Having Gods, Being Greek and Getting Better: On Equity and Integrity Concerning Property and Other Posited Laws

Gary Watt*

This paper explores the classic dramatic tension that exists between, on the one side, a person's *prima facie* obligation to obey posited law, and, on the other side, a person's obligation to respect extra-legal norms, whether established by reference to 'gods' (which term is taken to include transcendental value systems of a non-religious nature, such as 'respect for human rights') or by reference to the immanent values of the social 'group', which I refer to by the shorthand 'being Greek'. The descriptions 'having gods' and 'being Greek' do not pretend to be definitive or mutually exclusive; naturally one can imagine examples of religious values that have become social values and social values that have become laws. The descriptions are merely heuristic, indeed the purpose of the present paper is to lead us out of these categories and to propose a way of performing life and practicing sound judgment that will avoid the perils of excessive obedience to law, excessive insistence upon transcendental rights or righteousness and excessive respect for the customary values of our group. It should be stressed from the outset that to live this way does not require anyone to compromise the sincerity of any deeply held view, but it does require that the expression of deeply-held views should be tempered or moderated for the purpose of public performance. What is called for is a compromise between the need to be able to live with oneself and the need to live with others. This is, of course, the dramatic struggle of any average life. The struggle, as I describe it in this paper, is the tension between, on the one side, the quality of desiring integrity in oneself or integrity in

* Professor of Law at the University of Warwick and co-founder and co-editor of the journal *Law and Humanities*.

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a certain thing, idea or code; and, on other side, the quality of desiring to open up the self or the thing or the idea or the code to external influences. I summarise this struggle in terms of an agonistic relationship between 'internal integrity' and 'equity'. The former is always seeking to close the doors and windows of a thing; the latter is always trying to open them up. So, for example, the former would insist upon the strict letter of a posited law, whereas the latter would temper the law by reference to its wider human context. It is precisely this dramatic struggle that has supplied audiences with compelling theatrical drama since ancient times, so it is natural to suppose that drama performed in theatre and other creative and representative arts has at least as much potential as any legal case or posited law to show us what is at stake and how we might better exercise our judgment and better perform our lives. With that in mind, we will shortly turn to the drama of the ancient Greeks.

First, though, it will be useful to summarise the structure of the paper. My starting point is to demonstrate a commonplace of ancient Greek thought by reference to classical theatre. The commonplace thought is this: that it is sometimes impossible to achieve perfect obedience to transcendental norms such as the law of the gods and the law of kindred blood. The messy facts of life frequently throw up scenarios in which the human actor is faced with a hard choice between one or more transcendental moral norms. From the perspective of such absolute moral laws or norms there is sometimes no perfectly right way of proceeding in practice, and so the human actor is then presented with the challenge of exercising practical judgment within the confines of a dilemma. One task for philosophy is to offer wisdom to guide action in the face of these hard cases. Such wisdom often takes the form of encouragement to act 'wisely' or 'reasonably'. In the next part of this paper I suggest that there is an alternative to such unitary concepts as guides to practical action. The alternative, as I present it, is to exercise two behaviours in combination with each other. One behaviour is to work towards internal integrity; the other is to work towards equity. The crucial insight that I offer is that internal integrity has no merit and does not deserve its name unless it is pursued with regard for equity, and equity, likewise, has no merit and does not deserve its name unless it is pursued with regard for internal integrity. I liken these qualities to the string and wood of a bow. Unless they are joined in agonistic tension there is no bow, there is only a practically useless stick and a practically useless length of string. This paper proceeds next to consider the status of private property rights. A key argument of that section is that the idea of private property in law has no real respect for transcendental moral norms and therefore cannot claim to have merit or virtue except in so far as it pursues integrity to itself whilst simultaneously respecting integrity to social and historical context—in other words, unless it seeks to sustain the necessary practical tension that should exist between internal integrity and equity. To allocate property rights between competing claimants according to law can seem morally repugnant from an external or transcendental perspective (for example, one that has an eye to global justice), but it can still have the merit of being done well from an internal perspective. One controversial implication of this, is that even thieves have

the capacity to divide their spoils amongst themselves in a way which, even though it lacks propriety from an external perspective, might have merit from an internal perspective if done with regard to the need to exercise internal integrity and equity. The paper then proceeds to make the suggestion that in the messy world where transcendental norms provide no clear answers to hard cases, and in which the on-going struggle must be to exercise equity to temper an excess of internal integrity, there will be cases in which apparently inequitable behaviour (that is, behaviour marked by an excess of internal integrity) will be tolerated because in the particular context there is recognisable common sense, that is an identifiable communal sense, that such behaviour is permissible even if it is not ideal. So now, at last, we will start with the drama.

Sophocles' *Antigone* (c.442 BC) proved so popular with theatregoers in the ancient *polis* of Athens that it prompted a re-write of the ending of Aeschylus' *Seven Against Thebes* (467 BC) (e.g. Vellacott 1961, 7-19; Dawe 1967). Aeschylus's play presents the epic military conflict between the seven defenders of the seven gates of Thebes and the seven captains of the Argive army who opposed them. It culminates before the seventh gate, where the king of Thebes, Eteocles, battles his brother Polynices, who has joined forces with the Argives. The brothers kill each other and the Theban law-makers resolve that Polynices, who is deemed to be a traitor, must be left unburied. It is at this point that the new ending inspired by Sophocles' play introduces Antigone, a sister of the two brothers, who has resolved to bury Polynices despite the legal prohibition. In this conflict the chorus reluctantly sides with the law, while the semi-chorus resolves to join with Antigone:

> Let the city take action or not take action against those who lament for Polynices. We, at all events, will go and bury him with her, following the funeral procession. For this grief is shared by all our race, and the city approves as just different things at different times. (Aeschylus, *Seven Against Thebes* 1072-1080.)

The play employs the semi-chorus (made up of Theban women) in much the same way that modern theatre uses the 'everyman' role: to prompt the audience to imagine itself in the place of the performers; to prompt the audience to engage personally with the universality of an ethical dilemma. The performance of a personal judgment is imperative, because the play presents the audience with a choice between the law-maker and Antigone, which, in the nature of a true dilemma, admits of no right answer. The play acknowledges that posited law need not command our total obedience and, being ephemeral, may be less deserving of our allegiance than more enduring sources of norms such as 'kindred', 'custom' and the 'divine'. Even today it is still our tendency to oppose posited law with, on the on hand, such transcendent values as religion and human rights (the notion of the 'human right' nowadays exerts a normative influence in social affairs equivalent to that of religion and, like religion, it claims an authority that transcends the present political will of the *demos*), or, on the other hand, such customary values as the familial, the filial and the patriotic (what I abbreviate here as the morality of 'being Greek'). There is, though, as I will

seek to show, distinct merit (distinct, that is, from the sorts of categorical norms that are demanded by the morality of 'having gods' or 'being Greek') in the practice of acting equitably. Equity moderates extremity whether it takes the form of an excess of 'right' or an excess of 'wrong'. As William West observed of equity in the context of law: '[e]quitie is always most firmly knit to the evil of the Law which way soever it bends' (West 1594, sect. 28). West's project was to explain the practical operation of the philosophical (essentially Aristotelian) idea of equity in English private law, and that, incidentally, is one aim of my own project. In this project I find that valuable guidance may be gained from the practical arts of drama and creative writing—arts that are not so different from the arts of law as some might like to think.

Consider, for example, a compelling ethical dilemma that is presented in series three of the contemporary French television drama *Engrenages*. It is a dramatic dilemma which would not have looked out of place had its essentials been played out in the tragedy competition of the city *Dionysia* in ancient Athens. It might seem that we are taking quite a digression from the path that will eventually lead to equity in English private law, but the *Engrenages* episode is universally informative, for it performs the archetypal human drama that is inevitably sparked when strict general rules abrade against the particular stuff of individual lives. Contemplate this scenario: you are an investigating magistrate and you discover that an intern has been pressurised into impeding one of your prosecutions. Add to this the fact that you are not fond of the intern on a personal level and, more significantly, that he is the son of your ex-lover with whom you now have an uneasy on-going relationship. Now imagine that you have the power to require the intern to resign from his judicial training, even though you know that in doing so you are effectively killing his career in the bud. What would you decide to do? Judge François Roban, an investigating judge (*juge d'instruction*) in the television series *Engrenages*, found himself in this position. Judge Roban is the classic figure of a strict and upright judge. For him the solution to the dilemma was straightforward and he would no doubt have claimed that his personal connection to the intern, still less his personal feelings towards him, did not enter into the matter. He terminated the intern's employment and as a direct consequence the young man committed suicide. Let us nuance the facts slightly, but significantly, so as to deepen the dilemma still further. Suppose that the intern had been not merely the son of the judge's ex-lover, but the judge's own son by that ex-lover. On such a set of facts the intern's suicide would be attributable not merely to the loss of a career but to a father's betrayal. But what could the judge have done differently; done better? How could he have upheld the sanctity of his judicial office, aligned as it is in his view with an almost religious respect for the rule of law, whilst making a concession to the context of his paternal bond and the moral demands of kinship which that entails? The dilemma is hardly less compelling than that which confronted Antigone. In normative, abstract and theoretical terms, there is no morally right answer to a true dilemma, but we will see that equity can be performed in practice to moderate an excess of internal integrity without commitment to moral absolutes. So how might equity be performed in the case of

the intern and Judge Roban? I will postpone my own suggestions until later in this paper. First, we will examine more closely the natures of 'equity' and 'integrity' as I understand those terms.

1. On equity and integrity

The argument that equity has merit without promoting a transcendental moral ideal is not straightforward, but equity is not the only instance of a quality for which we might claim such merit. Integrity is another. Integrity has the merit of respecting a thing for its own nature or 'in its own right'. Integrity is, for instance, the benefit that is gained when one respects the laws of property for their own sake even though respect for property rights perpetuates inequality of wealth distribution across society as a whole. Integrity in this sense has a rather closed and self-regarding quality, so I refer to it as 'internal integrity', to distinguish it from other senses in which the word 'integrity' might be employed. 'Internal integrity' is the morally neutral (at least it is not morally categorical) quality of integrating a thing to itself. It describes the quality of acting consistently with the internal relationships that constitute an activity or thing, even if the activity or thing may be considered immoral or otherwise wrong from an external point of view. Integrity of this sort does not of itself aim at any transcendental good, and it must, accordingly, be checked from blindly proceeding to excess. This function of moderating an excess of internal integrity is performed through the exercise of equity, thus internal integrity and equity are agonistically opposed to each other. Suppose that a simple example of internal integrity is adherence to legal rules and that a simple instance of equity is the recognition of exceptions to rules, then it can clearly be seen that equity is needed to check an excess of internal integrity but also that internal integrity is needed to check an excess of equity for an excess of exceptionality destroys the rule. Aristotle seems to have had a virtue of integrity in mind when he wrote in the *Nicomachean Ethics* that 'a function is performed well when performed in accordance with the excellence proper to it' (Aristotle, *Nicomachean Ethics* 1098a14-15), but whereas Aristotle argues that we cannot talk of virtuous ways of doing things which categorically lack virtue, I would argue that one can achieve a sort of internal integrity even in a normatively 'bad' context. To be more precise, Aristotle argues that one cannot achieve an ideal mean in a thing that is extremely right or extremely wrong, and this leads him to say that one cannot talk of a perfectly moderate way of committing theft, for example (Aristotle, *Nicomachean Ethics* 1107a10). That must be right. Theft can never be categorically ideal. Even the claim that there is merit in robbing the rich to give to the poor, depends upon such qualifying questions as 'rob why?'; 'rob how much?'; 'poor why?'; 'poor when?'; 'rich why?' and 'rich when?'. One may recall that Croesus, proverbially the richest man in the ancient world, was said, when in fear of imminent death, to have called out the name of Solon, for Solon had warned him that the happiness of a man cannot be judged until the story of his *whole* life is known.

The fact that theft cannot be categorically ideal, and indeed is generally considered to be categorically immoral, does not deny the possibility that thieves

might exhibit the attribute of internal integrity between themselves (so-called 'honour' amongst thieves). As John Locke wrote:

> Justice and truth are the common ties of society; and therefore even outlaws and robbers, who break with all the world besides, must keep faith and rules of equity amongst themselves; or else they cannot hold together. (Locke 1690, I.ii.2.)

It is, admittedly, highly controversial to suggest that there might be an acceptable way of doing something, like theft, which most people would agree is categorically immoral. Some would argue that a sound branch cannot grow from a rotten bough. Clearly one does not want to talk of 'good theft' any more than one would want to talk in categorical terms of 'moral killing', but one does not have to. The branch will naturally be rotten if the bough is rotten and nothing can change that categorical conclusion, but it is still open to us to consider whether the rotten branch, as a rotten branch, has the capacity to be a more or less vile version of that immoral type. If a thief is faithful to their partners-in-crime or an adulterer is faithful to their extra-marital lover or a sniper is obedient to their commander, we would not describe any of their activities as 'moral' or 'good'—the context categorically resists such a description—but we might recognise that they are failing less badly, in terms of categorical moral norms, than they might otherwise have failed. We do not want to say that there is virtue in any shade of failure, but if we free ourselves from ideal and absolute moral notions of virtue, we find that there is a less undesirable quality, if only less undesirable as a matter of degree, in the way in which these people do bad things. This is the quality that I have called 'internal integrity'.

Thankfully, we can find less controversial examples of internal integrity than the examples of the sniper, the adulterer and the thief. In the legal context, for example, we can say that a starting level—which has been called a 'threshold' (Dworkin 1977, 340) or 'preliminary' (White 2010, 574) level—of internal integrity is achieved by the simple expedient of deciding like cases alike. The first case might have been badly decided, in which case one compounds the error by deciding the second case in the same way (Alexander 1996), but at least one can be confident that one has achieved integrity between the two decisions. In such a case we commit two wrongs, but by virtue of internal integrity those two wrongs produce a distinct right, even as they individually remain wrong. It might be objected that internal integrity of this sort is nothing more than consistency. There are at least three responses to that complaint. The first is that strict consistency between judicial decisions in different cases is never possible, precisely because the cases are different. Hence, the process of treating like cases alike is a process that requires the judge to exercise an imaginative art of deeming one case to be like another. It follows that even when one is seeking consistency as a 'threshold' or 'entry-level' element of internal integrity, one must first enter into an imaginative engagement with the material. The second, and related, response is that the process of treating like cases alike is not based upon legal materials in the abstract, but upon respect for the community of judges who

produced them. One is never aiming for coldly calculated consistency, but for comity between persons united by an outlook or purpose that is in some respect shared. The third response is that even at its most simple, consistency is accompanied by predictability. Staying with the example of the law, we can observe that whether the law is good or bad, predictability should enable one better to adapt one's affairs to the law's demands. To reiterate, none of this is intended to promote 'internal integrity' as a categorical moral virtue; it cannot be denied that one may be consistently 'bad' as well as consistently 'good'. Likewise, none of this is intended to promote 'internal integrity' as a *free-standing* virtue of any sort. On the contrary, the pursuit of internal integrity is likely to be positively harmful, and it will certainly be positively harmful if pursued to its extremes, unless it is tempered by equity.

So what is the nature of equity's agonistic relationship to integrity? The struggle of equity is, as has already been said, to open up the doors and windows of a thing against internal forces that would pull the portals shut. A key way in which equity achieves this is by setting one idea of integrity against another. What I mean is that equity resists excess in a thing's integrity to itself by attempting to integrate the thing to the context in which it occurs. Equity's respect for the context of a thing can mean respect for the immediate factual circumstances of the thing and it can mean respect for the broader social and historical context in which the thing is set. Take a stereotypically English example. It is a rule that one should stand when the Queen enters the room in which one is presently seated. One can easily imagine that strict insistence upon the internal integrity of the rule could be cruel. It is for this reason that, if one of those present in the room is too old and frail to stand, equity moderates the rule to allow the elderly person to remain seated. This operation of equity could be called integrity to the particular factual context. If the elderly individual is a war veteran of Her Majesty's Armed Forces, the indulgence of equity is even stronger because the fact of the elderly person being seated must now be integrated to the broader social and historical context in which the fact is set. One could, of course, postpone the need for equity by redefining the rule to require 'all to stand when the monarch enters the room, if they are physically able to do so', but it would only be a postponement. Strict insistence upon the integrity of a stated rule will always risk harmful excess and will always call for equitable moderation. It is not so much the words of the rule that produce the wrong as the potential for powerful people to insist upon their own preferred reading of the words.

What gives an exception the character of equity and saves it from the error of excessive liberality? The answer is that the exception must be exercised whilst keeping the rule in mind. What gives consistency the character of integrity and saves it from the error of unthinking routine? The answer is that consistency to the internal code must be exercised whilst keeping in mind the equitable call for consistency to the external context.

The work of equity is especially necessary in the legal sphere because law prides itself on qualities of internal coherence, freedom from external influence and stability over time. The legal regime of rules is always seeking settled stability, which is an

extreme version of integrity to itself; but equity aims to integrate a rule to its social and historical context and will therefore moderate the law's attempts to establish a fixed settlement on the sands of a shifting society. Moving somewhere between the current of society and the status of statute, equity sets the walking pace of law. Lord Denning, who was by nature both deeply conservative and deeply compassionate, wrestled like a Greek with the problem of law's stability in a changing society. This is how the eminent Law Lord, Robert Goff, described Alfred Thompson Denning in the *Oxford Dictionary of National Biography*:

> […] [H]is great achievement stands: that he taught the English judiciary that the common law cannot stand still. It must be capable of development, on a case-by-case basis, to ensure that the principles of the common law are apt to do practical justice in a living society; even so, it is recognized that this must be done within the confines of a doctrine of precedent, the function of which is to ensure stability in the law and consistency in its administration, but which must not be construed too strictly to preclude the organic development of the common law.

I am impressed and persuaded by James Boyd White's argument that the law is not really stable at all (White 2012), but the *language* of stability is nevertheless perennially prevalent—and historically very stable—in the law (Watkins 1970, 321), as are symbols of stability (the 'set of scales' and the 'standing stone' are, for instance, genuinely ancient symbols of the stability of judicial or legislative order). Even if the law is churning inside, it pretends to stability, professes stability, takes pride in stability and wants to persuade the world through linguistic and embodied rhetoric that it is, in fact, stable.

Before concluding this overview of the idea of integrity as I employ it for present purposes, it must be acknowledged that Ronald Dworkin has already advanced a concept of 'integrity' as a virtue of judicial reasoning. His idea of integrity has, in one sense, more integrity than mine—but this may not be a good thing if we sometimes need to distinguish integrity to A from integrity to B. For Dworkin, judges can be compared to the authors of a chain novel who are bound to seek something more than conformity to previous decisions, for they are also required to keep the whole story of the law in mind: 'an experienced judge will have sufficient sense of the terrain surrounding his immediate problem to know instinctively which interpretation of a small set of cases would survive if the range it must fit were expanded' (Dworkin 1986, 245). This is all very well, but the problem with Dworkin's metaphor is that it invites judges to plot and plan a story that has integrity from an internal, distinctly judicial, point of view. According to Dworkin's metaphor, the judges as authors must always pretend to their own authority. Equity as I understand it, requires judges to pretend to (that is, etymologically, to 'reach out to') authorities beyond their internal point of view. It requires judges to pretend to humility. The dubious decision of an English court in the recent case of *X v A*, considered later in this paper, is one which is perfectly consistent with Dworkin's notion that an ideal judge will seek

the internal integrity of the judicial narrative, but what makes the decision dubious is that it fails to open up the law to claims that have authority from perspectives external to the law. The problem, in short, is that the imagined integrity of Dworkin's idea of integrity restrains him from differentiating the internal integrity of a relation from the integrity that the relation might have with things external to it. The tension between internal and external integrity is the drama of life, even the life of the law. Dworkin's analogy of the chain-novel lacks that drama, or seeks to solve it as if it were a problem susceptible to solution. However appropriate Dworkin's analogy of the chain novel might be to describe the progress of juridical science, improvised theatre might be a better analogy for the more general progress of law as a social fact; and better than to seek a solution to the dramatic tension that exists between law and life is to aim to appreciate it and participate in it.

If a virtue of internal integrity is that two wrongs can make a right, then a virtue of equity is that it intervenes when conduct is too right and therefore makes a wrong. When Cicero observed that the height of law is the height of injury—*summum ius summa iniuria* (Cicero, *De Officiis* 1.33), he was stating the universal truth that one can have too much of a good thing. Consider the example of music. The more sublime a tune, the more we listen to it, but there is no music so sublime that our appreciation of it is not diminished through over-exposure. Similarly with food, Shakespeare observes in *A Midsummer Night's Dream* that 'a surfeit of the sweetest things / The deepest loathing to the stomach brings' (2.2.137-8). And in *Twelfth Night*, famously: 'If music be the food of love, play on; / Give me excess of it, that, surfeiting, / The appetite may sicken, and so die' (1.1.1-3). Might there even be an excess of Shakespeare? It is a virtue to check an excess of vice, but it is also a virtue to check an excess of right. When the Old Testament book of *Ecclesiastes* cautions us to 'be not righteous over much' (7:16), it perhaps expresses a caution against a personal ethic which, in one's dealings with others, is overly insistent upon the rightness of a religious principle or legal entitlement. Aristotle certainly considered it unethical, as lacking the moderate quality of *epieikeia*, for an individual to insist strictly upon the application of strict law against another, and, by the same token, he considered it to be 'equitable to pardon human weaknesses' (Aristotle, *The Art of Rhetoric* 1374b).

The attribute of equity as I conceive it is close to Aristotle's concept of *epieikeia*, but whilst I agree with Aristotle that there is an error in behaviour that pursues any quality or anything to excess, I do not agree with his postulation that there is an ideal mean point between too much and too little of every quality or thing (Aristotle, *Nicomachean Ethics* 1106a-1107a). It will suffice to practice the art of moderating extremes without conceptualising that practice in terms of striving for a new ideal. Aristotle draws a distinction between true justice as a virtuous quality of character and formal justice as constituted by human institutions. Aristotle argues that formal justice ought to be moderated by *epieikeia*, but that true justice is a virtue that should be pursued absolutely without moderation. For Aristotle, there is an ideal mean in every branch of human conduct, but no ideal mean in qualities, such as 'temperance' and true 'justice' (Aristotle, *Nicomachean Ethics* 1107a20-25) that are inherently ideal.

That is fine in theory, but political justice will never be a practical reality in human society, for, as Aristotle acknowledges elsewhere, there can only be a 'simulacrum' of political justice in a society in which the citizens are not in fact all free and equal (Aristotle, *Nicomachean Ethics* 1134a26-8). It is submitted that when it comes to the practical reality of human interaction, even a perfectly temperate or perfectly just person must moderate the manner in which they present their perfection to others, lest they come across as unsympathetically humourless or strict. It may be desirable to moderate the social impact of one's moral perfection even as it is no doubt desirable to moderate the social impact of one's moral imperfection.

Related to Aristotle's notion of an ideal mean is his claim that there are many ways to go wrong, but only one way of being right (Aristotle, *Nicomachean Ethics* 1106b28-32), which Martha Nussbaum slightly modifies with a nautical metaphor: '[t]here are many ways of wrecking a ship in a storm, and very few ways of sailing it well' (Nussbaum 1992, 78). I prefer to say that it is always an improvement to moderate excess, so that even if there is only one ideal way of being right, there are countless ways of getting better. The absolutely crucial implication of all this is that it requires the human actor, which for this purpose could even be a lawyer or a judge or a legal academic, to acknowledge that they are indeed an actor in the sense of being a practitioner or performer of an ethical life.

With concern for the practical performance of equity in mind, it is now appropriate to recall the ethical dilemma presented in the contemporary French television drama *Engrenages*. The dilemma, as I enlarged it earlier, requires a strict judge to adjudicate between the internal integrity of his judicial office and the integrity of his paternal bond to his son. Can there be a way to exercise equity in such a case, whereby excessive insistence upon the integrity of the judicial office might be tempered with integrity to broader concerns of blood and social bond? I will delay my response a little longer with a brief diversion into the mythology of ancient Greece. The tale is told of a Greek lawmaker named Zaleucus who created a law to punish all adulterers by the gouging out of both their eyes. When his own son was caught in the act and brought before Zaleucus as judge, Zaleucus was faced with a stark choice between exempting his son from the legal rule or else enforcing the law and blinding his son. In many popular versions of the tale, it is reported that the Greeks thought that the bond of kinship should overrule the law (which, as an enduring instinct of the ancient Greeks, no doubt explains the popularity of the character of Antigone), but Zaleucus found a practical way to moderate the extremes of integrity to law and integrity to the bonds of kin. He had one eye removed from his son and one eye removed from himself. The judgment of Zaleucus indicates an equitable path for Roban, the judge in the *Engrenages* case, to follow. Instead of killing off the intern's career, the ageing Roban could have given the young man a solemn reprimand and warned him that in the event of any future infraction he would report the original offence to the authorities. Having thus imposed a sort of suspended sentence upon the intern, and in the process breached his strict duty as an officer of the court, Roban should then have confessed to his superiors that he

had committed an unnamed breach of his judicial duty and forthwith resigned from public office. He could have given an eye to save an eye.

2. Having gods

> 'The gods in our conception of them enjoy the most complete blessedness and felicity. But what kind of actions can we rightly attribute to them? If we say 'just action,' how absurd it will be to picture them as making contracts and restoring deposits and all that sort of thing!' (Aristotle, *Nicomachean Ethics* 1178b).

Aristotle poured scorn on the idea that we should consider respect for contract or restitution to be an attribute of the gods, but it is arguable that modern law has indeed afforded sanctified status to the internal integrity of its own system. No wonder, then, that Dworkin supposes that a judge must have the qualities of a Herculean demi-god if he or she is to succeed in relating the law to human affairs. Aristotle cited the examples of contract and restitution, but if he had been presented with the modern law of property in England and Wales (which I choose as an example I am familiar with; although it would no doubt work as well to take the law of any modern property jurisdiction) he would have observed that respect for property has in fact achieved the sort of normative status that one might attribute to a divine decree. Thus, in the early days of the modern English law of property, we find that Christopher St German (the Warwickshire jurist who introduced the Aristotelian idea of equity into English law) describes the law of property as having being posited with the sort of self-referential authority that one might usually associate with the authority of God or gods:

> It is in human law, duly constituted, that justice concerning the possession of lands and the ownership of chattels is made plain, and whatever is possessed in accordance with those laws is justly possessed, and what is held against them is unjustly held. (St German 1530, Prologue.)

There are strong ecclesiastical overtones to St German's discourse throughout his *Dialogue*, which is not surprising for one of the chief legal facilitators of Henry VIII's break from the Roman Catholic Church (Baker 2004), and it is tempting to suppose that in the passage just quoted he was alluding to the morality that is inherent in the Christian ideal of respect for earthly authority and, one might add, to the legal example of the Judeo-Christian God (who, in contrast to Aristotle's Olympians) makes covenants and redeems debts; but St German was not, as far as we know, an actual saint. It seems more likely, on the face of his words, that he has in mind the purely human virtue of respecting property law for its own sake—what I have called the virtue of internal integrity. Arguably it is this virtue which English jurists have prized above all others since the time of St German right up until the present day. Professor Harris, for instance, was adamant that ownership is 'a conception—or rather a battery of conceptions—internal to the law' (Harris 1996, 70). He was responding to A. D. Hargreaves, who had argued that:

> The problem of ownership remains, but it is not a legal problem; it is the concern of the politician, the economist, the sociologist, the moralist, the psychologist—of any and every specialist who can contribute his grain to the common heap […] The lawyer, naturally, has his contribution to make, but as the problem is not even fundamentally a legal problem, the final solution does not lie with him. (Hargeaves 1956, 17.)

Professor Harris called this 'patently absurd', but for all the bravado of that dismissal, it is clear—even on the face of Harris' own analysis—that Hargreaves was right to say that ownership 'is not a legal *problem*' (emphasis added). The nature of Harris' response betrays the fact that for him the idea of ownership has been rendered essentially *un*-problematic through the very process of containing it within the doctrinal categories of property jurisprudence. We might say, by the same token, that litigation is problematic for everybody except the lawyers. In litigation, lawyers are opposed to each other in form but in fundamental point of fact they are cooperating with each other (White 2012, 8). In Harris' scheme, ownership is unproblematic in the way that the rules of chess are unproblematic. He would not deny the complexity of the puzzles that might be thrown up by the rules of the private property game, but he would see no problem at all in the assertion that the basic rules of the game are simple and are properly to be set by lawyers and the law. Hargreaves, in contrast to Harris, seems to be suggesting (albeit in a somewhat over-stated style) that doctrinal problems internal to the legal idea of private property are minor compared to the social, political and philosophical problems that are perpetuated by strict respect for legal ownership. Read in this way, Hargreaves can be said to challenge the assumption that jurists should be the only ones permitted to set the rules of the property game and the only ones permitted to influence outcomes when property is in play.

So, in spite of Harris' protestation, ownership remains a bigger problem for non-lawyers than it is for lawyers; and arguably the less problematic it is for lawyers the more problematic it is for everyone else. When lawyers internalise the issue of ownership and treat access to assets as being wholly a problem of corrective justice based on entitlement, it is harder for the voices of distributive justice, still less any moral concern for 'right and wrong', to be heard. From the perspective of Hargreaves' 'moralist' (or 'moral philosopher') in what sense can the system of property law be regarded as inherently moral? As a legal doctrine, it has the virtue of internal integrity, but this is not moral in any categorical sense. It also has a customary status which takes it beyond the internal integrities of any particular groups (such as conveyancers, lawyers and judges) and makes it part of the *mores* of the wider society—it can therefore claim such moral status as is implicit in the idea of 'being Greek' as I use that term—but is there any *transcendental* morality in respect for the scheme of legal property rights? Certainly, most people would consider it immoral to steal property belonging to another, but is it *positively* moral to assert one's property rights against another? Whatever morality might be enshrined in a system of property law, it can hardly be said to transcend its context. Is it moral to step over a homeless person on the way to claiming rights to one's second home in court? Is it

moral to retain millions of pounds of profit from a loan contract with a bank when it later emerges that those millions had been paid out of funds defrauded from third parties? Perhaps it is, perhaps it is not, but the law will uphold the defendant's right to retain the wealth.[1] One cannot deny that private property law secures the political advantage of resistance to arbitrary powers of expropriation, but to say that private property rights protect us from expropriation is rather circular, if not tautologous, for it ignores the fact that the idea of private property creates the very possibility of expropriation. In any case, if there are transcendent moral virtues enshrined in the idea of private property, they are surely off-set by the selfishness that is inherent in the private aspect of property and the exclusivity which is the essence of what defines property as being mine and not yours. If systems of private property law derive any authority from transcendent considerations, one senses that those considerations are more pragmatic than moral. A moment's attention to English land law reveals that legal title is ultimately based on mere priority in time. Legal title is traceable back to military powers or the priority of hours—whoever possessed land first, or was born first (and for that matter born male), was deemed to be the owner of it. All other factors being equal, the first possessor has the right to exclude all-comers; and this quality of exclusivity continues to be the essence of the idea of real property in English law (Gray, 1991).

Far from enshrining transcendent and positive moral virtue, property law has shown itself capable of achieving the worse potential of any system created by humans, for it has achieved the denial of humanity. In ancient Greece, women had a status that in some contexts was little more than that of a proprietary asset of male relatives, and then there is the great evil of slavery (which even Aristotle condoned), that has always been conceived in terms of property law. When Shylock sought to defend his right to take a pound of flesh from his debtor Antonio in Shakespeare's *The Merchant of Venice*, his argument was framed in terms of legal right and property for his plea was that he had purchased his right no less than the hypocritical Venetians had purchased their slaves:

> You have among you many a purchased slave,
> Which, like your asses and your dogs and mules,
> You use in abject and in slavish parts,
> Because you bought them: shall I say to you,
> Let them be free, marry them to your heirs?
> [...] You will answer
> "The slaves are ours:" so do I answer you:
> The pound of flesh, which I demand of him,
> Is dearly bought; 'tis mine and I will have it.
> If you deny me, fie upon your law! (4.1.91-102)

Perhaps we can consign to history the great evil of state-sanctioned property rights in people, but let us continue to suspect that there is nothing in the internal

1 *Bank of Credit and Commerce International (Overseas) Ltd v Akindele* [2001] Ch 437, Court of Appeal.

integrity of property law that can protect us in the future from its worst mistakes. We can easily find modern examples in which courts have been content, indeed doctrinally required, to recognise property rights in morally dubious circumstances. *Tinsley v Milligan* is a case in point.[2] Tinsley and Milligan were two women who had purchased a house on the understanding that they would be joint beneficial owners, but they agreed that legal title should be vested in Tinsley's sole name. This was to enable them to defraud the Department of Social Security of certain welfare benefits. Subsequently the relationship between Tinsley and Milligan broke down and Tinsley left the premises. She then brought proceedings against Milligan claiming possession and asserting sole legal and beneficial ownership. Milligan counterclaimed for an order for sale and for a declaration that Tinsley had held the property on trust for the two of them in equal shares. The judge held for Milligan, and Tinsley's appeals were dismissed in turn by a bare majority of the Court of Appeal and a bare majority of the House of Lords.

The basic principle, their Lordships agreed, was that parties should be left to their strict entitlement in property law despite their illegal design. Where their Lordships disagreed was in their opinion as to which rights should be left undisturbed. Lord Goff (dissenting) was of the opinion that formal *legal* entitlement should be left undisturbed, following Lord Chancellor Eldon's longstanding exhortation to 'let the estate lie where it falls'.[3] Applying that approach to the facts of *Tinsley v Milligan* would have confirmed Tinsley's legal title to the land unencumbered by Milligan's claim to have an informal beneficial interest in the land. For Lord Goff, Milligan's claim to be entitled to a beneficial share ought to be denied because she had not come to court with 'clean hands' (that is, she had not come to court free from taint). In contrast, Lord Browne Wilkinson (with the majority) stressed that a transaction might have proprietary consequences without any need for the claimant to establish 'clean hands'. His Lordship reasoned that the arrangement between the parties in *Tinsley v Milligan* had been of this sort. Milligan had automatically acquired an interest under a trust (a resulting trust) on the basis of a property law presumption of general application (the presumption being that the payment of cash to assist in the purchase of land in the name of another person requires the latter to hold a beneficial share of the land on trust for the former in proportion to the size of the former's cash contribution). In *Tinsley v Milligan*, it was held that Milligan had no particular need to rely on the court's assistance to establish her interest under the trust and she should therefore be allowed to take that which she would have been entitled to as against Tinsley under the general law of property, quite regardless of the illegality of their joint design. Lord Browne Wilkinson applied the so called 'Bowmaker rule',[4] which provides that a party to a transaction tainted by illegality is entitled to that which

2 *Tinsley v Milligan* [1994] 1 AC 340, House of Lords.

3 *Muckleston v Brown* (1801), 6 Ves 52, 69. In this context, to 'let the estate lie where it falls', describes the court's passive conduct in permitting the present possessor of formal legal title to an estate in land to assert that title unencumbered by the claims of other persons.

4 *Bowmakers Limited v Barnet Instruments Limited* [1945] KB 65.

the law would bestow on her in a similar case not tainted by illegality, provided she at no stage pleads or relies upon the fact of her illegality. Thus the House of Lords reduced the issue in the case to an internal question of doctrine of precisely the sort that the late Professor J. W. Harris would have appreciated: whether to uphold legal title to the property based on the formal documentation or to uphold substantial beneficial entitlement to the property based on the claimant's cash contribution. That one or other of these alternatives ought to be upheld was readily assumed, and the suggestion that broader societal perspectives (such as potential public objection to the fact of the court's assistance in regularising the property affairs of a couple who had obtained state benefits by fraud) might be relevant was confidently dismissed. Indeed, as so often in trusts law, the recognition of the claimant's beneficial title followed no value other than the value of cash. It is not suggested that their lordships in this case reached the wrong decision, or even that they took the wrong matters (or failed to take the right matters) into account; it is only intended to demonstrate that the potentially manifold moral and ethical issues that might have flowed from the facts of this case were readily reduced to a doctrinal debate between senior judges, with the judges on both sides agreeing that the only real challenge was to find a solution designed to preserve the internal integrity of property law.

Very occasionally, when called upon to vary a trust, the courts have acknowledged that there might be more to the nature of a 'beneficial interest' under a trust than benefits of a financial nature. Megarry J once held that benefit is 'not confined to financial benefit, but may extend to social or moral benefit'[5] and Lord Denning MR confirmed that 'the court should not consider merely the financial benefit to the infants or unborn children, but also their educational and social benefit', adding that '[t]here are many things in life more worth while than money'.[6] And yet, however much these supremely capable judges might trust themselves to determine when a non-financial interest ought to outweigh a financial interest, it is clear that judges do not trust trustees to make the same calculation. Trustees are encouraged to invest the trust fund with the sort of care they would show for their own kin ('to take such care as an ordinary prudent man of business would take if he were minded to make an investment for the benefit of other people for whom he felt morally obliged to provide'[7]), but it is clear that they are required to invest in order to produce purely financial benefits. Trustees cannot 'make moral gestures'[8] and, on the contrary, in matters of investment they may 'have to act dishonourably (though not illegally) if the interests of their beneficiaries require it'.[9] Trustees are not permitted to pursue benefits other than financial benefits unless the trust instrument authorizes the

5 *Re Holt's Settlement* [1969] 1 Ch 100, 121D.
6 *Re Weston's Settlements* [1969] 1 Ch 223, 245.
7 *Re Whiteley* (1886) LR 33 Ch D 347 CA, per Lindley LJ at 355 (later approved in the House of Lords). See also *King v Talbot* 40 NY 76 (1869).
8 *Re Wyvern Developments Ltd* [1974] 1 WLR 1097, per Templeman J, 1106.
9 *Cowan v Scargill* [1985] 1 Ch 270, per Megarry VC at 287–8, citing *Buttle v Saunders* [1950] 2 All ER 193, per Wynn-Parry J, 195).

pursuit of other benefits[10] or the beneficiaries can be taken unanimously to approve the pursuit of non-financial benefits.[11]

The case of *X v A*,[12] demonstrates the courts' belief that trustees' should, in the final analysis, prefer money over morality (or treat money as if it were equivalent to morality for legal purposes) when it comes to the exercise of their powers. The trustees of a marriage settlement had exercised their power of advancement to give the life tenant (the wife of the settlor) £350,000 in 1996 and £500,000 in 2000, which sums she had given to charity in accordance with her Christian beliefs. The trustees subsequently applied for directions from the court as to whether it was open to them to give her a very substantial part of the remaining trust capital for the purpose of enabling her to devote it to charitable causes. The judge did not criticize the earlier payments, but refused to authorize any further exercise of the trustees' power of advancement on the ground that the sums proposed to be released were too large a proportion of the whole. Should we applaud the judge for restraining the beneficiary from being over-righteous? Was the judge exercising equitable restraint? Sadly, no. It is not equitable to use power to restrain others; it is only equitable to resist one's own power and the excessive integrity of one's own codes and modes of conduct. It is implied by the judge's judgment in this case that trustees can apply funds to discharge a moral burden on the beneficiary's conscience, but only to a limited extent. Far from exhibiting equitable restraint, this betrays the law's inherent bias towards maintaining material wealth at the expense of moral considerations. His Lordship, Hart J, said:

> How, as Mr Le Poidevin asked rhetorically, can the court assess the validity and nature of a moral obligation otherwise than by reference to the beneficiary's own views on the subject? That is certainly not a question to which the court can give an abstract answer, whether by reference to the Bible or to Bentham, to Kant or the Koran. The answer has to be found in the concrete examples provided by the decided cases and the reliance placed in them on generally accepted norms applicable in the context of dealings with settled wealth.[13]

His lordship does not look to God for a moral guide nor to the values established by Kantian or Benthamite morality, but he looks to the virtue of internal integrity that comes from deciding according to precedent. He pays lip-service to the morality of customary practice ('generally accepted norms applicable in the context of dealings

10 As Sir Donald Nicholls VC acknowledged in *Harries v The Church Commissioners for England* [1992] 1 WLR 1241: 'trustees would be entitled, or even required, to take into account non-financial criteria . . . where the trust deed so provides' (1247B-C).

11 *Cowan v Scargill* [1985] Ch 270 per Sir Robert Megarry VC at 288E–G. Although Lord Nicholls of Birkenhead, writing extra-judicially, has expressed his opinion that the range of investments available to trustees is sufficiently extensive to allow trustees 'to give effect to moral considerations, either by positively preferring certain investments or negatively avoiding others, without thereby prejudicing beneficiaries' financial interests': 'Trustees and their broader community: where duty, morality and ethics converge' (1995) 9(3) *Trusts Law International* (1995) 71-77, 71.

12 *X v A* [2006] 1 WLR 741.

13 *X v A* [2006] 1 WLR 741, paragraph [43].

with settled wealth')—which is the morality of 'being Greek'—but he will respect those norms only so far as they are evidenced in the decided cases, which really amounts to little more than the internal integrity of the judicial system and property law system in another guise. Ultimately, there is no morality in his lordship's idea of a beneficial interest; there is only money. I do not make this observation by way of criticism of, or approval for, the approach taken by the judge, but rather to clarify what it is that judges do. The internal integrity of law may or may not be a virtue when viewed from perspectives external to the law, but it is certain that lawyers' excessive confidence in the virtue of law's internal integrity should be tempered by the humility of equity. The law may be more secure with its doors and windows closed, but it will also be unhealthily isolated from its social and cultural context. The internal integrity of the law, as with the internal integrity of anything, cannot be considered meritorious in isolation. The internal integrity must be off-set by integrity to context; or, as I prefer to put it, internal integrity must be tempered by equity. In a cosmos of categorical absolutes, in which we could predict every wind of change, we should know to close the window against the weather or to fling it wide open on the world. Since we do not live in such a place, it is prudent to keep the window just ajar.

I have so far sought to describe equity in agonistic relationship to internal integrity and to that end I have aligned equity very closely with concern for external context, so that equity might be considered shorthand for a force of 'external integrity' that struggles to find a living and dramatic tension with the force of 'internal integrity'. As 'internal integrity' pulls in; equity pulls out. The necessary next question is how hard and far equity may be permitted to pull before it commits the error of replacing an excess of 'internal integrity' with an excess of 'external integrity'. To express this challenge in a familiar metaphor of law, we might ask how far equity may bend a rule without breaking it. Another way of expressing the same challenge, for some purposes at least, is to ask how far the normatively neutral attribute of law's internal integrity may be tempered by the normatively neutral attribute of equity without going so far as to supplant law with morality. In the next section, I will offer an answer to that question.

3. Being Greek—customary limits on the scope of unconscionability

> For forms of government let fools contest;
> Whate'er is best administer'd is best:
> For modes of faith, let graceless zealots fight;
> His can't be wrong whose life is in the right (Pope, *An Essay on Man*, 1732-4)

The basic idea of this section is one that I have rehearsed elsewhere (Watt 2009), but the present challenge is to elucidate the idea in connection with the morality of 'being Greek' and in connection with the agonistic relationship between internal integrity and equity. The quote from Pope's *Essay on Man* makes my point for me, for, as I read it, it says that having gods in the form of political ideologies and formal religions

is not the only way of living well. Another is the practical virtue of 'proceeding' or 'doing' (in Pope's term 'administering') well. Pope says 'best', but I will be content with 'better'. The practical virtue of proceeding well is a combination of many practices including the pursuit of the complimentary qualities of internal integrity and equity. That equity should resist extremes of internal integrity is straightforward enough to accept. The problem is to know to what extent equity can operate to challenge the internal integrity of a rule through attention to concerns (including social, cultural and moral concerns) that lie outside the nature of the rule as rule. Rules might need to be bent but they ought not to be broken. The appropriate response to an excess of internal integrity in a thing is not to disintegrate the thing, but to produce a new integrity by tempering internal integrity with equity. If a rule needs to be replaced, that is a function for general law reform; it is not a function for equity. The challenge for the equitable function, as indicated above, is to exercise equity without going so far as to supplant law with morality.

My proposal is that we should conceive equity as being the practical art of resisting strict insistence upon the rule when strict insistence would be inappropriate to the context in which the rule operates. Insistence upon a rule might be inappropriate due to any number of specific factors, but the historical development of the idea of equity in English law suggests that the oppression or abuse of the relatively weak by the relatively strong is a key indicator of inappropriate insistence upon a legal right or power. Consider again the example of the veteran who remains seated when the Queen enters the room. It would patently be inappropriate for any authoritarian to insist that the weak and vulnerable veteran should attempt to meet the demands of the rule. When a general rule, legal or otherwise, is asserted in a context that makes such assertion oppressive or otherwise inappropriate this is a special kind of wrong. In the language developed in the English Chancery jurisdiction the special wrong of contextually inappropriate insistence upon a general legal right or power goes by the name of 'unconscionability'. In this section of the essay, the challenge is to identify appropriate limits to equity's unconscionability-based intervention. Although we will be focusing upon equitable intervention in legal cases, the principle applies as well to equitable efforts to moderate excess of 'internal integrity' in other contexts. The key argument of the present section is that although we should identify conduct to be 'unconscionable' where it abuses a routine or a legal right or a rule in a way that is inappropriate in the particular context, we ought nevertheless to refuse to treat conduct as 'unconscionable' if it conforms to behaviour which is customarily considered to be appropriate to the context under consideration. In short, a person who is acting morally according to prevailing *mores* for the relevant context—that is, behaving morally in the sense of 'being Greek' (or, to put it another way, 'doing in Rome as the Romans do')—ought to be immune from the accusation that they have acted unconscionably. The communal morality of 'being Greek' trumps the activity of equity so far as the judgment of any court should be concerned, for, in Pope's phrase: '[h]is can't be wrong whose life is in the right'. Legal authority to the same point is found in *The Commonwealth v Verwayen*, in which Deane J opined that

unconscionability describes conduct that commonly entails 'insistence upon legal entitlement to take advantage of another's special vulnerability. . . in a way that is unreasonable or oppressive to an extent that *affronts ordinary minimum standards of fair dealing*' (emphasis added).[14] This *dictum* confirms that the label 'unconscionable' should not be applied to ostensibly oppressive and unreasonable behaviour if that behaviour is consistent with (or not inconsistent with) behaviour that is customarily considered, according to *communis consensus utentium*, to be appropriate to the context in which it occurs. 'Unconscionability' is apt to describe the equity I have in mind because it is inherently un-idealistic. There is no such state—indeed there is no such word—as 'conscionability'. So 'unconscionability' is committed to the practical project of avoiding the worst errors without ever claiming to direct us to a new ideal. Unconscionability is no doubt hard to define, but it is clear that it does not imply breach of any moral code and that it is a label that should not be applied to conduct that is consistent with a recognised customary, or otherwise 'moral', norm. Of course it cannot be denied that some customary norms of behaviour, which may be considered moral in the sense of popular *mores*, may be considered immoral by other standards. The widespread acceptance of slavery in ancient Greece is one example of this. Suppose that someone acted unfairly or oppressively in his dealings with a slave, should it be a defence to a charge of unconscionability that such such behaviour is routinely accepted? Because unconscionability is a contextually-specific complaint, I have to admit that the defence of customary practice should normally operate. Of course this does not prevent the judge from remedying the oppressor's behaviour on grounds other than the ground of unconscionability, where the oppressive behaviour can be shown to be wrong on other grounds and where alternative courses of action are open to the judge.

Let us recall the metaphorical description of equity as the attribute of seeking to open up the doors and windows of a thing (such as a legal right) so as to prevent the thing from utterly sealing itself off from its external context and its responsibility to others. We can now extend the metaphor to say that there are times when equity finds that the door or window of a thing wants to close not merely because of the pulling force of the internal integrity of the thing, but because of the pushing force of the external context. To place this extended metaphor in a practical legal context, let us say that where a person insists strictly upon their legal ownership of land in a way that harms another person, one might be tempted to open the door of their property right to the interests of the other, but however tempted one might be, one is not permitted to do so where customary practice—that is *mores* or 'being Greek'—establishes that it is acceptable for the legal owner to insist upon his or her strict entitlement in the particular context.

The 2008 decision of the House of Lords in *Yeoman's Row Management Ltd v Cobbe*[15] illustrates my claim that custom in the relevant context (the *mores* of 'being Greek' or 'doing in Rome as the Romans do') places an outer perimeter on the ambition

14 *The Commonwealth v Verwayen* [1990] 170 CLR 394 at 441, High Court of Australia.
15 *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55; [2008] 1 WLR 1752.

of unconscionability-based equitable intervention. The essential facts of *Yeoman's Row Management Ltd v Cobbe* were that a property developer entered into an oral agreement with the owner of a block of flats under which the developer undertook to obtain planning permission to demolish the block and replace it with new town houses. A formula was agreed on price and division of profits from the development. The developer spent eighteen months acquiring planning permission to demolish the block to build new town houses, but after planning permission had been obtained the owner of the block purported to withdraw from the agreement. In the Court of Appeal, a proprietary estoppel was recognised in favour of the developer, which was remedied by awarding the developer a share in the increased value of the property attributable to the planning permission, but this was overturned by the House of Lords. Their lordships held that the developer had acquired no property right in the land on these facts and the developer was accordingly awarded a mere cash *quantum meruit* (sum deserved) sufficient to ensure that the land owner would not be unjustly enriched by the time and labour expended by the developer in pursuing planning permission in pursuance to their informal agreement. It was held that the developer had assumed the risk that the owner of the block might withdraw from the contract and insist upon its strict legal right to absolute unencumbered ownership of the land. The fact that such insistence on legal title might be considered immoral in the abstract did not suffice to justify equity's intervention; for it had to be shown that the owner had behaved in a manner that was unconscionable in this context. The evidence was in fact the other way—the customary practice was to allow parties to withdraw from an informal contract in such a case. The claimant's argument that both parties considered themselves to be bound 'in honour' to perform the contract was rejected. Neither the contextual intervention of equity based on the restraint of unconscionability nor respect for an abstract morality of honour could be permitted to prevent insistence upon legal title where such insistence was justified not merely by the internal integrity of the right but by the *mores* of customary practice in the particular context. As Professor Wooddeson recognized more than two centuries ago: '[t]o rescind every contract incompatible with the nicest principles of honor and morality, tends to terminate all commercial intercourse' (Wooddeson 1794).

'In law context is everything'. This was the opinion of the Judicial Committee of the House of Lords for England and Wales, which it confirmed at least twice in the last decade,[16] and no doubt its successor, the UK Supreme Court, will not dissent from that view. Concern for context lies at the heart of the proposal that I have set out in this paper. In certain contexts we can observe an excessive insistence upon the integrity of a code of conduct or law or some other thing. Equity can temper an excessive of integrity by opening up the thing to the wider social and cultural context in which it operates or exists. However, equity cannot claim transcendent virtue. Equity cannot claim to have a free-standing or categorical moral status. The virtue of

16 Albeit in two very different legal contexts: *R v Secretary of State for the Home Department ex parte Daly* [2001] 2 AC 532 per Lord Steyn, paragraph [28]; and *Stack v Dowden* [2007] UKHL 17 per Baroness Hale of Richmond, paragraph [69].

equity, such as it is, is limited by the context in which it operates. Without an excess of integrity and related errors, equity would have nothing to do and equity would be nothing of good. Recall the image of the archer's bow, and the dramatic beauty that exists in the tense relationship between the bow and the string because they are tied together. Uncouple them and the wood will straighten out and be just a regular stick. (The stick will achieve extreme internal integrity as a stick.) The string will lose all its power, for its power is inherent in its relation to the wood. And sometimes, even when the arm of equity might want to pull against the excessive integrity of a person who harms another by insisting upon strict entitlement, equity must relinquish the struggle if such insistence is customarily permitted as being appropriate to the context. The clearest occasion for equity to withdraw its assistance is where there is a *de facto* equality of power between the relevant parties. Power is the perennial problem, of course; not least because the power ultimately rests in the hands of the judges to define what *counts* as a relevant context for equity's intervention in legal matters and what *counts* as a customary bar on equity's intervention in a relevant context. The power of the judge is inevitably influential where one is concerned with the exercise of sound judgement, but so long as judges remain human there is hope that better judgment will proceed from a better humane appreciation of how the agonistic dynamics of integrity and equity may be performed in dilemmas and other hard cases.

4. Getting better

> '"Trial and error" is not an insult. It is the difficult challenge and the difficult virtue of the rule of law' (Manderson 2012).

The project of engaging law with morality must be a modest one. We should never expect a perfectly integrated scheme that will dictate 'right answers' to hard questions, and the question of law's relationship to morality is one of the hardest. Lord Scarman, when he was a judge of the High Court, expressed very well the sort of modesty we need, observing that '[w]hen all is dark, it is dangerous for a court to claim that it can see the light'.[17] We cannot take a seat in the theatre and hope to discern a theory for reconciling all the tensions in the drama, but what we can do, indeed what we must do by our being placed as actors in the midst of life with all its conflicts and contingencies, is to perform one way or another. Certainly we can perform according to the moral script set down by our God or gods, but we can also recognise that integrity to the script, whatever the script, must be tempered in its extremes by respect for the present context of our performance. To live well and to play our part with respect and sympathy for our audience and our fellow performers, we must improvise; we cannot succeed if we adhere slavishly to the script of law and other codes. It is not wrong to be idealistic, but it is wrong in some contexts to insist upon an ideal. There might be perfect political justice and perfect

17 I*n the Estate of Fuld deceased* (No 3) [1968] P 675, 714E.

distributive justice one day, but today we can only begin by correcting the worst errors. As Victor Hugo wrote—the *first* equality is equity (*La première égalité, c'est l'équité*) (Hugo 1862, iv.1.4).

How are we to identify the worst errors of excessive insistence upon the integrity of law? The practical answer, however unsatisfying it might be in theory, is that we have to exercise the difficult art of humane judgment. In the case of *Binions v Evans* a property developer purchased an estate and promised the vendor that it would permit an elderly widow to remain in her home on the estate for the rest of her life.[18] After the purchase, the developer was perfectly entitled to evict the widow according to the strict rules of contract, for the contract had not been made with her, and the developer did indeed insist upon the right to evict her. Fortunately for the widow, the judge in the case was Lord Denning, then Master of the Rolls, and he recognised that she had a right in equity to remain in occupation for the rest of her life. There might be a customary norm of insisting on documentary formalities in land dealings between commercial parties, but there is no customary norm for evicting vulnerable old widows from their homes. Of course, the developer needs no defence unless there is a *prima facie* case of wrongdoing to answer to. Was the developer's behaviour wrong? Whether it was technically-speaking 'unconscionable' might be debated, but we know that the developer's behaviour is some sort of wrong before we have given our theoretical reasons. With the worst offences we still fit our reasons to our instinct. The abuse of the widow's vulnerability combined with the breach of promise might be the doctrinal reasons we feel for the widow in *Binions v Evans*, but the fact of a rich and powerful agent evicting a poor and powerless person is fact enough to identify a wrong before we have a full-blown theory to fit the facts. Even Aristotle, whose life was devoted to reasoning from the facts of nature, acknowledged that we should not 'demand in every subject an account of the cause or reason why it is what it is, for there are cases in which it is quite enough if the fact itself is proved' (Aristotle, *Nicomachean Ethics*, 1098a25-28). It is desirable to prove things in theory; it is necessary to improve things in practice. So, how shall we improve? In Aristotle's conception an ethical character is produced by repeated acts of virtue (Aristotle, *Nicomachean Ethics*, 1103a.14). We acquire habits by acting habitually. And what is virtue? In this paper I have argued that, in addition to the obvious virtues of acting in accordance with the norms established by the divine or by the *demos*—that is, by God or gods (or the otherwise transcendental) on the one hand and the social group on the other—there is merit of a less categorical, non-ideal kind in the behaviour of respecting such qualities as 'internal integrity' and 'equity'. Such behaviour, regarded in context, is not always positively virtuous, but in practice it can certainly be regarded as more desirable to respect the need to balance internal integrity with equity in one's conduct than to have no such concern at all. I will conclude, not prosaically, but with a quote from prose. The conclusion we reach is this: that neither equity nor internal integrity is a moral ideal in any categorical

18 *Binions v Evans* [1972] Ch 359, Court of Appeal.

sense, yet both may be considered to have merit in a non-ideal (which is also to say 'moderate' or 'qualified') sense. Both can help to improve law and lawyers in practice, because both help us to 'fail better' (Beckett 1983).

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