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## Opportunism as Crucible: Rethinking Equity in View of Reliance Interests and Legal Evolution

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OPPORTUNISM AS CRUCIBLE: RETHINKING EQUITY IN VIEW OF  
RELIANCE INTERESTS AND LEGAL EVOLUTION

*John S. Ehrett\**

*This Article offers and defends a nuanced definition of opportunism in the context of legal decision-making by differentiating between opportunism in the broad sense and the particularized phenomenon of cognizably malignant opportunism. It subsequently proceeds by developing a normative critique of the case for broader invocation of counter-opportunistic equitable remedies, alongside a defense of the reliance and gap-filling functions performed by opportunistic actors. Centrally, I challenge the suggestion that the existence of opportunism in private law warrants a revival of the doctrines of ex post equity. I argue, instead, that opportunism serves an important structural purpose where the evolution of ex ante legal rules is concerned, and contend that while equity-oriented moral reasoning might serve to inform the character and construction of such rules, the use of equity as an ex post remedy should generally be rejected by judicial decision makers.*

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## INTRODUCTION

Given the unavoidable limitations of the human moral imagination, moral norms will not always align with the structures established by law. This understanding, recognized from Aristotle and other ancients onward,<sup>1</sup> has undergirded much of the debate regarding the proper mechanisms for bridging the chasm between the order established by law and the order required by morality.

The concept of *equity*—described by some commentators as second-order law—was, at common law, one instrument used to further this bridging process.<sup>2</sup> Equity sought to prescribe distinct remedies whose character was contingent upon the context of the proceeding at hand, whereas law (strictly understood) was bound to a more formalistic understanding rooted in rule sets established *ex ante*.<sup>3</sup>

Over time, the development of legal culture resulted in a fusion of courts of law and courts of equity, in which law-court judges were empowered to dispense equitable remedies.<sup>4</sup> The seminal (and perpetually controversial) case of *Riggs v. Palmer*,<sup>5</sup> which involved a murderer's unjust enrichment and ultimately turned on the general equitable principle that a wrongdoer must not profit from his wrongdoing, exists within this tradition, and the dilemma it poses underlies much of the analysis to follow.<sup>6</sup>

The workability of equity is often challenged due to its affirmation of *ex post* remedies (in lieu of reliance on *ex ante* frameworks).<sup>7</sup> Equity's critics argue that equity allows individual judicial discretion to take the place of law,<sup>8</sup> which destabilizes reliance interests and renders the legal landscape indeterminate. However, some scholars have defended the use of

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<sup>1</sup> See ARISTOTLE, NICHOMACHEAN ETHICS 100 (Roger Crisp trans., 2000) (“[W]hat is equitable . . . is nevertheless just, and it is not by being a different genus that it is superior to justice. The same thing, then, is just and equitable, and while both are good, what is equitable is superior.”).

<sup>2</sup> See Henry E. Smith, Equity as Second-Order Law: The Problem of Opportunism 1 (Jan. 15, 2015) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2617413&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2617413&download=yes) [hereinafter Smith, Equity].

<sup>3</sup> See *id.* at 1–2.

<sup>4</sup> See *id.* at 2.

<sup>5</sup> 22 N.E. 188 (N.Y. 1889).

<sup>6</sup> *Id.* at 190.

<sup>7</sup> See Smith, Equity, *supra* note 2, at 6.

<sup>8</sup> See *id.* at 20.

equity, and even argued for its expansion in cases where the dictates of legal and moral imperatives appear to diverge.<sup>9</sup>

This Article critiques the general case for a revived conception of ex post equity, articulated most thoroughly in Professor Henry Smith's *An Economic Analysis of Law Versus Equity*,<sup>10</sup> and argues for an alternative understanding of opportunism that recognizes the distinct varieties of opportunistic behavior. Specifically, this Article challenges the overarching characterization that the presence of opportunism in private law warrants this revival of ex post equity doctrines. Leading private-law scholars, most notably Professor Smith, have advocated for the broader use of ex post equity by judges as a needed "safety valve"<sup>11</sup> where traditional laws offer purportedly inadequate remedies. The primary situation in which these remedies are likely to prove inadequate, according to equity's advocates, is one in which agents have behaved opportunistically.<sup>12</sup>

In contrast, this Article argues that opportunism serves a necessary purpose where the evolution of ex ante legal rules is concerned, and contends that, while the general moral goals underlying equity might serve to inform the character and construction of such rules, the general movement away from equitable decision-making as a judicial remedy should continue—even where opportunistic conduct is discernibly problematic. In short, this Article offers a tailored critique of the counter-opportunistic case for broader invocation of equity principles alongside a defense of the utilitarian, gap-filling function performed by actors behaving opportunistically.

Part II offers an exploration of opportunism as a concept, engaging with the definitions offered by Professor Smith and other scholars. This Article argues that opportunism, defined in such a way as to render it conceptually meaningful, may be described as *amoral*, but need not be understood as universally *immoral*. The descriptor *immoral* may, however, be rationally attached to a particular variety of opportunism that bears certain conceptual characteristics, which I term *cognizably malignant*

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<sup>9</sup> *See id.*

<sup>10</sup> Henry E. Smith, *An Economic Analysis of Law Versus Equity* (Oct. 22, 2010) (unpublished manuscript), [http://www.law.yale.edu/documents/pdf/LEO/HSmith\\_LawVersusEquity7.pdf](http://www.law.yale.edu/documents/pdf/LEO/HSmith_LawVersusEquity7.pdf) [hereinafter Smith, *Economic Analysis*].

<sup>11</sup> *See id.* at 4–5.

<sup>12</sup> *See id.*

*opportunism* (CMO). In outlining this idea of CMO, this Article suggests that opportunism is generally a useful descriptor. It serves as convenient shorthand for conduct occurring within the interstices of law, but does not violate the law per se: its problematic connotations, however, are best understood by viewing CMO as a distinct subtype of this phenomenon.

Part III both engages with the counter-opportunistic case for equity and offers an alternative portrait of the development of legal rules. This Article suggests that ex ante structures of law should be understood by means of an evolutionary paradigm, and that this paradigm works against the idea of supplementation via equity jurisprudence. It also considers how an understanding of opportunism that affirms its innate utility (coupled with a recognition that certain forms of opportunism are more pernicious than others) can lead to entrenchment of efficient rules over time, which are grounded in generally accepted social norms. This recognition is epitomized within the doctrine of strict liability in Tort Law.

The Conclusion briefly examines additional normative questions regarding the morality of opportunism and the role law should play in addressing any legal-moral disjunction. This Article ends with a proposed trajectory for equity jurisprudence recognizing both historical developments and future avenues for growth. It ultimately argues that the moral purposes underlying equity—and the formulation thereof advanced by its contemporary defenders—may be achieved by structuring ex ante rules in such a way as to progressively reduce the incidence of “immoral opportunism.” This solution offers the best balance between encouraging structural reliance, fostering legal evolution, and counteracting discernibly problematic practices.

The stakes in this ostensibly theoretical debate are high. By systemically expanding the breadth of judicial discretion, the push for greater use of equitable remedies introduces a new, strong disincentive against entering into legal obligations. Moreover, the resulting decisions fail to generate any momentum toward reforming defective laws, since weakly written texts can be “fixed” ex post by individual judges. In light of this, the advantages of rebutting CMO via safety-valve equity do not outweigh the consequences. Ex ante laws, created and modified via democratic processes, remain preferable. Similarly, opportunism—understood in a suitably broad sense—may serve a neutral, or even benign, purpose.

## I. OPPORTUNISM AS CONCEPT

Prior to weighing its relationship to law and equity, opportunism must be conceptually defined, and that definition must be justified. This task requires close consideration of embedded assumptions regarding the morality of conduct occurring in the shadow of legal rules and conduct occurring by means of such rules.<sup>13</sup> This Part begins by first considering the general characterization of “opportunism” that Professor Smith advances,<sup>14</sup> and subsequently offering a broader construction of the term. This Part then considers the question of *guilefulness* in opportunism, as raised by Professor Oliver Williamson.<sup>15</sup> These definitions of opportunism have provided the theoretical baseline for increased advocacy of safety-valve equitable remedies<sup>16</sup>: thus, scrutinizing them for internal coherence is vital. Having weighed the definitions suggested by these professors and found them wanting, this Part introduces a framework for conceptualizing CMO, which addresses the thorny moral and epistemological questions posed by the process of formulating a definition, and provides a workable baseline for the analysis to follow.

A. *Identifying a General Concept of Opportunism*

Professor Smith offers a definition of opportunism that warrants considered analysis: “Opportunism . . . often consists of behavior that is technically legal but is done with a view to securing unintended benefits from the system, and these benefits are usually smaller than the costs they impose on others.”<sup>17</sup> This definition serves as the foundation of Professor Smith’s argument in favor of ex post equity.<sup>18</sup>

An example serves to illustrate this: *A* enters into a contract with *B*, whom *A* knows to be gullible, and structures the terms such that *A* disproportionately reaps the benefits of the contract. *B* suffers from a lack of foresight but is legally capable of consenting to the agreement. *B*’s financial imprudence ultimately costs him his business, though the net economic returns to *A* are ultimately marginal.

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<sup>13</sup> See *id.* at 4.

<sup>14</sup> See Smith, Equity, *supra* note 2.

<sup>15</sup> OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING (1985).

<sup>16</sup> See Smith, Equity, *supra* note 2.

<sup>17</sup> Smith, Economic Analysis, *supra* note 10, at 9–10.

<sup>18</sup> See generally *id.*

Professor Smith's definition of opportunism, however, contains two problematic assumptions: first, it assumes that there is a singular, clear, ascertainable intent of the system and second, it rests on an indeterminate standard of net benefits as its moral benchmark.<sup>19</sup> Each of these deficiencies results in workability problems when opportunism is explored in light of the equity question.

First, the problem of discerning and articulating the collective intent of a decision-making body has been discussed at great length.<sup>20</sup> In the example above, the law's failure to shield *B* from *A*'s conduct may be explainable as either an incentive for individuals to engage in their own cost-benefit analysis prior to contracting,<sup>21</sup> or as a means by which lawmakers anticipate entrenching their self-interested plans at some future point. The fact that the law does not protect *A* sheds no light on the underlying past intent of those who left this lacuna in place. For purposes of this analysis, it suffices to note that *intent* cannot necessarily serve as a useful external referent.

Second, this characterization assumes that furtherance of net social benefits is the threshold standard for morality of conduct.<sup>22</sup> It is additionally unclear whether these benefits are to be understood in purely economic terms—to what extent are system norms such as “due process,”<sup>23</sup> for instance, quantifiable—and if not, how such benefits and costs can be rationally treated as commensurable. If gullible *B* is a historically incompetent manager, for instance, are *B*'s economic resources better put to use after they pass into *A*'s hands? *B*'s conduct may be reasonably described as immoral or undesirable by reference to a deontological ethic of reciprocity,<sup>24</sup> but it is not clear that this ethic should be employed as a more

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<sup>19</sup> See *id.* at 9–10.

<sup>20</sup> See, e.g., Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 517 (1989); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547 (1983); Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 869–72 (1930).

<sup>21</sup> See generally Don Bradford Hardin, Jr., *Why Cost Benefit Analysis? A Question (and Some Answers) About the Legal Academy*, 59 ALA. L. REV. 1135 (2008) (discussing the use of individual cost-benefit analysis).

<sup>22</sup> See generally Smith, *Economic Analysis*, *supra* note 10.

<sup>23</sup> U.S. CONST. amend. XIV, § 1.

<sup>24</sup> See generally *Deontological Ethics*, ENCYCLOPÆDIA BRITANNICA, <http://www.britannica.com/topic/deontological-ethics> (last visited Jan. 30, 2016) (describing ethical theories that place emphasis on the relationship between duty and the morality of human actions).

general criterion of net social benefit (and Professor Smith's definition does not endeavor to establish this).

Due to these inherent difficulties with Professor Smith's definition, I propose an alternative general definition of opportunism: opportunism is self-interested behavior that is *legal* but *unanticipated*. This definition encompasses three key ideas:

- 1) Behavior that is not self-interested would not inspire the loophole-exploiting controversy on which this entire debate rests. Opportunism, by definition, is self-interested.
- 2) Opportunism is not illegal. Illegal or fraudulent behavior is an express violation of ex ante rules, whereas, by definition, loopholes are matters to which the law does not explicitly speak either to sanction or to forbid.
- 3) Unanticipated behavior is not equivalent to unintended behavior. The language of unanticipated behavior recognizes that opportunism arises out of unforeseen possibilities as evidenced by the bare fact that the behavior itself may fall within the letter, if not the spirit, of the law. Whereas the language of unintended behavior presumes that a readily comprehensible intent exists against which opportunistic behavior can be weighed.

Professor Smith's general case for equity emerges from his attribution of certain properties to the phenomenon of opportunism<sup>25</sup>:

I suggest that opportunism is behavior that is undesirable but that cannot be cost-effectively captured—defined, detected, and deterred—by explicit ex ante rulemaking. Opportunism is residual behavior that would be contracted away if ex ante transaction costs were lower. Not coincidentally, it often violates moral norms, which are incorporated into the ex post principles that deal with opportunism.<sup>26</sup>

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<sup>25</sup> While many of the problematic features of opportunism Professor Smith identifies are analogous to the phenomenon of *cognizably malignant opportunism* (discussed *infra*), this Article argues that the particular features of Professor Smith's indictment of opportunism do not result in a coherent construct (against which equitable remedies should be used).

<sup>26</sup> Smith, *Economic Analysis*, *supra* note 10, at 9.



This definition of opportunism is rooted in the assumption that undesirable behavior—behavior that exploits loopholes within ex ante legal frameworks—cannot be captured cost-effectively; however, it also implies that such behavior will never be captured cost-effectively.

Note the time window within which each assumption rests: the first operates with a view to present conditions, while the second draws an inference regarding the capacity of future legal rulemaking to adequately address loopholes within the system. This second assumption fails to consider that ex ante rules exist within a dynamic process of information collection, reevaluation, and change. The operation of the legislative system over time offers a framework for the slow advance of ex ante rule tailoring to address loophole problems that may arise.

This idea of progressive rule tailoring is not merely an outgrowth of the deliberative process: deliberations extensive enough to address all, or even most, of the possible contingencies resulting from complex legislation would likely impose excessively high transaction costs.<sup>27</sup> Ex ante tailoring need not be conceptualized as ex ante in the sense that solutions necessarily emerge from a deliberative or legislative process, but from review of the extant legal processes as they unfold through court systems on a regular basis. The opportunist's systematic exploitation of loopholes, if deemed sufficiently undesirable by decision makers or their constituents, may be curtailed via changes in the law.<sup>28</sup>

Yet the undesirability of a particular loophole-exploiting behavior—a foundational component of Professor Smith's definition—is understood as undesirable only by virtue of its actualized effects. In order for its effects to be properly identified, the behavior in question must occur, be deemed undesirable, and be censured accordingly. This process is the pathway by which private law, at least in its ex ante dimension, evolves.

Recognizing that ex ante laws are perpetually imperfect and continually developing certainly does not suggest that, within a system of increasingly tailored ex ante rules, interstices will no longer exist. Rather, it correctly affirms that ex ante rules exist within an ongoing evolutionary

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<sup>27</sup> See generally Jacob E. Gersen, *Temporary Legislation*, 74 U. CHI. L. REV. 247, 262–66 (2007) (for an expanded discussion of transaction costs within the legislative process).

<sup>28</sup> See David D. Haddock & Jonathan R. Macey, *A Coasian Model of Insider Trading*, 80 NW. U. L. REV. 1449 (1987) (discussing the decentralized economic gains reaped from the informational asymmetries inherent to insider trading).

process of change. Under this schema, generalized opportunism is not necessarily something to be rooted out or tamed (a moral evil of sorts, *malum in se*, comparable to deception or fraud), but is instead merely a description of a phenomenon that will necessarily exist within any system that endeavors to set out any *ex ante* rules. Strict liability in tort, as discussed in Part III, offers one example of a way the *ex ante* tailoring problem has been addressed: namely, the entrenchment of certain conduct standards that allow for greater stakeholder reliance.

B. *The Question of Opportunism and Guile*

It may be objected at this stage of the argument that the definition of opportunism outlined here encompasses too broad a swath of conduct, including conduct not socially disadvantageous. Opportunism, as used colloquially, seems to suggest a cognizance of norm violation on the part of the individual exploiting a loophole.<sup>29</sup> Such an understanding is epitomized in the formulation of opportunism advanced by Professor Williamson, which parallels Professor Smith's definition, by casting opportunism as "self-interest seeking with guile."<sup>30</sup> This Article contends that a reluctance to include a specific definitional requirement of guilefulness or chicanery (comparable to the bad faith doctrines that may be invoked to impose damages in the sphere of Contract Law) is conceptually defensible and necessary to render the following discussions cogent.

First, it bears mentioning that Professor Smith's definition of opportunism—though itself not without difficulties, as noted above—moves beyond Professor Williamson's presumption of a guilefulness requirement. While Professor Smith's definition refers to "unintended benefits,"<sup>31</sup> the conception of intent by which he identifies opportunism is correlated with the intent of the extant legal structure's architects. It does not presuppose a sort of economic *mens rea* that the opportunist must possess. In short, guilefulness may be a property of an actor who behaves opportunistically, or a descriptor of a discrete action taken, but neither Professor Smith's definition nor the definition proposed here include guilefulness, understood on the level of a first-person perspective, as a requirement.

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<sup>29</sup> See Smith, *Economic Analysis*, *supra* note 10, at 4–5.

<sup>30</sup> WILLIAMSON, *supra* note 15, at 30.

<sup>31</sup> Smith, *Economic Analysis*, *supra* note 10, at 10.

A more fundamental problem sheds light on the reason for this conceptual cabining. The argument that opportunism entails a certain cognizance of norm violation<sup>32</sup> encounters an epistemic difficulty: for this cognizance to occur, the actor must be aware of the intent of the rule-maker at the time the action in question (the action later termed “opportunistic”) transpires. This motive-driven inquiry goes well beyond the scope of a typical *mens rea* analysis.<sup>33</sup> For a finding of opportunism to hold, it requires establishing not simply intent to do something, but the intent to do something with awareness that the formulator of the system’s rules did not intend to permit such conduct. This is a very high conceptual bar, and one that renders it generally impracticable to use the term opportunism in the sense deployed by Professor Smith. After all, how can one feel confident terming any particular form of conduct opportunistic when satisfying a second-order intent-to-commit-normative-violation prerequisite may prove elusive? An alternate characterization of opportunism—one that renders the term a persistently meaningful descriptor at the *ex post* level—is warranted.

In short, the effort to incorporate an intent-to-commit-normative-violation requirement into the definition of opportunism entails two problematic assumptions: first, an actor’s capability to consistently discern the underlying intent of a rule-maker and second, an ability to establish, via external or third-person observation, that an actor had such a capability and, yet, did not exercise it.<sup>34</sup> By contrast, a definition turning on unanticipated consequences establishes a broader, yet more epistemologically articulable, understanding of opportunism, which can bind the inquiry moving forward.

Last, the problem of social costs must be considered. The question is whether an adverse imbalance between costs incurred and benefits accrued is a necessary component of a definition of opportunism. As suggested above, this immediately encounters a problem of indeterminacy. Decisions regarding the number and character of the stakeholders involved, which form the background against which such a cost-benefit analysis is situated, appear to stem from ultimately arbitrary judgments. For example, is *A*’s

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<sup>32</sup> *See id.*

<sup>33</sup> *See generally* *Staples v. United States*, 511 U.S. 600, 605–06 (1994) (common law rule of typical *mens rea* requirement).

<sup>34</sup> Additional normative questions may also be raised at this stage: for instance, how a rule-maker’s expressed or unexpressed intent translates into the imposition of a moral obligation, and to what extent an actor several degrees removed from the rule-maker may be compelled to adhere to such an obligation.

conduct to be judged (via cost-benefit analysis) solely with respect to *B*'s interests, or should *A*'s conduct be assessed with respect to the particular industry as a whole? Or, thinking more broadly, is the entire landscape of the national or global economy the appropriate forum for judging the costs and benefits of *A*'s action? Thus, definitions of opportunism that hinge on this cost-benefit disparity are ultimately problematic: they rest on non-standardized, embedded assumptions regarding how, and with respect to whom, cost-benefit analyses of economic conduct should be handled. The generalized definition proposed here avoids this particular theoretical pitfall.<sup>35</sup>

### C. *Cognizably Malignant Opportunism*

The preceding Part has offered a much broader definition of opportunism than those offered by Professors Smith and Williamson. The definition proposed above, however, seems to neglect the fact that a certain subset of opportunistic behavior still remains intuitively problematic. Some sort of substantive difference exists between seeing a unique opportunity, which has arisen under the law and no one else has yet identified, and obvious exploitation of the rule to one's advantage. An additional ingredient appears present in the latter formulation, though the precise character of that ingredient may be challenging to ascertain.

Within the large umbrella of opportunism, as broadly defined above, discrete instances of the type of morally dubious conduct of which Professors Smith and Williamson speak are certainly present. This Article has challenged the components of their respective definitions, but as yet identified, no standard against which certain particularly pernicious forms of opportunistic conduct (heretofore described as "immoral") may be challenged.

This Article accordingly proposes the following framework, loosely derived from the Kantian categorical imperative,<sup>36</sup> to break the

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<sup>35</sup> None of this definitional inquiry should be read as a defense, on moral grounds, of individual actors' rationales that may lie behind opportunistic practice (as defined here). Nor should this discussion be considered a per se indictment of the moral ends sought by the use of equitable remedies as counter-opportunistic measures. Indeed, certain forms of opportunism (as discussed *infra*) can still be subjected to challenge on moral grounds, though equitable remedies may be an ultimately unsuitable countermeasure.

<sup>36</sup> See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (Allen W. Wood ed., Yale University Press 1785).

aforementioned impasse between intuitive moral awareness and epistemic indeterminacy. The specific types of undesirable conduct challenged by Professors Smith and Williamson fall within the category of CMO. In this Article, I have defined CMO as follows: *the use of a given legal rule to act in such a way that if all actors were to do likewise, the anticipated effect of the rule would be wholly frustrated.*

This formulation, existing within the broader bounds of the more amorphous opportunism category previously outlined, sets up a four-part requirement for deeming conduct an instance of CMO.

*Use of Legal Rule:* A particular rule, or meaningfully interrelated set of rules, must exist where a charge of CMO may be leveled, *i.e.*, there is a meaningful difference between a generally wrongful act and an occurrence of CMO. Additionally, CMO entails an affirmative act of engaging in a particular type of conduct—one does not accidentally manifest CMO. Using a rule suggests a discernible orientation of an actor's behavior toward rule manipulation.

*All Actors:* This prong of the test requires an adjudicator to weigh the conduct of a given actor by means of a large-scale assessment. What would be the wide effect of a challenged behavior if all parties bound by the rule in question engaged in such behavior? Since individualized instances of conduct may be impacted by hard-to-assess contextual factors, this prong entails a more meta-level inference about the broad effects of a behavior that has hypothetically become commonplace.

*Anticipated Effect of the Rule:* This is the key prong of the test; and is necessary to differentiate between the broad category of arguably amoral opportunism previously discussed and the far more problematic CMO. Unanticipated conduct—all types of behavior arising under a given rule—is not identical to anti-anticipated conduct—the forms of unanticipated conduct that bear an actual relationship to the conduct norms outlined in the rule itself or its prefatory matter. To establish a finding of CMO, there must be a connection between the anticipation of the rule-makers and the active thwarting of this specific anticipation by the bad actor engaging in CMO. Note that this Article deliberately avoids using the language of intent due to its subjective overtones (as discussed above), whereas anticipated effects (invoked here) are more easily discernible from the text and legislative history that underpin a given rule.

*Wholly Frustrated:* Presuming that the rules governing a specific domain of behavior have been formed through a morally legitimate process

(hypothetically speaking, via democratic voting in a liberal society), moral and social harm likely result from a mass strategic circumvention, by self-interested actors, of legitimate rules. In an instance of CMO, a rule is thwarted to achieve not just a self-interested end, but a rule-oppositional end. In short, the rule itself is not conceptually reconcilable with CMO arising thereunder.

Consider the example of *Riggs v. Palmer*,<sup>37</sup> discussed at length throughout Professor Smith's analysis. *Riggs* featured an example<sup>38</sup> of CMO in action: if all actors killed people to prevent them from changing their wills, the anticipated effect of having a will in the first place (the expression and instantiation of one's wishes regarding postmortem disposal of assets) would be wholly frustrated.

In contrast to the problems developing from CMO, benign or inconsequential (non-CMO) opportunism is an incidental and necessary effect of lawmaking; it is not a behavior perceptibly directed toward the actual frustration of the rule itself (an action whose anti-normative intent may potentially be inferred from conduct, but an action the invalidity of which is not contingent on such an inference). For instance, let us suppose that loopholes in the structure of a recently passed international financial regulation provision allow a clever-minded financier to take advantage of a newly created arbitrage opportunity. The financial regulation provision in question has no anticipated effect on arbitrage practices, but an opportunity has arisen nonetheless. This is a species of opportunism within the definition sketched above, but it is not a form of CMO. Even if everyone engaged in the practice in question, the purpose of the tax provision itself would not be thwarted. The presence of some unanticipated effects may be desirable as a means of identifying areas where the law may need to, or can, develop; however, contradictory effects are almost certainly undesirable.

Both definitions of opportunism introduced by Professors Smith and Williamson, as discussed above, encounter difficulties due to their reliance on attributions of bad intent to a particular actor (the imputation of which may be difficult when done at an ex post interval). Conversely, conduct allegedly falling under the category of CMO can be weighed more objectively against the rule itself, by weighing the projected effects of a

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<sup>37</sup> 22 N.E. 188 (N.Y. 1889).

<sup>38</sup> *Id.* at 190.

broad adoption of the challenged behavior against the anticipated results of the rule itself (hence the “cognizably” descriptor). An additional example may shed light on this distinction between manifestations of opportunism. Consider the example of a company, such as Uber or Lyft, which provides many of the services associated with taxi companies but is not bound by many of the same regulations.<sup>39</sup> This company shall be called “Malevolent Motors.” Malevolent Motors, like both Uber<sup>40</sup> and Lyft,<sup>41</sup> employs background checks and vehicle inspections in conducting its operations (even though Malevolent Motors is not required to do so explicitly by law).<sup>42</sup> Malevolent Motors operates within the interstices of existing *ex ante* rules, in that its conduct is self-interested and legal, but was likely unanticipated by rule crafters.

Suppose that Malevolent Motors is so successful that it ultimately drives out the taxi industry entirely and becomes the sole provider of driver-for-hire services in its market. Suppose further that upon attaining marketplace dominance, Malevolent Motors suspends its voluntary practice of requiring background checks and vehicle inspections and allows anyone to serve as drivers.

In such a scenario, the rules binding taxi services, but not Malevolent Motors, have been themselves used in such a way as to wholly frustrate their anticipated effect (where the anticipated effect is enhanced vetting of drivers-for-hire).<sup>43</sup> This latter is an instance of CMO, whereas the former case (Malevolent Motors’ operation alongside established taxi outfits, despite the fact that Malevolent Motors exists within a legal loophole) exemplifies more generalized opportunism.

Given that a distinction exists between opportunism as a broad category and CMO in particular, one might contend that equity judgments

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<sup>39</sup> Sam Frizell, *A Historical Argument Against Uber: Taxi Regulations Are There for a Reason*, TIME (Nov. 19, 2014), <http://time.com/3592035/uber-taxi-history>.

<sup>40</sup> *Details on Safety*, UBER (July 15, 2015), <https://newsroom.uber.com/details-on-safety/>.

<sup>41</sup> *We Go the Extra Mile For Safety*, LYFT, <https://www.lyft.com/safety> (last visited Jan. 30, 2016).

<sup>42</sup> See generally Mike Isaac, *Technology: Uber’s System for Screening Drivers Draws Scrutiny*, N.Y. TIMES (Dec. 9, 2014), [http://www.nytimes.com/2014/12/10/technology/uber-s-system-for-screening-drivers-comes-under-scrutiny.html?\\_r=0](http://www.nytimes.com/2014/12/10/technology/uber-s-system-for-screening-drivers-comes-under-scrutiny.html?_r=0) (discussing Uber’s and Lyft’s controversial background check policies).

<sup>43</sup> In other words, Malevolent Motors would not have been able, “but for” the existence of these rules, to engage in the conduct it did.

are uniquely suited to redress injuries resulting from CMO. A broad revival of equitable remedies as an anti-CMO counter, however, risks applying a sledgehammer where a tack hammer is more appropriate. As subsequent Parts will argue, the potential harms of failing to remediate specific instances of CMO are outweighed by the potential structural harms of deploying remedies untethered to ex ante rules or precedents. Later, the Conclusion contends that equity is best understood as an ongoing moral value (informing, in a normative sense, how ex ante rules are shaped by lawmakers) rather than as a remedial instrument for use by adjudicators.

## II. OPPORTUNISM AND THE EVOLUTIONARY CASE AGAINST EQUITY

This Part argues that opportunism, understood in its generalized sense, serves an indispensable role in the evolution of law.<sup>44</sup> There are two normative reasons to prefer this view of opportunism to a view that embraces increased use of equity and its maxims: reliance interests and legal gap-filling. These two reasons, while distinct, are interlinked in several ways.

### A. *Reliance Interests*

Reliance interests (the need for decision makers to rely on consistent requirements, guidelines, and restrictions)<sup>45</sup> underpin the conventional argument against equity. Ex ante legal norms must be predictable<sup>46</sup> in order for rational actors to continue engaging in the commerce of ordinary life; arbitrariness in the administration of law works as a disincentive to action of any sort. Accordingly, these norms, operating with a high degree of continuity, are vital to ensure the flourishing of society.

Conversely, equity (operating in an ex post capacity) reserves judgment of an action's permissibility until that action has occurred and been challenged on account of some allegedly overriding moral principle. Such a standard may be justifiably accused of imprecision: Professor Smith

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<sup>44</sup> "Law" is understood as the formal, ex ante rule structures established by decision makers, enforced by the state, and broadly accessible to individual actors.

<sup>45</sup> See William N. Eskridge & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 81 (1994).

<sup>46</sup> See generally *id.* (describing the problems of a scenario in which "neither private parties nor Congress can rely on settled law. This . . . undermines both democratic values and rule-of-law values.").



himself writes of “the chilling effect of ex post discretionary equity.”<sup>47</sup> For those responsible for weighing possible courses of action, law is undoubtedly preferable to equity as an overarching scheme. The permissibility of particular actions (or classes of action) is generally easier to ascertain when laws are announced ex ante than when actions are subjected to judicial reevaluation (and the granting of unpredictable remedies) in light of relatively unfixed “equitable” standards.

Notably, the major structural advantages identified in the following subsections are applicable to all forms of opportunism, including CMO. Where CMO is concerned, counter-opportunistic tools (namely, the modification of ex ante rules) exist, which need not open the door to the unpredictability problems associated with equitable remedies.

#### B. *Legal Gap-Filling*

Where recourse to ex post equity is sharply circumscribed or curtailed entirely, changes in the law itself may be catalyzed. Opportunism (broadly construed) functions as a sort of dye in the system of law that identifies areas where unanticipated occurrences have arisen, which may warrant intervention by those responsible for the crafting of law. For instance, in some domains, (such as Tax Law) public sentiment may weigh against gap-filling action where certain loopholes are concerned. This can operate as a barrier to change.<sup>48</sup> It has no bearing, however, on the identification of the loopholes that opportunism allows.

In short, acts falling within the general definition of opportunism identify structural legal loopholes, which decision makers may choose to close or ignore. Where such loopholes are left open, this inaction may be understood, from the perspective of an individual actor making conduct decisions in a system where equitable safety-valves are not in place,<sup>49</sup> as de facto permission to engage in the opportunistic practice. This is a factor weighing against a broad characterization of opportunism as always being undesirable.<sup>50</sup> Therefore, decision makers may wish to allow a certain degree of risk and reward within the system. This does not, however, apply

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<sup>47</sup> Smith, Economic Analysis, *supra* note 10, at 6.

<sup>48</sup> See, e.g., Susannah Camic Tahk, *Making Impossible Tax Reform Possible*, 81 *FORDHAM L. REV.* 2683 (2013).

<sup>49</sup> See Smith, Equity, *supra* note 2, at 6.

<sup>50</sup> See *id.* at 10.

to CMO—against which alternative, punitive sanctions may be leveled via a process of ex ante rulemaking.

Reliance interests and evolutionary legal processes may not always intersect perfectly. It bears mentioning that evolutionary developments in the law do implicate the aforementioned reliance interests, and they may potentially have a destabilizing effect on those invested in the processes governed by such changing laws. Such a critique is fair. However, a more nuanced understanding does not embrace a strict binary of equity as destabilizing and law as stable. Rather, it acknowledges a continuum between arbitrariness and predictability. An evolutionary understanding of law hews closer to predictability than equity does for three reasons: participation, deliberation, and accountability.

Under a system in which laws evolve to rebut opportunism (or do not do so) as information increases, affected parties have the opportunity to help shape, by means of engagement with the rule crafters, the ex ante constraints to which they will eventually be subjected. In so doing, they may blunt the effects of sharp changes in legal direction (a proposed abrupt closing of long-existent loopholes might undergo an extension in the timeline for mandatory compliance), promoting greater continuity between pre-change and post-change states of the law. This participation in the process by those affected is not present in a system where judges may, unilaterally and without prior warning, dispense equitable remedies.

In allocating sufficient time for debate regarding possible consequences of a given legal rule, lawmakers create a record of deliberation to which subsequent actors can look when determining the real-world ramifications of said rule.<sup>51</sup> The lack of an instant case or controversy enables rule crafters to carefully structure their attempts to limit opportunistic practices, diminishing the risk of entrenching bad policy via precedent. The deliberative process also allows for greater fact-finding regarding the nature and extent of loophole exploitation, rather than subjecting such determinations of exploitation to judicial discretion alone.<sup>52</sup>

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<sup>51</sup> For example, legislative history keeps track of debates regarding laws. See *Federal Legislative History: Initial Steps*, LIB. CONGRESS, <http://www.loc.gov/law/help/leghist.php> (last visited Jan. 30, 2016).

<sup>52</sup> Additionally, questions regarding the admissibility, or lack thereof, of evidentiary materials relevant to the loophole-exploitation question (as epitomized within a particular case) may potentially exist within a judicial proceeding. Legislative drafters are not subject

The standards of participation and deliberation are themselves bolstered by the fact that legislative decision makers are (in most cases) subject to the democratic process.<sup>53</sup> This process produces incentives to maintain the integrity of the legal evolutionary system. Those whose conduct has been destabilized without sufficient justification can eventually punish those responsible for arbitrary treatment or bad faith decision-making. Equity jurisprudence is not always subject to such institutional constraints.

Once counter-opportunistic revisions in *ex ante* rules have been formulated, implementation must occur. This implementation is assuredly not costless; the costs of compliance with new *ex ante* rules, however, can be offset by the aforementioned predictability advantages. Since statutory texts generally have a cabining effect on the extent of courts' equitable discretion,<sup>54</sup> comparatively greater stability follows from the evolutionary model.

The evolutionary alternative to equity, outlined above, has operated from a presumption that equity is both necessarily indeterminate and problematically vague. Such a presumption has not gone unanticipated in the work of equity's advocates. Early on, Professor Smith offers a means of cabining the vision of equity, he posits: "Injunctions, the quintessential equitable remedy, act against named parties (and those acting in concert with them) and can be very finely tailored, both in their specificity and their breadth to the problem at hand."<sup>55</sup> This characterization, however, appears incongruous with the rationale previously identified for broader deployment

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to such institutional constraints, and thus (structurally speaking) have the capacity to work with a greater range of informational resources.

<sup>53</sup> See *Democracy*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/democracy> (last visited Feb. 20, 2016) ("A form of government in which people choose leaders by voting.").

<sup>54</sup> Professor Plater explained:

Where the judge believes that a statute does not serve the public interest in a particular case, he or she is of course free to say so, but must nevertheless give the law its required effect. In such cases the practical result of statutory enforcement, by injunction or otherwise, will often be a transfer of the controversy to the legislature, which is the proper repository of the power to promulgate statutory exemptions and amendments.

See Zygmunt J.B. Plater, *Statutory Violations and Equitable Discretion*, 70 CAL. L. REV. 524, 528 (1982).

<sup>55</sup> Smith, *Economic Analysis*, *supra* note 10, at 23.

of equity principles, given that the justification of equity based on grounds of ex post fairness is the crux of equity's legitimation by means of opportunism. If opportunism is, as supporters of equity characterize it, fundamentally immoral, it would appear necessary for equity to operate as a broad counter to this moral violation (a violation not expected from an ex ante perspective). The charge that such action risks a blunderbuss effect is seemingly unavoidable. That outcome, which is immoral, must be rejected broadly, irrespective of ex ante controlling principles.

In arguing that the advantages of increased use of equity outweigh the structural costs imposed, Professor Smith contends that the use of equity can be confined to a limited domain in order to preserve reliance interests as much as possible.<sup>56</sup>

[T]he question is whether and when equity, with its chilling effect, can be a more cost-effective response to S's opportunism than is the ex ante precaution (and the alternative of no contract). . . . It makes sense for equity to develop proxies for the opportunities for opportunism and limit itself to this defined domain in order to diminish its chilling effect on legitimate behavior.<sup>57</sup>

Drawing a parallel between ex post equitable remedies and ex ante rules that incorporate the moral-philosophical goals behind equitable remedies conflates equity as *practice* with equity as a *normative value*, the latter of which may inform the legal deliberations of those who craft ex ante rules.<sup>58</sup> The process of making law—as opposed to equity—is a process characterized by the predictability advantages outlined above, thus leaning in the direction of more reliable ex ante decision-making. For instance, the proscription against contracting with minors, the mentally handicapped, or intoxicated persons serves as an ex ante bar to a transaction. Conversely, under a system incorporating safety-valve equity, a transaction with such persons might occur and reliance interests might vest, but the transaction could subsequently be invalidated ex post. Though this is a clear example of

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<sup>56</sup> See *id.* at 49.

<sup>57</sup> *Id.*

<sup>58</sup> For instance, those developing ex ante rules may choose to structure rule-responsibility frameworks so as to mitigate inequalities in bargaining power—strict sets of disclosure requirements, for instance, that allow parties to enter transactions with fuller cognizance of the risks involved.

immoral CMO as outlined in Part I, it shows how equity is structurally problematic in a way that opportunism is not.

A hypothetical serves to illustrate this distinction: a statute exists that only prevents contracting with individuals within the three categories outlined above (underage/handicapped/inebriated). *A* contracts with *B* at a time when *B* is emotionally unstable. *A* is provably cognizant of *B*'s ongoing inner turmoil. Shortly after performance has begun, *B* challenges the initial validity of the contract on the grounds that *A* inequitably exploited *B*'s condition of emotional instability.

Per the definition of opportunism outlined in Part I, *A* behaved opportunistically within the bounds of the existing law. *A*'s conduct was self-interested, since *A* pursued *A*'s own interest in contracting knowing of *B*'s emotional condition. *A*'s conduct was legal, as *B* was of the age of majority, of sound mental health, and not intoxicated. Finally, *A*'s conduct was (probably) unanticipated by *B*, if not by the drafters of the relevant controlling statute. (This does not, however, require that *A* had been aware, at the point of acting, that *A*'s conduct was so unanticipated.)

Further, suppose that the presiding judge rules that *B* is excused from performance. Such a ruling would be consonant with the anti-opportunistic (or alternatively, anti-CMO) aims articulated as justifications for doing equity. However, to excuse *B* from performance (where the conceptual grounds for the excusal are specified solely ex post), would have substantial consequences: *A*, and those similarly situated, would be strongly incentivized to undertake expensive investigations into the general welfare and stability of potential contracting partners, in the hope of warding off any attempts to assert lack of capacity and levy charges of opportunism. No text-derived norm need limit the possible inequities an aggrieved claimant might assert before an equity-minded judge. Transaction costs would increase dramatically. Even then, *A* would lack any guarantee that *A*'s efforts might satisfy ex post scrutiny by equity-minded judges.

An alternative does exist: the law rendering certain types of contracts voidable might be expanded through the legislative process to include contracts produced under conditions in which one party is displaying acute emotional instability, with enough evidence that potential contracting partners might be expected to reasonably apprehend its

presence. If this particular language is unpalatable, then the relevant stakeholders might progressively make revisions.<sup>59</sup>

Suppose that the language provided is adopted into the governing statute. *A*'s opportunism (a clear instance of CMO: if all parties did likewise, the anticipated effect of having anti-incapacity safeguards in Contract Law would be thwarted) has triggered an evolution in the law, the need for which might have been obviated by the use of equity. Additionally, this evolution shapes the *ex ante* landscape that decision makers can consider prior to contracting, reducing the degree of guesswork necessitated by an equity-heavy system.

A further example serves to bolster this point. Professor Smith's case for equity discusses at length the problem of unintentional property encroachments as a justification for *ex post* equity.<sup>60</sup> Here, the strict application of the law may result in socially disadvantageous results, such as the demolition of unintentionally encroaching structures; ergo, judges should apply equity principles to avoid such an outcome.<sup>61</sup>

The claim that this scenario requires resorting to equity makes two assumptions: it assumes that inter-party bargaining (an optimal scenario, as it entirely sidesteps the transaction costs incurred through employing the judicial process) is not possible or has failed,<sup>62</sup> and it assumes that the laws governing encroachment are likely to be static. This second assumption touches on the crux of the evolutionary case against equity: if strict application of the law leads to persistently irrational and undesirable results, pathways for changing the substance of that law do exist.<sup>63</sup> The existence of

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<sup>59</sup> See discussion *infra* Part III for a consideration of how the "reasonableness" standard intersects with *ex ante* versus *ex post* considerations in the context of reliance interests.

<sup>60</sup> See Smith, *Economic Analysis*, *supra* note 10, at 14.

<sup>61</sup> It bears mention that "unintentional property encroachment" is *not* an example of CMO: the rules of property law are not affirmatively being *used to act* in a particular manner. Accordingly, this particular phenomenon does not seem germane to the problem of CMO that Professor Smith indicts.

<sup>62</sup> The Coase Theorem highlights the latent problems in this first assumption. See, e.g., *Coltman v. Comm'r*, 980 F.2d 1134, 1137 (7th Cir. 1992) ("So long as the rule of law is known when parties act, the ultimate economic result is the same no matter which way the law has resolved the issue.").

<sup>63</sup> See Louise Harmon, *Falling Off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 7 (1990) ("After all, another way to avoid an undesirable result from the application of a general rule of law is to change the general rule of law.").

opportunistic practices within a system can serve to highlight the need to make those legal changes. Additionally, it bears mentioning that such use of equity is likely to increase transaction costs in the long run; if problematic laws themselves remain unchanged and repeated recourse to the judicial process is required.<sup>64</sup>

C. *The Problem of Persistent Rule Exploitation*

At this point, one might contend that legal evolution (namely, counter-opportunistic rule reformulation) is always, to some degree, a form of “kicking the can down the road.”<sup>65</sup> After all, the possibilities for exploiting modified ex ante rules are not necessarily foreclosed by the mere act of modification. *The question is whether the dedicated CMO perpetrator will simply keep revising the method by which he steps outside anticipations of the rule-makers.*

The answer to the question of whether the possibilities for exploitation, even after ex ante adjustment, via CMO still remain great is necessarily indeterminate and circumstantial. Moreover, inquiry along these lines is subject to multiple intervening variables likely to stymie a systemic empirical investigation. As such, the direct answer to this objection depends on factors beyond the scope of the theoretical analysis offered here.

Such an objection, however, entails a presupposition that the only relevant quality of the legal evolutionary process is its ability to directly stop opportunistic<sup>66</sup> (or more narrowly, CMO) conduct—this is not the case. Professor Rebecca Stone, describing the phenomenology of norm compliance, describes “internalizers” as those whose preferences and values (which in turn govern conduct) are shaped by the pedagogical effect of legal structures:

[L]egal rules speak to subjects who adopt an “internal point of view” towards the law—subjects who are willing to bracket their immediate self-interest in order to conform with

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<sup>64</sup> See David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 101–03 (2005) (arguing that transaction costs are a price worth paying in order to attain equitable outcomes).

<sup>65</sup> See generally GRAMMARIST, <http://grammarist.com/usage/kick-the-can-down-the-road/> (last visited Feb. 20, 2016) (“[Kick the can down the road] means to defer conclusive action with a short-term solution.”).

<sup>66</sup> See Smith, *Economic Analysis*, *supra* note 10, at 24.

those rules . . . . [The internalizer] takes the law as having made certain normative determinations about what he should do at the second stage and he defers to those determinations rather than figuring them out for himself.<sup>67</sup>

As legal structures change and adapt in attempts to thwart opportunistic conduct, the moral senses of internalizers may be calibrated in a way that more accurately reflects the intent and dictates of the law. Such law—a reflection of both the popular will as expressed through the democratic process, and presumptively of the rule-maker’s own intent—is honed by way of anti-opportunistic adjustment and clarification. As the law improves, the tendency of internalizers<sup>68</sup> to comply grows stronger; this advance exists whether or not the new *ex ante* rules are successful with respect to opportunistic conduct itself. Equitable principles, by contrast, are less likely to have this effect, due to the lack of tailoring inherent in the equitable maxims and their contextually contingent nature.<sup>69</sup> Such a lack of consistency cuts against the characterization of equitable remedies as a norm within the purview of Professor Smith’s analysis: a species of remedy that works in unpredictable ways cannot meaningfully be described as a norm.<sup>70</sup>

This assessment of net benefits does not necessitate a belief that all, or even most, individuals are internalizers according to Professor Stone.<sup>71</sup> There may well be large swaths of society (presumptively including the genuinely determined opportunists) who fall within Justice Holmes’s famous definition of “bad men,” not driven by values, but whose compliance with norms is inseparably intertwined with a desire to avoid sanctions for noncompliance.<sup>72</sup> If even some members of society, however, are not bad men, but rather internalizers, the process of legal evolution has a

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<sup>67</sup> Rebecca Stone, *Economic Analysis of Contract Law from the Internal Point of View* 4–5 (Aug. 23, 2012) (unpublished manuscript), [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2134463](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2134463).

<sup>68</sup> *Id.*

<sup>69</sup> See Smith, *Equity*, *supra* note 2, at 40.

<sup>70</sup> See Smith, *Economic Analysis*, *supra* note 10, at 9.

<sup>71</sup> See generally Stone, *supra* note 67.

<sup>72</sup> Oliver Wendell Holmes, *The Path of the Law*, 110 HARV. L. REV. 991, 993 (1997) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict . . .”).



beneficial effect; namely, it triggers the greater compliance of internalizers with the broad set of civic values underlying the actual text of the law, which are more clearly expressed via evolved ex ante rules.<sup>73</sup>

These kinds of benefits extend further still: the advantages of ex ante rulemaking unfold not only on the landscape of meta-norms, but also in the realm of pragmatic legal effects. Ex ante rules, properly designed, are structured in such a way that generates additional positive system externalities.<sup>74</sup> Specifically, ex ante regimes legitimize punitive sanctions for wrongful conduct, the presence of which attaches a potentially stronger deterrent effect to immoral rule-breaking (or, as spelled out above, CMO) than may be achieved under a system of equitable remedies—including disgorgement.

As a matter of practice, the focus of the equitable remedy is inevitably the wronged party, not the wrongdoer.<sup>75</sup> Given that such remedies operate ex post, the principle against ex post facto laws<sup>76</sup> bars the possibility of certain punitive sanctions for undesirable conduct (where such punitive sanctions go above and beyond the disgorgement of gains reaped unlawfully or profits derived from such gains).<sup>77</sup> Not only does the law itself not develop to enhance reliance and clarify the lawmaker's norms (while at the same time cultivating positive pedagogical effects for Stone's internalizers),<sup>78</sup> the safety-valve use of equity contains an inherently weaker affirmative disincentive.<sup>79</sup> The worst outcome faced by a determined bad man, under the safety-valve formulation, is a series of failed attempts at rule exploitation, for which civil remedial penalties (conceptually tied to gains reaped) may be levied by equity-minded judges.<sup>80</sup> Over time, these risks may be calibrated and eventually rolled into the cost of business.

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<sup>73</sup> See Stone, *supra* note 67.

<sup>74</sup> Frank Partnoy, *The Timing and Source of Regulation*, 37 SEATTLE U. L. REV. 423, 426 (2014) (noting that ex ante rules are potentially subject to externalities).

<sup>75</sup> See Smith, *Equity*, *supra* note 2, at 11.

<sup>76</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>77</sup> See Russell G. Ryan, *The Equity Façade of SEC Disgorgement*, HARV. BUS. L. REV. ONLINE 1, 5 (2013), <http://www.hblr.org/2013/11/the-equity-facade-of-sec-disgorgement/> (“It is also generally acknowledged that disgorgement cannot be used punitively, and thus must be limited to an amount causally connected to the alleged wrongdoing.”).

<sup>78</sup> Stone, *supra* note 67.

<sup>79</sup> See Smith, *Economic Analysis*, *supra* note 10, at 4.

<sup>80</sup> Holmes, *supra* note 72, at 995 (considering the scenario “in which equity will grant an injunction, and will enforce it by putting the [bad man] in prison or otherwise punishing him unless he complies with the order of the court”).

Accordingly, expanding the use of equitable remedies strikes a less decisive blow to the immoral (CMO) conduct that an equity-minded judge seeks to prevent.<sup>81</sup>

Ex ante rules, by contrast, offer a more conceptually legitimate framework to which punitive, non-disgorgement sanctions can be attached as conduct incentives.<sup>82</sup> Even if a similar form of risk calibration develops on the part of the immoral opportunist, ex ante rules allow for a connection between specific rule violations and specific sanctions.<sup>83</sup> Stronger disincentives against rule violation exist in a system without equitable safety valves—such valves may ameliorate harm to the one exploited, yet fail to sting the exploiter. Where net social costs are concerned, this enhanced disincentive effect encompasses the remedial advantages envisioned in a safety-valve model<sup>84</sup> while also allowing for a maximally deterrent stick.<sup>85</sup>

To illustrate this, reconsider the example of *A* and *B* above.<sup>86</sup> Suppose that the legal regime put in place—treating contracts as void in which one party suffers from emotional instability, as evidenced such that potential contracting partners might be expected to reasonably apprehend its presence—is supplemented by an additional prong. This prong notes that violations of this section create a cause of action by which the aggrieved party may recover punitive damages.<sup>87</sup> *A* now not only knows exactly what is expected of *A*, but has an additional incentive to comply. This strong-form incentive would likely not be leveled ex post without violating the presumption against ex post facto laws<sup>88</sup>: its utility as a stronger-than-

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<sup>81</sup> See Smith, Economic Analysis, *supra* note 10, at 30.

<sup>82</sup> See, e.g., Smith v. Wade, 461 U.S. 30, 86 (1983) (citing United Mine Workers v. Patton, 211 F.2d 742, 749 (4th Cir. 1954)) (“Where Congress has intended [to create a right to punitive damages] it has found no difficulty in using language appropriate to that end.”).

<sup>83</sup> See Smith, Equity, *supra* note 2, at 11.

<sup>84</sup> See *id.* at 59.

<sup>85</sup> See generally GRAMMARIST, <http://grammarist.com/style/carrot-and-stick/> (last visited Feb. 20, 2016) (“[In order to motivate a person] either you strike [him] with a stick or you urge [him] along with a carrot.”).

<sup>86</sup> See discussion *supra* pp. 20–21.

<sup>87</sup> No claim is made here as to the economic or social prudence of an actual rule of this sort: the parameters of the scenario outlined here might have an overly disincentive effect or otherwise cause transaction costs to spike. It is here introduced solely to illustrate the powerful incentive-generating effect of ex ante rules—an effect that may exist to a lesser degree in a safety-valve formulation relying on equitable remedies.

<sup>88</sup> U.S. CONST. art. I, § 9, cl. 3.

disgorgement remedy hinges on ex ante rulemaking. Accordingly, where opportunism is accompanied by serious social costs, favoring an ex ante strategy creates the best means of disincentivizing such grasping (*i.e.*, CMO) conduct: while the definition of opportunism outlined above does not incorporate a finding that social costs must outweigh benefits for conduct to be deemed opportunistic, where such a negative dynamic exists, the model proposed here offers a better framework for instituting structural countermeasures. Equity jurisprudence cannot realistically replicate this same maximally deterrent effect.<sup>89</sup>

It may be argued at this stage that the imposition of punitive sanctions (other than the more conceptually limited disgorgement) suffers from the same uncertainty problems heretofore attributed to the use of ex post equity.<sup>90</sup> “Determining punishment by the gain attributable to a wrong”<sup>91</sup> seems to intuitively possess predictability advantages over punitive sanctions whose calculation is derived independently of the actual instance of malfeasance.

This question is properly addressed at the preceding level. The question is whether such a remedy will be used, rather than the precise character of the remedial sums awarded. The possibility of using such a remedy should be expressed as a property of the ex ante rules that govern the conduct in question.<sup>92</sup> Under a system embracing such a rule, engaging in CMO renders it likely that prescribed consequences will result, and that such consequences possess the capacity to reach high levels. A disgorgement remedy might fulfill this same role—but the possibility of its use as a CMO countermeasure should be bound into the ex ante rule whose violation initially triggers legal proceedings.<sup>93</sup> Where deterrence is concerned, the possibility that punitive non-disgorgement sanctions may possibly exceed the costs of disgorgement creates a deterrent effect beyond what is achieved by a system using disgorgement alone.

In summary, then, while CMO is conceptually distinguishable from general strategic conduct (opportunism in the broad sense) its existence

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<sup>89</sup> See Smith, Equity, *supra* note 2, at 59.

<sup>90</sup> See *id.* at 4–5.

<sup>91</sup> Mark P. Gergen, *Causation in Disgorgement*, 92 B.U. L. REV. 827, 830 (2012).

<sup>92</sup> See Jim Rossi, *Beyond Goldwasser: Ex Post Judicial Enforcement in Deregulated Markets*, 2003 MICH. ST. L. REV. 717, 717 (2005) (“Ex ante rules provide forward-looking, predictable and clear standards . . .”).

<sup>93</sup> See Gergen, *supra* note 91, at 830.

does not create a justification for the countermeasures prescribed by equity's advocates,<sup>94</sup> for the following reasons:

- 1) Reliance interests are undermined across-the-board where the potential for strong ex post equitable remedies is in place. While this Article has argued above that it is rational to speak of CMO as a distinct and bounded phenomenon, judges may disagree (particularly given the likely dearth of relevant precedent) about whether a given occurrence falls within this category. Accordingly, a system using counter-opportunistic ex post remedies proposed is inherently less predictable and disincentivizes actors' reliance.
- 2) Under a system reviving the use of equity, ex ante rules lose the impetus toward change or reform that opportunism (both in its general and CMO varieties) produces. This, in turn, compromises any pedagogical value that such changes have on norm internalizers endeavoring to comply with the system's rules of conduct.
- 3) Tying possible ex post remedies to the specific misdeeds committed (*i.e.*, disgorgement or restitution) results in a lack of access to maximally deterrent penalties that might be attached to ex ante rules.<sup>95</sup> Where disincentivizing CMO is the primary objective, stronger penalties (within a framework that best allows for predictable decision-making) are preferable.

Part III, moving beyond the question of opportunism to explore further pragmatic alternatives to the deployment of equity, will consider additional ways in which equitable objectives are instantiated in ex ante laws, primarily through considering the role of strict-liability torts as counterweights to opportunistic behavior.

### III. COUNTER-OPPORTUNISM AND NORMATIVE ENTRENCHMENT

This Part suggests that strict-liability torts constitute one example of a legal entrenchment of certain counter-opportunistic norms and, thereby, reflect an aspirational, though not adjudicatory, understanding of equity.<sup>96</sup>

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<sup>94</sup> See Smith, Equity, *supra* note 2, at 74.

<sup>95</sup> Gergen, *supra* note 91, at 830.

<sup>96</sup> See *supra* Introduction.

Much debate has raged over whether torts constitute economic or moral harms,<sup>97</sup> and how law should be constructed to mitigate or punish such harms. Without directly weighing into this debate, this Part suggests a complementary perspective on Tort Law. From a historical standpoint, Tort Law serves a signaling function. It offers a way for the values of a society, at a given moment in time, to be instantiated in law; it provides a snapshot of incentives and disincentives collectively expressed by the popular will.

Nowhere is this more pronounced than in the case of strict-liability torts. After extensive experience, society determined that, in particular contexts, certain aspects of opportunistic behavior are socially undesirable (identified above as CMO). In an evolutionary paradigm such as the one sketched here, strict-liability torts are an advanced form of counter-opportunist measures that are legally codified (encompassing such comparatively narrow categories as design defect and manufacturing defect, among others) after standards of proper conduct have become thoroughly entrenched in society. Where conduct norms based on social consensus are less clear, or are likely to remain persistently unclear, fault-based, negligence standards exist. Importantly, this observation does not require that a specific position be taken on whether negligent actions constitute moral failures (crossing the line into CMO). Rather, it simply relies upon a generalized cultural idea of reasonableness that may be said to exist—the bounds of which are inexact, but the presence of which is not. Accordingly, though it may not be possible to definitively entrench anti-opportunistic or anti-CMO norms based on a standard of reasonableness, negligence-based standards still constitute a form of ex ante checks on conduct (albeit more vague than strict-liability standards). Moreover, the ostensibly opaque standard of reasonableness becomes progressively clearer over time as additional laws develop and relevant judicial precedent accretes.

The crucial takeaway from this analysis is that initial expectations for product manufacturers are made clear (or, at the very least clearer) under a system of unpredictable, equitable remedies based on judicial discretion. Manufacturers can grasp the general contours of the standards to which they will be subjected; these standards are uniquely linked to their particular

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<sup>97</sup> See, e.g., Gregory C. Keating, *Strict Liability Wrongs*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 292 (John Oberdiek ed., 2014).

industry and practice, and are not simply generalized maxims applied to their conduct.

This evolutionary, counter-opportunistic way of viewing Tort Law may also offer clues as to why the extant tort regime remains in place, in lieu of an expanded social insurance system designed to ameliorate harm to injured parties. The systematic evolution of Tort Law—understood as an ongoing process of observation, information collection, and legal reformation—encourages the historical development of specific, *ex ante* conduct norms that decision makers (who set the bounds of actors' legal expectations) can consistently rely upon. If these norms are unclear, the presence of social insurance may not sufficiently disincentivize antisocial (CMO) conduct. From this viewpoint, Tort Law is not exclusively about “punishing moral wrongdoing” or “making an injured party whole,” but on a meta-level, about reducing conduct deemed socially undesirable<sup>98</sup> (where “undesirability” is not some fixed lodestar principle).

Strict-liability torts impose rigorous *ex ante* expectations on actors whose conduct falls within the ambit of such torts. These rigorous expectations, in turn, restrict the exercise of independent discretion on the parts of judges. From the viewpoint of an actor deciding how to behave in a context where rules of strict liability exist, these rules have a strongly anti-opportunistic effect: specifically, they provide a substantial deterrent against CMO.<sup>99</sup>

The codification of default rules in Contract Law serves a similar function. Such rules are accessible prior to an actor's decision to contract or not contract and operate as an additional support for reliance interests in the

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<sup>98</sup> See generally GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) (examining the advantages of strict liability vis-à-vis negligence).

<sup>99</sup> The possibility that a manufacturer might obtain insurance and engage in certain risk-taking behavior it deems to be cost-justified does not undermine this thesis. Where insurance and strict liability are considered in the context of opportunism, both incurring liability and paying out and not incurring liability are permissible non-CMO choices. An occurrence of CMO in this context would entail an attempt to circumvent the payout/insurance dynamic *entirely*. The purpose of a strict liability rule is to impose damages if certain conduct results in harm: the correct binary is not between safety and payout, but between safety *or* payout and *neither* safety *nor* payout.

event that drafting deficiencies within the contract itself are identified.<sup>100</sup> These default rules are not themselves static, but (like strict-liability torts) they reflect the prevalent normative consensus regarding the contracting process.

At this point, an important criticism might be raised against the perspective outlined above. Both Tort and Contract Law are not strictly rule-based systems: these domains of law contain both ex ante rules and ex ante standards (e.g., “good faith and fair dealing”).<sup>101</sup> Professor Arthur Leff, for instance, has challenged the utility of these standards.<sup>102</sup> “[W]hen the question is presented as a decision as to the ‘unconscionability’ of a single contractual provision, the vacuousness of the standard is apparent.”<sup>103</sup> Elsewhere, Leff calls into question the tendency of the Uniform Commercial Code’s drafters to “increase the abstraction level of the drafting and explaining language”<sup>104</sup> in order to produce “an emotionally satisfying incantation.”<sup>105</sup>

In view of Leff’s critique, where judicial rulings are based not on ex ante rules, but on ex ante standards, the question is whether the indeterminacy problem outlined above is simply more obscured. Or, put another way, is judicial discretion regarding standards likely to be as potentially unpredictable as it might be under a system overtly embracing discrete principles of equity? Leff raises a particularly salient objection to such standards.<sup>106</sup> “When the key evaluative word, however, is a description of the judge’s own state of mind [*i.e.*, too expensive] rather than of the situation which might be justified in producing such a state, the likelihood that the court will even examine the relevant questions is severely lessened.”<sup>107</sup>

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<sup>100</sup> See generally Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989) (discussing in depth the characteristics of default rules when contracting).

<sup>101</sup> See *Hometown Folks, LLC v. S & B Wilson, Inc.*, 643 F.3d 520, 528 (6th Cir. 2011) (“The duty of good faith and fair dealing requires parties to a contract to conduct themselves fairly and responsibly.”).

<sup>102</sup> Arthur Allen Leff, *Unconscionability and the Code: The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 541 (1967).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 558.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 551.

<sup>107</sup> *Id.*

There are two possible avenues for answering this dilemma. The former weighs the relative utilities of *ex ante* and *ex post* standards, while the latter addresses the intrinsic and unavoidable vagueness of standards in general. Each shall be considered in turn.

*A. Relative Utility Framework:* If the continuing use of necessarily indeterminate standards is taken as a given, three reasons suggest that *ex ante* standards are preferable to *ex post* standards.

- 1) *Institutional Constraints Favor Limited Principles.* Law crafters have at least some structural incentive toward restraint in the process of formulating standards. In order to pass laws, they must build consensus with other legislators, many of whom will have constituents whose lives will be adversely affected by overbroad limiting schemes. As discussed previously, the deliberative process can have a tempering effect, which contributes to the quality of the ultimate product.
- 2) *Standards Likely More Tailored than Ex Post Maxims.* Even imperfectly constructed *ex ante* standards are still likely to be more limited than general equitable maxims. Even a standard as seemingly vague as reasonableness is likely to include, in some form, external referents by means of which it may be defined more precisely. These referents may take many possible forms, from materials produced during legislative deliberations to those values expressed in the legal literature of the time; relatively speaking, however, they bear at least some connection to observable practices. From the perspective of an *ex ante* decision-maker, this standard is preferable to an abstracted moral imperative lacking contextual clarifiers.<sup>108</sup>
- 3) *Cabining Effect of Precedent.* In the context of judicial interpretation of standards, precedent has a binding effect; this not only allows *ex ante* reliance on past interpretive precedents, but also enables persistently problematic standards to be clarified and revised by the crafters of law—again, a testament to the view that law ought to be viewed as evolutionary rather than static. Conversely,

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<sup>108</sup> See *Lane v. N.Y. Life Ins. Co.*, 145 S.E. 196, 207 (S.C. 1928) (“Equity will not suffer a wrong without a remedy.”).



precedent may exemplify a given equitable norm, but does not bind its subsequent invocations—after all, the utility of equity emerges from its role as an ex post remedy. Thus, where reliance interests and the evolution of law are concerned, even imperfect ex ante standards are preferable to ex post equity judgments. The goals reflected in the normative judgments that are made by society (both at the legislative level and the level of their constituents) may be described, broadly, as equitable. These judgments inform which rules and standards become legally and culturally entrenched over time. In view of Leff’s critique, then, precedent works to restrict the degree to which a “judge’s own state of mind”<sup>109</sup> impacts the ultimate judgment handed down. The ex ante/ex post distinction, however, is critical: equity as understood in the ex ante context refers to a generalized, if somewhat indeterminate, moral objective, whereas equity in the ex post context refers to acts of judicial gap-filling in accord with the maxims of equity. Such gap-filling by the judiciary, where not closely consonant with the ex ante laws in question, stymies the evolution of the law itself.

*B. Intrinsic Vagueness Framework:* One might reject the heretofore-sketched idea of a continuum of determinacy by which individuals may be more or less able to predict the legal outcomes of particular actions. For instance, requirements foreclosing bad faith in contract dealing are broadly established as ex ante standards<sup>110</sup>: is it possible to anticipate, as a party contemplating entering an agreement, whether one will be subsequently charged with bad faith in the deal-making process? It would appear, proponents of a non-continuum-oriented view might charge, that on balance a system favoring ex ante rulemaking is no less subject to the uncertainty-based pitfalls faced by a system incorporating ex post equitable remedies.

In response, it first bears note that indeterminacy in norm-setting is problematic whether it occurs ex ante or ex post,<sup>111</sup> and such indeterminacy adversely implicates reliance interests in both cases. Moreover, actions occurring within the domain of a badly bounded law also offer little in the

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<sup>109</sup> See Leff, *supra* note 102, at 551.

<sup>110</sup> See generally *Bad Faith Tort Remedy for Breach of Contract*, 34 AM. JUR. TRIALS 343 (2015) (regarding the rules governing bad faith).

<sup>111</sup> See Leff, *supra* note 102, at 542.

way of meaningful information for those seeking to construct meaningfully specific laws. Accordingly, the objector's point is well taken: a law that affords excessive interpretive discretion (including by way of over-vague standards) is problematic and should likely be more closely tailored.<sup>112</sup> Some standards will, assuredly, be either overinclusive or underinclusive, but unlike the traditional equitable maxims (whose persistence in the common law, in some general form, is offered by Professor Smith as a grounds for asserting their continuing utility),<sup>113</sup> ex ante standards can be more precisely calibrated. Instances may exist where this calibration fails to occur, but the possibility of doing so remains available in relative perpetuity.

That being said, within a framework that has rejected ex post equity in favor of ex ante rules and standards, the existence of close cases where outcome indeterminacy persists does not itself constitute an affirmative argument for the use of ex post equity. All proceedings will not be close cases hinging on a finding of good faith versus bad faith; where the law that determines an outcome is not itself closely contingent on the interpretation of a particular standard, equity should not be invoked ex post to ameliorate an outcome deemed undesirable.<sup>114</sup> In short, a degree of unavoidable indeterminacy may persist (particularly in areas where rule crafters display a tendency to favor standards over rules), but at the very least, indeterminacy arising from ex ante standards (as opposed to general equitable maxims) likely exists within narrower discretionary bounds: the substantive ex ante doctrines from which a judge may reason are generally fleshed out to a greater degree than are the maxims of equity, enhancing the possibility of meaningful reliance.

Moving beyond these arguments from pragmatic impact, the Conclusion addresses the moral questions surrounding opportunism and equity, and offers a justification for the paradigmatic framework through which the foregoing analysis has unfolded, before ending with an argument for rethinking the intersection of law and equity.

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<sup>112</sup> See, e.g., *Skilling v. United States*, 561 U.S. 358 (2010) (considering the difficulties posed by a statute suffering from overbroad interpretive leeway).

<sup>113</sup> Smith, *Economic Analysis*, *supra* note 10, at 17; cf. Roscoe Pound, *The Decadence of Equity*, 5 COLUM. L. REV. 20, 20–26 (1905) (arguing that the system of equity and the system of law will inevitably blend into one system).

<sup>114</sup> See e.g., *Riggs v. Palmer*, 22 N.E. 188 (N.Y. 1889).

## CONCLUSION: THE MORAL QUANDARY OF OPPORTUNISM

Throughout the preceding analysis, this Article does not seek to justify or validate opportunistic practice—nor CMO in particular—as an intrinsic moral good. This Article’s scope is limited to offering a functional theory of opportunism (in both its generalized and CMO forms) as a trigger for legal evolution, as well as a normative case that *ex ante* laws are generally preferable to the use of *ex post* equity (where reliance interests and effective development of law over time are the key evaluative criteria).

This Article has previously described opportunism as amoral; this should be understood as contending that opportunism as defined here—self-interested behavior that is legal but unanticipated—is amoral in itself, but may be immoral in a given context. Casting all forms of opportunism as intrinsically immoral risks, as previously discussed, rendering opportunism a non-cognizable phenomenon: it is no easy feat to accurately discern the motives behind a given norm. Definitions of opportunism must thus differentiate between generally strategic conduct, which may not be harmful, and the morally problematic phenomenon that is CMO.

Professor Smith writes, “Models of self-interest combined with asymmetric information can explain a lot of the behavior we would call opportunistic. Also, if opportunism is simply playing outside the rules then it reduces to imperfect enforcement.”<sup>115</sup> This characterization insinuates that self-interested behavior, in areas where the law has not explicitly regulated, is in some way immoral or socially destructive—an assumption that is not substantiated in depth—yet the characterization also recognizes that some forms of self-interest-seeking behavior are especially pernicious. While legal conduct and moral conduct may well be at odds, this does not necessitate that extra-legal conduct is *always* immoral. The kind of behavior challenged by Professors Smith<sup>116</sup> and Williamson<sup>117</sup> involves conduct that is broadly antagonistic to the anticipated effect of a given law—conduct here termed CMO. The equitable countermeasures proposed by counter-opportunistic theorists, however, adversely impact both general opportunism (which one might also describe as “strategic behavior”) and

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<sup>115</sup> Smith, *Economic Analysis*, *supra* note 10, at 9.

<sup>116</sup> *See id.* at 17.

<sup>117</sup> *See* WILLIAMSON, *supra* note 15.

CMO: though CMO should indeed be policed, for both moral and practical reasons, a different solution is required.

To revisit the hypothetical case of Malevolent Motors, an appropriate avenue for counteracting the company's CMO behavior could take the form of a newly enhanced ex ante law regulating driver-for-hire services above and beyond taxicab companies. Crucially, the need to expand this law would likely not have been clear without Malevolent Motors' conduct actually occurring and being identified as harmful; the very essence of Malevolent Motors' conduct is that it was unanticipated. Penalties for violation of the law might be attached to this enhanced ex ante rule, which in turn could carry a punitive force beyond disgorgement of illicitly reaped profits. This would have the effect of maximally deterring Malevolent Motors' undesirable conduct without triggering the trapdoor effects of equity. Moreover, a rule evolving in this sort would not automatically disincentivize strategic (non-CMO) behavior: a company operating within legal loopholes, in a socially advantageous way, could still do so without the immediate fear of an adverse judgment in equity.

A brief note on the scheme of legal philosophy within which this analysis exists: the evolutionary portrait of law outlined here exists generally within the contours of the positivist tradition.<sup>118</sup> From a meta-ethical standpoint, however, the process by which law changes to reflect changes in social values may well reflect an ever-increasing cognizance of the higher norms that exist within a realist framework. Ergo, to recognize the phenomenon of opportunism as a driver of important structural changes in law is not to automatically espouse a utilitarian morality.<sup>119</sup>

Simply put, that conduct which is socially destructive or bad—conduct that likely falls within the boundaries of CMO—should be addressed at the ex ante level. The acts of agents engaging in forms of opportunism, whether benign or CMO, determine what society labels as socially destructive or elects to permit; such determinations are then codified via the legislative apparatus. Additionally, as discussed above, such a process allows for the attachment of non-disgorgement punitive sanctions to the rule set deployed. This is the crucial point where Professor

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<sup>118</sup> See generally H.L.A. HART, *THE CONCEPT OF LAW* (3d ed. 2012) (outlining the broad paradigms of the legal positivist tradition).

<sup>119</sup> See generally JOHN STUART MILL, *UTILITARIANISM* (George Sher eds. 2d ed., 2001) (regarding utilitarian moral theory).

Smith's analysis encounters argumentative difficulties.<sup>120</sup> He writes, "There is little to be gained and much to be lost by allowing people to easily contract around an equitable safety valve."<sup>121</sup> Indeed, some norms must govern the process by which contracts are formulated, but such norms are rendered more specific and more effective as information enters the system and instances of opportunistic conduct (including cases of CMO) are repeatedly adjudicated. The ex ante structures established through such a process may work to achieve equitable, counter-CMO ends—for instance, as in *Riggs*, by preventing a wrongdoer from being enriched by his misdeeds<sup>122</sup>—without the need for ex post equity (even as a "safety valve").<sup>123</sup> The very presence of this safety valve defuses any momentum toward reform of the ex ante processes and norms.<sup>124</sup> Where fighting CMO is the goal, precision in rule setting is acutely important, and that precision is best achieved by ensuring that rule-makers have access to information regarding the behavior of self-interested actors.

A final word is warranted on the broad trajectory of law and equity in light of this evolutionary portrait. From a perspective that recognizes the inevitability of normative change over time, separating law and equity into distinct judicial tools (and using both interchangeably as discrete instruments, invoking equity when a situation is assessed to be "problematically opportunistic") is the least desirable scenario. This not only disincentivizes reliance, given that assumptions made based on ex ante legal rules and standards may be invalidated by ex post acts of judicial discretion, but it also offers no structural incentive for laws to develop. Integrating the use of both law and equity, as contemporary courts have generally done, is preferable to their explicit separation, but it may have the effect of obscuring (by committing to ex post judicial discretion) areas where the law itself should evolve via the conventional lawmaking process. The conceptual framework proposed here, which challenges the argumentative rationales for employing ex post equity, provides for the incorporation of punitive sanctions as a strong deterrent against socially

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<sup>120</sup> See Smith, Economic Analysis, *supra* note 10, at 50.

<sup>121</sup> *Id.*

<sup>122</sup> *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889).

<sup>123</sup> See Smith, Economic Analysis, *supra* note 10, at 6.

<sup>124</sup> See generally Stone, *supra* note 67, at 4–5.

adverse conduct—sanctions which must be meaningfully attached to ex ante requirements in order to remain philosophically defensible.

The optimal scenario entails a translation of the moral goals sought by equity—suppression of CMO conduct—into the discursive process of lawmaking at an ex ante level. In this vision, equity is understood not as an actual instrument used to sidestep a “bad” judicial outcome, but rather as a more abstracted aim that may underpin the formulation of ex ante rules in order to thwart perpetrators of CMO. What is needed is not second-order law but second-order architecture—law crafted in accordance with popular normative expectations to achieve equitable outcomes. If law is ultimately to flourish and respond to changing cultural needs, it must evolve within a society that *seeks*, but does not *seek to do*, equity.