

Cardozo's Equitable Method and Judicial Lawmaking's Auxiliary Role: A Comment on Professor Samet's *Equity, Morality, and Law in The Nature of the Judicial Process*

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I. RULE-BASED ALIGNMENT OF LAW AND MORALITY

As Irit Samet expertly demonstrates in her contribution to this Symposium, the jurisprudence of equity is “key” to understanding some of the central ideas Benjamin N. Cardozo sets out in *The Nature of the Judicial Process* (*NJP*).¹ This is, as she puts it, because equity and the ideas underlying it serve “as an essential foil for the work [Cardozo] aims to do in the text.”² According to Samet, what Cardozo is after is the promotion of a progressive agenda that succeeds in striking the balance between dynamism and stability of a legal system.³ For her, the aims laid out in the *NJP* resonate strongly with the aspiration of equity.⁴ In her article, she draws attention to the structural similarities between Cardozo’s picture of adjudication, on the one hand, and the jurisprudence of equity, on the other.

On Samet’s view, equity aligns law and morality while carefully balancing judicial creativity and adherence to established rules and precedent. Equity, so she argues, lays out a picture of judicial decision-making that is attuned to the necessity to synchronize law and morality without running roughshod over the rule of law.⁵ Samet sees the jurisprudence of equity as exemplifying “the viability of aligning law and morality as a project that judges can and ought to pursue.”⁶ As she stresses, equity carries out this alignment “in a way that supports, rather than

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1. Irit Samet, *Equity, Morality, and Law in The Nature of the Judicial Process*, 34 YALE J.L. & HUMANS. 136, 136 (2023).

2. *Id.*

3. *Id.* at 137.

4. *Id.* at 142.

5. See, e.g., *id.* at 151.

6. *Id.* at 140.

undermines, the rule of law.”⁷ In point of fact, she views the alignment of law and morality as central to the rule of law and ultimately as grounding law’s legitimacy.⁸ A legal outcome that does not match and is even at odds with “the community’s deep convictions about moral accountability . . . is bound to alienate its addressees.”⁹

The aim of keeping law and morality tethered together forms the core not only of the jurisprudence of equity but, on her view, is prominently expressed by Cardozo in the *NJP* as well.¹⁰ Taking inspiration from the jurisprudence of equity allows judges to avoid too easily discarding established rules while seeking to keep law and morality apace. The identification of this twofold concern in the *NJP* leads Samet to stress the accuracy of John Goldberg’s characterization of Cardozo as an “inclusive pragmatist.”¹¹

Equity, for Samet, displays a path to “reform[ing] the law in a creative way without losing sight of the importance of conceptual analysis, stare decisis, and horizontal justice.”¹² And indeed, as the *NJP* makes clear, Cardozo’s progressive agenda aims to come about through carefully crafted reform, not revolution. Against this background, the abundance of examples drawn from equity that appear throughout the different parts of Cardozo’s text is but the expression of structural parallels at a deeper level.¹³ For Cardozo, these examples stand emblematically for the “method of the great chancellors, who . . . built up the system of equity”¹⁴ in precisely the way the *NJP* imagines the task incumbent on judges more generally. In his view, “the judge is under a duty within the limits of his power of innovation, to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.”¹⁵

Samet’s article takes Cardozo up on the references to equity and the “method of the great chancellors.” She explores how far such an ‘equitable method’ of adjudication carries in rendering intelligible “Sir Oracle in action.”¹⁶ Her insightful reconstruction of Cardozo’s exposition of the “method of the great chancellors,”¹⁷ as it is harnessed for the broader purposes of promoting a progressive agenda enables her to shed new light

7. *Id.* at 156.

8. *Id.* at 146.

9. *Id.* at 146.

10. *Id.* at 146.

11. *Id.* at 140.

12. *Id.* at 150.

13. It is noteworthy that examples drawn from equity appear in discussions of all methods of adjudication. They are discussed not just in connection with the “sociological” but also the “philosophical” and “historical” methods.

14. BENJAMIN N. CARDOZO, *NATURE OF THE JUDICIAL PROCESS* 137 (1921).

15. *Id.* at 133–134.

16. *Id.* at 19.

17. *Id.* at 137.

on Cardozo's position as neither "down with system-radical" nor "reactionary conservative."¹⁸ Taking Samet's article as its starting point, this Comment highlights the way that Cardozo's equitable method spells out a role for judicial lawmaking that serves legislative lawmaking in an auxiliary capacity. This characterization of the equitable method also hints at the possibility of carving out a distinctive place for equity in legal systems where law and equity are fused.

II. THE EQUITABLE METHOD AND JUDICIAL LAWMAKING

The parallel Irit Samet draws between the jurisprudence of equity and the picture of adjudication as laid out by Cardozo in the *NJP* rests on two premises. These premises are: first, Samet's understanding of Cardozo's references to "mores" as to "conscience" and, second, her view of Cardozo's equitable method as embracing a seamless transfer of the motivations for equity's particular interventions toward a larger scale reform project. Both premises merit closer examination. Such examination points, as I will argue, to the need for important qualifications. In light of these qualifications, a distinctive picture of the role of judicial lawmaking in the *NJP* emerges.

1. *Conscience v Mores*

On Samet's account, Cardozo's reform agenda proceeds in line with and in the direction of "conscience." Alignment of law and morality, for her, is synonymous with realizing "Accountability Correspondence," that is, with matching legal liability to moral accountability. Accountability Correspondence thus understood—and as Samet has extensively developed in her prior work—is premised on the idea that moral duties are knowable to the participants in a legal system. This includes judges who are well placed to know what interpersonal morality requires.¹⁹ For Samet's judges, it is actually possible to heed the call to be disengaged and not impose their personal views on the outcome of their decisions.²⁰ This, she affirms, is certainly the case in equity's traditional core domains, such as contract and property law, where it is possible to "identify a broad consensus as to the relevant moral standards."²¹ As she acknowledges, the role of equity in establishing Accountability Correspondence is therefore also restricted to precisely those areas of law that are concerned with fundamental norms of inter-personal morality.²² However, the diverging views about the recognition of remedial constructive trusts—which she discusses in other

18. Samet, *supra* note 1, at 156.

19. See IRIT SAMET, EQUITY: CONSCIENCE GOES TO MARKET 42–65 (2018).

20. Samet, *supra* note 1, at 150–151.

21. *Id.* at 147.

22. *Id.*

parts of her article—may serve as illustrations of the occasional absence of a clear consensus even in equity's native territory.²³

In contrast to Samet's judge, Cardozo's judge is concerned with establishing a relation between law and morals, and does so by giving expression to the "*mores* of his day."²⁴ When judges have to determine the direction in which to take the law in accordance with the "sociological method," for instance, what matters are "justice, morals and social welfare, the *mores* of the day."²⁵ This seems to be a slightly different endeavour than an attempt to align law with "conscience" as understood by Samet. Cardozo's equitable method, in maintaining a relation (but not necessarily in aligning) law and morals, appears much closer to custom than to conscience. After all, Sir Oracle is tasked with translating "the customary morality of right-minded men and women" into legal forms.²⁶ And whereas Samet observes that Cardozo is concerned with legal results that are at odds with a community's convictions about moral accountability,²⁷ it appears to me that he is rather concerned with a community's convictions *tout court*. And if those convictions, the *mores* of the day, change, so must the law.²⁸

A more descriptive understanding of *mores* may also cast doubts on the alignment as inevitably fostering a progressive agenda.²⁹ Progressive laws, faced with more conservative *mores*, might raise similar alienation problems as conservative laws meeting progressive *mores*. What is more, the rich scholarship on legal consciousness (including in private law) has shown that legal rules can also have a feedback effect in shaping beliefs about what a "right" outcome is, so that alignment is much less of a one-way street than it may appear.³⁰ As John Goldberg has pointed out in his reconstruction of Cardozo's writings on the relation between the development of law and society, the author of the *NJP* believed that "in rendering her decisions, the judge simultaneously shapes the social mind she is trying to read."³¹

In addition, Cardozo is a lot more reluctant to assert that judges—or, for

23. See *id.* at 153–155.

24. CARDOZO, *supra* note 13, at 104.

25. *Id.* at 31.

26. *Id.* at 105–106.

27. Samet, *supra* note 1, at 146.

28. CARDOZO, *supra* note 13, at 152. Samet's reference to equity's contribution to the "flourishment of a sophisticated commerce-friendly legal system" instantiates well how a community's convictions governing interpersonal interactions can change over time. Samet, *supra* note 1, at 143.

29. References to the work of Eugen Ehrlich and Ezra Pound, throughout the text may lend further support to the identification of a much more descriptive take of the "attempt to uncover the nature of the [judicial] process." CARDOZO, *supra* note 13, at 13.

30. For an example of such a study covering *inter alia* contractual warranties and tortious liability, see PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW* (1998).

31. John Goldberg, *Community and the Common Law Judge: Reconstructing Cardozo's Theoretical Writings*, 65 N.Y.U. L. REV. 1324, 1344 (1990).

that matter: anyone—can know what morality would truly require.³² He points to the inevitability of socialization that shapes not just judges' conscious but also their subconsciously held beliefs and attitudes. In this, Cardozo's judges are no different from any other human, including the litigants before them.³³ Moreover, even if judges could somehow obtain such superior knowledge, they are bound to an objective standard of relating law and justice to achieve a result that "some other man of normal intellect and conscience might reasonably look upon as right."³⁴ On this more reluctant picture of judges' epistemic capacities, all we can—and should—hope for is adjudication that accords legal results with currently prevailing, customary views about morality.³⁵

2. *Equitable Lawmaking*

Samet's article stresses the importance of the well-known maxim—also employed throughout the *NJP*—that equity "follows the law."³⁶ This idea ensures that judges never exercise their discretion in a way that would run the risk of destabilizing the entire legal system.³⁷ Yet, when equity is drawn upon to integrate law and morality, it frequently goes against "crystal clear answers supplied by property or contract law."³⁸ Furthermore, and as Samet shows through reference to Cardozo's approach to constructive trusts, equity can occasionally fundamentally alter a parties' rights and duties, as when it turns a legal owner into a (constructive) trustee. Tellingly, Cardozo sees the imposition of a constructive trust on the complainant for fraud against the defendant in *Beatty v. Guggenheim* as an expression of the "conscience of equity."³⁹ Even if Samet defends English judges' hesitancy to have recourse to remedial constructive trusts, Cardozo clearly views equitable interventions as at times very capacious, if only since he also embraces the idea that "equity regards as done what ought to be done."⁴⁰

As Samet makes clear, reconciling a robust stance of equitable intervention with a commitment to stability is only possible because of the robust strings that are attached to it. In addition to confining equitable

32. See CARDOZO, *supra* note 13, at 106 (discussing the unattainable nature of an objective perspective).

33. CARDOZO, *supra* note 13, at 167.

34. CARDOZO, *supra* note 13, at 89. See also, *id.* at 120–21 (quoting Francis Gény on the need for objectivity).

35. In the same vein, Goldberg sees Cardozo's judges to be bound to enforce the community standards of obligation that are reflected in the common law. Goldberg, *supra* note 29, at 1135.

36. This is the heading she gives to her discussion of equity's rule-bound character. Samet, *supra* note 1, at 148.

37. See Samet, *supra* note 1, at 149.

38. Samet, *supra* note 1, at 150.

39. *Beatty v. Guggenheim Exploration Co.*, 225 N.Y. 380, 386 (1919) (cited in CARDOZO, *supra* note 13, at 42).

40. See CARDOZO, *supra* note 13, at 39 (discussing of the attribution of risk for loss in the context of claims for specific performance).

interventions to “the fields of private law and civil remedies,”⁴¹ these interventions are of a particular kind. They fix the sensed rift between law and morality by denying a party the insistence on a legal right rather than by denying the existence of the right as such, thereby giving rise to the double structure characteristic of equity.⁴² Furthermore, equity generally intervenes in individual disputes only and to counter, as Samet puts it, a “myopic view and rigid formalism.”⁴³ Put differently, equitable intervention only suspends the enforcement of rigid rules where “the particularity of the situation”⁴⁴ exceptionally demands overriding the legal rights of a “stickler.”⁴⁵

In addition to such particular interventions, however, the *NJP* highlights further moments during which judicial creativity may be required. In response to inevitable gaps in statutes and the common law,⁴⁶ judges are called upon to fill them through interpretation,⁴⁷ but occasionally also in their role as lawmakers.⁴⁸ As Samet points out, equitable intervention can and does influence legislative lawmaking.⁴⁹ But how far can the equitable method as laid out in the *NJP* really carry judicial creativity in legislating?

Cardozo sees room for judicial lawmaking across all areas of law but confines it to the “interstitial limits” of necessary gap-filling.⁵⁰ He is acutely attuned to the necessity to separate the tasks of legislative bodies and of judges as legislators, “judge-made law is secondary and subordinate to the law that is made by legislators”.⁵¹ While as Samet highlights, equity—and this undeniably applies to Cardozo’s equitable method, too—can intervene to disrupt common law arrangements,⁵² the *NJP* also makes plain that the approach to adjudication as gap-filling that it sets forth cannot bring about wider-ranging legislative change on its own. The equitable method alone cannot carry a reform agenda. At the same time, what the text also suggests is that the equitable method of adjudication is exceptionally well-placed to support a gradual change that might culminate in legislative change, and do so without resulting in problematic alienation. This is because the equitable

41. Samet, *supra* note 1, at 137.

42. Samet, *supra* note 1, at 148.

43. Samet, *supra* note 1, at 145.

44. Samet, *supra* note 1, at 145.

45. Samet, *supra* note 1, at 148 & n.67 (quoting ARISTOTLE, NICOMACHEAN ETHICS).

46. CARDOZO, *supra* note 13, at 144–145.

47. CARDOZO, *supra* note 13, at 17.

48. CARDOZO, *supra* note 13, at 124 (positing a duty to make law when none exists); *id.* at 129 (stipulating a right to legislate within gaps).

49. Samet gives the example of directors’ duties. Samet, *supra* note 1, at 142 n.34. One might add the U.K.’s Trusts of Land and Appointment of Trustees Act 1996, which statutorily enshrines the creation of a trust where two or more people own an interest in property.

50. CARDOZO, *supra* note 13, at 69 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting)); *id.* at 103.

51. CARDOZO, *supra* note 13, at 14.

52. Samet, *supra* note 1, at 152.

method, in seeking to accord law with *mores* without granting judges unfettered discretion to overturn established rules and precedent, can prepare the ground for successful progressive legislation further down the road. Interstitial judicial lawmaking has the capacity to turn a potentially disruptive progressive revolution into a continuous progressive reform. It hereby plays an indispensable auxiliary role for the processes of legislative lawmaking.⁵³ This, to me, seems to be a crucial refinement that further completes Samet's perceptive account of the references to equity in Cardozo's text. It is precisely in emphasizing the supportive capacity of the equitable method that Cardozo "can add credibility, nuance and a sense of 'can do' to the progressive agenda he promotes in the *NJP*."⁵⁴

This view of the auxiliary role of judicial lawmaking in Cardozo's equitable method explains his concern with keeping intervention contained within the "interstitial limits." As much as overly rigid adherence to formal rules can "[breed] distrust and suspicion of the courts,"⁵⁵ too frequent departure from settled rules risks that "litigants [lose] faith in the even-handed administration of justice in the courts"⁵⁶. As Samet notes, Cardozo seeks to preserve horizontal justice.⁵⁷ In my view, this aspect deserves to be highlighted even more prominently when seeking to understand Cardozo's approach to adjudication and judicial lawmaking. He conceives of judges as tasked with contributing to the drawing of one continuous—horizontal—line of justice by filling in occasional gaps. At the same time, judges are decidedly not in charge of shifting the position of the entire line on their own: this latter charge is incumbent on legislators. Still, adjudication in conformity with the equitable method facilitates, and perhaps sometimes enables, the effective implementation of profound and comprehensive changes to central tenets of law.

What this observation implies is that the equitable method may sometimes be advanced against too swift legislative reversal. Equity's "ethos,"⁵⁸ as it is taken up in the equitable method, also guards against hasty implementation of measures that are closer to disruptive revolution than to gradual reform. Judicial lawmaking has to proceed incrementally. In fact, throughout the *NJP*, Cardozo stresses the importance of continuous, gradual changes, including by accentuating the tentative groping of judges setting out to developing "new" law and by likening law's perpetual evolution to

53. As Cardozo writes elsewhere, re-calibrating law is a never-ending process. See BENJAMIN N. CARDOZO, *THE GROWTH OF LAW* 67 (1924) ("Hardly is the ink dry upon our formula before the call of an unsuspected equity—the urge of a new group of facts, a new combination of events—bid us blur and blot and qualify and even, it may be, erase."). See also CARDOZO, *supra* note 13, at 62 (discussing changing circumstances, which occasion a change of customs and, ultimately, of law).

54. Samet, *supra* note 1, at 137.

55. CARDOZO, *supra* note 13, at 91.

56. CARDOZO, *supra* note 13, at 34.

57. See Samet, *supra* note 1, at 150, 156.

58. See Samet, *supra* note 1, at 143, 150 (arguing that *NJP* channels the ethos of equity).

the slow but steady movement of a glacier.⁵⁹

III. THE EQUITABLE METHOD'S SUPPORTIVE CHARACTER: TRANSCENDING FISSION & FUSION?

To identify the primary function of the equitable method as supporting (progressive) legal reform by gradually preparing the ground for wider acceptance demonstrates how equity and equitable principles can maintain a distinct place in legal systems where equity and law are fused. Samet has argued elsewhere that such a fused, integrated system of law and equity leaves a fundamental idea of justice unfulfilled.⁶⁰ On an alternative picture, one that seems to emerge from the *NJP* through its “multi-layered” structure,⁶¹ Cardozo and his view of the equitable method of adjudication would again be occupying a position that transcends both extremes, complete fusion as well as clearcut fission, and do so in a way that points to the “deeper harmonies” between law and justice.⁶² While spelling out such an alternative in more detail must await further occasions, Samet’s thoughtful and illuminating reconstruction of the place of the jurisprudence of equity in the *NJP* allows us to see the possibility of such a middle ground.

59. See CARDOZO, *supra* note 13, at 25, 28, 48.

60. See SAMET, *supra* note 17, at 194.

61. Samet, *supra* note 1, at 149.

62. Samet, *supra* note 1, at 145 (citing Cardozo). In his contribution to this Symposium, Henry Smith puts forth an account of Cardozo and *NJP* as laying the ground for a view of equity’s special role as “meta-law” in fused jurisdictions. Henry Smith, *Cardozo and the Nature of the Equitable Process*, 34 YALE J.L. & HUMANS. 166 (2023).