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Abstract

In first-year Contract Law, I was mildly bemused to learn that from approximately the fourteenth to nineteenth century, England found itself with two separate court systems dispensing two separate bodies of law. There was the familiar, predictable Common Law, and then there was “Equity,” dishing out relief to deserving parties as a matter of good “conscience.” To the green law student who expected this profession to provide hardline rules, Equity’s doctrines appeared annoyingly vague. Further, it seemed incongruous with the rule of law (ROL) that, even after the fusion of the two court systems, Equity endured as a doctrinally distinct body of law.

Book Review

Equity: Conscience Goes to Market by Irit Samet¹

LUKE DEVINE²

IN FIRST-YEAR CONTRACT LAW, I was mildly bemused to learn that from approximately the fourteenth to nineteenth century, England found itself with two separate court systems dispensing two separate bodies of law. There was the familiar, predictable Common Law, and then there was “Equity,” dishing out relief to deserving parties as a matter of good “conscience.”³ To the green law student who expected this profession to provide hardline rules, Equity’s doctrines appeared annoyingly vague. Further, it seemed incongruous with the rule of law (ROL) that, even after the fusion of the two court systems, Equity endured as a doctrinally distinct body of law.

It is this uncharitable view of Equity, however, which Dr. Irit Samet⁴ sets out to counter in her recent book, *Equity: Conscience Goes to Market*. In less than 250 pages, Samet argues convincingly that Equity, with all its fuzzy and

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1. (Oxford University Press, 2019) [*Equity*].
 2. JD Candidate (2021) at Osgoode Hall Law School.
 3. Samet notes that she uses the capitalized term “Common Law” to refer to the “law dispensed by the common law courts as distinguished from the specific ‘equitable’ interventions by the Lord Chancellor and the Court of Chancery.” *Supra* note 1 at 21. It would appear, however, that she sometimes uses the term as a catch-all for law (including judge-made law and statutory law) minus equity. See *e.g. ibid*, s 1.2.2.
 4. Dr. Irit Samet is a Professor in the Dickson Poon School of Law at King’s College London, where she teaches courses on property law, equity, and trusts. She has published numerous papers on the topic of equitable doctrines, and she recently co-edited a book on Equity’s philosophical foundations. She studied law and English literature in Israel and holds a Doctorate of Philosophy from the University of Oxford.

morally-laden maxims, serves an important function in our legal system, and should remain independent from its rule and clarity obsessed Common Law counterpart. It is precisely Equity's open-ended application of conscience, Samet contends, which allows it to promote "Accountability Correspondence": the normative principle that legal liability should, where possible, converge with moral responsibility.⁵

Equity is a refreshingly bold piece of legal theory. Samet's central thesis kicks against the historical and intuitive bend toward fusion, and her supporting arguments often run counter to the current ideological climate—Samet, for instance, rejects moral relativism and anchors her model of Equity in moral objectivism.⁶ The book is analytically rigorous but surprisingly accessible; for anyone somewhat interested in the relationship between law and morality, *Equity* makes for an enjoyable read. On this point, Samet deserves credit for breaking up the monotony of her extensive analysis with incisive quotes and metaphors that are, surprisingly, as illuminating as they are creative.⁷

As is often the case with more daring projects, however, *Equity* leaves itself vulnerable to significant criticism. After laying out Samet's thesis, I will turn my attention to some of the book's weaknesses: namely, its unpalatable characterization of the Common Law; its ahistorical orientation; and its over-abundant faith in the capacity of judges to properly administer and keep separate Equity and Common Law. Despite these flaws, however, I insist above all that Samet's book constitutes an important contribution to the study of Equity: one which, given its readability and provocative argument, will likely cultivate greater interest in this somewhat esoteric subject. Equity scholars and legal theory enthusiasts are therefore indebted to Samet for *Equity's* originality and accessibility.

I. IN DEFENCE OF EQUITY

Equity's detractors fall into two camps: "fusionists"—those who would let the Common Law absorb Equity and recast its doctrines in more technical language; and "sceptics"—those who view Equity as dangerously subjective and would cast it away entirely.⁸ In countering these arguments, Samet orients her defence of Equity with two higher-order legal ideals: the ROL, which seeks to curtail the

5. Samet, *supra* note 1 at 28.

6. *Ibid* at 205-07.

7. See *e.g. ibid* at 112 (describing equity as the "Flangeless wheel").

8. *Ibid* at 1-10.

arbitrary exercise of power; and Accountability Correspondence, which seeks to conjoin legal liability and moral responsibility.

While both ideals are equally important, anti-Equity scholars tend to ignore Accountability Correspondence and subscribe to an overly-formalistic conception of the ROL, whereby predictability and clarity are the only relevant considerations when assessing the legitimacy of law.⁹ Under this framework, no matter how morally repugnant a given law may be, it is perfectly legitimate if it is intelligible to all interested parties and if one is able to predict, with reasonable certainty, how a court would apply it. In this context, Equity is considered reprehensible because its very purpose seems to be undermining predictability in the Common Law. Equity, to be sure, has historically intervened in those cases where the mechanical application of crystal-clear legal rules would lead to an “unconscionable” outcome.¹⁰

For Samet, however, this external injection of moral values is necessary to preserve the community’s trust in the legal system. When left unchecked, the Common Law’s fixation with bright-line rules gives rise to an industry of “creative compliance,” whereby well-resourced and well-informed actors “take shelter” behind formal requirements to get away with morally dubious practices such as aggressive tax avoidance. In this environment, Equity provides a necessary check on the ROL-focused pursuit of form over substance. The equitable doctrines of proprietary estoppel, fiduciary duty, and “clean hands” all implore courts, to varying degrees, to factor “conscionability” into its analysis. Samet illustrates her argument with reference to the egregious example set by Enron, the American energy company which meticulously exploited regulatory rules and gaps to hide its real financial situation, committing accounting fraud in the most compliant manner possible.¹¹ Under Samet’s model, Enron, try as it might, cannot maneuver around “conscionability” without genuinely acting in good faith.

Equity, then, derives much of its strength from its morally charged language, the potency of which Samet fears would be lost if recast in more technical terms.¹²

9. For Samet’s discussion of the Chancellor’s foot critique of equity, see *ibid.*, s 1.1.2. See also *ibid.* at section 1.1.3.1 (“The two critiques of Equity we attended to above (i.e. fusion and Chancellor’s foot) aim to flesh out (what its critics see as) the bankruptcy of this approach as it begets norms that fail to realize the fundamental legal virtue of compliance with the demands of the ROL...The Chancellor’s foot critique...is more concerned with the retrospectivity (3) and obscurity (4) that (allegedly) typifies the norms of Equity” (*ibid.* at 19)).

10. *Ibid.* at 14.

11. *Ibid.*, s 1.2.2.

12. *Ibid.*

Further, “conscionability,” as Samet understands it, is not as unpredictable as its critics might suggest.¹³ We all have a conscience, and we all recognize that it gives rise to certain moral duties. For Samet, these duties are objective in the sense that they can be discovered through reference to a society’s shared morals and mores. “The conscionability standard,” Samet observes, “invites the court to delve into a pool of shared morality, and scoop out the answer to the question: ‘What was the moral duty of the defendant in the circumstances?’”¹⁴

II. THE COMMON LAW—DEVOID OF MORAL DELIBERATION?

Samet’s sharp contrast between Equity and Common Law—whereby Common Law is formalist, fixated on bright-line rules, and Equity is morally substantive, interested in upholding open-ended standards—is superficially alluring.¹⁵ I am not convinced, however, that this dichotomy can hold up to scrutiny. Indeed, it seems to me that the Common Law is often just as fixated on open-ended standards, and concerned with the conscientious resolution of issues, as is Equity.

To demonstrate her point that the Common Law is formalist and rule-obsessed, Samet points to various bulky statutes and generally statute-heavy areas of law like tax and consumer protection.¹⁶ It is not very surprising, however, that legislation often produces a lengthy list of hardline rules—it would indeed be absurd if statutes simply codified a few general principles. What is more telling, in my view, is that Samet is markedly quiet on the role of bright-line rules in judge-made law. In fact, she fails to make a compelling case that judge-made law is fixated on rules, and therefore paints an unconvincing picture of the overwhelming favouritism for rules over standards in the Common Law.¹⁷

There is a broader methodological issue at play here as well. Samet is a British-based academic, but she does not limit her analysis to any single jurisdiction. While this enables her to draw on examples across a wide array of jurisdictions that support her thesis, it also makes it easier for her critics to counter her arguments with local nuances. Consider, for example, the Supreme Court of Canada’s conceptualization of the duty of good faith in contract law. In *Bhasin v. Hrynew*, the Court recognized for the first time a common-law duty

13. For a discussion of conscionability, see *ibid*, s 1.4.

14. *Ibid* at 57.

15. *Ibid* at 28, 66.

16. *Ibid* at 38.

17. See *e.g.* *ibid* at 33.

to act honestly in the performance of contractual obligations: “That organizing principle is simply that parties generally must perform their contractual duties honestly and reasonably and non-capriciously or arbitrarily.”¹⁸ Here, the duty of good faith articulated by the Court does not rest on bright-line rules at all. Indeed, the duty to act “honestly” and “reasonably” could just as easily be recast as a duty to act in “good conscience.”

In my view, the role of “good faith” in contract law undermines Samet’s claim that the moral potency of Equity would be lost if its principles were absorbed by the Common Law. The Common Law, at least through the Supreme Court of Canada, has proven itself capable of giving effect to open-ended standards of behaviour while also preserving their moral tenor. And that this would be the case seems intuitively obvious. To paraphrase my first-year Contracts professor, “Never forget that judges want to sleep well at night!” Indeed, if Samet is correct that Equity alone cares about conscience and morality, then beyond defending the independence of Equity, we ought to be ringing alarm bells about the current state of our legal system.

III. CONCLUDING THOUGHTS—HISTORY, GOD, AND JUDGES AS MORAL ARBITERS

Though I am wary of criticizing an author for not doing what they explicitly decided not to do, it seems to me that a more detailed discussion of Equity’s origins in history would better ground Samet’s analysis. It is difficult to appreciate the ingenuity of Samet’s take on the role of conscience in Equity without a brief synopsis of how the relationship between conscience and Equity has been interpreted in the past. Furthermore, in putting forward a theory of conscience based on Immanuel Kant’s model of objective morality,¹⁹ I could not help but feel that Samet (too conveniently) brushed aside Equity’s deeply theological origins. Though she briefly acknowledges that “conscience,” as it appeared in medieval Equity theory, was interchangeable with God, she suggests that “conscience” is now best understood with reference to a community-based set of objective moral norms.²⁰ If precedent plays any role in the law of Equity, I think judges may be more sluggish to make that conceptual leap.

Nonetheless, society or social convention is, then, the rather paradoxical source for Samet’s model of objective morality in Equity. Though intriguing,

18. 2014 SCC 71 at para 63.

19. Samet, *supra* note 1 at 48.

20. For a discussion of conscience, see *ibid.*, s 1.3.1.1.

this model raises two issues: (1) given that social attitudes change over time, one wonders how they can possibly constitute a source of objective morality; and (2) setting the first issue aside, why would judges, trained primarily in the Common Law, be any better suited than you or my neighbour to divine and apply the relevant moral truths in any given case? Samet set out ambitiously to defend the separation of Common Law and Equity, and for this she deserves credit. But I am left wondering: Perhaps she should have gone even further, doubled down, and argued for an institutional split as well. We could, for instance, bring back the Court of Chancery, only this time we would pack it with secular Equity Commissioners trained to act as the mediums and interpreters of society's collective conscience. Why not?