EQUITY'S ATROPHY

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The plainest evidence for the modern "triumph of equity" can be found in the daily newspapers. The scene is set in the federal courts. Litigation that makes the news usually involves someone asking a court to interfere directly, by means of injunction, in the operations of government.

The centrality of injunctive relief to addressing some particular concerns of federal courts has long been recognized. Reaffirming the discretionary character of any grant of injunction, the Supreme Court has noted that

> [t]he essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims.[1]

Indeed, "[w]hen federal law is at issue and 'the public interest is involved,' a federal court's 'equitable powers assume an even broader and more flexible character than when only a private controversy is at stake.'"[2] When modern commentators refer to the significance of equity, the remedy in view is almost always the injunction. In his 1976 article about the expanding "public law model" of litigation, Abram Chayes described what he called "[t]he Triumph of Equity" exclusively in terms of injunctive relief.[3] Even Samuel Bray, arguing that we must

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1 Hecht Co. v. Bowles, 321 U.S. 321, 329–30 (1944).

2 Kansas v. Nebraska, 574 U.S. 445, 456 (2015) (quoting Porter v. Warner Holding Co., 328 U.S. 395, 398 (1946)).

3 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1292–98 (1976).

preserve the separateness of equitable remedies in order to safeguard the "equity system" as a whole, comes close sometimes to describing those remedies as if they consisted solely of injunctions.[4]

The scope of this aspect of federal equity power has meanwhile been extended far beyond what could once have been imagined, as traditional limits on injunctive relief progressively fell away. Chancellors formerly disavowed interference by injunction except to protect interests in property, as opposed to "personal rights."[5] Equity jurisdiction to protect *political* rights was likewise out of the question. As late as *Colegrove v. Green* (1946), the Court refused to entertain a challenge to the malapportionment of Illinois congressional districts "because due regard for the effective working of our Government [has] revealed this issue to be of a peculiarly political nature and therefore not meet for judicial determination. . . . Courts ought not to enter this political thicket."[6] The recent discovery of the ability to issue "national" injunctions assures that the grant or denial of injunctions will continue to appear, to many observers, to be the most important business of the federal courts.[7]

If this all-important feature of the system—the judicial power *to tell people what to do*—is taken as its proper measure, the federal equity jurisdiction is plainly thriving as never before. What has virtually disappeared, by contrast, is equity's substantive contribution. An injunction orders compliance with rules established elsewhere: possibly by common law, increasingly by statute and regulation. While the extent of lawmaking power involved in the judicial interpretation of these codified requirements is unmistakable, it is a different thing from announcing and enforcing an independent rule. By contrast, the most characteristic function of traditional equity was what it did on its own authority. This was the power to modify and correct applicable *legal* rules, suitable as the first-order resolution of the general run of cases, so as to do better justice between particular parties in particular circumstances.[8] The fact that law might dictate one resolution (in most

4 *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 534 (2016) ("It is necessary to have remedies that compel action or inaction. And sometimes that compulsion needs to be adverbial or open-ended—requiring not only that something be done but also specifying the manner in which it must be done, or demanding a process of obedience over time.").

5 The rise and fall of this idea is helpfully summarized in *Developments in the Law—Injunctions*, 78 HARV. L. REV. 994, 998–1001 (1965).

6 Colegrove v. Green, 328 U.S. 549, 552, 556 (1946) (opinion of Frankfurter, J.).

7 *See* Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 HARV. L. REV. 417, 419–20 (2017).

8 Here it is customary to cite ARISTOTLE, NICOMACHEAN ETHICS, at 1137b. Lord Chancellor Eldon put it more succinctly: "[I]t is likewise necessary that there should be a law by which Laws are modified." Michelle Johnson & James Oldham, *Law Versus Equity—*

cases) and equity another (in some) was not a source of uncertainty or surprise so long as lawyers understood they were dealing with a hybrid system, and that a resort to the equity side was natural and predictable when a first-order legal outcome would be manifestly unfair. The instances of unfairness likely to trigger this intervention were limited, recurrent, and easily recognized. Most of them could be found within the lawyers' jingle according to which "[t]hree things are to be judged in Court of Conscience: Covin, Accident, and breach of confidence"[9]—plus the various forms of undue advantage-taking we now tend to call opportunism.

The explicitly dissenting and corrective function of equity has become so unfamiliar that it is worth recalling a simple illustration. Every modern instance of *estoppel*—promissory or otherwise—is an illustration of equity's refusal to accept a legal outcome and of its power to change it. The defendant who has made a gratuitous promise is not liable at law because he received no consideration, but the promise will be enforced (in equity) as necessary to protect reliance. The defendant who (without promising anything) has allowed his neighbor to cross his land to build a house on an adjoining lot, otherwise inaccessible, retains unimpaired legal title—but he will be precluded from asserting his legal right to exclude the neighbor, so long as justice requires that the neighbor have access. Of course, the familiar estoppel cases make perfect examples of the way important equity doctrines have come to be incorporated within our general law: thus contract law now protects "reliance," property law recognizes an "easement by estoppel." Douglas Laycock is partly correct when he argues that "substantive equity is now fully integrated into our substantive law, with or without continued consciousness of its equitable origins."[10] In the examples he offers, equity's substantive

as Reflected in Lord Eldon's Manuscripts, 58 AM. J. LEGAL HIST. 208, 224 (2018) (quoting John Scott, Earl of Eldon, Of Legacies (notes on file at Georgetown University Law Library, Special Collections, Lord Eldon Manuscripts, *Of Legacies*, EM-002, MSS 54, Page 39) (unpublished lecture)). For a contemporary reworking of this ancient idea, see Henry E. Smith, *Equity as Meta-Law*, 130 YALE L.J. 1050 (2021).

9 EDWARD COKE, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND: CONCERNING THE JURISDICTION OF COURTS 84 (1644). "Covin" is fraud. *See id.* In context, the most common sort of "accident" is probably mistake, though some commentators have given this category a much broader scope: "Accident means happening; and its consequences therefore, falling upon one who seeks relief from them, fall there without that one's intention. On this ground—the absence of intention on the part of the plaintiff—relief is granted." 1 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 78, at 84 n.a (Melville M. Bigelow ed., Boston, Little, Brown & Co. 13th ed. 1886) (1835–1836).

10 Douglas Laycock, *The Triumph of Equity*, L. & CONTEMP. PROBS., Summer 1993, at 53, 68–71 (examples of such integration—among them estoppel—include fiduciary duties, security interests, equitable servitudes, and restitution, *inter plurima alia*).

modification of legal rules has indeed triumphed—but its triumph has made it invisible. What has been largely forgotten, in consequence, is equity's residual power of intervention to correct unjust legal outcomes. Lawyers who no longer see (and recognize) instances of equitable intervention to adjust legal outcomes will no longer believe that judges have that power—at which point the judges will no longer have it.

Current U.S. law sees numerous decisions from which a once-predictable, traditional equitable corrective has simply disappeared. The salient cases are those in which, until recently—recent history for this purpose comprising just one or two generations of lawyers and judges—equitable intervention would have been at least highly likely: because the unmodified legal outcome diverges so plainly from equity and good conscience, and because an established equitable response was part of what everybody knew. The idea that equity in U.S. law has been losing some previous degree of vitality is so venerable that it can scarcely be debatable at this point,[11] and in the present discussion it will be treated as self-evident. Rather the object will be to consider briefly some illustrations, and some possible explanations, of the current equity deficit.

The nature of the deficit will be apparent from a handful of examples. The cases are selected for purposes of demonstration, not as a representative assortment: the object is to offer unmistakable illustrations, not a survey. The problem cases are all commercial in character—a fact that suggests one part of the explanation—and their difficulties seem to stem from the same general sources. These obstacles to the exercise of traditional equity are interrelated and overlapping, to the point that it will be somewhat artificial to distinguish them. Still they may be classified for convenience as (1) simple ignorance; (2) a loss of trust in the ability of judges to exercise the necessary discretion; and (3) an explicit preference for form over substance in the attitudes of commercial lawyers.

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11 The most familiar citation is to Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20 (1905), where the combination of author, title, and date makes it scarcely necessary to read further. But the same pessimistic view had prefaced the first edition of Pomeroy's famous treatise twenty-five years earlier. Looking back on "the experience of the past thirty years" in those states where law and equity procedure had been unified, Pomeroy observed

> a weakening, decrease, or disregard of equitable principles in the administration of justice. I would not be misunderstood. There has not, of course, been any conscious intentional abrogation or rejection of equity on the part of the courts. The tendency, however, has plainly and steadily been towards the giving an undue prominence and superiority to purely legal rules, and the ignoring, forgetting, or suppression of equitable notions.

1 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE vii (San Francisco, A.L. Bancroft & Co. 1881).

I. IGNORANCE

For half a century, students have been going through U.S. law schools without hearing anything said about equity—other than the assurance that references to "equity" in the older cases, having become obsolete, can be safely ignored.[12] This lack of introduction has reduced professional awareness of basic equity doctrines, and the consequences—now that the same law students are on the bench—are visible in judicial decisions. Some cases in which equitable intervention would once have been almost a matter of course are decided with no apparent recognition that such a response is even possible. Decisions that do acknowledge—though declining to adopt—the possibility of an equitable approach appear oblivious to the extent of the authority supporting the traditional intervention; while the concerns that were its accepted justification have entirely disappeared from view. Either way, the result is what Pomeroy summarized as "the ignoring, forgetting, or suppression of equitable notions."[13]

XL/Datacomp, Inc. v. Wilson (*In re Omegas Group, Inc.*)[14] makes a revealing illustration of the latter sort of case. This was the notorious decision in which the Sixth Circuit declared that "[c]onstructive trusts are anathema to the equities of bankruptcy since they take from the estate, and thus directly from competing creditors, not from the offending debtor."[15] The adverse claimant in this bankruptcy case was asserting that certain funds had been obtained from it by the fraud of the debtor; "constructive trust" entered the discussion because this was the remedy the claimant sought.[16] A court familiar with the operation of the equitable remedy might easily have denied it here. Evidence of fraud was wafer-thin, the claimant's hands were not overly clean, and there was no indication that the claimant could trace any property into the hands of the bankruptcy trustee. Instead of disposing of the claim on these matter-of-fact grounds, the Sixth Circuit chose this occasion to declare that the traditional remedy of constructive trust had no application in bankruptcy at all.

The court's famous line about "anathema" revealed at once its ignorance of the real "equities of bankruptcy." Equity's conception of the problem at hand has always been that property obtained by fraud is not, in equity, the property of the debtor. A transfer induced by fraud conveys bare legal title—such is the legal result that equity intervenes to correct. The fraud victim may therefore retake the

12 The Seventh Amendment rule on jury trials might make one exception.

13 1 POMEROY, *supra* note 11, at vii.

14 16 F.3d 1443 (6th Cir. 1994).

15 *Id.* at 1452.

16 *Id.* at 1445–46.

misappropriated property, so long as it remains identifiable, in the absence of intervening equities.[17] The claims of the creditors are good against property of the debtor, not against the property of third parties. It follows that the fraud victim is not a "competing creditor" at all, but an owner whose property is not available to satisfy the debtor's obligations—any more than yours or mine would be. The usual remedial shorthand for this three-cornered relationship is to say that the debtor (or the bankruptcy trustee) holds property obtained by fraud in "constructive trust" for its equitable owner.

Naturally, it is possible to argue that the equitable conception of the property rights involved—with the striking priority it affords dispossessed owners over unsecured creditors—is the wrong resolution in the context of insolvency. Some academic commentary advances such criticism.[18] But the point about *Omegas Group*, for present purposes, is not that equity's rules are necessarily the best ones. It is merely that no court could discuss "the equities of bankruptcy" in the naive terms advanced by the Sixth Circuit majority if the judges (or their law clerks) had grasped the scope and depth of the legal context into which they were wading. An ocean of authority—more than a century of caselaw, commentary, statutes, and legislative history—gave answers that the court would have been obliged to address, if it was going to write an opinion that could be taken seriously.[19] If legal materials of comparable weight bore on a question the court saw as an important one, it is inconceivable their authority could have been ignored.

The missing context was not simply a matter of tallying judicial statements about "equitable title" or "constructive trust," which (until the day before yesterday) all came out the same way. Lawyers and judges of an earlier day understood *why* equity and good conscience gave priority to the dispossessed owner over the unsecured creditor. In a classic case of mistake or "accident," *In re Berry*,[20] Raborg & Manice sold some stock for the account of their customer, Berry & Co. Raborg's bookkeeper erroneously posted the same credit twice. When Berry, facing financial difficulties, sent a messenger one afternoon

17 The traditional view of the problem is summarized in Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 AM. BANKR. L.J. 265 (1998).

18 *See, e.g.*, HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 297–327 (2004); Emily Sherwin, *Why* In re Omegas Group *Was Right: An Essay on the Legal Status of Equitable Rights*, 92 B.U. L. REV. 885 (2012).

19 The best synopsis of the authorities under the Bankruptcy Act is found in the pertinent sections of the former COLLIER ON BANKRUPTCY (James Wm. Moore et al. eds., 14th ed. 1976–1978) (1940–1943). Adding the subsequent perspective of the Bankruptcy Code, the problems with *Omegas Group* are effectively summarized in a Sixth Circuit bankruptcy opinion, *In re* Dow Corning Corp., 192 B.R. 428, 432 (Bankr. E.D. Mich. 1996).

20 147 F. 208 (2d Cir. 1906).

requesting "some money," Raborg—who had already paid over the actual sale proceeds—delivered a check for $1500 of the phantom credit. Raborg's check was deposited about 3 p.m., and the next day Berry & Co. made an assignment for the benefit of creditors.[21]

The $1500 was traced into Berry's bank account, and Raborg sued to recover it from the bankruptcy trustee.[22] The Second Circuit took the trouble to explain what was usually taken for granted:

> Stripped of all complications and entanglements we have this naked fact that Raborg & Manice by mistake paid Berry & Co. $1,500, which they did not owe and which Berry & Co. could not have retained without losing the respect of every honorable business man.
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> . . . .
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> It is urged that to compel restitution now will work injustice to the general creditors of the bankrupts, but this contention loses sight of the fact that the money in dispute never belonged to the bankrupts, and their creditors, upon broad principles of equity, have no more right to it than if the transaction of November 25th had never taken place. . . . The proposition that Raborg & Manice, who have done no wrong, shall be deprived of their property and that it shall be divided among creditors to whom it does not fairly belong, is not one that appeals to the conscience of a court of equity.
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> . . . .
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> When the money was paid under a plain mistake of fact equity impressed upon it a constructive trust which followed it through the bank and into the hands of the trustees.
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> . . . .
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> . . . [I]t is enough to say that as the final result of the bank's liquidation of the account $6,310.41 was delivered to the trustees in bankruptcy. But for the mistake of Raborg & Manice this sum would have been $4,810.31, which is all the bankrupts' creditors are entitled to. The $1,500 should be paid by the trustees to Raborg & Manice, its lawful owners.[23]

The point is not that no judge today (and no honorable businessman) could decently envisage a different set of priorities in insolvency. But the intuition underlying *In re Berry*—that it would be unjust for Berry's creditors to be paid with Raborg's funds because of a bookkeeper's mistake—is not easily dismissed. Although the trustees had legal title

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21 *See id.* at 209–10.

22 *See id.*

23 *Id.* at 210–11. It is tempting to see in the court's language here the influence of counsel for Raborg & Manice, Benjamin N. Cardozo. *See id.* at 209.

to the $1500, the Second Circuit did not hesitate to say that the money did not "fairly belong" to the creditors, and to make this judgment the explicit basis of its equitable intervention.[24] A century afterwards, in *Omegas Group* and other cases to be mentioned, there remains no trace of the idea that a concern for fairness might justify the court in adjusting a legal outcome. This is no longer surprising—we don't see it and don't miss it—but it is natural to ask why the idea has so completely disappeared.

Part of the answer, already suggested, is sheer unfamiliarity. If we look at *Omegas Group* for evidence of "the ignoring, forgetting, or suppression of equitable notions" by modern-day lawyers and judges, the court's most revealing statement is not the one about "anathema," but the innocent remark that "Nowhere in the Bankruptcy Code does it say, 'property held by the debtor subject to a constructive trust is excluded from the debtor's estate.'"[25]

The most important commercial statutes—the Uniform Commercial Code as well as the Bankruptcy Code—did not attempt to codify the fundamental common law of contract and property, still less the occasional interaction of law and equity. Such basic propositions were part of what everybody knew, the common-law-and-equity background against which the statutes were written, and no lawyer who understood the relationship between background law and statute would have expected to find the one codified in the other. But as the terrain occupied by statute has expanded, the background has inevitably receded from view, until a lawyer who finds himself on unfamiliar ground is likely to regard with suspicion any proposition not laid out black-on-white in code or regulations.

II. DISTRUST

In view of the discretion entrusted to federal judges to interpret modern statutes and regulations—not to mention the U.S. Constitution—our reluctance to leave the outcome of a private dispute to the same judges' ideas about equity and good conscience might appear superficially paradoxical. Some of the difference is readily explained. There is an ancient skepticism about whether there exists a common standard of what justice requires in a particular case—the gibe about the length of the Chancellor's foot dates from the seventeenth century[26]—but that difficulty is easily overstated. A few equity doctrines inherently required a nice judgment—just how dirty

24 *See id.* at 210.

25 16 F.3d 1443, 1448 (6th Cir. 1994).

26 For the famous remark by legal historian John Selden (1584–1654), see 1 STORY, *supra* note 9, § 19, at 16 (quoting JOHN SELDEN, SELDEN'S TABLE TALK (1689)).

did the claimant's hands have to be before they were "unclean"?—and a chancellor who failed to understand the transaction before him could naturally get it wrong.[27] But such cases are atypical, because most of equity's judgments about fairness rest on ordinary intuition. If the system of priorities in bankruptcy should be reorganized, for instance, it is not because *In re Berry* was wrong to assert that Raborg's $1500 "did not fairly belong" to Berry's creditors.

One important reason for the attitude toward judicial discretion about private transactions is that lawyers trust their own foresight more than they do any judge's appraisal after the fact. In *Kingston v. Preston*,[28] explaining what would once have been called the "theory of conditions" (determining whether a given failure of performance by one contracting party excuses further performance by the other party), Lord Mansfield could say "that the dependence, or independence, of covenants, was to be collected from the evident sense and meaning of the parties."[29] But even if the lawyers preparing the next agreement could submit their disputes to the arbitration of another Lord Mansfield, they would prefer to specify contingencies and consequences for themselves. Instead of relying on a theory of conditions which few of today's lawyers could comfortably explain, modern business agreements contain page after page of "events of default," followed by as many pages of "remedies," specifying step-by-step what each party is obliged or entitled to do when something goes amiss. The unattainable ideal would be a contract so fully specified that it could be enforced by algorithm, like the "smart contracts" imagined by some blockchain enthusiasts. Limited by mere human capacity and established drafting techniques, the modern tendency is nevertheless toward a system of dispute resolution that relies as little as possible on anyone's judgment.

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27 In *Marks v. Gates*, 154 F. 481 (9th Cir. 1907), the court felt that the exchange between the San Francisco moneylender Isaac Marks and "Swiftwater Bill" Gates, colorful hero of the Klondike Gold Rush, was unconscionably one-sided after it had turned out profitably for Marks. *Id.* at 482. If the terms of this grubstake contract had been analyzed ex ante instead of ex post, it might appear that Marks had overpaid.

28 Jones v. Barkley (1781) 99 Eng. Rep. 434, 437–38; 2 Dougl. 684, 689–91 (describing the unreported 1773 case *Kingston v. Preston*).

29 *See id.* at 437–38. For a more recent reference to implied conditions of the kind described by Mansfield, see Jacob & Youngs, Inc. v. Kent, 129 N.E. 889, 890 (N.Y. 1921) ("The distinction is akin to that between dependent and independent promises, or between promises and conditions. Some promises are so plainly independent that they can never by fair construction be conditions of one another. Others are so plainly dependent that they must always be conditions. Others, though dependent and thus conditions when there is departure in point of substance, will be viewed as independent and collateral when the departure is insignificant." (citations omitted)) (opinion by Judge Cardozo).

The skepticism of the lawyers has come to be paralleled by a lack of confidence on the part of the judges themselves. Modern courts have disavowed the judicial discretion that is an indispensable part of large tracts of the equity jurisdiction, establishing mechanical rules to displace the individualized evaluation of facts and circumstances that has always been the point.

Equitable discretion begins with the determination of what equity will do, and how. "It is probably inevitable," wrote a commentator of an earlier day, "that the development of a department of government which has the exclusive right to construe and define its own jurisdiction should illustrate the maxim quoted by Lord Chesterfield, that 'there are misers of money but none of power.'"[30] The Supreme Court refuted Lord Chesterfield in *Grupo Mexicano*, when it announced that the federal judiciary lacked the power to issue a preliminary asset-freezing injunction (preventing the dissipation of disputed funds prior to judgment), where the effect of the remedy would have been to safeguard the Court's jurisdiction and its ability to do justice in the controversy before it.[31] This was so, the Court explained, because the equity jurisdiction of the federal courts was exclusively defined and constitutionally limited by the set of remedies being employed by the English Court of Chancery in 1789—among which the Court discerned no asset-freezing injunctions.[32] The disclaimer was historically incoherent. It presumed that the Chancery jurisdiction of 1789 was itself something static, incapable of devising new measures to meet new circumstances; it misread the evidence of what American courts of equity were actually doing at the time;[33] not least, it ignored the fact that major landmarks of modern American equity had been the independent creations of U.S. judges over the intervening centuries.[34]

30 Charles Noble Gregory, *Government by Injunction*, 11 HARV. L. REV. 487, 488 (1898).

31 *See* Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 333 (1999).

32 *See id.*

33 *See* James E. Pfander & Wade Formo, *The Past and Future of Equitable Remedies: An Essay for Frank Johnson*, 71 ALA. L. REV. 723, 738–39 (2020).

34 For example, constructive trust as a means to reach illicit gains in the hands of a wrongdoer other than a defaulting fiduciary—a familiar feature of today's "disgorgement"—is an equitable remedy unknown to the English courts even today. GOFF & JONES: THE LAW OF UNJUST ENRICHMENT ¶ 38-17 (Charles Mitchell, Paul Mitchell & Stephen Watterson eds., 9th ed. 2016), Westlaw UK (observing that, while some Commonwealth jurisdictions allow the U.S.-style constructive trust remedy, "it is clear as a matter of authority that English law does not recognize 'remedial' constructive trusts of this kind"). Again, the equitable doctrine of "common fund," taken for granted these days as the source of compensation for class-action attorneys, was created out of the whole cloth by the Supreme Court itself in *Trustees v. Greenough*, 105 U.S. 527, 537–38 (1881). Such innovations require a self-confidence about the purpose and powers of equity jurisdiction that today's judges lack.

Still, the reason for this self-denial seems fairly clear: a profound distaste on the part of the Court's majority in 1999 to acknowledge any head of jurisdiction that would allow the federal courts to define and construe their own powers. Because that is exactly what equity did, equity had become antipathetic.

Other noteworthy episodes confirm a strong inclination on the part of modern judges—and not just in the federal courts—to minimize the need for equitable discretion by formulating rules and checklists to replace equity's traditional, open-textured standards. The best-known recent illustration is found in the aftermath of *eBay Inc. v. MercExchange, L.L.C.*, in which the Supreme Court made a seemingly offhand remark about what it (erroneously) called a "well-established" four-factor test for the issuance of permanent injunctions in patent disputes.[35] Because intervention by injunction has always been a matter of equitable discretion, the relevant factors could never be accurately simplified to this extent. The test stated in *eBay* was easily criticized on a number of grounds. In the hands of more confident judges, it might have been limited to patent cases, tactfully neglected, eventually ignored. What followed instead was "a remarkable legal juggernaut" in which *eBay*'s simplistic four-factor test was adopted by federal courts as the definitive rule for the issuance of permanent injunctions—not just in patent cases, but across the legal landscape.[36] The result was "a doctrinal straitjacket of a sort that courts sitting in equity have commonly resisted."[37] The explanation of the legal juggernaut is that courts today, confronted with the challenge of exercising a traditional equitable discretion, prefer the comfort of a straitjacket.

The same judicial preference for checklists may be seen in the extraordinary influence of *Williams v. Walker-Thomas Furniture Co.*,[38] the famous decision in which Judge Skelly Wright revived the equitable doctrine of unconscionability in the service of modern consumer protection. For centuries, equity judges had refused to order the specific performance of contracts involving interests in real property when they found those contracts "unconscionable"—leaving the plaintiffs to pursue their legal rights in the law courts.[39] The word was undefinable; it evoked a constellation of familiar reasons why a court might refuse to order performance of a transaction that—while within

35 *See* eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

36 Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 206 (2012).

37 *Id.* at 211.

38 350 F.2d 445 (D.C. Cir. 1965).

39 *See* 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 769, at 89–914 (Melville M. Bigelow ed., Boston, Little, Brown & Co. 13th ed. 1886) (1835–1836).

the equity jurisdiction, the plaintiff having no adequate remedy at law—was not one that appealed to the conscience of the court. The attitude of equity was summarized by Pomeroy:

> [A] specific performance will always be refused when the plaintiff has obtained the agreement by sharp and unscrupulous practices, by overreaching, by concealment of important facts, even though not actually fraudulent, by trickery, by taking undue advantage of his position, or by any other means which are unconscientious; and when the contract itself is unfair, one-sided, unconscionable, or affected by any other such inequitable feature; and when the specific enforcement would be oppressive upon the defendant, or would prevent the enjoyment of his own rights, or would in any other manner work injustice.[40]

As late as the 1950s, when the drafters of UCC Article 2 were taking the bold step of applying a test of unconscionability to contracts for the sale of goods, they cut the doctrine loose from its roots in equity but saw no need to furnish a definition.[41] Unconscionability was an idea and a conclusion, and an unconscionable agreement was something that lawyers and judges were able to recognize.

In view of the facts and circumstances of the case, the Walker-Thomas contract with Mrs. Williams was manifestly obnoxious. The company's "add-on" security interest attached to each item successively purchased, with monthly payments applied in proportion to the cost of each item, until the aggregate balance due was reduced to zero. Until the slate was wiped clean, payment default enabled the seller to repossess all the items purchased since the last zero balance. These features of the credit arrangement were unquestionably legal at the time. The crucial objection was to the circumstances under which the most recent sale to Mrs. Williams had been made:

> The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full

40 2 JOHN NORTON POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 400, at 435–36 (San Francisco, A.L. Bancroft & Co. 1882). The passage appears verbatim in the final edition of the treatise, 2 JOHN NORTON POMEROY, EQUITY JURISPRUDENCE § 400, at 101 (Spencer W. Symons, Bancroft-Whitney Co., 5th ed. 1941) (1881).

41 U.C.C. § 2-302 (AM. L. INST. & UNIF. L. COMM'N 1951). The closest the U.C.C. comes to defining "unconscionable" is a reference in the official comment to clauses that are "one-sided," along with the remark that "[t]he principle is one of the prevention of oppression and unfair surprise." *See id.* U.C.C. § 2-302 cmt. 1 (AM. L. INST. & UNIF. L. COMM'N 2020).

> knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.[42]

A court that shared Pomeroy's idea of unconscionability would have required no extended discussion before refusing to enforce a lien so created. The D.C. Court of Appeals deplored the transaction but felt it had no authority to set it aside.[43] The D.C. Circuit reversed and remanded, instructing the lower courts that "the common law of the District of Columbia" already embodied the rule of unconscionability that had been enacted (subsequent to the contract in question) as part of D.C.'s statute law.[44]

Significantly, Judge Wright felt obliged at this point to supply a *definition*—for use by a generation of judges for whom the traditional, capacious concept would invite (and require) the exercise of an unwelcome discretion. By way of definition, Judge Wright compiled a famous checklist for unconscionability. His list of factors, centering on "absence of meaningful choice," was a hasty reworking of the equitable approach to serve modern, consumer-protection objectives.[45] It made a notably poor fit in the case of Mrs. Walker, who clearly had a "meaningful choice" in deciding whether to buy a costly stereo and who moreover (as the dissenting judge pointed out) "seem[ed] to have

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42 *Williams*, 350 F.2d at 448 (*quoting* Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 916 (D.C. 1964), *rev'd*, 350 F.2d at 450).

43 *Id.* at 448, 450.

44 *Id.* at 448–49.

45 The heart of the opinion, and the source of its subsequent influence, is contained in this well-known paragraph:

> Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power. The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain. But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the agreement are not to be questioned should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.

Id. at 449–50 (footnotes omitted).

known precisely where she stood."[46] But it was the existence of a convenient checklist, rather than its particular elements, that gave unconscionability its modern-day currency; courts that discuss "unconscionability" today take their bearings from Judge Wright's formula, not from equity.[47] If Judge Wright had written, "[u]nder the circumstances disclosed, this contract was plainly unconscionable," citing Pomeroy and Story, the decision would have been in better accord with authority—but also a dead letter.

III. FORM OVER SUBSTANCE

The most dramatic illustration of the current equity deficit is inevitably *In re Motors Liquidation Co.*,[48] where a trivial error by a law-firm paralegal wiped out a valid, first-priority UCC security interest in assets of General Motors Corporation—the collateral for a syndicated loan, fully secured in the amount of some $1.5 billion, managed by JPMorgan Chase. When GM entered bankruptcy seven months later, the mistake was belatedly discovered. The eventual result of the paralegal's mistake would be to transfer hundreds of millions of dollars from the secured lenders and their representatives to GM's unsecured creditors.[49] Beyond the terrible fascination (for lawyers) of the mistake that was made and the sheer numbers involved, *Motors Liquidation* is noteworthy because the equities of the situation were unusually clear. Equitable intervention to correct a manifest injustice would have been both easy to accomplish and easily justified by authority. This background makes it significant, not only that the opinions of the three courts to consider the matter made no mention of the possibility of equitable relief for mistake, but that—so far as the published opinions reveal—the lawyers for the secured lenders did not even think it worthwhile to ask.

In October 2008, GM repaid the $150 million balance of a syndicated loan that had been set up in 2001 using a financial structure known as a "synthetic lease."[50] This indebtedness had been secured by

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46 *Id.* at 450 (Danaher, J., dissenting).

47 Standing by itself, "absence of meaningful choice" is an empty concept, and it formed no part of any equitable test. This makes the expression a telltale for the pervasive influence of the *Williams* checklist. Prior to *Williams v. Walker-Thomas*, according to Westlaw, the words "absence of meaningful choice" appeared in no reported decision of any U.S. court, state or federal. A recent search finds it in 2,203 cases as of April 14, 2022, invariably being mentioned as a factor tending to establish "unconscionability."

48 755 F.3d 78 (2d Cir. 2014).

49 *Id.* at 80.

50 The most thorough account of this part of the story is Judge Gerber's original bankruptcy opinion, *In re* Motors Liquidation Co., 486 B.R. 596, 602–15, 615 n.54 (Bankr. S.D.N.Y. 2013), *rev'd on other grounds*, 777 F.3d 100 (2d Cir. 2015).

liens on 12 parcels of real property, perfected (among other means) by two UCC-1 financing statements filed with the Delaware Secretary of State.[51] At the time the Synthetic Lease financing was being repaid, GM was also indebted to a different syndicate of lenders in a different transaction, this one a "Term Loan" in the amount of $1.5 billion, secured by different collateral: equipment and fixtures located at 42 GM facilities across the country.[52] Security for the Term Loan had been perfected (among other means) by a third Delaware UCC-1, this one filed in 2006.[53]

Repayment of a debt at maturity (even in a complex financing like a synthetic lease) might seem to be a fairly simple matter, but with large amounts of money and large law firms involved, it required a termination agreement, an escrow agreement, a closing memorandum, and an extensive set of closing documents. At Mayer Brown—GM's lawyers in this transaction—the routine tasks of arranging the closing were delegated too far. A partner instructed an associate, who instructed a paralegal, who instructed another paralegal. At the end of the day, the paralegal whose task it was to identify financing statements filed against GM in Delaware—and who later testified that he did not understand why he was doing this—had turned up the two UCC-1's relevant to the 2001 Synthetic Lease, but also the UCC-1 filed for the Term Loan in 2006. Because of the failure to distinguish them, the closing documents eventually prepared by Mayer Brown included *three* UCC-3 termination statements—releasing not just the security for the Synthetic Lease transaction (so far correctly), but also the security interest of unrelated lenders, in different collateral, under the Term Loan.[54]

The extraneous UCC-3, obscurely announcing the termination of "6416808 4 on 11.30.06," was duly circulated, along with another hundred pages of closing documents, to a long list of lawyers and bankers.[55] None of them noticed the superfluous termination statement, though one of them commented, "Nice job on the documents."[56] The closing went ahead without a hitch. No one

51 486 B.R. at 606.

52 *Id.* at 607.

53 *Id.*

54 *Id.* at 608–611.

55 *Id.* at 611–12. It helps to have an idea what a UCC-3 "termination statement" looks like. The form itself can be used for a variety of minor amendments to an existing financing statement, identified on a line for "Initial Financing Statement File Number." When the purpose is termination, a small box is checked next to the word "Termination." The standard form of UCC-3 is readily accessible through the website of the Delaware Division of Corporations, *UCC Forms*, DEL. DIV. OF CORPS, https://corp.delaware.gov/uccform [https://perma.cc/ZY55-PG3A].

56 *In re* Motors Liquidation Co., 755 F.3d 78, 81 (2d Cir. 2014).

involved in the matter—neither GM, the lenders, JP Morgan as agent, the lawyers, nor (needless to say) GM's unsecured creditors—had the slightest idea that a termination statement had been filed relating to the Term Loan until GM's eventual bankruptcy, when its postpetition financing had to be secured by the Term Loan collateral. Despite this discovery, the bankruptcy court authorized repayment of the Term Loan—still "thought to be a duly secured claim"—subject to the right of the unsecured creditors to challenge the priority of the Term Loan security in light of the lenders' mistake.[57]

In the ensuing decade of litigation, it was the parties' initial contentions that posed the interesting questions—only later subsiding into messy questions of fact. The unsecured creditors took a straightforward legal position. According to UCC § 9-513(d), "[e]xcept as otherwise provided . . . upon the filing of a termination statement . . . the financing statement to which the termination statement relates ceases to be effective."[58] It followed (or so it seemed at first) that with the filing of the erroneous UCC-3, the Term Loan had become entirely unsecured—resulting in a transfer from lenders to unsecured creditors of the best part of $1.5 billion. In response, JPMorgan (as agent for the lenders) adopted an essentially *legal* position as well. Instead of arguing that a transparent and catastrophic mistake justified equitable relief, the banks looked for help in the same statute. When the cross-references are pursued, the exception mentioned in § 9-513(d) provides that the filing of a termination statement does not terminate anything if the filing was *unauthorized*. Grasping at this straw, JPMorgan was obliged to argue that a UCC filing by an authorized agent is not "authorized" if the effect of the filing—in this case, the release of the Term Loan security—is not what the principal intended.[59] That this approach would require an uphill legal battle must have been apparent from the start. The bankruptcy court, in a heroic opinion by Judge Gerber, managed to give summary judgment for JPMorgan—not, we might surmise, because the court found a compelling argument in the rarefied reaches of agency law, but because of the powerful equities of the case. Yet this was the aspect of the situation that somehow nobody wanted to mention.

Success resting on such subtleties could only be fleeting. On appeal from the bankruptcy court, the Second Circuit first certified to the Delaware Supreme Court a question about what the word "authorize" meant in the Delaware UCC. Was it "enough that the secured lender review and knowingly approve for filing a UCC-3

57 *In re* Motors Liquidation Co., 486 B.R. at 615 n.54.

58 U.C.C. § 9-513(d) (AM. L. INST. & UNIF. L. COMM'N 2020).

59 *In re* Motors Liquidation Co., 486 B.R. at 617.

purporting to extinguish the perfected security interest, or must the secured lender intend to terminate the particular security interest that is listed on the UCC-3?"[60] The Delaware court replied that "authorize" meant "authorize," with "no requirement that a secured party that authorizes a filing subjectively intends or otherwise understands the effect of the plain terms of its own filing."[61] The Second Circuit followed suit, leaving the Term Loan largely unsecured.[62]

The back-and-forth between the courts in *Motors Liquidation* sheds no light on either the common law of agency or its function within the UCC. What does illuminate, in dramatic terms, is the apparent determination of courts and lawyers to resolve a classic problem of equity without resort to equitable principle. Despite the explicit reminder in UCC § 1-103(b) that "the principles of law and equity, *including* . . . *mistake*, . . . supplement [the Code's] provisions,"[63] there is no hint in the published opinions that anyone thought it appropriate to state the obvious. A mistake had been made, one that equity—in pursuit of its traditional objectives—would certainly seek to correct. The problem for equity was not merely that innocent parties would be prejudiced. It was that hundreds of millions of dollars would be arbitrarily transferred from one set of creditors to another—overturning the relative priorities that were intended and understood by all parties—as the result of a trifling clerical error. No one was

60 *In re* Motors Liquidation Co., 755 F.3d at 86. It is more than a little strange that the Second Circuit should have been so shy about interpreting plain language in some uniform provisions of the Uniform Commercial Code—while continuing to miss the forest for the trees. Assuming away any question of agency, if a valuable security interest had been inadvertently released by the lender itself, would the court have seen no problem worth discussing?

61 Off. Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, 103 A.3d 1010, 1017–18 (Del. 2014).

62 *In re* Motors Liquidation Co., 777 F.3d 100, 105–06 (2d Cir. 2015). The ultimate windfall to the unsecured creditors was less than the full principal amount of the Term Loan, because termination of the Delaware UCC-1 did not entirely eliminate the lenders' security. Because the collateral consisted of equipment *and fixtures*, lawyers for JPMorgan had made "fixture filings" with the appropriate offices in the twenty-six different counties across the country where such assets were located. Termination of the Delaware financing statement did not disturb the real-property security created by these fixture filings—but it did necessitate the identification of 200,000 disputed assets as either "equipment" (in which the lenders no longer held an Article 9 security interest) or "fixtures" (on which they held valid mortgages). For details of the laborious investigation required, see *In re* Motors Liquidation Co., 576 B.R. 325 (Bankr. S.D.N.Y. 2017). After further years of litigation, at a cost of countless millions in legal fees, the impossible factual issues were settled by compromise—including payment of $231 million for the benefit of the unsecured creditors. *See* Perry L. Glantz, *Infamous GM Bankruptcy Case, Triggered by Colossal UCC Filing Error, Is Settled for $231 Million*, CLARKS' SECURED TRANSACTIONS MONTHLY, May 2019, at 1, 1.

63 U.C.C. § 1-103(b) (AM. L. INST. & UNIF. L. COMM'N 2020) (emphasis added).

prepared to address the situation in these commonsense terms. Instead, judges and lawyers did their best to pound a square peg into a round hole: to find an answer in the statute to a problem (that of mistake and consequent unjust enrichment) that the statute does not address.

Despite its grave consequences, the mistake involved in *Motors Liquidation* was trivial. It was transparent, in the sense that no one could be deceived: no interested party could have learned of JPMorgan's extraneous filing without at once realizing it had been made in error. The mistake was harmless, in that no party (and no stranger either) could possibly be prejudiced as a result. In the context of secured transactions, the "intervening equity" that would preempt a remedy for mistake would typically be that of a bona fide purchaser—someone who had purchased an asset without notice of a preexisting lien, or of an error in a deed description. The same concern extends to a nonpurchaser who has changed position in reliance. If one of GM's unsecured creditors could have asserted that it had extended credit in reliance on the erroneous filing, believing that equipment and fixtures were henceforth unencumbered, equity would protect that creditor from the effect of any relief extended to the lenders. In *Motors Liquidation* there was no possibility of any such reliance, since nobody knew about the filing at all.

Most importantly, the mistake was trivial because it left untouched the *substance* of the transaction (and the working of the Article 9 system as a whole), having only a passing effect on its *form*. A concern with substance in this context seeks to facilitate the system of secured credit by preserving intended priorities and protecting reliance. A concern with form is prepared to overthrow intended priorities, with no reliance to be protected, for the sake of maintaining an untouched (though erroneous) ledger.

The natural equitable intervention in *Motors Liquidation* would have been to cancel and disregard the unintended termination statement, leaving all parties where they were supposed to be—in what Professor Laycock calls their "rightful position."[64] Hundreds of millions of dollars of unjust enrichment and legal expense might thus have been avoided with the stroke of a pen. The purpose of equitable intervention in a commercial setting is very often to establish or restore priorities among competing claimants, where the uncorrected result of one party's mistake about the state of title would be to promote claims which should properly be subordinate. The leading case of *French Lumber Co. v. Commercial Realty & Finance Co.*,[65] from the early

64 DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 14–15 (4th ed. 2010).
65 195 N.E.2d 507 (Mass. 1964).

years of the UCC, offers a telling contrast to *Motors Liquidation*. French borrowed from Ware to purchase a 1959 Cadillac, granting a security interest in the car. French defaulted, Ware repossessed; Associates advanced funds with which French reacquired the car, free of Ware's lien. Associates' new security interest was duly perfected, but Associates was (inexcusably) unaware that French—before the Ware default—had granted a second lien on the Cadillac, properly recorded, to Commercial. After French defaulted again, Associates and Commercial asserted competing claims to the proceeds of the car. Commercial, as first to file, would prevail by the law of Article 9.[66] The trial judge instead applied the rule of equity, which asks if anyone has been prejudiced:

> I infer from the evidence that Associates had no knowledge of this situation. It is incredible that Associates would not have taken appropriate protective steps by way of an assignment from [Ware]. If the assumption is made that Associates was negligent in failing to check the records, this negligent act will not necessarily bar Associates from obtaining the relief it seeks through subrogation. Such negligence was as to its own interests and did not affect prejudicially the interests of Commercial. There has been no change of position by Commercial. It is left exactly in the position it originally was in. It had a claim known by it to be subordinated to [Ware]. [Ware] was paid by Associates. If Associates had taken an assignment from [Ware], Commercial would have had no cause for complaint.[67]

The Massachusetts Supreme Court affirmed, citing § 1-103 on "principles of . . . equity" and observing that "[n]o provision of the Code purports to affect the fundamental equitable doctrine of subrogation."[68] For the availability of subrogation to extricate Associates from the effect of its "incredible" negligence, the court could point to a wealth of prior authority in cases of comparable mistakes by mortgagees. And this is notwithstanding the fact, in almost all real-property cases, that equitable intervention means overriding the state of title as formally recorded—so long as record title has not been relied upon.

The equities of the situation in *Motors Liquidation* were perfectly obvious, and the equitable remedy would have been an easy one. What explains the reluctance of the courts to acknowledge even the

66 *Id.* at 508–10.

67 *Id.* at 509 (supplemental punctuation omitted) (quoting trial court decision without citation).

68 *Id.* at 510. The decision in *French Lumber* was approved by Grant Gilmore, who described it as "entirely sound." 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY § 15.3, n.7 (1965).

possibility of an equitable response—and of JPMorgan's lawyers even to ask for one? Lawyers and judges these days will sometimes respond that the certainty and reliability of the Article 9 filing system must be the paramount objective, and that the need for reliability leaves no room for equitable correction. But if the point of the system is to enable and safeguard the creation of intended priorities, it is stultifying to prohibit the correction of errors. Where the intelligent answer can only be "it depends," the legal and formalist reflex assumes that there must be one rule for all cases. If UCC filings must either be always binding prima facie or always open to question, an elementary concern for reliability means that they must always be binding. And that is what the UCC provides—if you ignore § 1-103(b).[69]

IV. FEWER JUDGES, MORE LAWS

According to Roscoe Pound in 1905, "Everywhere we find two antagonistic ideas at work in the administration of justice—the technical and the discretionary."[70] Over a century later, the antagonism he paraphrased is still most readily identified by the names law and equity. Law is inclined to form, equity to substance. Law claims the advantage of rules that are knowable in advance; equity, the superior justice that is sometimes available when judges can modify those rules to fit particular cases. An immediate corollary of this basic antagonism is the question of the effect to be given any sort of formal document. Here "the world-old legal problem"—according to Wigmore, writing in the same year as Pound—is "to define the *relation that must exist between volition* (or *intention*) *and expression.*"[71] Law prefers to treat the expression as definitive and exclusive, while equity looks not only to intent behind the expression but also to the consequences of the impression it has created. The problem comes to

69 Some courts, including the Delaware court in *Motors Liquidation*, have suggested that "[i]f parties could be relieved from the legal consequences of their mistaken filings, they would have little incentive to ensure the accuracy of the information contained in their UCC filings." Off. Comm. of Unsecured Creditors of Motors Liquidation Co. v. JPMorgan Chase Bank, 103 A.3d 1010, 1016 (Del. 2014). The absurd overstatement reflects a pervasive response to an unfamiliar legal issue. If law students retain one idea from their brush with the common law—a single, polyvalent analytical approach, adaptable to almost any situation—it is the idea from Torts class that liability be imposed where it will tend to optimize incentives. The Delaware court likewise hinted that—while it might properly step in to help an innocent individual—big banks and big law firms ("sophisticated transacting parties") deserve what they get. *Id.* at 1015. There is an echo here of latter-day unconscionability—unequal bargaining power?—that the students might recall from Contracts class.

70 Pound, *supra* note 11, at 20.

71 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2404, at 3374 (1905).

the fore when someone has made a mistake, for instance in a deed or a UCC filing statement.

Law in its original, undiluted version gave us *legal estoppel*, according to which the grantor of a deed, or the maker of any promise under seal, could not assert the truth to contradict his own statements. Since it constituted an obvious improvement over the older proof by oath-swearing, "a writing proved to be the defendant's could not be contradicted. For if a man said he was bound, he was bound."[72] Equity, in response, considered both intent, yielding the doctrine of reformation, and prejudice to others, yielding equitable estoppel. In the classic exposition by Chief Justice Ira Perley of New Hampshire:

> The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law. For reasons of general policy, a record is held to import incontrovertible verity, and for the same reason a party is not permitted to contradict his solemn admission by deed. . . .
>
> . . . .
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> Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth.[73]

No court today would embrace an *avowed* doctrine of legal estoppel—though *Motors Liquidation* shows us the doctrine alive and well, at least for purposes of Article 9. The antagonistic ideas in the administration of justice remain as recognizable as ever. Law favors rules—specificity, certainty, predictability. Less room for judicial discretion means a legal system that requires less *judgment*. The fact that the opposing tendencies are clearly recognizable does not mean that they are in equipoise. Speaking of "swings toward or away from legal formalism . . . determined by changes in community values," Grant Gilmore saw "a continuing struggle of evenly matched forces."[74] But insofar as the federal cases just reviewed indicate the status quo, the struggle appears to be over. This would not have been a surprise

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72 O.W. HOLMES, JR., THE COMMON LAW 261–62 (Boston, Little, Brown & Co. 1881).

73 Horn v. Cole, 51 N.H. 287, 290–92 (1868).

74 GRANT GILMORE, THE AGES OF AMERICAN LAW 17 (1977).

to Pound, writing in 1905 that "all the circumstances of modern life draw us to the strictly legal side, and the judge, bound hand and foot by a code and the maxim that that law is best which leaves least to the discretion of the judge, is our natural goal."[75] We appear to have reached that goal, in commercial cases at least, and for reasons that may be sufficiently apparent.

Whatever age of American law preceded what Guido Calabresi called "the age of statutes"[76] is now beyond living memory. In Gilmore's summary:

> Between 1900 and 1950 the greater part of the substantive law, which before 1900 had been left to the judges for decision in the light of common law principles, was recast in statutory form. We are just beginning to face up to the consequences of this orgy of statute making.[77]

One of those consequences—not of particular concern to Gilmore or Calabresi, but plainly visible in the cases reviewed—is that important parts of the substantive law that were *not* recast in statutory form have faded from professional awareness. The interstitial "principles of law and equity" that were left uncodified by Gilmore and his colleagues—being merely signaled by the saving clause of § 1-103—make a perfect example. For the authors of the UCC and the legal profession for which they were writing, the "principles of law and equity" they tried to incorporate as background law were a significant part of what every lawyer already knew. Their Code is now being interpreted by lawyers and judges whose law school education has devoted less time than ever to common-law principles and none at all to equity. Most legal practice tends to reinforce the same lesson: that any really important legal proposition will be codified somewhere, and that a code citation affords the only sure basis of prediction or conclusion. A lawyer whose first recourse is to statute will go to great lengths to find an answer there, and a proposition that does not appear in the statute becomes unworthy of trust. ("Nowhere in the Bankruptcy Code does it say, 'property held by the debtor subject to a constructive trust is excluded from the debtor's estate.'"[78]) If a situation is arguably governed by statute, the relevant propositions of common law, inevitably contestable, are better avoided—and "equitable discretion" left strictly alone.

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75 Pound, *supra* note 11, at 21.

76 *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982), especially chapter 1 ("Choking on Statutes") and its accompanying endnotes.

77 GILMORE, *supra* note 74, at 95.

78 *Supra* note 25.

The federal cases displaying the most pronounced equity deficit are commercial in character—a fact that surely explains part of the phenomenon. Given the competing advantages of law and equity, it is understandable that commercial lawyers show a distinct preference for rules over judgment. Quoting Pound once more: "[T]he present is a period of law. Commercial and industrial development, as Montesquieu saw in his day, make for certainty. The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion."[79] Montesquieu's remarks are so pertinent that they deserve quotation, not merely cross-reference:

> Commercial transactions can tolerate little legal procedure. These are actions of each day, which others of the same kind must succeed each day. It is necessary, therefore, that they can be settled each day. It is different with those actions of life which may greatly influence the future but which rarely happen. One usually marries only once; family gifts and wills are not made every day; a child reaches majority only once.
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> *Plato* says that a city without maritime commerce needs only half as many laws; and this is very true. Commerce brings into the same country different sorts of people, with many contracts, types of property, and means of acquiring it.
>
> In a commercial city, therefore, there are fewer judges, and more laws.[80]

It is especially the maritime trader's *lawyer* who will be glad to have more laws and fewer judges. The possibility that a client might one day need equitable relief from the consequences of mistake seems so remote as to be negligible. Meanwhile, the lawyer's everyday job is to furnish a legal opinion: in the Article 9 context, the firm's guarantee that—the client having been first to file—the intended security interest will be not only legal, valid, binding, and enforceable, but first in priority as well. Preparation of such opinions is greatly facilitated if we can assume that the relevant law is exclusively to be found in the specific provisions of Article 9, without reference to supplemental "principles of law and equity."

For the present and the foreseeable future, the most distinctive kind of equitable intervention—an explicit power to supplement standard legal rules to do better justice in particular cases—has been lost to American legal culture. Of course this does not mean that equity has disappeared without a trace. Across a wide range of

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79 Pound, *supra* note 11, at 24 (citation omitted).

80 2 CHARLES LOUIS DE SECONDAT, BARON DE MONTESQUIEU, DE L'ESPRIT DES LOIS, bk. XX, ch. 18 (Geneva, Barrillot & Fils. 1748) (translated here). The remark about "half as many laws" is from PLATO, LAWS 842c–d.

important topics, equity thinking has been woven into the fabric of a modern "law" in which law and equity can no longer be distinguished. Still, the fact that the resolution of private controversies will no longer be entrusted to judicial discretion stands in sharp contrast to the ever-increasing discretion afforded to the same judges in deciding public questions. It takes judgment to resolve political issues we can't settle for ourselves. Given enough rules, however, lawyers prefer to handle their own problems.