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. MCCINTOCK, HANDBOOK OF EQUITY 44 (1936) (hornbook series) [hereinafter MCCINTOCK 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. Based primarily on principles of ethics and morality, it bars the contradictory conduct of litigants that works to their advantage in a case or to the disadvantage of the adverse party.

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. 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.

Given its amorphous nature, critical commentary on the subject of equitable estoppel has been confined to concrete contexts with continuing confusion in the cases. No attempt has been made to examine the underlying reasons that have led to the proliferation of cases involving equitable estoppel.
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. It also recasts the relationship between law and equity as one of formalism and realism. 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.

Part II explains the pluralistic model of law popularized by legal theorists a decade ago. It adopts the model outlined by Wilson Huhn in his recent book titled The Five Types of Legal Argument. 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).
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

15 See generally Huhn, supra note 12.
16 See generally id.
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.
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

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., Huhn, 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. Huhn, 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 DALHOUSSIE 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 Huhn, 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 Huhn, 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. Huhn, 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, Huhn, 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 Huhn, supra note 12, at 13.

32 Id.
judicial notice considered in light of the law’s policies. 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, tradition reflects social cohesiveness and coherence, and policy analysis furthers the flexibility of law to adjust to the changing conditions of society.

No doubt these processes of legal reasoning have become second nature to most lawyers and judges. Nevertheless, an exploration of their characteristics in the area of estoppel may identify arguments that may otherwise be overlooked. 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. To the extent that the types of argument all lead to the same interpretation, the claim for that version of the law is stronger. Because the confluence of these methods of interpretation gives an argument its persuasive force, they are often used in tandem.

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. Huhn, 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 Ruggiero 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 Huhn, supra note 12, at 16; see also id. at 41–43.

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

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


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. Huhn, 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 Huhn, 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 Huhn, 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. Huhn, 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


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.


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).

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. The art of analogy, or case analysis, depends on what points of similarity and dissimilarity are deemed important. How the judge answers the question of importance determines whether the prior decisional rule will be distinguished or applied. Likeness in the cases can be measured at the level of facts or values. 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.

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

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).


48 Huhn, 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 Huhn, supra note 12, at 43, 139.

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

52 Huhn, 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) (“Estoppel 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) (“Equity 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. Viewing the role of precedent from the perspective of rules and standards explains why. “Rules” are applied formalistically and depend on factual determinations. “Standards” are applied realistically and depend on value judgments. 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”).


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 undiscriminating 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.


58 *Huhn*, 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
As standards age, courts incrementally determine their meaning. While the debate between rules and standards is usually framed as a dichotomy, Huhn places them within a dialectical relationship. He proposes that cases are the common denominator that move the law from one end of the spectrum to the other. 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. In fact, the English Court of Chancery during the eighteenth and nineteenth centuries came to be called a court of “crystallized conscience.” Though the clarification of equitable principles in some areas was considered a positive improvement on equity’s administration, their

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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).


61 Id.


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. Huhn, 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.


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. 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. 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.

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. Equitable remedies and defenses outside of estoppel 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

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68 See, e.g., *Megarry & Baker*, supra note 1, at 9–10; see also Main, supra note 19, at 439–40.

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.


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 Funiaq, 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).


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.
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. Prausnitz, 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., HUHN, 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 MCLINTOCK 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. 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.

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

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, may truly be in a standard-like state with only a non-exclusive list of factors to determine their application. Courts have also been encouraged to embrace equity by making up more estoppels. 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,” the learning curve may be exhilaratingly steep. Many practicing lawyers have graduated without the benefit of a comprehensive course in equity. There have been no books or


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. [I]t 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”).


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. The most recent treatise on equitable estoppel is almost a hundred years old. The law review literature, largely student-written, has examined the defense only in special contexts such as patent law, paternity, arbitration clauses, government action, 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).


contracts, and unfair competition cases concerning the validity of restrictive employment covenants. 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. 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. 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” in the opposite direction. As rules go to standards, courts


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).


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. 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.

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


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.”).


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); Keesee v. Fetzer, 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. 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, lower courts will be understandably reluctant to deviate from existing decisions in distinguishing a case. 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 seisen. 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.”

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.”

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 MCLINTOCK 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 seisen 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, the historical record is clear that equity was administered as an ameliorating and uplifting force. Fredrick Maitland said that “[e]quity had come not to destroy the law, but to fulfil [sic] it.” From an overriding outlook of justice, law and equity were not seen as conflicting, but as complementary systems.

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

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).

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”).

Holdsworth, supra note 116, at 25 (quoting F.W. Maitland, Equity 17 (1909)).

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.

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).

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).

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 HUHN, 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. 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.

Despite the different epochs of flexibility and alleged inflexibility of
equity throughout history, "[t]he stream of equity is, in reality, continuous
throughout ages." While there has been some comments to the contrary,
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. The estoppel doctrines are
alive and well. These defenses are not simply something that remained on
the musty records of the Master of the Rolls in Chancery, or that dead judges
applied at the time the Pilgrims landed on Plymouth Rock. While equitable
estoppel predated the American colonial experience, U.S. courts have embraced
the doctrine in all areas of law. The variability of equity, which gives judges
freedom to decide differently, is its most salient feature. Therefore, courts
made by challenging the evidence supporting it or by referencing a competing tradition.

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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"); Pomroy'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 Deweese v.
Reinhard, 165 U.S. 386, 390 (1897) ("A court of equity acts only when and as conscience
commands . . . .").

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

126 See supra notes 67–70 and accompanying text.

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 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).

130 See Ian Holloway, Judicial Activism in an Historical Context: Of the Necessity for
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 concepts 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 HUHN, 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 HUHN, supra note 12, at 131.

137 HUHN, supra note 12, at 55–56.
court’s role within it). 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. This approach to the law gave courts permission to acknowledge underlying human choices rather than hide behind mystical absolutes. 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.

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. 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. Any decision necessarily involves a resolution of the conflicts and an ordering of these values through a balancing process.

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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”).


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 Huhn, supra note 12, at 10–11 (“[T]he rules of law do not describe objective truth, they reflect subjective intentions.”).


142 Huhn, 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). 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 Aristotelian epikeia (justice). According to Aristotle, equitable justice involved a consideration of the consequences. 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.” Since that time, courts have engaged in this kind of consequential analysis (either implicitly by divining duties or explicitly through balancing) in the creation and application of equitable defenses.

Equity was once associated with conceptualistic church canons and notions of most subjective type of argument. HUHN, 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.”).

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 ciuile whose chief end was certainty). Civil law legal systems accommodated these paradoxical ideas together. NEWMAN, supra note 92, at 14, 30, 34.

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. Emmerglick, 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).


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

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

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.” HUHN, 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.”\textsuperscript{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,\textsuperscript{152} equitable defenses like estoppel developed to prevent wrongs or injuries in conjunction with cases initially brought in the courts of common law.\textsuperscript{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.\textsuperscript{154} This occurred, for example, if a plaintiff was claiming damages for breach of contract entered into by reason of fraud\textsuperscript{155} 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

\textsuperscript{151} Huhn, 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. \textit{Id.}

\textsuperscript{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, \textit{Confusion of Law and Equity}, 21 \textit{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).

\textsuperscript{153} See Chafer, supra note 25, at 29–30; see also Charles E. Clark, \textit{The Union of Law and Equity}, 25 \textit{Colum. L. Rev.} 1, 3 (1925); Extension of Equitable Principles, supra note 92, at 354.

\textsuperscript{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 Pomroy’s \textit{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:

\begin{quote}
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.
\end{quote}


\textsuperscript{155} See William F. Walsh, A \textit{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. 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. By the allowance of an equitable defense, equity moderated the harshness of the law and provided discretionary relief based upon individualized interests of fairness. Accordingly, at a time when common law judges were blindly applying precedent, equity made allowance for “mercy in an otherwise rigid, rule-bound system.”

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

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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).


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. It is not surprising, then, that equity has come to be regarded as public policy. 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.”

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. 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. Yet no better solutions have been forthcoming. 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.” It cannot be crowded by popular opinion or be judged from a few cases. Besides, Emily Sherwin reminds us that there is a certain amount of restraint in the common law construction process. It is built brick by brick on


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 Aristotelian idea of teleology that identified the purposes of human existence and then inferred from those purposes the rules of right conduct. See *Huhn*, 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.


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.”).


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.  

While the issue of choice among legal conventions is likely to remain one of the great mysteries of the law, 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. 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. Similarly, tradition demonstrates that there is no tradition, at least from the standpoint of a consistently common definition of the defense. Therefore, policy is the path marked out by the collective conscience of the courts and the community.

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

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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 Huhn, 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 Huhn, supra note 12, at 134; see also Nichol, supra note 165, at 1114.
179 Huhn, supra note 12, at 133–35 (describing rules as the marker buoys and the policies they serve as the unseen anchor).
In making a policy argument, counsel should align the consequences of the case with the policies in support of the defense. 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.” 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. 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. Notably, judicial notice of the factual basis of a policy argument is considered a matter of law. The judge would be determining “legislative” facts as opposed to the jury determining “adjudicative” facts. 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.

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 took note of the absence of any adverse impact. It held that allowing the system “in no way undermines Vermont’s wastewater permitting system” which, according to the statute, was designed to protect human health and the environment.

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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.


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 Id.

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, but discerning what Aristotle would do in the twenty-first century is probably too fanciful for modern sensibilities. 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.

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

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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).


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. 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. 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.

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

Doctrinal analysis also exposes three other core values of estoppel: promoting fair play, protecting weaker parties, and preserving the integrity of the justice system. 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. In the case, one competitor sued another for tortious interference with the non-competition contracts of its former employees. 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. 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. Despite the lack of reliance or harm, the court furthered

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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.


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.\textsuperscript{209}

A similar concern was evidenced by the Supreme Court of Vermont in \textit{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.\textsuperscript{210}

It was for the protection of weaker parties that Lord Mansfield invoked equitable estoppel in \textit{Montefiori v. Montefiori},\textsuperscript{211} beginning its long association with the common law.\textsuperscript{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.\textsuperscript{213} Indeed, one of the main purposes of equity in medieval times was to protect those who could not otherwise protect themselves.\textsuperscript{214} More recently, the protection of weaker parties was the concern of the Supreme Court of Hawaii in \textit{AIG Hawai’i Insurance Co., Inc. v. Smith}\textsuperscript{215} and \textit{Filipo v. Chang}.\textsuperscript{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.\textsuperscript{217}

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

\begin{itemize}
\item \textsuperscript{209} \textit{Id}.
\item \textsuperscript{210} \textit{In re Lyon}, 882 A.2d 1143, 1145, 1149 (Vt. 2005).
\item \textsuperscript{211} (1762) 96 Eng. Rep. 203 (Ch.).
\item \textsuperscript{213} 96 Eng. Rep. at 203; see also \textit{Ingersoll, supra} note 152, at 58–59 (commenting how Lord Mansfield “opened the [common law] [c]ourts to the gladsome light of [e]quity”).
\item \textsuperscript{214} \textit{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. \textit{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. \textit{Bigelow, supra} note 93, at 620–27.
\item \textsuperscript{215} 891 P.2d 261 (Haw. 1995).
\item \textsuperscript{216} 618 P.2d 295 (Haw. 1980).
\item \textsuperscript{217} \textit{AIG}, 891 P.2d at 266; \textit{Filipo}, 618 P.2d at 300–01. In each case, the court basically replaced reliance with a more severe degree of harm.
\item \textsuperscript{218} 629 A.2d 831 (N.J. 1993).
\end{itemize}
Surety Co. 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. The courts found that the insureds were entitled to equitable protection even without their reliance on the insurers’ inconsistencies.

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. Undeniably, an attitude “developed in Chancery toward the production of injustice by the very agencies which have been established to do justice” 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.” 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.

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

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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.
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).\footnote{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).} As such, they preclude inconsistent conduct of a party and prevent inconsistent results by the court.\footnote{See discussion supra Part III.} 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.\footnote{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, \textit{Raising the Cost of Lying: Rethinking Erie for Judicial Estoppel}, 64 U. CHI. L. REV. 873 (1997).} Preservation of the legal process has even caused courts to use procedures more protectively in cases of equitable estoppel.\footnote{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).} 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).

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.\footnote{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) and have considered it for the first time on appeal.

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. Inevitably, the human practices and public policies that shaped the substantive law will be measured against it. Estoppel cases that implicate legislation will also serve policies derived from the intent and text of the statute. Court and counsel should also consider higher laws like fairness, certainty, and justice.

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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[.]”).


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.


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.\textsuperscript{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,”\textsuperscript{240} the court extended the defense to interference theory at the intersection of tort and contract.\textsuperscript{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

\textsuperscript{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.

\textsuperscript{239} Role of Equity, supra note 87, at 58–59.

\textsuperscript{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.; \textit{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)).

\textsuperscript{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).
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. 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”—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.