

BOOK REVIEW

IRIT SAMET, *Equity: Conscience Goes to Market* (Oxford: Oxford University Press, 2018)*

Irit Samet's *Equity* develops a novel and philosophically rich interpretation of the body of law originating in the English Court of Chancery, the body of law known as 'Equity.'¹ Equity began as a response to particular cases where the rigid procedures of the common law led to substantive injustice. In such cases, the Court of Chancery could intervene to force individuals to act according to the dictates of 'conscience.' As Lord Ellesmere LC wrote, 'when a Judgment is obtained by Oppression, Wrong and a hard Conscience, the Chancellor will frustrate and set it aside, not for any error or Defect in the Judgment, but for the hard Conscience of the Party.'² Over time, Equity was itself systematized, and in the 1870s the separate courts responsible for Equity and common law were fused: from then on, one court could apply both bodies of law. But many Equitable doctrines retained the marks of their origin: broad principles, stated in morally freighted language ('conscience,' 'clean hands,' 'loyalty,' and so on) and applied in a backwards-looking and fact-sensitive way (xv).³

The fusion of Equitable and common law courts raised the question whether the substantive bodies of law developed by these courts ought to be fused as well. Samet's aim, in this constructive and tightly argued book, is to defend Equity against the fusionists. We can reconstruct her argumentative strategy in two steps, which rebut different strands of the fusionist project (120). Some fusionists maintain that the separation of Equity from common law is a historical accident, so that little of substance would be lost by formalizing its rules in the style of property and contract.⁴ Others grant that Equity pursues a distinctive normative ideal but suggest that this ideal is unjustifiable in a modern legal order.⁵ Samet argues, first, that Equity is not just a grab bag of doctrines that happen to share an origin; rather, it is unified around a distinctive normative ideal. This ideal would be undermined in a fused legal system, because it requires the flexible and particularistic approach that is typical of Equity as opposed to common law (2). Second, Samet argues that the normative ideal served by Equity is still worth

* All parenthetical page references are to this text.

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1 In this review, I will follow the convention of using 'Equity' to refer to the law (both procedural and substantive) originating in Courts of Chancery and 'equity' to refer to the concept of doing justice in particular cases.

2 *Earl of Oxford's Case* (1615), 21 ER 485.

3 On 'backwards-looking,' see *Thorne v Major*, [2009] UKHL 18 at para 101.

4 See Andrew Burrows, 'We Do This at Common Law But That in Equity' (2002) 22:1 Oxford J Leg Stud 1 [Burrows, 'We Do This']; Sarah Worthington, *Equity*, 2d ed (Oxford: Oxford University Press, 2006), ch 1.

5 For related discussion, see Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26:1 UWA L Rev 1 at sections 10, 53.

pursuing in a modern legal order (30). Other things being equal, then, we ought to keep Equity separate from common law.

The book's first chapter surveys the fusion debate, sets out the main lines of Samet's account of Equity and responds to fundamental objections. In the next three chapters, Samet offers detailed interpretations of three areas of Equitable doctrine: proprietary estoppel, fiduciary law, and the 'clean hands' principle. These interpretations serve both to articulate Samet's account of the purpose of Equity and to support her claim that this purpose would be undermined if Equitable doctrines were fused with the common law. Along the way, Samet engages with scholarship not only in law but also in moral philosophy, political theory, and economics. The range and detail of Samet's book is a strength, but it means that a review like this one will have to leave a lot out. I will focus on the core of Samet's account and raise two questions, corresponding to the first and second steps in my reconstruction of her argument. First, how far does Samet's proposed ideal fit with the doctrines of Equity? Second, does it justify retaining those doctrines against the fusionists? I will suggest that, though its immediate aim is to respond to fusionism, Samet's work also brings into the open a larger controversy about the purpose of private law.

The ideal which, on Samet's account, Equity serves to promote is Accountability Correspondence (AC): 'When legal rules impose liability it should ideally correspond to the pattern of moral duty in the circumstances to which the rules apply' (28). AC is very general: it says nothing about what the patterns of moral duty in fact are, or in which circumstances legal rules should impose liability, but only specifies that liability ought to correspond to moral duty. Indeed, we might worry that AC is too general to be distinctive of Equity: what about other apparently morally laden bodies of law, such as tort or even criminal law? Surely Equity aims to enforce a special class of moral duties rather than moral duties as such? I will return to this worry below. For now, we can get a sense of the role that AC plays by contrasting it with another, more familiar legal ideal, the Rule of Law (ROL): 'an exemplary state of affairs wherein the government in all its actions is bound by legal norms fixed and announced beforehand so that people can foresee with fair certainty how the authority will use its coercive powers in given circumstances' (16). Samet suggests that much of private law, such as the law of property and contract, is composed of general, precise rules so as to promote the ROL (33). AC has a parallel relation to the particularistic, flexible rules of Equity.

Samet does not deny that the ROL is a good thing. Nor does she deny that its demands can be in tension with those of AC (42). How, then, do the two ideals relate to each other? The answer is simple: AC is a value as well as the ROL, and sometimes the latter ought to give way to the former (74). A legal order might satisfy various ROL criteria, with rules that are general, clear, prospective, non-contradictory, and so on – and still be defective.⁶ This reflects the formality of the ROL, which specifies the form of a legal order while leaving open – at least to a large degree – what the content of the laws ought to be. Moreover, a body

6 For these and other rule of law criteria, see Lon Fuller, *The Morality of Law* (New Haven, CT: Yale University Press, 1964), ch 2.

of law composed of highly formal rules might allow for behaviour which, though technically legal, evades the law's point. When faced with such 'creative compliance,' regulators in tax and finance have responded using a 'substance over form' approach similar to that of AC (39).

Samet suggests that AC is closely tied to the language of 'conscience' which permeates Equity: 'The concept of conscience is fundamental to Equity since it beautifully expresses its *role* as an advocate of Accountability Correspondence, as well as the *mode of reasoning* it employs in order to impel our legal system in the direction of this ideal' (43; emphasis in original). She develops a sophisticated account of conscience, building on Immanuel Kant's moral psychology. It combines a meta-ethical claim – that there are objective moral principles – with an epistemic one – that ordinary individuals are able to know these principles. The trouble comes in applying these principles to particular circumstances. Here we can be led astray by our self-interest, which leads us to speciously justify our conduct to ourselves. Conscience, on Samet's account, allows us to become aware of our self-serving rationalizations (56). A court of Equity, presupposing that individuals have a conscience, exists to hold them to what they know is right: to 'correct Mens Consciences for Frauds, Breach of Trusts, Wrongs and Oppressions, of what Nature soever they be.'⁷ This is why Equity will intervene 'only where sincere engagement with the moral aspects of [the individual's] behaviour would readily reveal its illicit nature' (61).

To see how this works, consider Samet's interpretation of fiduciary law. Samet argues that fiduciary law creates a space for a distinctive kind of relationship centred on selflessness rather than self-interest (125); the language of 'loyalty' and 'conscience' serves as a reminder – both to the court and to the fiduciary – of the moral duties that the fiduciary owes to the principal (150). (Kantian moral psychology, in which self-interest distorts our application of moral rules to our circumstances, seems especially apt as a description of the fiduciary who has to decide whether they stand in a conflict of interest.) Supposing that the fiduciary does have a moral duty of selfless conduct in favour of the principal, a body of law that enforces this duty will thereby promote AC. This feature would be lost if, as fusionists propose, fiduciary law were simply folded into contract law as a set of implied terms for various types of contract, since parties to an ordinary contract are not in general obliged to behave selflessly (130).

We might wonder, though, whether this sort of account, which places great emphasis on the duties of the fiduciary, and comparatively little on the rights of the principal, could be extended to the neighbouring area of Equitable property rights, such as the right of a beneficiary under a trust. For it is unclear how any amount of moral or legal duty on the part of the trustee alone could generate a proprietary right on the part of the beneficiary. Samet addresses this point in the introduction to her book, where she explains why the book does not discuss trust law (xvii). One reason for this omission is dialectical: the book is a defence of Equity against the fusionists, and trust law is not a popular candidate for fusion.⁸

⁷ *Earl of Oxford's Case*, supra note 2.

⁸ See e.g. Burrows, 'We Do This,' supra note 4 at 5.

Another reason, however, is that trust law – with its precise rules and its strict liability for trustees – is simply a poor fit for the book’s explanatory framework.

Here as elsewhere, Samet shows an undogmatic willingness to allow that different bodies of law might need to be explained in different ways. Still, the resulting situation is not fully satisfactory. Not only is trust law a central part of the law historically developed by courts of Equity: it also has clear continuities with the more explicitly conscience-based bodies of law which Samet treats (xvii). For example, in *Westdeutsche Landesbank Girozentrale v Islington LBC*, Lord Browne-Wilkinson took it as ‘uncontroversial’ that ‘the equitable jurisdiction to enforce trusts depends upon the conscience of the holder of the legal interest being affected.’⁹ It would be worth considering how much of trust law could, in fact, be explained by Samet’s theory.

This might require Samet to address a question on which her book appears to remain neutral. The book addresses itself to the normative question of whether Equity’s separateness is justified, or whether it ought to be fused with the common law. It says little about the more conceptual question of what Equity is, or what distinguishes Equitable rights from rights at common law. For example, what is the nature of Equitable title, and how is it distinct from common law title? This is the sort of thing at issue between theorists like Frederic William Maitland, who argue that Equitable rights are always personal, and those like James Penner, who argue that Equitable title is a property right, just as it sounds.¹⁰ A version of Maitland’s theory has recently been developed by Robert Stevens and Ben McFarlane, who suggest that Equitable rights are ‘rights in rights’ – for example, if A holds land in trust for B, then A has a right to the land and B has a right in A’s right.¹¹

My suspicion is that Samet’s account is less neutral on this question than it might appear. Her focus on conscience as the animating idea of Equity could be taken to underpin the ‘obligational’ theory of Maitland, Stevens, and McFarlane, on the basis that it is precisely by operating on the conscience of rights-holders that Equity creates new rights in rights. If this is correct, the work of these theorists may offer a way of extending Samet’s theory to explain at least the main principles of trust law. Moreover, to the extent that Samet provides a justification of Equity, we might wonder whether those principles that are not explicable by her theory appear defective in this light.

Supposing that Equity is best understood as promoting AC, a different sort of fusionist may doubt that AC is worth promoting. Is it really acceptable to exercise the coercive power of the state to make people carry out their moral duties? If so, is it acceptable for moral duties as such, or only for those belonging to some

9 *Westdeutsche Landesbank Girozentrale v Islington LBC*, [1996] UKHL 12. On the role of conscience in the constructive trust, see *Soulos v Korkontzilas*, [1997] 2 SCR 217 at paras 29, 43.

10 Frederic W Maitland, *Equity: A Course of Lectures* (Cambridge, UK: Cambridge University Press, 1969), Lecture X [Maitland, *Equity*]; James E Penner, ‘The (True) Nature of a Beneficiary’s Equitable Property Interest under a Trust’ (2014) 27:2 Can JL & Jur 473.

11 Robert Stevens & Ben McFarlane, ‘The Nature of Equitable Property’ (2010) 4:1 J Equity. See also Lionel D Smith, ‘Trust and Patrimony’ (2008) 38:2 *Revue générale de droit* 379.

special class? One reason that Samet gives for AC is that a legal order which satisfies it will be perceived to be legitimate and that this perception ‘translates into willingness to obey the law’ (31).¹² But a deeper reason can be found in the broad tradition in which Samet is working. In this tradition, which originates with Joseph Raz and John Gardner, not only is it acceptable for law to serve morality: the authority of law depends on its doing so.¹³ A legal order which satisfies AC will not only appear more legitimate, but will *be* more legitimate. Relying on this view of the relation between law and morality is not a weakness in Samet’s account, but I want to suggest that certain objections to the view emerge with particular force in the present context.

We should distinguish two reasons for concern about the justifiability of AC. The first is based on doubts about moral knowledge: either there are no moral truths or, if such truths exist, we have no way of coming to know them as would be required by a court of Equity. While moral anti-realism and scepticism may have implications for general jurisprudence, it seems to me that they have little specific bearing on the theory of Equity. In any event, Samet defends her moral realism, making reference to relevant work in meta-ethics in an appendix (197).

She does less to address a second reason for concern about AC: namely, that it is inconsistent with the neutrality that is required of a liberal state. As John Rawls argued in *Political Liberalism*, modern societies are characterized by ‘a pluralism of incompatible yet reasonable comprehensive doctrines.’¹⁴ People are committed to deeply divergent world-views, and a modern legal order is constrained by this fact. Rawls suggested that laws should be justified only in terms of ‘public reason,’ which is neutral on certain fundamental questions.¹⁵ Two centuries earlier, Kant defended an even stronger version of liberal neutrality in which questions of morals are to be kept apart from questions of right. Lawmakers should not ask what people ought to do but, rather, what they can legitimately be coerced to do.¹⁶ Even if we can know moral truths, then, it might not be legitimate for the law to coerce people to act in accordance with them. Fusionists may argue that the very features that, in Samet’s view, make Equity distinctive – its morally freighted language and flexible application – also make Equity distinctively problematic from the point of view of liberal neutrality.

This issue becomes particularly pressing when we consider Samet’s discussion of the ‘clean hands’ doctrine. When granting Equitable relief to a plaintiff would involve the court in some wrongdoing – for example, by allowing the plaintiff to carry out a fraud – the court may refuse its help on the principle that ‘he who comes to Equity must come with clean hands.’ Samet interprets this doctrine

12 For a similar argument, see Matthew Harding, ‘Equity and the Rule of Law’ (2016) 132 *Law Q Rev* 278 at 297 [Harding, ‘Equity’].

13 See Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1988), ch 3; John Gardner, *Law as a Leap of Faith* (Oxford: Oxford University Press, 2012), ch 6.

14 John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at xvi.

15 See John Rawls, ‘The Idea of Public Reason Revisited’ (1997) 63:4 *U Chicago L Rev* 765.

16 Arthur Ripstein, *Force and Freedom* (Cambridge, MA: Harvard University Press, 2009) at 14; *c.f.* Japa Palikkathayil, ‘Neither Perfectionism nor Political Liberalism’ (2016) 44:3 *Philosophy & Public Affairs* 171.

by way of a creative analogy with Bernard Williams's notion of integrity.¹⁷ For Williams, this notion expresses our concern not only with what happens in the world, but also with our contribution to what happens, and with whether our contribution is consistent with our deepest ethical commitments. Samet suggests, similarly, that in certain cases the court must refuse its help to a plaintiff purely in order to safeguard its integrity as an institution committed to justice (180). This seems right, but can a court invoke its integrity in relation to just any kind of serious wrongdoing? Samet raises the possibility that courts might use the doctrine to exclude greedy company executives who seek to enforce contracts for 'overtly excessive remuneration' (155) or to reject claims 'made in the context of using premises for prostitution' (182). The only common factor seems to be that the court considers these things to be seriously wrong. In this way, the 'clean hands' doctrine threatens to allow for unconstrained moralism in the law.

In response to this concern, we might try to draw on some commonplace ideas about Equity to narrow the range of relevant moral duties. Like many other Equitable doctrines, the 'clean hands' doctrine is second-order law, operating on top of a prior and complete set of legal rules.¹⁸ It responds to a specific kind of injustice – the sort which occurs when, as Georg Wilhelm Friedrich Hegel wrote,

a legal process, in itself in any case a means, now begins to be something external to its end and contrasted with it. This long course of formalities is a right of the parties at law and they have the right to traverse it from beginning to end. Still, it may be turned into an evil, and even an instrument of wrong . . .¹⁹

In other words, Equity responds to the way that the formalization of justice can itself work injustice.²⁰ If this is right, then the moral duties enforced by Equity are of the same kind as those that the common law aims to enforce, and there is no prospect of unconstrained moralism.

It is not clear whether Samet would, or could, agree with this suggestion. Her canonical statement of AC, which makes Equitable intervention conditional on legal rules which already impose liability, might be read in this way (28). But her accounts of proprietary estoppel and fiduciary relationships pull in the opposite direction. While property and contract rules provide a framework for equal freedom under law, these domains of Equity hold us to higher standards of interpersonal conduct. More importantly, then, reading Samet in line with commonplace

17 JJC Smart & Bernard Williams, *Utilitarianism: For and Against* (Cambridge, UK: Cambridge University Press, 1973), s 5.

18 Maitland, *Equity*, supra note 10, Lecture XII. The idea of Equity as 'second-order' law, responding to opportunistic uses of legal rules, is from Henry Smith. See Henry Smith, 'Equity as Second-Order Law: The Problem of Opportunism' (2015) [unpublished], online: <ssrn.com/abstract=2617413>. We might see the 'clean hands' doctrine as third-order law, responding to opportunistic uses of Equitable rules.

19 Georg WF Hegel, *Hegel's Philosophy of Right*, translated by Thomas M Knox (Oxford: Oxford University Press, 1968), s 223.

20 Harding, 'Equity,' supra note 12 at 301; Dennis Klimchuk, 'Equity and the Rule of Law' in Lisa M Austin & Dennis Klimchuk, eds, *Private Law and the Rule of Law* (Oxford: Oxford University Press, 2014) 247.

ideas about Equity would blunt the political edge of her account. The role of Equity, at least in part, is not to perfect the common law's pursuit of its own ideals, but to promote a different ideal. The debate with the fusionist is really 'a political controversy about the role of the state' (151). Samet's *Equity* brings this controversy into the open.

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