Philosophers and lawyers have discussed the idea of equity, and its relation to law, for centuries. The conventional way to think about equity is as a response to problems arising out of the generality of rules.¹ Say there is a rule in my house that children must never awaken adults before 7 A.M. (and dire sanctions await those who do.) That rule might even list a few exceptions, e.g., if there is blood or fire, children can wake up adults anytime. Now imagine a child wakes me up one morning at 5 A.M. because there is a flood in the bathroom, something no one in my household had foreseen. It seems unjust to treat her as a wrongdoer in the circumstances. The rule seems to require an ex post facto correction to ensure its equitable application in that case.² We might say then that my child had no obligation to forebear from awaking me to warn me of the flood. Equity in this broad

¹ Aristotle is the source of this view of equity. See Book V, Nichomachean Ethics, in J. Barnes, ed. The Complete Works of Aristotle, C. II (PUP 1984) at 1796 (“And this is the nature of the equitable, a correction of law where it is defective owing to its universality.”)

² Suarez, following Aristotle, thought that equity was a process of interpreting the will of the legislator to allow that a legal obligation had lapsed, “although it will be necessary for some extrinsic circumstances to arise which will force one to make such an interpretation.”
sense is the practice of allowing for exceptions where a particular application of a
general rule produces results at odds with the purposes or normative ideals to
which that rule is committed.

There are two ways that this broad idea of equity might relate to law: one
conceives of equity as bound up with the very idea of legal concepts. HLA Hart’s
account of the defeasibility of legal concepts reflects something like this idea. Hart
wrote that legal concepts are compounds of law and fact and as such are inherently
subject to defeating conditions (if $x$, then $y$, unless $p$).\(^3\) Equity in the broad sense
concerns an inherent feature of legal concepts: their defeasibility in circumstances
that are not knowable ex ante.

A second way to see the relation of equity to law is in terms of the judicial
role and its relation to law more generally. John Gardner has written about equity,
not as a feature of law or legal concepts but rather as a role-based responsibility of
judges, something judges do. For Gardner, whereas law aims at many things, judges
are charged with doing justice first.\(^4\) Equity is the idea of the judge acting as
arbiterator, doing justice as between the parties when the demands of law and justice
are at odds.\(^5\) Equity stands outside of law on this account, supplying justice in the
particular case where law fails to do so.

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\(^3\) Note that Hart himself did not intend this to be an account of equity but an account
of legal concepts generally. Cite Suarez.

\(^4\) J Gardner, Law as a Leap of Faith.

\(^5\) Aristotle drew the connection between equity and arbitration but did not go on to
suggest that equity was a feature of the judicial role or something built into law. See
Rhetoric Bk 1 sec 13 (we “prefer arbitration to litigation—for an arbitrator goes by
the equity of the case; a judge by the law and arbitration was invented with the
express purpose of securing full power for equity.”)
Equity, in this broad sense we trace to Aristotle, is not a difficult idea to go along with. The basic story and its normative significance seem relatively uncontroversial. For who would deny that there is a place for particularized justice in our legal institutions and in the work of courts in particular? If equity means justice in the particular case, then equity surely is a bedrock value of any legal system.

The real challenge is to figure out the extent to which equity in this broad sense sets out the philosophically significant core of Equity as an institution as we know it in common law systems, and, if not, what does. By core, I mean the ideals that give the institution as a whole its normative bearing, allowing us to determine the justifiability (or not) of various accretions to that core by reference to it. By Equity as an institution, I mean both the agents (or agencies) with the special power to make and enforce equitable rules and also the product of these agents: the equitable rules that agents of equity make and the juridical relations that they regulate.

Now, most lawyers, quite properly, recognize that Equity as an institution does much more, or maybe much other, than require judges to aim for justice in a particular case or to recognize the inherent defeasibility of legal concepts. Equity as an institution has given us all kinds of very specific rights, such as restrictive covenants, securities (such as the equity of redemption, which makes a mortgage really a mortgage rather than a conveyance of property to the bank), equitable shares in partnership assets, trusts, options to purchase, fancy interests in future
rights to property or contract\textsuperscript{6}, etc. The systematicity of Equity, and its trade in the language of rights and obligations, gives it more of the feel of law and juridical relations than the feel of equity as justice in the particular case.

Most lawyers recognize, moreover, that doing equity in the sense of meting out justice in the particular case has never been uniquely the province of Equity as an institution. Although courts of chancery, the primary agents of Equity as an institution for a time, did quite a lot of equity at least in early days, the common law, too, has elements of equity, and has the tools within it to promote justice in the particular case even if common law courts did not always deploy them. The view that the common law courts too could do equity in the traditional sense accounts for Thomas More’s famous challenge to the common law courts: courts of chancery would interfere less, he said, if the common law courts themselves took their responsibility to do equity more seriously.

What might we make of the looseness of the relation between equity and Equity as an institution? We might double down on the idea that equity in the broad sense is all that is philosophically interesting about Equity as an institution and dismiss the rest as normatively insignificant.\textsuperscript{7} Or we might find in this looseness a reason to deny that Equity has its own normative core (taking equity in the broad sense to be the only possible contender), perhaps concluding that that equitable

\textsuperscript{6} For instance, rights to undeclared dividends on shares or rights to contractual rights to payment for doing something in the future.

\textsuperscript{7} The more technical the institution, the more tempting it is to dismiss it as normatively insignificant: it is difficult to convince the philosopher to take notice of the option to purchase, the mortgage, the covenant no matter that this makes up the bulk of the work of the institution. We might say, as Holmes did about rules of conveyancing in Property law, that 99% of it is technical and (so) philosophically insignificant.
rights are just more private rights that we have against others. Equitable rights appear from this viewpoint as components of private law, itself a modular thing, to be justified in terms of what they add to the range of private law relations available to us.

An alternative to both these approaches is to investigate Equity’s normative significance in terms of its place within our larger institutional arrangements. This I think is what Henry Smith has set out to do recently in his account of Equity as an ex post curb on opportunism. Opportunists are people who act for the wrong reasons, to exploit the generality of law for their own, unwarranted advantage. The idea, as I reconstruct it at least, is that the law, or the legislator, warrants certain advantages to come out of legal rules and legal forms and not others. Thus Equity closes “loopholes” in the law that allow for this unwarranted advantage taking. This is a sequenced account of equity: the law sets down general rules for how we relate to one another at first instance and then closes off the unintended avenues for opportunism that law in its general form produces. By preventing opportunism, Equity reinforces the relations that law meant to set out but did not (too costly) or could not (epistemological limits on foreseeability of loopholes). Equity ensures that that law is not used immorally or badly.

In this paper, I will offer a different perspective on what Equity does and the kind of injustice it targets. Equity’s core work, on my account, is to establish and regulate public pathways to private rights. In doing so, Equity guards against a

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8 As Henry Smith has pointed out, this is the view of many American scholars and may be the view that lies behind the idea at many American schools that Equity is not a subject to be taught on its own.
specific kind of injustice, the forfeiture of the position a person has when she is substantially along the way to legal rights.9

The idea that Equity protects public pathways to private rights draws on political and moral ideas about the state and its status as a public authority.10 A private law order that sets out how things stand between us as a matter of right presupposes that people move in and out of these legal relations. And yet private law on its own does not take up the question of how and on what terms those outside of private law relations navigate their way in. Private law on its own would leave us, at least in that aspect of our lives together, in a state of chaos, emerging only into order at the moment we step fully into the legal relations private law sets out.11 There are limits on what the state can tolerate while maintaining its status as the public authority: injustice weighs on what I will call the political conscience of the state. There is a role then for the state to play in setting out public pathways to legal rights and in protecting us against injustice and tyranny as we traverse them. This is the role I think Equity is meant to fill.

There are two sides to Equity, on my account. The first, concerning the recognition and regulation of public pathways to legal rights, is the foundation for equitable rights as highly individualized public rights. There is another side to Equity on this account that concerns equitable obligation: the duty to avoid or to

9 Or even the threat of forfeiture. Hence, equity removes clouds on title. Rumsey v City 97 NY 114; Bishop v Moorman 98 Ind. 1
10 This is I suppose another way of saying that the core responsibility of the state is bring all aspects of our shared lives out of anarchy into a legal order and to maintain the conditions for civil society.
11 Private law allows for some very limited ways to connect outsiders to other people’s private rights: agents, for instance, can serve as a conduit between outsiders and another’s private rights.
mitigate the forfeiture. Equity almost always lays that duty upon the person who has the legal right to which the equitable right leads. This is not because there is necessarily anything unconscionable or morally problematic in the legal right-holder’s conduct or motive. The behaviour of the legal right-holder and her motive are not factors that mark another’s loss as a forfeiture in Equity. The exercise or enforcement of a legal right is simply the occasion of the forfeiture. A puzzle for an account of Equity as a public institution is to explain the mechanics of the institution: how it is that the burdens of Equity fall to private actors with legal rights. The role of the legal right-holder—the requirement that she act equitably—points to another dimension of Equity: Equity, I will argue, conscripts private actors to avoid or to mitigate the forfeiture.

My account of an equitable obligation, i.e. the duty to do as Equity requires for another’s benefit, draws on ideas about the state’s prerogative to enlist our help in discharging the burdens of government. Equity enlists the service of the legal right-holder—by making a personal demand that she avoid or mitigate the forfeiture in the exercise of her legal rights. It is a matter of political or civil conscience for each of us to serve the state in discharging its core obligations to protect its citizens against tyranny and injustice. Equitable rights are thus a kind of accession of a public law burden to a private right.

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12 Cf. Nyuk Chin, Relieving Against Forfeiture: Windfalls and Conscience, 25 W Austr L Rev 110, 111 (1995) (offering doctrinal grounds for the view “improper or shabby behavior on the part of the party against whom relief is sought has much less to do with relief than is believed.”)

13 Thus it is said that “Equity always acts in personam.”

14 "The conscience by which I am to proceed is merely civilis and politica" in Cook v Fountain, 3 Swan 576.
Both in its aims (protecting our positions on Equity’s pathways against forfeiture) and in its modus operandi (in enlisting legal rights-holders in service of this protection), Equity represents a political ideal of proper state-citizen relations. This normative ideal of proper state-citizen relation has an unmistakably pre-modern character.\(^{15}\) It may be helpful in understanding why that is so to remember that Equity as an institution emerged not from the judiciary’s understanding of its role (e.g. to do justice first) but from the Crown’s (the executive’s) understanding of its role within the constitutional order.\(^{16}\) Equity was one of a bundle of prerogative powers that constitute the Crown as the fountain of justice and honour.\(^{17}\) Prerogative power is sometimes described as an arbitrary power to decide the exception, shielded from review by courts or parliament.\(^{18}\) This description (at best)

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\(^{15}\) My view overall is that there is more than a trace of the pre-modern in the common law generally: the continued importance of roles and offices in ascribing rights and responsibilities is one indicator. See Katz, Governing through Owners, U. Penn. L. Rev. (2012); see Leif Wenar, The Nature of Rights, ETHICS (on roles).

\(^{16}\) And later the competing interpretations of that prerogative by courts of common law. See Thomas Poole, REASON OF STATE: LAW, PREROGATIVE AND EMPIRE (2015) (on the nature of the prerogative.)

\(^{17}\) Charles Barton, CONVEYANCING 282 ( “Nor can the King....grant to any one authority to hold a court of equity for the dispensation of equity is a special trust committed to the King himself and not to be entrusted to any other save only his chancellor.”

\(^{18}\) See Dicey, THE LAW OF THE CONSTITUTION at 240, 256 (comparing Equity to Droit Administratif in France, concluding it might have but did not continue on as a source of arbitrary discretion.) There is a strand of constitutional thought according to which rule by Royal Prerogative made its own distinctive a claim of public justifiability. Michael Braddick makes an argument that rule by king makes a claim of legitimacy based on wise counsel. Hobbes may mean something like that when he says: “The King’s reason, when it is publicly upon Advice and Deliberation declared...is all that is or ever was the Law of England.” (emphasis added.)
sets out only negatively the jurisdiction the Crown claimed for itself. The royal prerogative defined a role for the Crown as the source of justice and honour within its realm, with ultimate responsibility for peace, order and government. We can make sense of Equity as one aspect of the royal prerogative alongside other powers, including the Crown's exclusive jurisdiction to create offices and its ancient right to command the service of its subjects in those offices; the power to pardon and to grant dispensations; authority and responsibility to hear pleas from the poor.

Equity's original place in this institutional arrangement has left its mark.

The normative ideals that I say are at the core of Equity go some way toward accounting for the nature and structure of equitable rights. Equitable relations are, on my account, a kind of mediated relation. The holder of a legal right and the holder of the equitable right stand in a relation mediated by the state. I, the rightholder, stand under the protection of the state with respect to my position on the way to legal rights, and you, the obligor, stand in the service of the state's protection of me.

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19 This view of the prerogative implies that it stands outside the legal order rather than within it and constrained then by requirements of legality. I leave to one side here what I take to be obvious normative problems with this view.

20 One interesting application of this view of the royal prerogative is set out in Eric Nelson, *The Royalist Revolution*. Nelson argues that American revolutionaries first turned to the Crown and the royal prerogative as a sufficient source of governmental power and as a protector against the tyranny of the British Parliament.

21 See Coke and Hale for the idea that the King is entitled to the service of its subjects is an old idea in law and in philosophy. Coke, V I, Case of Non Obstante (this essentially sets out the right of the sovereign to the service of any of his subjects “for the publick Weal”) at 423. Maitland also mentions the ancient common law power to conscript subjects to serve. See also Hale, Royal Prerogative p 268 (the compulsion of men to do those things that are in aide and subservient to the dispensation of justice.) Generally, Suarez talked about the right of the Prince to the liberty (but not the life) of his subjects, i.e., a right to their service.

22 JH Baker, *An Introduction to English Legal History*
Equitable rights are rights against rights, rather than against things or persons.\textsuperscript{23} But equitable rights are not rights against private rights, as some have said. They are rather rights against the public right to conscript private actors to do public things, which means in the context of Equity the burden of avoiding or mitigating another’s disproportionate loss triggered by the enforcement of a legal right.\textsuperscript{24} Equity usually allocates the burden of that public right and responsibility to guard against forfeiture to the person best-placed to carry it out: the holder of the legal right or power. If that private actor fails in this, she is answerable to the state \textit{personally}.

In what follows, I set out the basic contours of this account of Equity.

\textbf{1. Of Forfeiture and Favourites}

We rightly take equity to be concerned with injustice, a kind of injustice arising out of the systematic enforcement of private rights. My aim here is to formulate with even greater specificity the kind of injustice that defines the work of Equity as an institution. It was never Equity’s place to supply distributive justice in general: Equity does not, for instance, adjust unequal distributions of wealth. It does not concern itself either to guard against the everyday losses that follow the allocation of private rights to one person and not another: one person patents an invention before her competition; another wins the race to record her security.

\textsuperscript{23} R Stevens, B McFarlane \textit{The Nature of Equitable Property}, Journal of Equity (2010). See also \textsc{Glanville Williams, ed., Salmond, On Jurisprudence (11\textsuperscript{th} ed.)} at 268-269 (describing rights in respect of other rights as one of the categories of rights we might have and includes here equitable rights arising by agreements of purchase and sale.)

\textsuperscript{24} Note the state can take over this function, by itself arranging for the exercise of a legal right in the manner that equity requires: equity regards as done what ought to have been done and a court can make whatever orders it needs to see to it that fact aligns with this fiction. That is in effect to take the proportionate exercise of rights out of private hands altogether.
interest before her fellow creditor; a present owner's defeasible interest is cut short, in favour of a future interest-holder, by the fulfilment of the defeating condition. Equity does not defend us against such losses.

Nor is Equity's concern to vindicate the rights, powers, or privileges we already have in private law. My claim is that Equity regulates an entirely different sphere, the pathways to legal rights. Equity concerns itself with a specific kind of injustice that arises in this context, the disproportionate loss or forfeiture of a position on a pathway to legal rights. The measure of disproportionality is the distance a person is set back (all the ground already covered) relative to the distance left to go to the terminus, the vesting of legal rights.

The idea of disproportionality in Equity is distinct from ideas of disproportionality that we typically find within private law. Equity’s concern with disproportionality is monadic in the sense that it concerns a single person and how substantially far she has come (and so how far she stands to be set back) in relation to how far she has to left to go on the way to legal rights.

Compare this with the relative or interpersonal character of private law proportionality we find in some accounts of abuse of right or in the law of negligence. It is sometimes said to be an abuse of right to exercise your rights such that the benefit to you is small in relation to the cost that exercise imposes on another.25 A proportionality requirement may seem to give abuse of right doctrine

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25 This was Maimonedes’ view of abuse of right. It is also a view that has some currency in Quebec. See e.g. Article 7, Civil Code of Quebec: “No right may be exercised with the intent of injuring another or in an excessive and unreasonable manner which is contrary to the requirement of good faith” (emphasis added). Ciment du Saint Laurent c Barette 2008 SCR 64 (dust-producing cement company
more of a public law feel relative to principles of abuse of right, concerned with the motives or reasons for action (spite, animus, opportunism). That is because a proportionality analysis in abuse of right doctrine requires a right-holder to take an other-regarding view to figure out when a use triggers a disproportionate loss to another. By contrast, abuse of right generally requires us only to abstain from reasons that are other-regarding in a bad sense: as when someone takes account of the position or interests of others only in order to gain leverage or to gratify spite.\textsuperscript{26} But proportionality analysis within a principle of abuse of right is nonetheless distinctively a private law ideal insofar as it has a bilateral, or interpersonal, dimension to it. We ask whether, \textit{as between these two parties}, the gain to the right-holder justifies the loss that exercise imposes on another. This is effectively the ideal of proportionality we see in other areas of private law, too, for instance, the Learned Hand Rule in the law of negligence, in which proportionality refers to the cost of prevention relative to the cost of the injury. By contrast, the public ideal of proportionality at work in Equity looks at the distance a person has traversed toward a legal right, relative to the distance left to go, in figuring out whether the loss (of position) is disproportionate-- a forfeiture.

Equity’s “darlings”27 are those who have substantially completed the way: substantiality is what brings the forfeiture properly to Equity’s attention, what marks our liability to forfeiture as a kind of oppression. Equity ensures that our positions on the pathways to legal rights are not something for which we are dependent on the courtesy or good grace of another. Put another way, Equity creates a kind of bare property with respect to private rights we don’t yet have.28 It is in this sense that, as jurists have been fond of saying for centuries, “Equity protects only property.”29 Being subject to forfeiture of one’s position on the way to legal rights is a kind of oppression against which Equity as an institution guards.30 In what immediately follows, my aim is to make apparent Equity’s concern with pathways to legal rights and with guarding against a kind of injustice relating to our passage along them.

27 The language of “Equity’s darlings” comes from the law of mortgages, where it referred to the mortgagor, the original property holder, who had conveyed his interest to his creditor subject to a condition subsequent: its return on the repayment in full of the mortgage loan by a specified time. This language is found across contexts in which Equity operates.

28 Property, said one court, is the word “being used for that right which we have both to land or tenements, goods or chattel, which in no way depends on another [person’s] courtesy. Jackson v. House, 17 John’s 281 (NY 1820) (my emphasis.)

29 Lord Eldon: “Equity protects property” dictum. Criticized as unduly restrictive in cases like Berrien v Pollitzer 165 F.2d 21 1947. Oliver W Holmes was concerned that “The traditional limits of proceedings in equity have not embraced a remedy for political wrongs.”242 See Scandinavian Trading Tanker Co v The Scaptrade (denying Equity’s jurisdiction to relieve against forfeiture in case where there is no right to property or possession of vessel: time charter cases involved contract for services: charterer provides services to ship owner through use of ship by employees of charterer. No path to anything in these cases (no specific performance possible). Therefore withdrawal of ship for nonpayment might cause economic loss but does not dislodge the plaintiff from path to rights.

30 It is consistent with this that Equity developed the action to quiet title, to remove what we might think of as threats of forfeiture—clouds on title. (See also Rumsey v City 97 NY 114; Bishop v Moorman 98 Ind. 1.)
II. Pathways to Rights

This talk of pathways and positions protected against forfeiture is meant to account for the nature and structure of Equitable rights, and their place in relation to private rights within the constitutional order. These central, organizing features of Equity, I will argue, actually explain the nature and structure of well-known forms of Equitable rights, in the law of trusts, the law of mortgages, the law of contracts and bankruptcy law. I will show how in each of these areas there are cognizable pathways to legal rights. A pathway has a point, a destination, and the destination here is the vesting of private rights. As we will see, Equity properly distinguishes between pathways and unilateral efforts to achieve some goal. Think of the nephew who assiduously cultivates his wealthy aunt in hopes of inheriting, the hunter who sets off in hot pursuit of a fox, or even of the father who intends to make a gift of a cheque to his infant son but dies before he can endorse it: there is in none of these cases a built pathway to legal rights for the nephew, the hunter or the baby son. Equity accordingly offers no protection in these cases to the expectants.

A. Mortgages

In English law, mortgages were created in the following way: an owner would transfer title in land in a “deed by mortgage” to the creditor to secure repayment of debt. The creditor would then have legal title to the land, subject to a condition subsequent: on repayment of the mortgage debt, the debtor would have a right to regain ownership of the land. This is roughly what the conveyance looked like: “To my Creditor A in fee simple, but if I pay him $1000 by Jan 1, then I may re-enter Blackacre.” The law strictly construed such conditions subsequent, which cut
short the vested interest of a present owner to make way for the future-interest holder. So it would happen time and again that when debtors defaulted, that is, failed to repay at the appointed time, the creditor would get the property free and clear of the future interest.

Equity intervened to preserve a debtor’s right to redeem her property by repaying the loan even after default, putting the debtor essentially in the position she held immediately before her time in law ran out for the repayment of the debt. This equity of redemption protected a debtor only so long as she remained on the path to repayment (i.e. one who is actively paying her debt and who evinced a clear intention and ability to continue to do so.) Should she fail to progress in this way, she has in effect vacated the position on the pathway to legal rights. Equity in that case properly allows her creditor to bring an action to foreclose the equity of redemption, and so to resort to the security.

What a mortgagor/debtor has, in a secured loan context, is a clear pathway to legal rights in her land. The point of a mortgage is to be an arrangement whereby a debt is paid off and property is regained. As the debtor pays more and more of the underlying mortgage loan, she moves closer and closer to the terminus, the discharge of her loan and the re-vesting of her rights to land. Her position on the pathway is established by the substantiality of the proportion of debt that she has re-paid.

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31 Here we sometimes find countervailing reasons of justice not to throw the burden of equity on some particular private actor: for instance, a “[creditor’s] ruin, notwithstanding all the court can offer as compensation.” Hill v Barclay 18 Ves 59, Lord Eldon Cited in STORY, COMMENTARIES ON EQUITY JURISPRUDENCE, v ii at 548.
It is well-established in the law of mortgages that there can be no secured interest relationship without a mortgage loan: the contractual and the property relationships are linked in Equity’s view. Without a mortgage loan, a conveyance to the bank is just the conveyance of a defeasible fee (defeasible on the happening of an event, *vìz*, paying $X), and the taking of a future interest by the original owner. This is the perspective of law. From a legal point of view, the conveyance of a defeasible fee is one thing; the debt relationship is an independent other. In law, a payment of money at a specific time, $1000 on January 1, may stand as the trigger for the vesting of the future interest. But this is not a pathway to a legal right: it is rather a moment of reckoning.

One way to make sense of Equity’s linking the loan and the secured interest is in terms of the integrity of the mortgagor’s (the creditor’s) claim: a person cannot reasonably claim a security interest without an underlying debt relationship where the raison d’être of the mortgagor’s interest is to secure the repayment of a loan. That must be right but I do not think it is the whole story. The underlying loan is also, I think, crucial to Equity’s formulation of the mortgagor’s interest, the equitable right it actually protects. It is revealing of the nature of equitable interests generally to consider how. The loan and so its repayment marks the path to the revesting of the legal right in the debtor. Without that underlying debt relationship, there is no basis for Equity to preserve an equitable right on the part of the original owner in the property conveyed to her creditor: in the absence of an underlying loan, there is no pathway to a future legal right and so no position along it that Equity might
protect against forfeiture. There would be merely a hope or expectation that the interest would vest at the relevant time in law.

B. Trusts

Equity's most famous intervention is on behalf of the beneficiary of a trust. A trust is an arrangement whereby the legal owner holds property for the benefit of someone else. The general formulation of equity as a response to problems arising out of the generality of rules is especially unhelpful in explaining the trust.

There have been attempts to explain the trust as an instance of private law's modularity or as an illustration of Equity's concern with opportunism. I do not attempt to disprove or to discredit either such approach but I see reason to avoid both. The first view sees the law of trusts as building on to private law, an expansion set if you like. But we need not give up so quickly on the idea that Equity does something distinctive in relation to law that is not just more law. We have potent reasons to favour an approach that accounts for Equity as equity, which is just the way it presents itself.

From another viewpoint, Equity’s protection of the beneficiary's interest is a curb on opportunism, the exploitation of a kind of defect in legal forms or legal rules whereby a person can gain advantages that the law had not intended to hand out. There is quite a lot of intuitive appeal to this idea: we can see the room for opportunism in a trust arrangement where a trustee as the legal owner could enjoy a far greater benefit from ownership than the settlor intended for them to enjoy. But there is an equivocation here between two kinds of opportunism. The first kind of opportunism concerns taking an advantage that the legislator did not intend to
convey in setting out the law or legal form in general terms (but could not anticipate or rule out ex ante). This I take to be the kind of opportunism with which, on Henry Smith’s account, Equity is concerned. So for example, where your debtor has already paid you but the bond securing repayment was not discharged, you may not sue on the bond to enrich yourself. A bond is by design meant just to guarantee the promise to repay. In a legal system that allows you to collect on a valid bond and does not admit evidence that might contradict the validity of the bond, there is the opportunity for abuse: for the use of that right for an illegitimate purpose, not as security for a debt but to enjoy a windfall.

The second kind of opportunism concerns taking precisely the advantage that the legislator intended the law or legal form to deliver but in circumstances that the actor who put you in a position to enjoy it did not intend you to have. To treat these two forms of opportunism as attracting Equity in the same way is in effect to confuse a private actor and legislator. There may well be a gap between the kind of decisional authority the transferor wanted to convey and the kind of decisional authority the transferee acquired through such a conveyance. But owners do not have the power to create new offices and new kinds of authority: ownership is an office of decisional authority and the incumbent merely appoints the successor.  

We see this idea, that private actors do not have the power to create new forms of decisional authority, in the restrictions on subinfeudation since the time of Edward

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32 Coke insisted that “as for how people get appointed to office, it is by law or by prescription. No new rules of appointment can be created by the king” (or presumably by anyone else acting privately).
I. We see an extension of this idea in courts’ treatment of certain restrictions as repugnant to a grant of ownership, an attempt in effect to reshape the nature of the decisional authority; for example, “to my wife in fee simple. Anything she has left on her death to my daughters in equal shares.” So former owners/settlors do get to appoint successors. But it is as a matter of constitutional principle, not for them to determine the kind of decisional authority associated with the office of ownership itself. Equity, which operates within—not outside—our political-legal order, will not help them to that power.

A settlor who transfers property to a dear friend to hold for the benefit of his daughter may have in mind a different kind of authority than the legal form is intended to convey. But form itself is doing exactly what it was designed to do: to transfer decisional authority outright to the new owner to exercise as she sees fit. The scope of an owner’s authority in law thus allows advantages to be taken that the settlor certainly never intended for the trustee to have, but Equity’s target insofar as it is opportunism at all is not this kind of opportunism, a defect in the form of authority owners have relative to the prior owner’s intentions. Rather, it is the kind of opportunism that is made possible by a defect in the legal concept that is at work

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33 Quia Emptores, 1290. This I think is a much larger political idea, that no one could in any case create offices for purely private ends. Coke had it out with the King on this point in Walter Chute’s Case, SELECTED WRITINGS OF SIR EDWARD COKE, at 492. This was a case involving a petition to the King to create a new office and to appoint one, WC, to hold it. Coke considered and said that actually no new offices could be created for private persons for private ends. (Office for x as opposed to an office, to which X might be appointed.)

34 (Re Taylor.)

35 As I said above, Equity is an aspect of a prerogative power, which is itself lodged within our constitutional order (whatever Schmittians might think.)
relative to a *legislator’s*\textsuperscript{36} intentions (for private actors’ intentions matter only with respect to the powers they actually have, e.g., whom to appoint, not the scope of authority and the office to which it is attached.) This kind of opportunism though is not at work in the trust.

So what explains Equity’s insistence that the new owner nonetheless hold for the benefit of the intended beneficiary? The trust is fertile ground for thinking more specifically about Equity’s role in protecting against forfeiture. We can profitably think about the beneficiary’s equitable interest in terms of Equity’s role in regulating the pathways to legal rights. The settlor’s intentions matter not in the creation of a new kind of property authority in the trustee/transferee, which I maintain is not her place, as a private actor to create; rather, the settlor’s intentions bear on her exercise of her power to appoint her successor: she never intended to appoint the trustee her successor but rather to appoint the beneficiary, by way of the trust. This requires us to think of the trust as a kind of delayed appointment of a beneficiary to the office, delayed during the trust and achieved by way of the trust. The trust arrangement is in effect a pathway to the vesting of rights in the beneficiary. The beneficiary’s position on that pathway is vulnerable to forfeiture where a trustee or anyone else in receipt of trust property exercises or enforces legal rights or acts with respect to the trust res so as to dislodge the beneficiary from that position in relation to the terminus. What the beneficiary has that Equity protects, is a position in relation to the legal right but not of course the legal right in

\textsuperscript{36} I don’t mean legislator in any narrow sense: I mean the constitutional processes and mechanisms by which society decides what decisional authority is available, how and to whom.
the property itself. All the beneficiary can do is petition Equity’s assistance in guarding against forfeiture, in ensuring her position on the way to the vesting of legal rights. The constraints on what the trustee can do in the office of ownership are not curbs on her opportunism but protection of the beneficiary’s position as the property passes through the trustee to its ultimate owner, the beneficiary. It falls to the trustee, who is in the position to trigger forfeiture of this position by appropriating, wasting, destroying, or otherwise mishandling the thing, to ensure that the beneficiary’s position is throughout maintained. Equity will conscript others too to do its work where the trust property falls into another’s hands although it is sensitive to avoid disproportionate losses to others, bona fide purchasers without notice, who cannot be seen as authors of their own misfortune (as the bona fide purchaser with notice surely is.)

What evidence is there that the trust is in effect a delayed transfer, a way that a settlor in divesting herself of rights sets the beneficiary on a pathway to legal rights? Here are at least two doctrinal indicators. The first is found both in Henry VIII’s famous Statute of Uses37 and in the attitude judges take and have taken to their role in relation to trusts (fixed and discretionary): a trust by design is something capable of executing; if it is not, it is not a trust. In other words, a trust is a pathway that admits of a beginning and an end: the vesting of the property in the beneficiary. The Statute of Uses made that plain by simply seeing to it that the

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37 Henry VIII: abolition of uses to prevent the evasion of feudal burdens “where any person stands seised of land to use of any other person or body politic” that beneficiary shall stand in “lawful seize of the same lands in such estates as they had in use in the same.” The statute made the cestui que use the legal owner. The statute executed the use: it in effect fast-tracked her along the pathway to legal rights in the property.
beneficiary was fast-tracked along the pathway to legal rights by cutting out the middle-man, the trustee, and effectuating the transfer of the property to the intended cestui qui trust. The Statute of Uses, in demanding the quick execution of the trust, was always consistent with the nature of the trust, merely accelerating its operation. If a judge must take over from a trustee, she does not go about managing property; the judge either appoints a new trustee or she simply executes the trust herself—which means transferring the property to the ultimate owners, the beneficiaries.

There is further doctrinal support for seeing the trust as a pathway to legal rights, which Equity regulates, in Equity’s insistence on what are called “Saunders v Vautier rights” for beneficiaries. The gist of the rule to come out of Saunders v Vautier is this: if a beneficiary is absolutely entitled to a gift and sui juris, then the trustee is dispensable. The beneficiary can demand the conveyance of the property straight away. What is more, it is not up to the settlor to do away with Saunders v Vautier rights: she cannot set up a trust that attracts Equity’s protection without Saunders v Vautier rights because it is the essence of the trust as a pathway to legal rights that the beneficiaries as ultimate owners ought at some point to be in a position to proceed to the terminus on their own initiative: to demand the conveyance of rights to them where they are sui juris and where there is no one else with a beneficial interest who might claim Equity’s protection.

Equity’s role to set out and preserve pathways to rights also explains Equity’s intervention in a related area, in which a legal transfer is in progress but
incomplete. A leading case in this area is Re Rose, in which a husband made two gifts of shares, one to his wife and one to a trustee for the benefit of his wife. The husband had done everything he could to divest himself of rights to the shares and yet the vesting of legal rights in the donees depended on a further exercise of a legal power by a third party, the Corporation itself, which had to approve and register the transfer.

Equity, it is said, does not assist volunteers or perfect imperfect gifts. The man who has a deed drafted but fails to deliver it has not put the intended recipient on a pathway to legal rights. Nor does the father who dies before signing over his cheque to his baby. There is no pathway in place nor any position for Equity to protect in those cases: Equity does not help people to pathways but only preserves them against forfeiture once they are on their way.

And yet in Re Rose, Equity allowed a constructive trust of the shares in the interval between the steps the donor took to divest himself of the shares and the registration of that transfer by the corporation. The basis for that decision I think has a lot to do with Equity’s recognition that there was already a built pathway to legal rights in that case and that the wife and trustees, the ultimate owners of the shares were substantially all the way there. To explain why there was a pathway here but not in all the other cases where people set out to make gifts to others but do not actually complete the gift we need to look more closely at the donor’s actions: the donor in Re Rose made the transfer under seal, declaring his wife and trustee to be owners and further leaving the burdens of ownership to his wife immediately.

38 cite
39 Milroy v Lord.
after. He was therefore estopped in law from going back on the gift (by for example claiming the dividends for himself during this interval or marching into the Corporation’s head office and demanding that they not register the transfer). The donor himself had set down the pathway for his wife and trustee to legal rights, and had ensured that they were substantially on the way to the terminus. It was this pathway that equity could recognize and their position on it that Equity would protect against forfeiture by imposing a temporary constructive trust on the legal owner (the donor) in their favour. The constructive trust was in effect a bridge allowing the wife and trustee to maintain their position between the divesting of legal rights and the completion of the transfer in law by the third party.40

C. Substantial Performance

We can explain the doctrine of substantial performance also in terms of this equitable idea of pathways.41 Some promises to perform in a contract are conditions of other promises, like the promise to pay. There is always the potential for forfeiture42 and so injustice when someone has substantially but not fully performed a promise that the parties have made a condition precedent to the right of payment. That is because, as Justice Cardozo put it, “the courts never say that one who makes a contract fills the measure of his duty by less than full performance.” To make sense of a right to payment for substantial performance in terms of contract law, we have to resort to a legal fiction about the party’s intentions to make a promise as a

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40 Future example: equitable tenancies in common as response to the forfeiture effected by survivorship.
41 See Cardozo J.’s famous decision in Jacobs & Young v. Kent, 230 NY 239.
42 Or as Justice Cardozo put it, “oppressive retribution.” Id at __ “That justice requires relief against the condition where a forfeiture will be caused, without fault on the part of the builder, may be admitted...” 2 Williston, Contracts (1920) 1527.
condition. We see something like this in Cardozo J.’s attempt to formulate the rule at least in part as a rule of contractual interpretation:\(^{43}\) “[Some promises], though dependent and thus conditions, when there is departure in point of substance will be viewed as independent and collateral when the departure is insignificant.”\(^{44}\)

A more coherent foundation for the doctrine of substantial performance is in Equity.\(^{45}\) Where a right to another’s performance (e.g., payment for services) is subject to a condition precedent (full performance of the services), there is a pathway to legal rights to payment: perform! Where the obligor has performed substantially all the work, she is substantially on her way to a right to payment. The obligee may trigger a forfeiture simply by enforcing the contract according to its terms. Someone who has performed 99% of the work is entitled to no more in law than the person who has not performed at all: a failure to complete is a failure to satisfy the condition precedent to payment. But where the obligor has covered substantially all of the ground, leaving just a “defect insignificant in relation to the project,” she is in a different position than someone who has not set out at all: she stands to suffer a much greater set-back relative to a much smaller deficiency. What

\(^{43}\) Id. at __. See also at__ (“Considerations of justice and partly of presumable intentions are to tell us whether this or that promise shall be placed in one class or another.”)

\(^{44}\) Id.

\(^{45}\) Indeed, Equity clearly is the driving force of Justice Cardozo’s decision although his notion of equity lacks specificity: it is just the idea of Equity as an instrument of justice. He writes “Those who think more of symmetry and logic in the development of legal rules than of practical adaptation to the attainment of a just result will be trouble by [the classification he suggests.] Something doubtless may be said on the score of consistency and certainty in favour of a stricter standard. The courts have balanced such considerations against those of equity and fairness and found the latter to be the weightier.” And later he says “the rule that gives a remedy in cases of substantial performance ... has been developed by the courts as an instrument of justice.”
is unfair about denying the obligor a right to payment for her work in that case is the lack of proportionality: all the ground she has covered is lost, a set-back out of proportion to the small distance she failed to go. Equity sees to it that the other side avoids the forfeiture or mitigates it by requiring that the obligee pay for the incomplete performance.

The doctrine of substantial performance trains our attention on an important factor in Equity's protection of positions on pathways to rights. It is not enough just to have taken some steps along the way; there is a substantiality requirement here. The equitable protection of the obligor against forfeiture does not kick in until the obligor has substantially performed. Substantiality in progress toward legal rights has an interesting role here: it does not displace the proportionality analysis but precedes it. Equity takes stock of a disproportionate loss not out of a pedantic concern to ensure each person actually gets her due: Equity does not make proportionality the aim of the state but rather takes disproportionality to be a limit on what the state can tolerate qua public authority. Substantiality is then a factor in making a forfeiture unjust in the relevant sense.

D. Links between Private Law Relations

Some of what Equity does is to provide the connections between legal relations where those links are missing in but clearly required by private law. One place we see this clearly is in the gap between a contract to transfer some property and the actual transfer of the thing itself. Where A contracts to sell Blackacre to B, A must follow through and actually transfer Blackacre. This is an exercise of a legal power that A has with respect to Blackacre, the power to appoint her own successor
by grant. Here we have two sets of jural relations, one in contract and the other in property. Contract does not fully open the way for B into property rights with respect to Blackacre. There is contract and there is property and the movement from one to the other is dependent on A’s exercise of her legal power to transfer, wholly within her control and not actually moved by the contract itself. We can see this problem from the other direction, too: where A and B have a contract for the sale and purchase of a horse, A has a right to payment from B only where A actually transfers the right to the horse to B. For that to happen, B must accept. If B refuses to accept delivery, A has no access to her contractual right to payment upon transfer.46

Equity intervenes in both cases, by regulating the path to legal rights, to property rights in one case and contractual right to payment in the other: Equity allows that B has a protected position in the lead up to the transfer of land: A is a constructive trustee of that asset from the signing of the agreement to the time of transfer.47 Equity imposes an obligation on B to accept the horse and so not to block A’s way to rights to payment.

The idea of assignment, one of Equity’s central innovations, is an expansion of Equity’s role in opening the pathways to legal rights. Assignment connects people to the private rights of others in ways that Equity will protect. Through assignment,

46 I am grateful to Peter Benson for the example. See J.F. Burrows, The Duty to Cooperate and the Implied Term, 1968 31 Modern L. Rev. 390
47 This can be put in terms of the availability of equitable remedies that set out the power to obtain the thing. “Whenever someone has the power to obtain title to an asset, whether thorough recission, rectification, specific performance or even self-help, that person thereby obtains a property right [in equity] to that asset.” See Rob Chambers, The Importance of Specific Performance in Equity in Commercial Law, at 433.
we can move into private rights that private law might otherwise treats as closed bilateral relations (through ideas like privity). Equity has thus made possible the assignment of personal obligations (e.g. debts, shares, futures, royalties), thus extending the possible ways in which people can connect to the private rights of others. The same idea is replicated within Equity, too: people take turns in the position Equity protects. A beneficiary of a trust through assignment puts someone else in exactly the position she originally held in relation to the legal right occupied by the trustee. A mortgagor, with a right to redeem, can assign that right to redeem to yet another creditor and so create a second equitable mortgage interest: she herself regains her position to redeem against the first mortgagee only after she overtakes the assignee of the right to redeem by paying down the second mortgage. Equity changes the way in which private law serves as a blueprint of our lives together, allowing for the movement of people in and out of the legal relations it sets down.

III The Absence of Pathways

Just as important as where there are pathways is where there are not. A nephew who has spent years cultivating an aging aunt in hopes that she may leave him her fortune might consider himself to have taken significant steps in the direction of that inheritance. I have no doubt that in many cases there is a likelihood of that person’s succeeding in what he has set out to do: he may in the end inherit all.

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49 Sarah Worthington, The Disappearing Divide between Property and Obligation in Equity in Commercial law. It is benefits not burdens that were assignable because it is pathways to the legal rights to these things, that was being set out and protected. See page 98, noting possibility of equitable charges in after acquired assets, the recognition of floating charges, automatic crystallization clauses.”
And yet it should be clear that there is no pathway to legal rights that the nephew is traversing. A pathway to his aunt’s fortune is not his to build, and his acts are just so much unilateralism.

We can say the same about cases involving claims of first possession, where the first possessor interrupts someone in hot pursuit of something.\textsuperscript{50} Pierson v Post involved a contest between hunters in hot pursuit of a fox and a beachcomber who stepped in at the last moment to capture the fox from under their noses. The saucy intruder, as the first to capture the fox (meaning in this context, mortal wounding), thereby acquired the better right to it by first possession. The dissent in Pierson v Post, for instance, makes much of the labour the hunters exerted in mounting the hunt, the main steps they took in preparation for it and the long pursuit that followed. In law, the beachcomber clearly had better rights: first possession depends on capture, in that context, mortal wounding, as well as intention to possess. Equity did not intervene however to protect the hunters. That, I think is because it was not for the hunters unilaterally to build private road to rights and then claim Equity’s protection for it. Of course they should be free to do as they like in positioning themselves to prevail at the time of law’s reckoning but they have no cause for complaint involving the state when their path is not protected.

A more recent case, Popov v. Hayashi, tries, more explicitly, to suggest that we think about “hot pursuit” of a thing in terms of a pathway to legal rights, with the result that someone who sets out but fails to capture something can claim Equity’s protection. Popov like many fans had bought a ticket to a game in which it was

\textsuperscript{50} Pierson v Post; cf. INS v AP; Keeble v Hickeringill; Popov v. Hayashi.
widely expected that Barry Bonds would hit a record-breaking home run. Barry Bonds did as expected: his 73rd home-run ball went into the arcade and landed in or on Popov's glove and stopped in its path. What happened next was poorly documented but something like the following happened. Popov was tackled and thrown to the ground by a mob, and at some point, the ball left his glove, rolled onto the ground. Popov was unable to establish whether at some point the ball had been secured in his glove. Another fan Hayashi, who was also knocked over by this mob, saw and pocketed the ball. Hayashi clearly took control of the ball and had proof of control—his capture of it was caught on camera. The court found that Popov had not established that he actually captured the ball by taking full control of it and so had not met achieved first possession in law. Hayashi clearly had. What is more, Hayashi was not at all implicated in the mob activity that had deprived Popov of his chance to complete the catch.

What is fascinating about the case is that the court switched midway to an equitable mode, in which it analyzed Popov's interest in terms best described as a position on a pathway to legal rights. The loss of that position was in the court's view something like a forfeiture. In finding Popov had a protected interest in his position on the cusp of capture, the Court placed the burden of mitigation on Hayashi, whose capture ended the contest for the ball, and not the mob whose fault it was that Popov had fumbled: Hayashi was the one best placed to mitigate the loss. The court reasoned thus: “where an actor takes significant but incomplete steps to achieve possession of a piece of abandoned property and the effort is interrupted by the unlawful acts of others, the actor has a cognizable prepossessory interest in the
property.” The case gets the logic of Equity right but misapplies it: there was no built pathway to legal rights for Popov and it was not his place to build one. He was merely at liberty to take steps that improved his chance of success when law made its binary allocation: the award of the ball to its first possessor.

Why did the hunters not hold a protected position, given how close they were to capturing the fox and how far they had come (literally)? Why do I think the court in Popov was wrong to act as though Popov did have a protected position along a cognizable pathway? The answer has to do with the nature of Equity as a prerogative power, what we once spoke of as a royal prerogative, a power of the Crown. Equity is not an escape from the blueprint for our shared lives together, a way that we can each act unilaterally and demand the assistance of the state: on the contrary, it is a way that the state secures against all avenues of oppression within that blueprint. To demand Equity’s protection as we follow paths of our own, unilateral, making is to commandeer public authority for private ends, the definition of corruption. The pathways that Equity recognizes are built within the legal order, through the exercise of legal powers relating to property or contract. Equity ensures that pathways to legal rights (like the King’s highways) are traversed safely.

This talk of pathways is not just a metaphor for regular patterns of equitable relief for petitioners who find themselves outside of private law's protection. There is a built quality to these Equitable pathways: they harden in other words into categories of Equitable rights for which we have names (trusts, etc.). Equity as an institution sets out a network of pathways that works to secure the full, free and equal membership of all of us in the private law order.
Equity speaks the juridical language of rights, obligations, and reason. There is a generality to equitable rights. The state cannot legitimately recognize a private pathway to rights any more than it could create an office for a particular subject or criminalize one person’s conduct. There is a permanence to the pathways Equity recognizes: once established, they stand ready for anyone to traverse. That does not mean that Equity is unchanging. It means that once the state sets down those pathways within the private law order, there is something there to change.

IV. Conscripting Private Actors to do Equity’s work

Equity is engaged where there is a claim to the state’s protection and there is a mechanism in place for the state to offload that burden to private actors: by placing it as a burden or a charge on how they exercise their legal rights. The duties that secure equitable rights are superadded burdens of a public nature. Equity’s demand that legal right-holders avoid or mitigate disproportionate loss in this way shifts a public law burden to private actors. The trustee forbears from exercising her

51 Neil McCormick found it absurd to deny the generality of equitable rules and the insistence by some that Equity as an institution traded in individualized justice. There is a concern for individualized justice in the structure of Equitable rights but of course it is not open to a King to do purely individualized justice, anymore than a King could create an office for one person, or a crime for one person. It is not in the nature of the royal prerogative that gave rise to Equity as an institution to work like a dictator’s fiat.

52 Compare with Charles Reich, on New Property. Neil Duxbury has an intriguing paper forthcoming with UTLJ where he talks about the 17th century idea of prescription as a mode of acquiring fundamental public rights that limit the royal prerogative. The pathways idea may lend itself all too neatly to a prescription-based account of how equitable interventions harden into general and permanent rights: long usage of these pathways grounds claims of right in those pathways and so constrains any exercise of the royal prerogative that would remove or otherwise undermine those protections.
legal rights or powers as owner in any way that undermines the integrity of the
beneficiary's position throughout the duration of the trust; the mortgagee holds off
on selling the property to satisfy their claim in debt, to preserve the mortgagor’s
right to redeem; and so on. In charging legal right-holders to bear the burden of
satisfying the demands of justice (proportionality, avoiding forfeiture), Equity
invokes an ancient common law right to service: to assist the state in the
dispensation of justice.53

Equity exacts this service from legal right-holders not at first instance by
calling them out on interpersonal wrongdoing but by regarding as done what ought
to have been done: private actors sometimes have a role, in virtue of being best-
placed as legal right-holders to play it, and that concerns the regulation of pathways
to legal rights. Equity’s response at first instance is to act as though each of us lives
up to the role we are meant to play. This sort of response can be illustrated by an
exchange between Anatole France and academician who had promised to support
France’s bid for election to the Academy, only to break his word (and so fail to live
up to the role of promisor). France was eventually elected to the academy anyway.
The academician then wrote France in order to apologize for his perfidy. France
would have none of it. His response was: “You are a gentleman and a person of your
word and so you are mistaken. You did vote for me.”54 That is, the academician,
having promised his support, had a role to play, and, whether he liked it or not, that
was the position available to him and no other would be countenanced. The selfish,

53 Coke, V I, Case of Non Obstante (this essentially sets out the right of the sovereign
to the service of any of his subjects “for the publick Weal”) at 423.
54 Edmund Wilson, To the Finland Station.
deceitful, pernicious position was simply not open to him to claim. Similarly, Equity takes as far as it is able the view that everything has been done as it ought to have been done. That is because the point of Equity is not to uncover new ways of wrongdoing each other but rather to use its available levers of power to guard against forfeiture. Thus, the trustee who uses trust money without authorization to buy a painting is taken to have bought it for the trust if it turns out or have been a good investment or if the painting turns out to be worthless to have used his own money to buy himself a worthless painting. The trustee is regarded as having done what ought to have been done, as abiding within her role, even as in fact she palpably did not. In its accounting process, Equity fills in the hole the withdrawal obviously left in the trust fund by requiring the trustee personally to top it up. This leaves the corpus of the trust, what ultimately the trustee holds on account of another, intact and available ultimately for conveyance to the beneficiary.

Equity’s first concern is administrative: to see to it that the public right and responsibility to avoid forfeiture is carried out. If it so happens that a trustee or some other legal right-holder, called on to do as Equity requires, instead withdraws her service, she has committed much more than a personal wrong against the person with the equitable right: she is in effect in contempt of the state.55 Contempt is a disregard of public authority. It is a form of contempt for public authority to refuse to serve the state where there is a public right to that service.56 It is then on

56 It was contempt to fail to provide services to King. It is contempt to fail to require to do as equity requires. See Hale, Prerogatives of the King at 268 (“on the
pain of contempt, that the holders of legal rights are commanded to do as Equity requires.

**Conclusion**

This account of Equity as an institution suggests a different place for equity in relation to law. It is not that equity is built into the very legal concepts we find in private law, concepts of right or obligation that are inherently defeasible then on equitable grounds (as Hart would have it). Nor is it that law and equity come apart, so that we can understand equity an appeal to judges to put law to one side and to act as arbitrators in the particular case (as Gardner would have it). Equity on my account completes the private law order, by setting down public ways to move in and out of legal relations. It would not make any sense to speak of Equity without law (and very little more sense to speak of Equity without private law) because the whole point of Equity is to avoid a kind of injustice that private law in particular generates—the potential for oppression and disproportionate forfeiture that lies just outside private law relations, on the way to them.