d 13, 21–22 (Iowa 2005) (equitable estoppel in paternity action); *cf. Garvey*, *supra* note 68, at 73–74 (arguing for the adoption of equitable defenses not yet recognized in legal actions and urging that equitable principles are not too uncertain given that they have been time tested and refined by repeated application over the centuries).

⁸² CHAFEE, *supra* note 25, at 94–95.

⁸³ The chameleon metaphor has been used in numerous articles and cases, from words, *Comm'r of Internal Revenue v. Nat'l Carbide Corp.*, 167 F.2d 304, 306 (2d Cir. 1948) (Hand, J.); to legal interpretation, John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 919 (2004); to issues determining the right to trial by jury, *Ross v. Bernhard*, 396 U.S. 531, 550 (1970) (Stewart, J., dissenting).

⁸⁴ *See Johnson v. Henderson*, 314 F.3d 409, 414 (9th Cir. 2002) (finding equitable estoppel rests on non-exhaustive list of factors); *A.C. Aukerman Co. v. R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1039 (Fed. Cir. 1992) (expressly allowing the court to choose any number of factors in an equitable estoppel decision); *Horn v. Cole*, 51 N.H. 278, 299 (1968) (“The doctrine is not reduced to the limits of any formula.” (citation omitted)); *Lucas v. Hart*, 5 Clarke 415, 418 (Iowa 1857) (“[T]here can be no fixed and settled rules of universal application, to regulate them, as in technical estoppels[.]”); *Welland Canal Co. v. Hathaway*, 8 Wend. 480, 483 (N.Y. 1832) (stating that “[f]rom the manner in which a party must avail himself of [these estoppels], it is obvious that there can be no fixed and settled rules of universal application”); *Sullivan v. Buckhorn Ranch P’ship*, 119 P.3d 192, 202 (Okla. 2005) (“Equitable estoppel . . . must be determined by the circumstances in each case and according to right and justice.”); *Burson*, *supra* note 3, at 802 (“No mechanical rules govern . . . [an] equitable estoppel determination.”); 28 AM. JUR. 2D, *supra* note 2, § 27 (explaining that “estoppels cannot be subjected to fixed and settled rules of universal application, like legal estoppels, or hampered by the narrow confines of a technical formula” (citing cases)); *see also* discussion *supra* notes 44–46 and accompanying text.

⁸⁵ Collateral estoppel or “issue preclusion” refers to the effect of a prior judgment in precluding subsequent litigation of the same issue of fact or law. *See* 2 A.C. FREEMAN, A TREATISE ON THE LAW OF JUDGMENTS § 720 (Edward W. Tuttle ed., 5th ed. 1993); Allan D. Vestal, *Rationale for Preclusion*, 9 ST. LOUIS U. L.J. 29, 29–30 (1964). The development of collateral estoppel in England and America has been traced to the technical common law doctrine of estoppel by record, the Roman principle of *res judicata*, along with important contributions concerning the conclusiveness of judgments by the ecclesiastical courts and Exchequer. *See generally* Millar, *supra* note 57. The U.S. Supreme Court first recognized the doctrine of collateral estoppel in *Cromwell v. County of Sac.*, 94 U.S. 351 (1876).

⁸⁶ The Tennessee Supreme Court created judicial estoppel or “the doctrine of preclusion,” *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 600 (9th Cir. 1996), in *Hamilton v. Zimmerman*, 37 Tenn. (5 Sneed) 39 (1857). *See* Brian A. Dodd, *Civil Procedure—Intent and the Application of Judicial Estoppel: Equitable Shield or Judicial*

estoppels, which apply when a prior inconsistency occurred during a lawsuit or similar truth-seeking process,⁸⁷ may truly be in a standard-like state with only a non-exclusive list of factors to determine their application.⁸⁸ Courts have also been encouraged to embrace equity by making up more estoppels.⁸⁹ These situations leave limited direction as to the ordering and reconciliation of goals and values relevant to a particular case.

Without the guidance of an established “goal matrix,”⁹⁰ the learning curve may be exhilaratingly steep. Many practicing lawyers have graduated without the benefit of a comprehensive course in equity.⁹¹ There have been no books or

Heartbreak?, 22 AM. J. TRIAL ADVOC. 481, 481 (1998); see also *Wills v. Kane*, 2 Grant 60, 63 (Pa. 1853). The U.S. Supreme Court adopted the doctrine of judicial estoppel in *Sturm v. Boker*, 150 U.S. 312, 334 (1893).

⁸⁷ See, e.g., *In re Chambers Development Co., Inc.*, 148 F.3d 214, 229 (3d Cir. 1998) (ruling that judicial estoppel “seeks to prevent a litigant from asserting a position inconsistent with one that [he or she] has previously asserted in the same or in a previous proceeding”); *State of Haw. Org. of Police Officers (SHOPO) v. Soc’y of Prof’l Journalists—Univ. of Haw. Chapter*, 927 P.2d 386, 408 (Haw. 1996) (stating elements of collateral estoppel as requiring that the initial position be taken in a prior lawsuit or dispute resolution process that resulted in a judgment in which the party to be estopped had a full and fair opportunity to litigate); see also T. Leigh Anenson, *The Role of Equity in Employment Noncompetition Cases*, 42 AM. BUS. L.J. 1, 25–41 (2005) [hereinafter *Role of Equity*] (comparing the two doctrines). For other estoppel genre, see, for example, Steve R. Johnson, *The Taxpayer’s Duty of Consistency*, 46 TAX. L. REV. 537 (1991) (discussing “duty of consistency” as an estoppel to prevent taxpayers from profiting from all sorts of tax abuses); Peter Raven-Hansen, *Regulatory Estoppel: When Agencies Break Their Own “Laws,”* 64 TEX. L. REV. 1 (1985) (discussing doctrine of “regulatory estoppel” estopping agencies to enforce an action when they have violated their own procedures); J. Douglas Uloth & J. Hamilton Rial, III, *Equitable Estoppel as a Basis for Compelling Nonsignatories to Arbitrate—A Bridge Too Far?*, 21 REV. LITIG. 593 (2002) (discussing “direct-benefits” estoppel compelling nonsignatories to arbitrate); Note, *Estopping the Madness at the PTO: Improving Patent Administration Through Prosecution History Estoppel*, 116 HARV. L. REV. 2164 (2003) (discussing “prosecution history” estoppel).

⁸⁸ See *New Hampshire v. Maine*, 532 U.S. 742, 750 (2001) (providing a non-exclusive list of factors for judicial estoppel). From another angle, both situations described above can be seen as the formalistic creation of an estoppel standard from precedent. *Stages of Legal Reasoning*, *supra* note 60, at 374 (noting that rules and standards correspond with formalism and realism in their application, but not in their derivation).

⁸⁹ *Robinson v. Fife*, 3 Ohio St. 551, 567–68 (1854). The Supreme Court of Ohio declared: “[I]f some strict definition of estoppel forbid such an expression, . . . add[] a new name to the body of legal nomenclature. [It is n]ot the name by which it may be distinguished, but the substance of equity which supports it . . .” *Id.* (Warden, J., dissenting); see also MCCLINTOCK ON EQUITY, *supra* note 1, at 45 (noting that “the term has been extended in many cases beyond its original meaning”).

⁹⁰ J.C. Smith, *Machine Intelligence and Legal Reasoning*, 73 CHI.-KENT L. REV. 277, 327 (1998).

⁹¹ See Robert S. Stevens, *A Brief on Behalf of a Course in Equity*, 8 J. LEGAL EDUC. 422, 422 (1956) [hereinafter *Course in Equity*] (noting the trend of law schools that do not offer a separate course in equity); see also Re, *supra* note 14, at xiv (“[T]he elimination of a separate course in equity in many of the law schools in the United States has caused much that is truly valuable in the study of equity to be either completely lost or scattered to the point of useless dilution in various courses.”).

treatises dedicated to equitable defenses.⁹² The most recent treatise on equitable estoppel is almost a hundred years old.⁹³ The law review literature, largely student-written, has examined the defense only in special contexts such as patent law,⁹⁴ paternity,⁹⁵ arbitration clauses,⁹⁶ government action,⁹⁷ insurance

⁹² The literature dealing generally with equitable defenses is dated. *See generally* Cook, *supra* note 54; E.W. Hinton, *Equitable Defenses Under Modern Codes*, 18 MICH. L. REV. 717 (1920); *see also* Rosalind Poll, Note, "He Who Comes Into Equity Must Come With Clean Hands," 32 B.U. L. REV. 66 (1952). Most of it pertains to procedural issues in pleading following the fusion of law and equity and to the ongoing issue of the adoptability of non-estoppel defenses in actions at law. *See, e.g.*, Edward Yorio, *A Defense of Equitable Defenses*, 51 OHIO ST. L.J. 1201 (1990); Garvey, *supra* note 68; Robert S. Stevens, *A Plea for the Extension of Equitable Principles and Remedies*, 41 CORNELL L.Q. 351 (1956) [hereinafter *Extension of Equitable Principles*]. An article by Douglas Laycock in 1993 makes mention of equitable defenses in an overall discussion of the integration of equitable principles into law. *See generally* Laycock, *supra* note 69. Published fifty years ago or so, various books also address the subject of merger. *See, e.g.*, CHAFEE, *supra* note 25 (published in 1950); RALPH A. NEWMAN, *EQUITY AND LAW: A COMPARATIVE STUDY* (1961).

⁹³ In the United States, the last book dealing comprehensively with the subject of equitable estoppel was published in 1913. *See* MELVILLE M. BIGELOW, *A TREATISE ON THE LAW OF ESTOPPEL, OR OF INCONTESTABLE RIGHTS* (James N. Carter ed., 6th ed. 1913).

⁹⁴ *See, e.g.*, Jay I. Alexander, *Cabining the Doctrine of Equivalents in Festo: A Historical Perspective on the Relationship Between the Doctrines of Equivalents and Prosecution History Estoppel*, 51 AM. U. L. REV. 553 (2002); Kenneth D. Bassinger, *Allocating Linguistic Uncertainty in Patent Claims: The Proper Role of Prosecution History Estoppel*, 49 LOY. L. REV. 339 (2003); Peter Corcoran, *The Scope of Claim Amendments, Prosecution History Estoppel, and the Doctrine of Equivalents after Festo VI*, 9 TEX. INTEL. PROP. L.J. 159 (2001); Rachel Clark Hughey, *Implied Licenses by Legal Estoppel*, 14 ALB. L.J. SCI. & TECH. 53 (2003); Douglas Lichtman, *Rethinking Prosecution History Estoppel*, 71 U. CHI. L. REV. 151 (2004); Note, *Estopping the Madness at the PTO: Improving Patent Administration Through Prosecution History Estoppel*, 116 HARV. L. REV. 2164 (2003); Derek Walter, Note, *Prosecution History Estoppel in the Post-Festo Era: The Increased Importance of Determining What Constitutes a Relevant Narrowing Claim Amendment*, 20 BERKELEY TECH. L.J. 123 (2005).

⁹⁵ *See* Jacquelyn A. West, *Maintaining the Legal Fiction: Application of the Presumption of Paternity and Paternity by Estoppel in Pennsylvania*, 42 DUQ. L. REV. 577 (2004); Heather Faust, Comment, *Challenging the Paternity of Children Born During Wedlock: An Analysis of Pennsylvania Law Regarding the Effects of the Doctrines of Presumption of Legitimacy and Paternity by Estoppel on the Admissibility of Blood Tests to Determine Paternity*, 100 DICK. L. REV. 963 (1996). For other domestic relations issues, *see* Jane Muller-Peterson, *Expanding the Definition of Parenthood: Why Equitable Estoppel as Used to Impose a Child Support Obligation on a Lesbian Domestic Partner Isn't Equitable: A Case Study*, 4 GEO. J. GENDER & L. 781 (2003); Rebecca C. Raskin, Note, *Fisco v. Department of Human Services: The Inequity of Equitable Defenses in Child Support Arrearage Cases*, 48 ME. L. REV. 153 (1996).

⁹⁶ *See* Uloth & Rial, *supra* note 87; Jeff DeArman, Comment, *Resolving Arbitration's Nonsignatory Issue: A Critical Analysis of the Application of Equitable Estoppel in Alabama Courts*, 29 CUMB. L. REV. 645 (1998); Frank Z. LaForge, Note, *Inequitable Estoppel: Arbitrating with Nonsignatory Defendants Under Grigson v. Creative Artists*, 84 TEX. L. REV. 225 (2005); Scott M. McKinnis, Note, *Enforcing Arbitration with a Nonsignatory: Equitable Estoppel and Defensive Piercing of the Corporate Veil*, 1995 J. DISP. RESOL. 197 (1995); *see also* David F. Sawrie, *Equitable Estoppel and the Outer Boundaries of Federal*

contracts,⁹⁸ and unfair competition cases concerning the validity of restrictive employment covenants.⁹⁹ Outside of these discrete areas is a hodge-podge of estoppel decisions on miscellaneous topics unadorned by informed commentary. As a result, attorneys are left to search the electronic databases to dissect divergent decisions on a case by case basis.

Furthermore, an absence of precedent, or the more likely scenario of conflicting precedents, cause counsel to explore other arguments in support of the invocation of estoppel.¹⁰⁰ Moving beyond doctrinal argument to include tradition and policy analysis in the litigation arsenal is especially important if equitable estoppel application depends on the removal of one of its more established elements. Recall that precedent bridges the gap between rules and standards.¹⁰¹ Rather than standards going to rules as courts apply estoppel and determine its meaning in particular factual circumstances, counsel would be seeking to move the rule-like elements of “reliance,” “harm,” “intent,” or even the “inconsistency”¹⁰² in the opposite direction. As rules go to standards, courts

Arbitration Law: The Alabama Supreme Court's Retrenchment of an Expansive Federal Policy Favoring Arbitration, 51 VAND. L. REV. 721 (1998).

⁹⁷ See Fred Ansell, Comment, *Unauthorized Conduct of Government Agents: A Restrictive Rule of Equitable Estoppel Against the Government*, 53 U. CHI. L. REV. 1026 (1986); John F. Conway, Note, *Equitable Estoppel of the Federal Government: An Application of the Proprietary Function Exception to the Traditional Rule*, 55 FORDHAM L. REV. 707 (1987); Laura Pfefferle, Comment, *A New Green Government Weapon: Shooting Down Regulatory Takings with Estoppel*, 13 TUL. ENVTL. L.J. 471 (2000). For zoning issues in particular, see Kenneth R. Kupchak et al., *Arrow of Time: Vested Rights, Zoning Estoppel, and Development Agreements in Hawai'i*, 27 U. HAW. L. REV. 17 (2004); Lynn Ackerman, Comment, *Searching for a Standard for Regulatory Takings Based on Investment-Backed Expectations: A Survey of State Court Decisions in the Vested Rights and Zoning Estoppel Areas*, 36 EMORY L.J. 1219 (1987).

⁹⁸ See Anderson & Holoher, *supra* note 42; Jeremy P. Brummond, *Will the Smoke Clear?: Application of Waiver and Estoppel in Missouri Insurance Law*, 66 MO. L. REV. 225 (2001); Stanley C. Nardoni & John S. Vishneski, III, *The Illinois Estoppel Doctrine Revisited: How Promptly Must an Insurer Act?*, 24 N. ILL. U. L. REV. 211 (2004).

⁹⁹ See *Role of Equity*, *supra* note 87 (discussing the issue from a policy perspective); T. Leigh Anenson, *Litigation Between Competitors with Mirror Restrictive Covenants: A Formula for Prosecution*, 10 STAN. J.L. BUS. & FIN. 1 (2005) (relating strategic implications).

¹⁰⁰ In those jurisdictions that have criteria for its application, reliance and other so-called “elements” of equitable estoppel may be not be settled. *Compare* First Fed. Sav. & Loan Ass'n of Toledo v. Perry's Landing, Inc., 463 N.E.2d 636, 648 (Ohio Ct. App. 1983) (describing Ohio law of equitable estoppel as including misrepresentation and reliance) *with* UZ Engineered Prods. Co. v. Midwest Motor Supply Co., Inc., 770 N.E.2d 1068, 1080 (Ohio Ct. App. 2001), *appeal denied*, 766 N.E.2d 1002 (Ohio 2002) (omitting reliance as an element of equitable estoppel).

¹⁰¹ See *supra* note 64 and accompanying text.

¹⁰² Another reason to move beyond doctrinal argument would be to attempt to use equitable estoppel when there was no inconsistency of behavior by the opponent at all. Expanding estoppel beyond its present boundary of contradictory conduct would enhance its application and essentially equate it with the equitable defense of clean hands. Like the other elements, the recipe a la Huhn to justify the removal of the one constant in all of the

question their validity by creating exceptions that overtly (or implicitly through fictions) circumvent the restriction in a particular case pursuant to their policies.¹⁰³ Unless courts directly resort to other types of arguments, rules evolve into standards through the use of realistic analogies that identify the interests justifying exceptions to the rule.¹⁰⁴

The leading case of equitable estoppel, for example, emphasized that the earlier position must be taken “wil[l]fully.”¹⁰⁵ A series of subsequent cases, however, eradicated the intent element altogether in light of reliance or other interests at stake.¹⁰⁶ Now, many courts allow knowledge or even negligence to satisfy the state of mind of the party to be estopped.¹⁰⁷ Courts are also removing the requirement of reliance in a variety of circumstances based on a plurality of policies.¹⁰⁸ The phenomena of rules returning to standards is also evidenced in the creation of ambiguous estoppel species like quasi-estoppel¹⁰⁹ that forego the traditional elements (other than an inconsistency) when there is

estoppels would be primarily policy-based leavened with other precedents and a twist of tradition.

¹⁰³ See *supra* notes 58–60. For the masterful use of policy analysis to choose among competing analogies in an equitable estoppel case, see *Horn v. Cole*, 51 N.H. 287, 290 (1868). See generally Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119 (1985).

¹⁰⁴ *Stages of Legal Reasoning*, *supra* note 60, at 378–79; see also John Dickinson, *The Law Behind the Law: II*, 29 COLUM. L. REV. 285, 290 (1929). Standards evolve into rules through the use of formalistic analogies that identify the factual similarities in the cases that apply the standard. *Stages of Legal Reasoning*, *supra* note 60, at 378–79.

¹⁰⁵ *Pickard v. Sears*, (1837) 112 Eng. Rep. 179, 181 (K.B.); see also *Horn*, 51 N.H. at 293 (“The case of *Pickard v. Sears*, 6 Ad. & Ellis 469, decided as late as 1837, appears to have been regarded, both in England and in this country, as the leading case at law on this subject.”).

¹⁰⁶ See *Freeman v. Cooke*, (1848) 154 Eng. Rep. 652, 656 (Exch.); *Gregg v. Wells*, (1839) 113 Eng. Rep. 35, 38 (Q.B.); see also *Jurgensen v. New Phoenix Atl. Condo. Council of Unit Owners*, 843 A.2d 865, 876 (Md. 2004) (stating that “an estoppel may arise even where there is no intent to mislead”); *Whitacre P’ship v. Biosignia, Inc.*, 591 S.E.2d 870, 891 (N.C. 2004) (finding that an intent to deceive is not an element of judicial estoppel, albeit inadvertence or mistake in taking the earlier position may avoid its application).

¹⁰⁷ See, e.g., *Gould v. Transamerican Assocs.*, 167 A.2d 905, 912 (Md. 1961) (stating that actual knowledge or imputed knowledge of the truth may form the basis of equitable estoppel); *Rauscher v. City of Lincoln*, 691 N.W.2d 844, 851 (Neb. 2005) (requiring actual or constructive knowledge of the real facts of the party to be estopped and lack of knowledge or the means to know the truth of the party asserting estoppel); *Champlin Oil & Ref. Co. v. Chastain*, 403 S.W.2d 376, 388 (Tex. 1966) (ruling that “one having the means of knowledge may be held to the same standard of responsibility as one possessing conscious knowledge”).

¹⁰⁸ See discussion *infra* Part V.

¹⁰⁹ See, e.g., *KTVB, Inc. v. Boise City*, 486 P.2d 992, 993–95 (Idaho 1971) (acknowledging that the application of quasi-estoppel must be focused on the specific facts and circumstances of the case); *Keese v. Fetzek*, 723 P.2d 904, 906 (Idaho Ct. App. 1986) (describing quasi-estoppel as a “broadly remedial doctrine, often applied ad hoc to specific fact patterns”); see also *Simmons v. Burlington, Cedar Rapids & N. Ry. Co.*, 159 U.S. 278, 291 (1895) (stating that equity “may operate in analogy to estoppel—may produce a *quasi* estoppel—upon the rights of remedy”).

an unfair or unconscionable outcome.¹¹⁰ Similar to the function of quasi-contract in the field of contract law, quasi-estoppel provides a penumbra of public policy around the estoppel defense without breaking class barriers or sacrificing precedent.

Still, even in those jurisdictions that echo the embryonic character of estoppel,¹¹¹ lower courts will be understandably reluctant to deviate from existing decisions in distinguishing a case.¹¹² The right incentives for change must therefore be found in the traditions of equity and in its policies.

IV. TRADITION

The argument of tradition is useful in reminding court and counsel that equity is basically as old as dirt. Indeed, the original common law composition of estoppel applied only to legal transactions in real property such as the formal transfer of interest by livery of seisin.¹¹³ The medieval English practice of feoffment with livery of seisin was where “land was conveyed with the symbolic handing over of a clod of dirt.”¹¹⁴

The very reason for the invention of equity was that the common law judges in the Middle Ages were reading the law, to borrow the words of Justice Stevens, “through the opaque green eyeshade of the cloistered bookkeeper.”¹¹⁵

¹¹⁰ See *Jamison v. Consol. Utils., Inc.*, 576 P.2d 97, 102–03 (Alaska 1978) (listing various considerations to analyze unconscionability); *Fast v. Fast*, 496 P.2d 171, 175 (Kan. 1972) (“‘Quasi-estoppel’ . . . must be based on the previous assertion of a position so inconsistent with the one now taken as to make the present claim unconscionable.”); see also *Unruh v. Indus. Comm’n*, 301 P.2d 1029, 1031 (Ariz. 1956) (ruling that quasi-estoppel is invoked when “the conscience of the court is repelled by the assertion of rights inconsistent with a litigant’s past conduct”); *Willard v. Ward*, 875 P.2d 441, 443 (Okla. Civ. App. 1994) (similar); cf. *Christensen v. Pocatello*, 124 P.3d 1008, 1015 (Idaho 2005) (declaring that the elements of quasi-estoppel are established when a litigant (1) with knowledge of the facts (2) takes a position inconsistent with a former position (3) to the disadvantage of another).

¹¹¹ See *supra* notes 84–89 and accompanying text.

¹¹² See *MEGARRY & BAKER, supra* note 1, at 11 (“[T]he prevailing judicial climate seems to favour the refinement of existing rules rather than the creation of new doctrines.”); see also *Garvey, supra* note 68, at 62 (“Extoll as we might the advantages of justice without law in the theoretical realm, we are skeptical of achieving it in the practical world in which we live and have demanded, for the most part, justice according to law.”).

¹¹³ *MCCLINTOCK ON EQUITY, supra* note 1, at 44.

¹¹⁴ *United States v. Lee*, 232 F.3d 556, 559 (7th Cir. 2000); see also *CORNELIUS J. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY* 162 (2d. ed. 1988) (depicting livery of seisin as where “A would usually hand over to B a branch, twig or piece of turf as a symbol of the land itself”).

¹¹⁵ *Smith v. United States*, 507 U.S. 197, 217 (1993) (Stevens, J., dissenting). Equity and law began in one system but were gradually split into two systems during the fourteenth century as a result of power struggles between the English barons and the king. See *Main, supra* note 19, at 439–40; *NEWMAN, supra* note 92, at 23 (“The jealousy of Parliament, itself not yet altogether secure in its recently acquired authority, toward the growing authority of the courts, had created an atmosphere which dictated a policy of self-constraint on the part of the common law courts in accepting novel types of cases, and becoming rigidified.”); see also *MEGARRY & BAKER, supra* note 1, at 8 (explaining how courts became hampered by

Whether it was truly an intolerant attitude or the lack of power under existing procedures causing the injustices,¹¹⁶ the historical record is clear that equity was administered as an ameliorating and uplifting force.¹¹⁷ Fredrick Maitland said that “[e]quity had come not to destroy the law, but to fulfil [sic] it.”¹¹⁸ From an overriding outlook of justice, law and equity were not seen as conflicting, but as complementary systems.¹¹⁹

Surely, the unfathomable issues created by modern society that test the limits of the law and challenge the skill and ingenuity of even the most experienced juridical actors are still worthy of an equitable solution. Refusing to “do equity”¹²⁰ and adopt equitable estoppel would cast aside a millennium of moral teaching and experience at a time when the need to craft solutions to complex problems is greater than ever.¹²¹ Thus, a decision eliminating an element of estoppel that may be initially perceived as bending the rules and possibly losing the predictability and stability fostered by precedent, can be valued for conforming to the settled expectations of society.¹²² Albeit in a

precedent and the “Provisions of Oxford, 1258, which restrained the Chancellor from issuing new types of writ of his own initiative”).

¹¹⁶ See Garvey, *supra* note 68, at 60 (“[T]he Court of Chancery was originally established to assure a fair and just resolution of those controversies which the common-law judges could not, or would not, satisfactorily resolve.”); William Searle Holdsworth, *Blackstone’s Treatment of Equity*, 43 HARV. L. REV. 1, 18–19 (1929).

¹¹⁷ See, e.g., Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339, 350 (1905) (concluding that “the rise of the court of chancery preserved [our legal system] from medieval dry rot”).

¹¹⁸ Holdsworth, *supra* note 116, at 25 (quoting F.W. MAITLAND, EQUITY 17 (1909)).

¹¹⁹ Socrates to Glaucon:

The time then has arrived, Glaucon, when, like huntsmen, we should surround the cover, and look sharp that justice does not slip away, and pass out of sight, and get lost; for there can be no doubt that we are in the right direction; only try and get a sight of her, and if you come within view first, let me know.

2 THE DIALOGUES OF PLATO 257 (B. Jowett trans., 1907); see also Holdsworth, *supra* note 116, at 25–28 (discussing how the different remedies were a conflict in substantive rights and duties of citizens, but not a conflict in the form of the rules themselves); 1 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS § 1 (2d ed. 1956) (“There is no conflict in form . . . ; there is only a conflict in substance.”). The evils of the two systems were still pronounced as “[o]ften in the course of the same litigation parties were driven to and fro between courts of common law and courts of equity as no court had full power to grant complete relief.” MEGARRY & BAKER, *supra* note 1, at 12. To mitigate these problems, later statutes gave law courts some ability to grant injunctions and the chancery court the power to award damages. *Id.*

¹²⁰ It is easy to emphasize that estoppel stems from equity with a derivation of the word “equity” built into the name *equitable* estoppel. See *Horn v. Cole*, 51 N.H. 287, 289 (1868) (emphasizing the term *equitable estoppel* as originating in equity).

¹²¹ See generally *End of Law*, *supra* note 64; *accord Extension of Equitable Principles*, *supra* note 92 (arguing for the integration of equitable principles for the same reason).

¹²² Of course, counsel should present the case as one of first impression rather than one that will change the law in order to avoid a choice between precedent and tradition. The issue as to which legal argument prevails over another is a controversial matter of “commensurability” discussed *infra* in Part V. See HUHNS, *supra* note 12, at 151–57 (describing the relational cross-type argument). An intra-type attack on tradition can be

somewhat Machiavellian manner, court or counsel could maintain that breaking the rules is a respected tradition.¹²³ The settled expectations of society served by the tradition type of argument extraordinarily view estoppel law as unsettled in accordance with the conscience of the ecclesiastical chancellors.¹²⁴

Despite the different epochs of flexibility and alleged inflexibility of equity throughout history,¹²⁵ “[t]he stream of equity is, in reality, continuous throughout ages.”¹²⁶ While there has been some comments to the contrary,¹²⁷ proof that change is a recurring theme of not only equity, but of equitable estoppel in particular, can be evidenced by present day court practice. Courts have not only expanded equitable estoppel, but have also created companion theories of collateral, judicial, and quasi-estoppel.¹²⁸ The estoppel doctrines are alive and well.¹²⁹ These defenses are not simply something that remained on the musty records of the Master of the Rolls¹³⁰ in Chancery, or that dead judges applied at the time the Pilgrims landed on Plymouth Rock.¹³¹ While equitable estoppel predated the American colonial experience, U.S. courts have embraced the doctrine in all areas of law.¹³² The variability of equity, which gives judges freedom to decide differently, is its most salient feature.¹³³ Therefore, courts

made by challenging the evidence supporting it or by referencing a competing tradition. HUHNS, *supra* note 12, at 127–29; *see also* Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1198–99 (1987) (discussing the conflict between general and specific traditions).

¹²³ This form of doublespeak is undoubtedly why attorneys are accused of talking out of both sides of their mouth.

¹²⁴ *See* 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE AS ADMINISTERED IN ENGLAND AND AMERICA § 42, at 47 (14th ed. 1918) (describing the chancellor as the “dispenser of the king’s conscience”); POMEROY’S EQUITY JURISPRUDENCE, *supra* note 1, §§ 33–35 (explaining the procedure established by Edward III in 1349 that ordered the chancellor to base his decision on “Honesty, Equity, and Conscience”); *see also* Dewese v. Reinhard, 165 U.S. 386, 390 (1897) (“A court of equity acts only when and as conscience commands . . .”).

¹²⁵ *See supra* notes 67–70 and accompanying text.

¹²⁶ HANBURY, *supra* note 53, at 34.

¹²⁷ *See* NEWMAN, *supra* note 92, at 38 (concluding that the “concept is obsolete that equity is discretion without rules”).

¹²⁸ *See* discussion *supra* Part II. For a wonderful rendition of the tradition argument in adopting judicial estoppel for the first time, *see generally* Whitacre P’ship v. Biosignia, Inc., 591 S.E.2d 870 (N.C. 2004) (discussing the “historical roots” of estoppel).

¹²⁹ Not only are courts creating companion estoppel doctrines, but they are also expanding these subsidiary theories. *See* discussion *supra* Part II.

¹³⁰ The Master of the Rolls had custody of the public records. MEGARRY & BAKER, *supra* note 1, at 9 (discussing the master’s increasing responsibilities from custodian to general deputy to judge).

¹³¹ CHAFEE, *supra* note 25, at 30.

¹³² *E.g.*, Glazer v. Dress Barn, Inc., 873 A.2d 929, 947 (Conn. 2005) (“Equitable estoppel is a doctrine that operates in many contexts to bar a party from asserting a right that it otherwise would have but for its own conduct.”).

¹³³ *See* Ian Holloway, *Judicial Activism in an Historical Context: Of the Necessity for Discretion*, 24 MEM. ST. U. L. REV. 297, 317 (1994) (“[E]quity could never have developed had there not been . . . a recognition that the exercise of discretion was an appropriate

could be encouraged to harness that tradition by changing the elements of estoppel in the interests of justice.

Convincing the court that “justice” means dismissing the case under some version of estoppel is, at bottom, the heart of the matter.¹³⁴ Arguments that seek to persuade a court that a particular result will fulfill the purpose or purposes of a legal precept, or the end of law in general, come from policy analysis.¹³⁵

V. POLICY

Policy analysis considers the law in light of its purposes and likely consequences.¹³⁶ Until the first half of the twentieth century, American courts did not formally recognize policy analysis as a legitimate legal argument.¹³⁷ Only with the influence of such legal icons as Holmes, Cardozo, Pound, and Llewellyn did our picture of law change (along with our conceptions of the

judicial function.”); *see also* Garvey, *supra* note 68, at 62 (describing the ““very ancient tradition”” of equity that frees judges to consider all the circumstance) (quoting 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 168 (1895)). For recognition of the flexibility in modern cases, see *Heckler v. Cmty. Health Servs. of Crawford County, Inc.*, 467 U.S. 51, 59 (1984) (declaring that “a hallmark of the doctrine [of estoppel] is its flexible application”); *see also* discussion *supra* Part II.

¹³⁴ CARDOZO, *supra* note 27, at 65 (“[W]hen the social needs demand one settlement rather than another, there are times when we must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger ends.”); H.L.A. HART, *PROBLEMS OF PHILOSOPHY OF LAW*, in 6 *ENCYCLOPEDIA OF PHILOSOPHY* 271 (Paul Edwards ed., 1967) (discussing the multiplicity of diverse considerations that courts are required to balance in the common law method of analysis); *see also* FELIX FRANKFURTER, *OF LAW AND MEN, PAPERS AND ADDRESSES OF FELIX FRANKFURTER: 1939–1956*, at 43 (Philip Elman ed., 1956) (recognizing contradictory conceptions of justice). In discussing the difficulty of choosing among competing interests to find a just solution in a case, Professor Green explained: “The ultimate question in any particular case is: how does the court value the respective interests subject to its power?” Leon Green, *Relational Interests*, 29 *ILL. L. REV.* 1041, 1049 (1935). He answered the question as follows:

This is beyond the range of arbitrary rules and formulas and colorful phrases, and in the realm of what we like to call “reason and justice.” Reason and justice are, of course, not always safe guides for the settlement of disputes, but historically they have been the best we have had.

Id.

¹³⁵ HUHNS, *supra* note 12, at 63.

¹³⁶ Huhn describes the policy argument as a five-step process:

First, one must imagine the hypothetical consequences of interpreting the law one way or another. Second, one must identify the interest or abstract principle that a rule serves. Third, one must evaluate the weight of that interest or principle. Fourth, one must estimate the likelihood that the rule will accomplish its goal and serve this interest or principle. Finally, one must simultaneously balance the weight and likelihood of all the competing interest and principles.

Stages of Legal Reasoning, *supra* note 60, at 317–18; *see also* HUHNS, *supra* note 12, at 131.

¹³⁷ HUHNS, *supra* note 12, at 55–56.

court's role within it).¹³⁸ Their thesis was that laws should be evaluated not by *a priori* first principles like those found in natural law, but in light of their consequences.¹³⁹ This approach to the law gave courts permission to acknowledge underlying human choices rather than hide behind mystical absolutes.¹⁴⁰ Given its decidedly realistic view of the world, the philosophy came to be called "legal realism," which eclipsed the more formalistic and conceptualistic modes of analysis.¹⁴¹

The complexity of policy analysis stems from the fact that laws often serve multiple values and purposes which represent a compromise among their competing aims.¹⁴² They may support targeted societal goals such as ensuring a safe water supply or providing assistance to the poor, instrumental concerns such as compensation and deterrence, or abstract values such as equality and justice.¹⁴³ Any decision necessarily involves a resolution of the conflicts and an ordering of these values through a balancing process.¹⁴⁴

¹³⁸ Stemming from the British school of utilitarianism and the American philosophy of pragmatism, policy analysis has become a principal force in American law. See *Teaching Legal Analysis*, *supra* note 12, at 447–48 ("It was introduced into our case law by arguably the greatest American jurists of this century, Learned Hand, Oliver Wendell Holmes, Louis Brandeis, and Benjamin Cardozo and was written into our statutory law by reformers such as Grant Gilmore and Karl Llewellyn." (footnotes omitted)); see also *Theory of Judicial Decision*, *supra* note 19, at 654 (discussing the impact of our ideas about the end of law, such as philosophical, political, ethical, as a "phenomena of the highest significance for the understanding of the actual functioning of judicial justice").

¹³⁹ Horwitz, *supra* note 25, at 62–63 (discussing the realist attack on the intellectual foundations of conceptualism and formalism). Christopher Columbus Langdell, former Dean and Dane Professor of Law at Harvard Law School, believed law is a science. Thomas A. Woxland, *Why Can't Johnny Research? or It All Started with Christopher Columbus Langdell*, 81 LAW LIB. J. 451, 455 (1989); see also HUHNS, *supra* note 12, at 9–10 (noting Langdell's pedagogical innovations of introducing the case method Socratic discussion and the casebook to the American law school). Holmes characterized Langdell as a "legal theologian." *Book Notices*, 14 AM. LAW. 233, 234 (1880). Posner called Langdell's approach "Platonism". Richard Posner, *The Decline of Law as an Autonomous Discipline: 1962–87*, 100 HARV. L. REV. 761, 762 (1987).

¹⁴⁰ Law had been identified with science as a set of immutable principles that could be deduced by logic and that existed independent of human intention. Horwitz, *supra* note 25, at 62–63 (explaining that conceptualism collapsed in the twentieth century because science and philosophy no longer legitimized the theory that judges passively discovered the law); GRANT GILMORE, *THE DEATH OF CONTRACT* 97–98 ((Ohio State Univ. Press 1974) (footnote omitted) (calling Langdell's idea of law as science a "sort of mystical absolute" that "seems absurd")); see also HUHNS, *supra* note 12, at 10–11 ("[The] rules of law do not describe objective truth, they reflect subjective intentions.").

¹⁴¹ See *Teaching Legal Analysis*, *supra* note 12, at 447–48.

¹⁴² HUHNS, *supra* note 12, at 135.

¹⁴³ *Id.* at 135 (listing "abstract values such as liberty and equality, instrumental concerns such as economic efficiency or criminal deterrence, or targeted societal goals such as improving the nutritional value of food or streamlining traffic flow"). *Contra* Dworkin, *supra* note 39, 1067–73 (distinguishing "principles" from "policies" and stating that only principles may legitimately form the basis of judicial decision-making).

¹⁴⁴ The indeterminacy associated with the range of choice, including the selection of policy goals and the process of balancing the competing policies, makes policy analysis the

The divided court system of equity and law in England and America literally replicated the duality of law in seeking both fairness (equity) and certainty (law).¹⁴⁵ The application of equitable principles reflects a policy choice that fairness (progress) prevails over certainty (stability), at least if the latter value is to be achieved by sacrificing Aristotelean *epikeia* (justice).¹⁴⁶ According to Aristotle, equitable justice involved a consideration of the consequences.¹⁴⁷ Maitland also described equity in the thirteenth century as an allowance for judges to “consider all the circumstances” and “adapt the means to the end.”¹⁴⁸ Since that time, courts have engaged in this kind of consequential analysis¹⁴⁹ (either implicitly by divining duties or explicitly through balancing) in the creation and application of equitable defenses.¹⁵⁰ Equity was once associated with conceptualistic church canons and notions of

most subjective type of argument. HUHNS, *supra* note 12, at 68; *see also* Smith, *supra* note 90, at 326–27:

Each case decided in favor of a plaintiff or a defendant resolves a conflict of interest by hierarchically ordering the goals pitted against each other in the dispute An examination of the law will show that the decisions of the courts . . . result in a fairly consistent ordering of our values.

For this reason, certain judges will only resort to these “ends” of the law at the end of the line. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1187 (1989) (“We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them.”).

¹⁴⁵ Aristotle described the law’s dilemma when he said that equitable justice considers the unique individual circumstances which demand a departure from the rigid rules. ARISTOTLE, *ETHICA NICOMACHEA* 1131 (W.D. Ross trans., Oxford Univ. Press 1st ed. 1925); *see also* *End of Law*, *supra* note 64, at 204–13 (reviewing the period of strict law evidenced by the Roman *ius civile* whose chief end was certainty). Civil law legal systems accommodated these paradoxical ideas together. NEWMAN, *supra* note 92, at 14, 30, 34.

¹⁴⁶ *Compare* LAWRENCE JOSEPH RILEY, *THE HISTORY, NATURE AND USE OF EPIKEIA IN MORAL THEOLOGY* 137 (1948) (defining *epikeia* as the correction of laws which in their expression are deficient by reason of their universality) with Leonard J. Emmeglick, *A Century of the New Equity*, 23 TEX. L. REV. 244 (1945), *reprinted in* *SELECTED ESSAYS ON EQUITY*, *supra* note 14, at 53, 62 (editorial comment) (defining *epikeia* more loosely as the interpretation of law by its spirit rather than its letter).

¹⁴⁷ *See generally* Anton-Hermann Chroust, *Aristotle’s Conception of “Equity” (Epieikeia)*, 18 NOTRE DAME L. REV. 119, 125–26 (1942).

¹⁴⁸ POLLOCK & MAITLAND, *supra* note 133, at 168 (writing about the thirteenth century before the separation of equity and law).

¹⁴⁹ HUHNS, *supra* note 12, at 51 (“The distinctive feature of policy arguments is that they are consequentialist in nature.”).

¹⁵⁰ *See, e.g.*, *Rauscher v. City of Lincoln*, 691 N.W.2d 844, 851 (Neb. 2005) (“Equity is determined on a case-by-case basis when justice and fairness so require.”). Policy analysis applies to law as well as equity. Huhn emphasizes the majority opinion in the case of *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (1921), written by Judge Cardozo where he determined that “equity and fairness” outweighed “consistency and certainty.” HUHNS, *supra* note 12, at 166; *see also* Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the “Law of Satisfaction”—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 443 (1995) (citing the case as an example of the ongoing tug of war in contract law between the norms of certainty and predictability and the norms of fairness and justice).

natural law with a view to the “heaven of legal concepts [rather than] human experience.”¹⁵¹ Notwithstanding the formalistic viewpoint, the application of equitable principles served the same end of fairness and flexibility as present day policy.

During the bygone era of a split system of law and equity,¹⁵² equitable defenses like estoppel developed to prevent wrongs or injuries in conjunction with cases initially brought in the courts of common law.¹⁵³ When parties were penalized in a court of law under circumstances that were considered “inequitable,” they could file an affirmative equitable action in a court of equity for relief from the common law judgment.¹⁵⁴ This occurred, for example, if a plaintiff was claiming damages for breach of contract entered into by reason of fraud¹⁵⁵ or if a plaintiff were attempting to set up legal title under circumstances that would be contrary to good conscience on account of his or

¹⁵¹ HUHNS, *supra* note 12, at 60 (quoting Karl Llewellyn as reprinted in Ansaldi, *supra* note 26, at 748–49); *see also* *End of Law*, *supra* note 64, at 217 (noting the problem with natural law was that its abstractions were stretched so thin as to be deprived of their moral character). The philosophies of natural law and deontology were replaced by British utilitarianism and American pragmatism. *See* discussion *supra* note 138. The latter two philosophies were precursors to the movement of legal realism. *Id.*

¹⁵² There are six states in the United States that retain the separation of law and equity either in separate courts (Delaware, Mississippi, Tennessee) or in separate divisions of the same court (Illinois, New Jersey, South Carolina). For a historical survey of the three different treatments of equity within the state systems at the turn of the twentieth century, see generally Henry Ingersoll, *Confusion of Law and Equity*, 21 YALE L.J. 58 (1911) (summarizing the state systems as having separate courts, having the same court but separate procedures, and having the same court with the same procedures).

¹⁵³ *See* CHAFEE, *supra* note 25, at 29–30; *see also* Charles E. Clark, *The Union of Law and Equity*, 25 COLUM. L. REV. 1, 3 (1925); *Extension of Equitable Principles*, *supra* note 92, at 354.

¹⁵⁴ *See* MEGARRY & BAKER, *supra* note 1, at 12 (“A plaintiff who had obtained a judgment in his favour in a court of law might be prevented from enforcing it by a ‘common injunction’ granted by the Court of Chancery, because in the opinion of the latter court he had obtained the judgment unfairly.”); *see also* POMEROY’S EQUITY JURISPRUDENCE, *supra* note 1, §§ 181, 231 (explaining that the chancellor enjoined either the common law proceedings or the enforcement of the judgment). Ralph Newman describes the kind of areas in need of equitable protection in the early years of the Court of Chancery:

A person who injured another in self-defense must pay damages for the battery; he was also guilty of a crime. Killing by accident was a crime. Misrepresentation was not protected against by existing forms of action. A wife’s property belonged to her husband during coverture. If one paid a debt expressed in a sealed instrument without obtaining an acquittance, he could be made to pay again. Only contracts in the form of covenants under seal were enforced, and even in such cases the common law courts gave relief only if the breach involved an affirmative act. The theory of dependent promises was as yet undreamed of, and recovery for unjust enrichment was four centuries away.

NEWMAN, *supra* note 92, at 25–26.

¹⁵⁵ *See* WILLIAM F. WALSH, A TREATISE ON EQUITY 491–92 (1930); *see also* MEGARRY & BAKER, *supra* note 1, at 543–60 (describing myriad situations that equity would recognize as fraud).

her prior declarations or conduct.¹⁵⁶ Because the early common law did not recognize these defenses, the defendant had no recourse at law but could seek relief in the chancery court to enjoin the common law cause of action.¹⁵⁷ By the allowance of an equitable *defense*, equity moderated the harshness of the law and provided discretionary relief based upon individualized interests of fairness.¹⁵⁸ Accordingly, at a time when common law judges were blindly applying precedent, equity made allowance for “mercy in an otherwise rigid, rule-bound system.”¹⁵⁹

Whether mercy rained from heaven¹⁶⁰ or the hands of the chancellor,¹⁶¹ most courts viewed equitable estoppel as a flexible doctrine to be applied or

¹⁵⁶ *E.g.*, *Horn v. Cole*, 51 N.H. 287 (1868) (explaining that estoppel was used to enjoin suits at law to establish legal title and to cancel deeds and other instruments or to decree conveyances).

¹⁵⁷ *See Extension of Equitable Principles*, *supra* note 92, at 351 (describing the natural antagonism between law and equity in early English history because equity courts attempted to correct the judgments of the common law courts). “The thorn in the side of the common-law judges was the presumption of the Chancellor in daring to enjoin the prosecution of actions at common law.” Garvey, *supra* note 68, at 71. It was the effect of enjoining a common law judgment that precipitated the great fight between Ellesmere (equity) and Coke (law). MEGARRY & BAKER, *supra* note 1, at 12. In resolving the conflict, King James I decreed the legitimacy and primacy of equity in the dual system. *See Main*, *supra* note 19, at 446 (describing the events as a “drama that could carry an opera”). The impact of the decree would act as an impetus to liberalize the common law writ system to minimize encroachment by equity. LARRY A. DiMATTEO, *EQUITABLE LAW OF CONTRACT: STANDARDS AND PRINCIPLES* 30 (2001); J.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 14 (1888) (noting the “[j]ealousy of the growing jurisdiction of the chancellors was doubtless a potent influence in bringing the common-law judges to the point of allowing the action of assumpsit”).

¹⁵⁸ *See* MEGARRY & BAKER, *supra* note 1, at 14:

A plaintiff who proved an infringement of his legal right was entitled at law to a general and unqualified judgment against the defendant, regardless of the circumstances of the infringement and his own conduct. But in equity there was no *right* to relief, and the plaintiff’s conduct or the other circumstances of the case might lead equity to refuse any equitable remedy, even though the plaintiff had proved his case.

See also Oliver Wendell Holmes, *Early English Equity*, 1 L.Q. REV. 162, 162–63 (1885) (discussing substantive doctrines developed in chancery).

¹⁵⁹ *See* Jacqueline M. Nolan-Haley, *The Merger of Law and Mediation: Lessons From Equity Jurisprudence and Roscoe Pound*, 6 CARDOZO J. CONFLICT RESOL. 57, 58–59 (2004) (citing Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83 (1993)).

¹⁶⁰ WILLIAM SHAKESPEARE, *THE MERCHANT OF VENICE*, act 4, sc. 1, lines 184–85 (William Lyon Phelps, ed., Yale Univ. Press 1923) (“The quality of mercy is not strain’d, / It droppeth as the gentle rain from heaven . . .”); *see also* 2 *THE WORKS OF JOHN MILTON* 307 (F. Patterson ed., 1931) (“temper . . . Justice with Mercie”). The trial scene in Shakespeare’s *The Merchant of Venice* is thought to highlight the tension between common law literalism and flexible equitable construction. *See* Thomas C. Bilello, *Accomplished with What She Lacks: Law, Equity, and Portia’s Con*, 16 LAW & LITERATURE 11, 12 (2004) (discussing the ongoing debate among critics regarding the connection of the play to English equity).

¹⁶¹ *Deweese v. Reinhard*, 165 U.S. 386, 390 (1897) (“A court of equity acts only when and as conscience commands . . .”).

denied as weighted by the equities between the parties.¹⁶² It is not surprising, then, that equity has come to be regarded as public policy.¹⁶³ It bears repeating that equity and public policy promote the same purpose of change based on modern morality. Thus, in applying equitable estoppel, there is no room for “the skepticism that ceaselessly exploits the appetite for certainty.”¹⁶⁴

In fact, the alignment of these two concepts toward the same goal answers the question of commensurability for equitable estoppel cases. An admitted weakness of the pluralistic model of law is its failure to explain what judges should do when two types of arguments direct different decisions. Philip Bobbitt’s conclusion that the commensurability of legal conventions is left to the conscience of the court has been subject to criticism.¹⁶⁵ The fear being that without fetters to bind judges in the selection process, they will run amuck and adversely affect the legitimacy of the law.¹⁶⁶ Yet no better solutions have been forthcoming.¹⁶⁷ Like things of a more tangible nature, justification of any legal proposition must stand the test of time. “It needs perspective, as a great building.”¹⁶⁸ It cannot be crowded by popular opinion or be judged from a few cases.¹⁶⁹ Besides, Emily Sherwin reminds us that there is a certain amount of restraint in the common law construction process.¹⁷⁰ It is built brick by brick on

¹⁶² See, e.g., *Straup v. Times Herald*, 423 A.2d 713, 720 (Pa. Super. Ct. 1980) (describing equitable estoppel as a flexible doctrine subject to a balancing of the equities between the parties).

¹⁶³ See *Course in Equity*, *supra* note 91, at 424–25 (noting one of the factors to influence a decision in equity was that special consideration was given to the public interest). Equity can be linked to public policy via another Aristotelean idea of teleology that identified the purposes of human existence and then inferred from those purposes the rules of right conduct. See HUHNS, *supra* note 12, at 54 (explaining that policy analysis originated with the “ends-means” philosophy of teleology) (citing ARISTOTLE, NICHOMACHEAN ETHICS 3 (Oswald Trans. 1962)). The fusion of law and equity coincided with the rise of realism.

¹⁶⁴ See Patterson, *supra* note 17, at 293.

¹⁶⁵ See, e.g., PATTERSON, *supra* note 22, at 143; Richard S. Markovits, *Legitimate Legal Argument and Internally-Right Answers to Legal-Rights Questions*, 74 CHI.-KENT L. REV. 415, 445 (1999); Gene R. Nichol, *Constitutional Judgment*, 91 MICH. L. REV. 1107, 1115 (1993); Balkin & Levinson, *supra* note 38, at 1796.

¹⁶⁶ PATTERSON, *supra* note 22, at 149 (“[I]t is far from self-evident that the exercise of conscience is consistent with—or guarantees—justice.”).

¹⁶⁷ See, e.g., Eskridge & Frickey, *supra* note 11, at 351–52; Fallon, *supra* note 122, at 1243–46.

¹⁶⁸ THE WORKS OF RALPH WALDO EMERSON 309 (Tudor Publ’g Co. n.d.).

¹⁶⁹ Patterson, *supra* note 11, at 272 (“Lawyers have always recognized the effects of ‘hermeneutic delay’—that is, the meaning of today’s precedent can only be known in the fullness of time.”). A similar sentiment can be found in poetry: “One must wait until the evening to see how splendid the day has been.” Wanda S. Martinson, *My Twenty-Five Years with “Old Number Three,”* 99 COLUM. L. REV. 1405, 1405 (1999) (quoting Sophocles).

¹⁷⁰ Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179 (1999) (beautifully explaining the benefits of judge-made law as providing numerous data for decision-making, representing the collaborative efforts of judges over time, correcting the biases that might lead judges to discount the force of precedent, and exerting a conservative force in the law to change at a gradual pace).

the backs of numerous judges bound by past precedents in saying what the law is—one case at a time.¹⁷¹

While the issue of choice among legal conventions is likely to remain one of the great mysteries of the law,¹⁷² Huhn's take on Bobbitt's position suggests a solution in cases of equitable estoppel. Huhn posits that measuring the relative persuasiveness of different legal arguments entails reconciling the fundamental values served by each type of argument.¹⁷³ Huhn's explanation supports the proposition that there should at least be a presumption that policy analysis prevails over precedent and tradition in analyzing estoppel. This hypothesis is underscored by the fact that both precedent and tradition types of argument discussed earlier point to policy analysis. Recollect that there is precedent paradoxically pronouncing there is no precedent.¹⁷⁴ Similarly, tradition demonstrates that there is no tradition, at least from the standpoint of a consistently common definition of the defense.¹⁷⁵ Therefore, policy is the path marked out by the *collective* conscience of the courts and the community.¹⁷⁶

Furthermore, reminiscent of the institutional idea of "conscience" in the application of equitable principles in Chancery,¹⁷⁷ judges using policy analysis are not free to decide in accordance with their own personal preferences.¹⁷⁸ The sea of policy choices must be anchored to one or more of the other four types of argument (text, intent, precedent, tradition).¹⁷⁹

¹⁷¹ See generally *id.*

¹⁷² Cardozo said it best:

What is it that I do when I decide a case? To what sources of information do I appeal for guidance? In what proportions do I permit them to contribute to the result? In what proportions ought they to contribute? If a precedent is applicable, when do I refuse to follow it? If no precedent is applicable, how do I reach the rule that will make a precedent for the future? If I am seeking logical consistency, the symmetry of the legal structure, how far shall I seek it? At what point shall the quest be halted by some discrepant custom, by some consideration of the social welfare, by my own or the common standards of justice and morals? Into that strange compound which is brewed daily in the caldron of the courts, all these ingredients enter in varying proportions.

CARDOZO, *supra* note 27, at 10.

¹⁷³ See HUHNS, *supra* note 12, at 152; see also discussion *supra* Part II. Ultimately, then, Huhn's position on the relative merit of competing arguments returns to policy analysis of higher order values.

¹⁷⁴ See discussion *supra* Part III.

¹⁷⁵ See discussion *supra* Part IV.

¹⁷⁶ In her practice experience, the author has found inspiration for the ordering of these types of arguments in the cases themselves.

¹⁷⁷ MEGARRY & BAKER, *supra* note 1, at 8 ("'Conscience' was in theory based on universal and natural justice rather than the private opinion or conscience of the Chancellor.").

¹⁷⁸ HUHNS, *supra* note 12, at 134; see also Nichol, *supra* note 165, at 1114.

¹⁷⁹ HUHNS, *supra* note 12, at 133–35 (describing rules as the marker buoys and the policies they serve as the unseen anchor).

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In making a policy argument, counsel should align the consequences of the case with the policies in support of the defense.¹⁸⁰ A good start may be to remember that the basic orthodoxy of equity is that “[the] good guys should win and [the] bad guys should lose.”¹⁸¹ This seemingly simple conclusion reminds us that marshalling the facts of a case for a favorable application of estoppel is not too different from the stance taken at trial to influence a jury.¹⁸² The difference with equity is that such a characterization or “spin” of the case would be for the benefit of the judge and not the jury.¹⁸³ Notably, judicial notice of the factual basis of a policy argument is considered a matter of law.¹⁸⁴ The judge would be determining “legislative” facts as opposed to the jury determining “adjudicative” facts.¹⁸⁵ Legislative facts are not limited by the rules of evidence and allow maximum creativity in convincing the court to take judicial notice that the application of estoppel will bring about a certain state of affairs.¹⁸⁶

For instance, in estopping the revocation of a permit to install a wastewater system without the statutorily required certifications, the Vermont Supreme Court in *In re Lyon*¹⁸⁷ took note of the absence of any adverse impact.¹⁸⁸ It held that allowing the system “in no way undermines Vermont’s wastewater permitting system,”¹⁸⁹ which, according to the statute, was designed to protect human health and the environment.¹⁹⁰

¹⁸⁰ A policy argument has a predictive portion followed by an evaluative judgment. *Id.* at 51. The predictive statement requires the court to predict the consequences in giving the law one interpretation or another. *See id.* at 64. The evaluative judgment requires the court to determine the values that are served by the law. *Id.* at 66. Huhn describes the five ways to attack a policy argument: “One can challenge the accuracy of the factual prediction; one can challenge the legitimacy, strength, or likelihood of achieving the policy goal; or one can assert a competing policy.” *Id.* at 141.

¹⁸¹ Roger Young & Stephen Spitz, *SUEM—Spitz’s Ultimate Equitable Maxim: In Equity, Good Guys Should Win and Bad Guys Should Lose*, 55 S.C. L. REV. 175, 177 (2003) (listing maxims); *see also* Eugene Volokh, *Lost Maxims of Equity*, 52 J. LEGAL EDUC. 619, 619 (2002) (listing equally humorous maxims).

¹⁸² Regardless of the legal issues involved, a familiar trial tactic is spinning facts in such a way so that your client is wearing the “white hat.”

¹⁸³ *See Triumph of Equity*, *supra* note 45 (explaining the circumstances under which there may be a jury resolution of the underlying facts supporting equitable estoppel).

¹⁸⁴ HUHNS, *supra* note 12, at 65.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *In re Lyon*, 882 A.2d 1143, 1151 (Vt. 2005).

¹⁸⁸ *Id.* at 1149. The court found there was no present injury to the property or the environment with the system as installed. *Id.* It further found that any future adverse effects could be adequately addressed under existing procedures. *Id.* at 1150.

¹⁸⁹ *Id.* at 1150.

¹⁹⁰ *Id.* at 1150–51; *accord* *Campbell v. Dep’t of Soc. & Health Servs.*, 83 P.3d 999, 1011 (Wash. 2004) (“The doctrine may not be asserted against the government unless it is necessary to prevent a manifest injustice and it must not impair the exercise of government functions.”).

The next step would be to trace those consequences to the purposes of the law. So what are the purposes and policies of equity? Equitable defenses? Equitable estoppel? The inherently variable value of “justice” was obviously a beacon of equity,¹⁹¹ but discerning what Aristotle would do in the twenty-first century is probably too fanciful for modern sensibilities.¹⁹² What proves more promising is examining estoppel opinions, from the early cases to those of the present day, to discern the policies supported by the defense.¹⁹³

Of course, the paramount purpose of equitable estoppel is to prevent the unconscionable conduct of the plaintiff and, concomitantly, withhold aid to the wrongdoer.¹⁹⁴ For the unconscionable or wrong, courts have targeted inconsistent or contradictory behavior of all kinds that occurs before, during, or after the lawsuit.¹⁹⁵ In a case of first impression during the nineteenth century, the New Hampshire Supreme Court in *Horn v. Cole*¹⁹⁶ applied equitable estoppel to suppress fraud and bar a subsequent contradiction concerning the ownership of certain property.¹⁹⁷ The prevailing judicial climate at the time of

¹⁹¹ See, e.g., *Ohio St. Bd. of Pharmacy v. Frantz*, 555 N.E.2d 630 (Ohio 1990); cf. MEGARRY & BAKER, *supra* note 1, at 6 (noting that in modern English statutes, provisions relating to what is “equitable” are usually construed to mean what is “fair”).

¹⁹² It may also encourage a return to the all knowing, yet inscrutable, notion of natural law. See *End of Law*, *supra* note 64, at 217 (noting one of the difficulties of natural law was that moral duties are not tangible).

¹⁹³ Recall that policies must be derived from one of the other types of argument such as precedent.

¹⁹⁴ *Dimond v. Manheim*, 63 N.W. 495, 497 (Minn. 1895):

Its foundation is justice and good conscience; its object is to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of the law, unless prevented by the estoppel; and its practical effect is, from motives of equity and fair dealing, to create and vest opposing rights in the party who obtains the benefit of the estoppel.

See also NEWMAN, *supra* note 92, at 28 (stating that “[c]onsiderations of . . . unconscientious conduct of the plaintiff, were matters of decisive importance to the Chancellor”); *End of Law*, *supra* note 64, at 226–27 (placing law in its historical context and discussing equity stage as preventing the individualistic unconscientious exercise of rights with early twentieth century socialization of law stage that prevents anti-social exercise of rights).

¹⁹⁵ See, e.g., *City of Grosse Pointe Park v. Mich. Mun. Liab. & Prop. Pool*, 702 N.W.2d 106, 116 (Mich. 2005).

¹⁹⁶ 51 N.H. 287 (1868).

¹⁹⁷ The case arose from the attachment of goods bound for the West. The owner of the goods was moving to Illinois to join his son who had recently relocated there from New Hampshire. The goods were to accompany him. Prior to his departure, the owner told the party responsible for the attachment that the goods belonged to his son. The owner falsely stated that his son owned the goods because he owed debts to other persons in the area. The lie was intended to avoid attachment by his creditors. However, unknown to the owner, his son had skipped town without paying a debt to the very person to whom he made the false statement. Consequently, in a twist of fate, the son’s creditor attached the goods in reliance on the false representation. Under the common law claim for trover existing at that time, the plaintiff merely had to prove ownership in the goods and conversion by the defendant to receive a favorable judgment. Thus, when the father sued for the detention of the goods, his son’s creditor asserted that the plaintiff should be estopped by his statements from proving that he owned the goods. *Id.* at 287.

the decision allowed estoppel only when the party to be estopped meant to deceive the person seeking estoppel.¹⁹⁸ Nonetheless, the court extended the protection of the defense even though the plaintiff had meant to deceive another by his initial false statement. It liberalized the element of intent in order to further the policy of fraud prevention which would be defeated under existing doctrine.¹⁹⁹ The court concluded:

In a case depending on a question of “legal ethics,” it would bring down the morality of the law to a very low standard to hold that a party was not liable for the wrong caused by his fraud to one man, because the fraud was contrived against another man.²⁰⁰

Pomeroy lauded the decision in his treatise *Equity Jurisprudence* as “an admirable and accurate presentation of the true reasons and grounds of the doctrine.”²⁰¹

Doctrinal analysis also exposes three other core values of estoppel: promoting fair play,²⁰² protecting weaker parties,²⁰³ and preserving the integrity of the justice system.²⁰⁴ The instrumental objective of fair play is evidenced by the Ohio Court of Appeals decision in *UZ Engineered Products Co. v. Midwest Motor Supply Co., Inc.*²⁰⁵ In the case, one competitor sued another for tortious interference with the non-competition contracts of its former employees.²⁰⁶ When Midwest challenged the validity of the UZ’s employment restrictions on public policy grounds, the court estopped the argument because the former company had and enforced its own contracts containing the same terms.²⁰⁷ UZ had no prior relationship with Midwest and, accordingly, did not detrimentally rely on or even know that the company had employment agreements with identical restrictions.²⁰⁸ Despite the lack of reliance or harm, the court furthered

¹⁹⁸ *Id.* at 289. The plaintiff claimed equitable estoppel did not apply because he did not know about his son’s debt to the defendant. As a result, he could not have intended to defraud the defendant as required in other jurisdictions for the application of estoppel.

¹⁹⁹ The court held that a contrary result would “abdicate [its] duty of administering the equitable doctrine effectually in suppression of fraud and dishonesty” and “defeat the remedy in a large proportion of the cases that fall within the principle on which the doctrine is founded.” *Id.* at 292.

²⁰⁰ *Id.* at 299.

²⁰¹ POMEROY’S EQUITY JURISPRUDENCE, *supra* note 1, § 802.

²⁰² *In re Lyon*, 882 A.2d 1143, 1151 (Vt. 2005) (“We have repeatedly noted that the doctrine of equitable estoppel is based upon the grounds of public policy, fair dealing, good faith, and justice.” (internal quotations and citations omitted)).

²⁰³ *B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 493 (Miss. 2005) (“Equity comes to the aid of those who may not or can not protect themselves.”).

²⁰⁴ *See, e.g., Zechariah Chafee, Jr., Foreword to SELECTED ESSAYS ON EQUITY, supra* note 14, at iii.

²⁰⁵ 770 N.E.2d 1068 (Ohio Ct. App. 2001), *appeal denied*, 766 N.E.2d 1002 (Ohio 2002).

²⁰⁶ *See generally id.*

²⁰⁷ *Id.* at 1079–80.

²⁰⁸ *Id.* at 1080.

the spirit of fair play by checking opportunistic behavior in the application of equitable estoppel.²⁰⁹

A similar concern was evidenced by the Supreme Court of Vermont in *In re Lyon* discussed previously. The court precluded the government from revoking a permit given the agency's failure to follow such statutorily required certifications when issuing wastewater permits to countless other permit applicants.²¹⁰

It was for the protection of weaker parties that Lord Mansfield invoked equitable estoppel in *Montefiori v. Montefiori*,²¹¹ beginning its long association with the common law.²¹² The case arose when one brother sued another to compel the return of a promissory note. Because the note was given in order to create the impression of wealth and facilitate the defendant's marriage, the court denied relief to protect the bride and promote the bonds of holy matrimony.²¹³ Indeed, one of the main purposes of equity in medieval times was to protect those who could not otherwise protect themselves.²¹⁴ More recently, the protection of weaker parties was the concern of the Supreme Court of Hawaii in *AIG Hawai'i Insurance Co., Inc. v. Smith*²¹⁵ and *Filipo v. Chang*.²¹⁶ Notwithstanding an absence of reliance in both cases, an insured and a potential welfare recipient successfully invoked estoppel to ban their more powerful opponents from taking away their respective services.²¹⁷

Promoting fair play and protecting weaker parties was also served by the estoppel decisions of *Morton International, Inc. v. General Accident Insurance Co. of America*²¹⁸ and *Chemical Leaman Tank Lines, Inc. v. Aetna Casualty &*

²⁰⁹ *Id.*

²¹⁰ *In re Lyon*, 882 A.2d 1143, 1145, 1149 (Vt. 2005).

²¹¹ (1762) 96 Eng. Rep. 203 (Ch.).

²¹² Earlier cases on the same subject allowing estoppel had been decided in the English Court of Chancery. See *Dyer v. Dyer*, (1682) 22 Eng. Rep. 869 (Ch.); *Hobbs v. Norton*, (1682) 23 Eng. Rep. 370 (Ch.); *Storrs v. Barker*, 6 Johns. Ch. 88 (N.Y. Ch. 1822) (reviewing *Dyer* and *Hobbs* and also citing other marriage-related cases of estoppel during the same era). But *Montefiori* was the first reported case at law invoking equitable estoppel. Walter S. Beck, *Estoppel Against Inconsistent Positions in Judicial Proceedings*, 9 BROOK. L. REV. 245, 245 (1940).

²¹³ 96 Eng. Rep. at 203; see also *Ingersoll*, *supra* note 152, at 58–59 (commenting how Lord Mansfield “opened the [common law] [c]ourts to the gladsome light of [e]quity”).

²¹⁴ See MEGARRY & BAKER, *supra* note 1, at 8 (discussing an original source seeking equitable aid was the plaintiff who could not get a remedy from a common law court due to the powerful defendant). The protection of weaker parties included those in less advantageous economic positions as a result of transactions as well as those who were in weaker positions by reason of their status. See DE FUNIAK, *supra* note 71, § 60, at 134 (discussing equity jurisdiction in disputes involving domestic or family relationships). At one point in time, married women and minors were not even subject to equitable estoppel. BIGELOW, *supra* note 93, at 620–27.

²¹⁵ 891 P.2d 261 (Haw. 1995).

²¹⁶ 618 P.2d 295 (Haw. 1980).

²¹⁷ *AIG*, 891 P.2d at 266; *Filipo*, 618 P.2d at 300–01. In each case, the court basically replaced reliance with a more severe degree of harm.

²¹⁸ 629 A.2d 831 (N.J. 1993).

*Surety Co.*²¹⁹ in New Jersey. These cases involved insurance contracts where the insurer had misled regulators and then attempted to take advantage of their misdeeds in denying coverage.²²⁰ The courts found that the insureds were entitled to equitable protection even without their reliance on the insurers' inconsistencies.²²¹

Above all, it seems, equitable estoppel is used to protect the court. Throughout history, equity has been concerned with the court's role in administering justice.²²² Undeniably, an attitude "developed in Chancery toward the production of injustice by the very agencies which have been established to do justice."²²³ American-style equity adopted the same dogma. In banning a case on equitable grounds, the U.S. Supreme Court declared that "tampering with the administration of justice . . . is a wrong against the institutions set up to protect and safeguard the public."²²⁴ Fundamentally, equity "is a power which, if wisely exercised, enables a judge to prevent the use of the courts as machinery for extortion or chicanery."²²⁵

The more direct the harm or perceived harm to the legal system, the more likely it is that a court will apply estoppel.²²⁶ Collateral and judicial estoppels are examples of this policy.²²⁷ These trajectories of equitable estoppel deal with

²¹⁹ 89 F.3d 976, 992 (3d Cir. 1996).

²²⁰ *Morton Int'l, Inc.*, 629 A.2d at 873; *see also Chem. Leaman Tank Lines, Inc.*, 89 F.3d at 992 (applying New Jersey law).

²²¹ *See Morton Int'l, Inc.*, 629 A.2d at 873; *Chem. Leaman Tank Lines, Inc.*, 89 F.3d at 992.

²²² *See* BIGELOW, *supra* note 93, at 790 ("[T]he rule requiring consistency of action before the courts is no arbitrary rule, but one demanded . . . by the very object of courts of justice.").

²²³ Chafee, *supra* note 204, at iii.

²²⁴ *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246 (1944).

²²⁵ Arthur L. Goodhart, *Costs*, 38 YALE L.J. 849, 862 (1929).

²²⁶ *See Whitacre P'ship v. Biosignia, Inc.*, 591 S.E.2d 870, 885 (N.C. 2004) (analyzing Philadelphia, Wilmington & Baltimore R.R. Co. v. Howard, 54 U.S. (13 How.) 307, 337 (1852), and its focus on fraud on the court as occupying a gray area between equitable and judicial estoppel and marking the emergence of judicial estoppel in U.S. Supreme Court jurisprudence).

²²⁷ *See, e.g., Levinson v. United States*, 969 F.2d 260, 264 (7th Cir. 1992) (judicial estoppel prevents the perversion of the judicial system by protecting "the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories."); *Montana v. United States*, 440 U.S. 147, 153-54 (1979) (discussing that collateral estoppel protects adversaries from "expense and vexation . . . , conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions"); Courts repeatedly emphasize that judicial estoppel is designed to prevent parties from "playing 'fast and loose' with the court or blowing 'hot and cold' during the course of litigation." *Rosa v. CWJ Contractors, Ltd.*, 664 P.2d 745, 751 (Haw. Ct. App. 1983) (citing *Godoy v. County of Hawaii*, 354 P.2d 78 (Haw. 1960)); *see also Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 360 (3d Cir. 1996) (judicial estoppel prevents a party from assuming a position in a legal proceeding inconsistent with one previously asserted when the inconsistency would allow the party to play "fast and loose with the courts" (quotation marks omitted)). The U.S. Supreme Court explained that the objective of the doctrine of collateral estoppel is to "foster[] reliance on judicial action by minimizing the

inconsistencies during litigation that caused court reliance (judicial estoppel) if not an actual judgment (collateral estoppel).²²⁸ As such, they preclude inconsistent conduct of a party and prevent inconsistent results by the court.²²⁹ The latter denigrates the interest of the law in the predictability of precedent and facilitates the goal of judicial economy by eliminating needless and repetitive litigation.²³⁰

A court's protection of its truth-seeking mission is not only the reason for the creation of new estoppel doctrines, but also for their inevitable expansion.²³¹ Preservation of the legal process has even caused courts to use procedures more protectively in cases of equitable estoppel.²³² Specifically, to protect the integrity of the judicial process, courts have raised the defense of

possibility of inconsistent decisions," *Montana*, 440 U.S. at 153–54, and to protect the judicial system from acquiring "the aura of the gaming table," *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 328 (1979) (citation omitted).

²²⁸ See discussion *supra* Part III.

²²⁹ The "[r]ationales behind the doctrine include protecting judicial integrity by precluding the risk of inconsistent results in separate legal proceedings, and preserving the sanctity of the oath." *Decker v. Vt. Educ. Television, Inc.*, 13 F. Supp. 2d 569, 573 (D. Vt. 1998) (citing *Simon v. Safelite Glass Corp.*, 128 F.3d 68, 71 (2d Cir. 1997)); see also *Davis v. B & S, Inc.*, 38 F. Supp. 2d 707, 711 (N.D. Ind. 1998) ("[T]he purpose of the doctrine of judicial estoppel is to reduce fraud in the legal process by forcing a modicum of consistency on a repeating litigant." (citation and quotation marks omitted)).

²³⁰ *Whitacre P'ship*, 591 S.E.2d at 886 ("Both judicial estoppel and the 'mend the hold' rule . . . serve to preserve judicial resources, protect judicial integrity, and boost public confidence in the fairness of the judicial system."). Estoppels may be seen as interfering with the truth-seeking function of the court, such as when the former false assertion prevents the later true assertion. *Id.* at 891 ("[W]hile valuable to help 'prevent that which deals in duplicity and inconsistency,' by their nature run the risk of 'shut[ting] out the real truth' in favor of its 'artificial representative.'" (citations and emphasis omitted)). The truth-defeating potential of estoppel, however, is counterbalanced by its prophylactic effect. Courts rationalize that while it may subvert the truth in the short term, it encourages litigants to tell the truth in the first place by "rais[ing] the cost of lying." *Int'l Union, United Mine Workers of America v. Marrowbone Dev. Co.*, 232 F.3d 383, 391 (4th Cir. 2000) (quoting *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427–28 (7th Cir. 1993)). See generally Ashley S. Deeks, Comment, *Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel*, 64 U. CHI. L. REV. 873 (1997).

²³¹ E.g., *Capsopoulos v. Chater*, 1996 U.S. Dist. LEXIS 18330, at *9 (N.D. Ill. Dec. 4, 1996) (expanding judicial estoppel beyond identical parties to include their privies) ("[A] rigid rule . . . would unnecessarily diminish the protective function of the doctrine[.]"). For example, collateral estoppel has been extended to bar not only contradictory interpretations of the same contract, but also contrary interpretations of different contracts that have the same or similar terms. See *NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1259 (2d Cir. 1983); see also *Pine Top Ins. Co. v. Pub. Util. Dist. No. 1 of Chelan County*, 676 F. Supp. 212, 215 (E.D. Wash. 1987). But see *Operating Eng'rs Pension Trust v. A-C Co.*, 859 F.2d 1336, 1339–40 (9th Cir. 1988) (rejecting collateral estoppel because separate contracts were involved).

²³² See T. Leigh Anenson, Justice without Law: Procedural Problems in the Application of Equitable Defenses (working paper, on file with author).

their own accord (even when not pleaded as a defense)²³³ and have considered it for the first time on appeal.²³⁴

As mentioned in Part III, in addition to equity or estoppel-specific policies, counsel should not forget to identify their clients' interests with the policies associated with the particular claim or category of law (e.g. tort, contract) potentially prevented by the estoppel.²³⁵ Inevitably, the human practices and public policies that shaped the substantive law will be measured against it.²³⁶ Estoppel cases that implicate legislation will also serve policies derived from the intent and text of the statute.²³⁷ Court and counsel should also consider higher laws like fairness, certainty, and justice.²³⁸

²³³ See *AFSCME Int'l Union v. Bank One, NA*, 705 N.W.2d 355, 362 n.3 (Mich. Ct. App. 2005) (noting equitable estoppel raised independently by the court); Poll, *supra* note 92, at 67 (citing cases). In one of the earliest discussions of judicial estoppel, the Supreme Court of Tennessee explained: “[F]rom the nature of such an estoppel it should not necessarily be incumbent upon the litigant to plead it. It is based on public policy and might perhaps be raised by the court itself” *Sartain v. Dixie Coal & Iron Co.*, 266 S.W. 313, 317 (Tenn. 1924); see also BIGELOW, *supra* note 93, at 763 (“It is well settled at common law that an estoppel in pais need not be pleaded[.]”).

²³⁴ *Osborne v. Mountain Life Ins. Co.*, 130 S.W.3d 769, 774 n.6 (Tenn. 2004) (analyzing equitable estoppel after noting that the court of appeals raised the doctrine *sua sponte*); *Altman v. Altman*, 653 F.2d 755, 757-58 (3d Cir. 1981); *cf.* *New Hampshire v. Maine*, 532 U.S. 742, 749, 814 (2001) (deciding case under the “discrete doctrine” of judicial estoppel despite arguments to apply *res judicata*). *But see* *U.S. ex rel. American Bank v. C.I.T. Constr. Inc. of Texas*, 944 F.2d 253, 257-59 (5th Cir. 1991) (estoppel defense waived if not pled absent manifest threat to judicial process). Concern for the administration of justice has led to the expansion of other equitable defenses as well. The courts of Michigan, for instance, have developed an exception to the inapplicability of clean hands in damages actions when there has been litigation misconduct that affects the integrity of the judicial process. *Cummings v. Wayne County*, 533 N.W.2d 13, 14 (Mich. Ct. App. 1995); *Maldonado v. Ford Motor Co.*, No. 243763, 2004 WL 868657, at *5-6 (Mich. Ct. App. Apr. 22, 2004) (per curiam).

²³⁵ The targeted societal goal of stability of title often overrode other policies such as withholding aid to the wrongdoer supporting the application of equitable defenses in real property cases. NEWMAN, *supra* note 92, at 242.

²³⁶ See Rebecca S. Eisenberg, *Patents and the Progress of Science: Exclusive Rights and Experimental Use*, 56 U. CHI. L. REV. 1017, 1072-76 (1989) (discussing substantial consequences of application of equitable estoppel in patent infringement litigation).

²³⁷ See *In re Lyon*, 882 A.2d 1143, 1151 (Vt. 2005); see also Note, *Stopping the Madness at the PTO: Improving Patent Administration through Prosecution History Estoppel*, 116 HARV. L. REV. 2164 (2003) (advocating strong doctrine of prosecution history estoppel to assist goals of patent administration). As early as the sixteenth century, Sir Edward Coke advised how to interpret legislation by finding the “true reason of the remedy; and then the office of all the Judges is always to make such construction as shall suppress the mischief, and advance the remedy.” *Heydon’s Case*, (1584) 76 Eng. Rep. 637, 638 (footnote omitted). Statutes often direct that they be interpreted pursuant to their particular policy goals. See, e.g., T. Leigh Anenson, *Defining State Responsibility under NAFTA Chapter Eleven: Measures “Relating To” Foreign Investors*, 45 VA. J. INT’L L. 675 (2005) (evaluating whether an arbitral decision served the policies provided in NAFTA); *cf.* T. Leigh Anenson, *Attorney Liability under the Fair Credit Reporting Act: The Limits of Zealous Representation*, 23 ANN. REV. BANKING & FIN. L. 431 (2004) (discussing ambiguity

UZ Engineered Products Co. illustrates these points. Rather than sacrificing consistency for an ad hoc rendering of justice typical of equity, the application of equitable estoppel facilitated certainty and stability in unfair competition cases concerning restrictive employment covenants.²³⁹ Perhaps too because the doctrine of equitable estoppel is recognized as an extension of the duty of good faith and fair dealing in contracting that is contravened by “asserting an interpretation [of a contract] contrary to one’s own understanding,”²⁴⁰ the court extended the defense to interference theory at the intersection of tort and contract.²⁴¹

In sum, the identification and weighing of policy considerations enriches equitable estoppel and the principles for which it stands. Examining these policies, along with other legal practices pertinent to estoppel, helps develop the defense and transition it into the twenty-first century.

VI. CONCLUSION

This Article analyzed equitable estoppel through the looking glass of legal theory. It offered insight into equitable estoppel by viewing law as a multidimensional matrix with precedent, tradition, and policy as dimensions determining its application. Based on the foregoing jurisprudential ideology, the article outlined justifications for estoppel in cases where precedent was

of attorney liability under the Fair Credit Reporting Act in the absence of express statutory language).

²³⁸ See, e.g., *Clark v. Teeven Holding Co.*, 625 A.2d 869, 878 (Del. Ch. 1992) (“The use of the term ‘equitable principles’ . . . is merely equivalent to the words ‘principles of fairness or justice.’”); JOSEPH STORY, COMMENTARIES ON EQUITY PLEADINGS AND THE INCIDENTS THEREOF § 72 (10th ed. 1892) (“Equity delight[s] to do justice, and not by halves.”). In describing a policy argument in a case not involving equitable estoppel, Cardozo described how justice was weighted above other interests: “But over against these was another principle, of greater generality, its roots deeply fastened in universal sentiments of justice, the principle that no man [or woman] should profit from his own inequity or take advantage of his own wrong.” CARDOZO, *supra* note 27, at 41.

²³⁹ *Role of Equity*, *supra* note 87, at 58–59.

²⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. e (1979). Comment e of § 205 extends the duty between contracting parties to “the assertion, settlement and litigation of contract claims and defenses.” *Id.*; see also *Penn v. Heisey*, 19 Ill. 295, 298 (1857) (opining that “[t]his principle, so equitable and legal, runs throughout all the transactions and contracts of civilized life”); cf. *Heimer v. Travelers Ins. Co.*, 400 So.2d 771, 772–73 (Fla. Dist. Ct. App. 1981) (“the rule we apply in this case was said to reflect the feeling that a party may not . . . ‘blow hot and cold at the same time’ or ‘have his cake and eat it too’” (citation omitted) (discussing inconsistent position concerning contracts under the related “mend the hold” doctrine)).

²⁴¹ Beck, *supra* note 212, at 245–46 (tracing common law history of equitable estoppel); Benjamin F. Boyer, *Promissory Estoppel: Principle from Precedents: II*, 50 MICH. L. REV. 873 (1952) (discussing how equitable estoppel originated in contract cases frequently invoked under the name “promissory estoppel”); cf. DiMATTEO, *supra* note 157, at 30 (stating that the foundational principles of equity (fair play, protection of weaker parties, equality of consideration) influenced the development of contract law in the eighteenth century).

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exactly on point, where there were conflicting precedents, and where precedent did not exist at all.

The everlasting popularity of equitable estoppel lies in the lesson that it teaches about how to use social and moral values to attain our legal system's greatest reward of justice.²⁴² Huhn's translation of legal theory to modern law practice allows lawyers and judges to make the wisdom of the historic chancellors their own. Akin to the ancient alchemist, merging theory and practice under a pluralistic model of law enables juridical actors to create magic—what Pound called “juristic chemistry,”²⁴³—in the invocation of equitable estoppel.

²⁴² Chafee, *supra* note 204, at iii–iv (advising that the problem of justice originally presented by Aristotle “is always pressing for solution”).

²⁴³ *Theory of Judicial Decision*, *supra* note 19, at 643.