I am deeply grateful to the four commentators for engaging with my work in a deep and creative manner; tempting such outstanding scholars setting their inquisitive minds unto my work is the best I could possibly ask for. Their thoughts set me unto new paths that correspond with the present book but move beyond it. There is no way I can do justice in this short piece to all the excellent points they raise in their critique. I therefore chose to write about four themes that recur in two or more of the papers: the place of the trust in my account of Equity, the extent to which equity sides with (moral) angles, whether the morality invoked by Equity is thick or thin, and the quesiton to what extent Equity as it emerges from the book can be the subject of future fusion projects.

1. Trust

Is the express trust a (or the) central case of Equity? If the answer to this quesiton is positive, an account of Equity that would not, and could not, pay trust the tribute it is due is defective. For if one sets out to offer an analysis of a legal field that is both descriptive and prescriptive, the general contours and the main emphasis must fit the doctrine as we find it in the law books. From this perspective, both Katz and Miller find the book lacking, as only a small part of it is devoted to direct engagement with this ingenious invention of Equity: the express trusts. The reason for that neglect, the writers claim, is that the significant body of rules that govern all aspects of trust does not seem to be grounded in the accountability correspondence justification developed in the book. Moreover, the norms of which trust law comprise do not feature the characteristics of Equitable norms as these are identified in the book, namely, flexible ad hoc principles that feature morally-freighted language and appeal to conscience. Is the thesis suggested in the book really incapable of accommodating one of the most salient aspect of the explanandum? I will try to persuade you that this is not the case in three steps: first, the express trust was, and still is, fundamentally, a mechanism for enforcing obligations of conscience that still retains the characteristics of Equity when it comes to court discretion and proactive role in managing the rights. Second, remedies against third parties involved in a breach of trust are

1 Professor, King’s College, London, Dickson Poon School of Law
2 Larissa Katz, ‘Conscience with a Filter’ (2020) Jerusalem Review of Legal Studies text to FN 6; Paul Miller, ‘Conscience and Justice In Equity’ (2020) Jerusalem Review of Legal Studies Sec. 2
exclusively based on finding of unconscionability, and conscience is thus an elementary building block in the enforcement of the beneficiary’s rights. Third, trusts cannot be a focal point of a project like mine which is essentially an anti-fusion campaign.

A quick glance at the law that governs the creation and running of express trusts may lead one to the conclusion that it has long ago outgrown its historic roots as part of a flexible system of principles intending to enforce moral obligations where the common law has neglected to do so due to over commitment to justice embodied in formalism. As she takes note of the many technical, clear rules in statute and case law, the strict liability of trustees and the autonomy-enhancing justification for enforcing it, she may conclude, like my critics, that an analysis of Equity that gives place of pride to conscience must be missing a central piece of the jigsaw that we call Equity. But if we dig deeper, we will see that the law of trusts has not moved that far from its early self-perception as essentially an enforcement of conscience-based obligations. Take the very recent UKSC decision on Akers v. Samba.\footnote{Akers and others v Samba Financial Group [2017] UKSC 6 (UKSC)} Citing Selborne LC opinion in Ewing v Orr that ‘the Courts of Equity in England are, and have always been, courts of conscience…accustomed to compel the performance [of these obligations]’ regardless of the domicile of owners who are bound by them, the UKSC went on to base their decision on the principle that ‘equitable interests arise from equity’s recognition that in some circumstances the conscience of the holder of the legal interest may be affected’.\footnote{(1883) LR 9 App Cas 34, 40; ibid [24],[89].} Thus, two perplexing questions on fundamental aspects of trust were resolved with direct reference to conscience: the effect of the trust’s locus (here, in Saudi Arabia), and the question whether a breach of trusts occurred. When a novel question comes up, the court must go back to basics, and the basis of trust, they found, is an obligation of conscience; the thick layers of formalistic rules that were added through the years did not suffocate the heart of the trust that beats to the rhythm of conscience. Going beyond the question of conscience, the critic’s depiction of trust law as a body of law that was stripped off equitable characteristics is inaccurate.\footnote{E.g. in Katz, the law of trusts is ‘too regular, too law-like to count as equity on Samet’s view’ (around FN 32)} If one looks closely at the law that governs the way trusts are managed, the picture of a set of ex-ante bright-line rules, which is typical to common law doctrines, shows some deep cracks. For, in stark contrast with contracts, courts have been quick to cease on the opportunity given to them to intervene in the day-to-day management of the trust relationship: execute trusts, remove and appoint trustees and keep them to their powers, where the court deems these measures necessary in the
A strong form of discretion, justified on the premise that trustees are bound by an obligation of conscience, thus looms large over the entire institution of the express trust and draws it closer to the Equity family home which it had supposedly left. Moreover, once we move from the daily management of the trust to the consequences of breach, the root of trust as an obligation of conscience is fully exposed to the light. For while the liability of trustee in breach is independent of the trustee’s motives (more in that see below sec.2), the responsibility of third parties who get involved in the breach is intimately bounded with their conscience. Thus, the profound difference between the liability of buyers of stolen property and the liability of buyers of property sold in breach of trust is best explained by reference to the role of conscience in Equity. Other third parties who are embroiled with breach of trust may find themselves liable under the heading of unconscionable dealing with received trust property, or as dishonest assistants. They will only be made personally liable to pay compensation to the beneficiary if their conscience is at fault. Thus, the beneficiary’s ability to protect her right from intervention by third parties is explicitly dependent on the state of their conscience. Of course, a full answer to the question ‘why is it good to have the express trust on our law books’ would go well beyond the value of accountability correspondence, and engage other values worthy of promotion by the law like autonomy and efficiency. Not being a fundamentalist about the values served by Equity (or private law in general) I have no problem with that. Thus, an account of Equity like that suggested by the book has room for the express trust since accountability correspondence features as one of the main goals of enforcing the obligations owed to beneficiaries. A fuller account of trust will indeed have to appeal to other goals it serves. But the way in which the law of trusts still applies ex-post, flexible morally-oriented principles at key junctions show that thick strings still attach it firmly to its origins in Chancery as an obligation of conscience.

That said, from the particular angle which my book approaches the distinctiveness of Equity, the express trust cannot occupy the centre stage. The question that occupies me in the book is whether we should work towards a fusion of Equity and Common Law; finding the

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7 I am grateful to Peter G. Turner for raising this point with me.


9 Royal Brunei Airlines v Philip Tan Kok Ming; ‘When the asset is transferred to a third party, the question becomes whether the conscience of the transferee is affected’ *Akers and others v Samba Financial Group* [89]

10 *Independent Trustee Services Ltd v GP Noble Trustees Ltd* [2010] EWHC 3275 (Ch) (Chancery)
distinctive contribution made by Equity is means to answer it. In that, the book is no different from many attempts to defend the independence of Equity throughout history in which ‘fusion’ became the portal to discussions of the very nature of equity and its place in the legal system.\(^{11}\)

The book sets to examine the terrain of Equity to see whether arguments from rule of law (‘ROL’), horizontal justice and efficiency justify the merger of its doctrines with their common law counterparts as recommended by fusion projects. But even the most ardent pro-fusionists stop short of proposing that trusts are stripped off their Equitable character. Bearing in mind the immense utility of the trust, the way it enhances people’s autonomy by offering a diverse plethora of options for arranging one’s affairs, and its attraction to foreigners who set the UK as the jurisdiction of their contract, almost all fusion supporters are willing to tolerate the deeply equitable features of the trust and leave it as an oddity in a perfectly fused system.\(^{12}\) To make this choice palatable they mischaracterise the trust; thus, rather than see the trust for what it is, namely, an institution that stands and falls on the enforcement of an obligation of conscience, pro-fusionists depict the law of trust as having taken a life of its own by largely detaching itself from the mother base and losing en-route much that Equity prides itself on. But be it as it may, an anti-fusion project of the kind offered in the book that seeks to engage with the arguments the pro-fusion camp actually makes, would have to marginalise one of the shiniest diamonds excavated by Equity from the potent mine of conscionability. But I hope to have shown that the account of Equity suggested in the book is nevertheless applicable to the deep foundations of trusts as well as to important aspects of its enforcement, even if it does not highlight what Paul Miller calls its supplementary power. We are not yet done with the trust: in the next section I ask what is the significance of the stains that tarnish this glistering diamond of Equity.

2. Angels

The next critique I consider can be approached through the express trust, and the distance between its early inception as a commitment to conscionability in the face of rigid formalism and the character it assumed in modern times. If the express trust is indeed ‘equity’s most precious and precocious child’, we must face the fact that as the trust grew in significance, it brought shame on the family as it turned into an instrument of ‘tax avoidance and mitigation on a grand scale’.\(^{13}\) And this, Katz and Miller argue, is only one instance where Equity fails to

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\(^{12}\) See for example, Andrew Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22 Oxford Journal of Legal Studies 1, p.3

\(^{13}\) Quotes from Miller, ‘Conscience and Justice In Equity’, pp.3 & 8.
side with the angels: the strict responsibility of fiduciaries and Equity’s reluctance to introduce a duty to rescue are two more examples. Indeed, if Equity were to pick the wrong side of the moral story too often, or only on a few occasions but with dramatic results, it would be a serious problem for an account that presents Equity as means for injecting morality into private law. My reply refers to three instances of such apparent choice that Miller and Katz refer to: the case of settlors whose aim is to avoid tax, the treatment of principals who sue their innocent fiduciaries and Equity’s attitude to people who fail to engage in easy rescue. I will show, hopefully, that Equity’s decisions on these occasions can be explained as either serving morality in the best way in spite of appearances, or as institutional choices that do not reflect on the commitment of the Courts of Chancery to closing the gap between moral and legal norms.

The way in which trusts can be used to avoid paying one’s fair share of tax is a thorn in the side of any defence of Equity as promoting a more conscionable conduct in the market. We must remember however that the trust, like a knife, is an instrument that can be used for good – charity, trust for incapacity or pension funds, as well as for ill – tax avoidance, money laundering, or asset smuggling. Equity has created the instrument, but setting the limitations that would prevent its abuse, I wish to argue, is a job for the elected and executive branches not the judicial. In a paper aptly titled ‘Trusts: Weapons of Mass Injustice’ published by the Tax Justice Network, the author identifies the soft spots of the trust regime which can be exploited to achieve unpalatable goals: the absence of public trust registry, laws that allow beneficiaries to shield behind the trust and avoid their duties to the state, creditors and family members, and off-shore jurisdiction that engage in race to the bottom to attract shady investment (and thereby generate business to a burgeoning local legal profession). All these, the author rightly argues, can be fixed if only the will is there. In a different paper by the Tax Justice Network, the writers tell us what can be done: introduction of mandatory public transparent registration, prohibition on abusive trust provisions in trust documents like non-recognition of foreign laws and judgements, and blacklisting of jurisdictions that allow the formation of abusive trust structures.

Advancing such measures is obviously way beyond the reach of the Chancery Court. Sure enough, the court of Equity could do more to prevent the use of trust to shade assets from

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14 See a similar argument in Andrew Gold, 'Equity and the Right to Do Wrong' in Dennis Klimchuk, Irit Samet and Henry Smith (eds), *Philosophical Foundation of the Law of Equity* (OUP 2019)
the tax authorities, creditors and spouses. It is worth noting that the ‘trusts’ that are often used by off-shores jurisdiction which combine strict separation of ownership with maximum power to the settlor would not qualify as trusts under the orthodox law in force in England and Wales.\(^\text{17}\) But the court can, and should, go beyond the orthodoxy and use the power given to them by Equity to push for better compatibility between the uses to which trusts are put and their essence as obligations of conscience. Lord Walker has showed the right way forward when he commented in *Pitt v. Holt* that ‘there has been an increasingly strong and general recognition that artificial tax avoidance is a social evil which puts an unfair burden on the shoulders of those who do not adopt such measures’, and that therefore ‘in some cases of artificial tax avoidance the Court might think it right to refuse relief’.\(^\text{18}\) However, the dramatic measures needed for initiating a sea change in attitude to the grievous abuses of the trust institution can only be put forward by the legislative and executive branches of government. The current situation in the UK demonstrate how much can be done when the political will is in place. A gaping hole in public finances following the 2008 financial crisis, growing inequality and a series of tax havens scandals created a public mood that was strongly set against tax evasion and instruments that facilitates it like the trust. In response to all these factors (coupled with a strong reluctance to raise taxes), the UK government introduced a series of measures like the ‘Common Reporting Standard’ (‘CRS’): a global standard for the automatic exchange of financial account information between tax authorities, which helps tackle tax avoidance and evasion. Under CRS rules, trusts can be defined as a reporting financial institution, with the result that UK tax residents who are settlors, beneficiaries, trustees or otherwise exercise control over non-resident trusts are reported to UK tax authorities (‘HMRC’) by other countries.\(^\text{19}\) By 2018 around 100 jurisdictions committed themselves to exchange information in accordance with the CRS.

Another major step in tackling the abuse of trusts is the Money Laundering, Terrorist Financing and Transfer of Funds (Information on the Payer) Regulations 2017. The act imposes a legislative obligation on trustees of UK resident express trusts and non-UK express trusts that generate a UK tax consequence to hold written, accurate and up-to-date records of their beneficial owners and to make these available to UK law enforcement authorities on request. These and other similar measures bear fruit: a recent statistics from HMRC show the number

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\(^{17}\) See Lionel Smith, ‘Massively Discretionary Trusts’ (2017) 70 Current Legal Problems 17

\(^{18}\) *Pitt v Holt*, para 135.

\(^{19}\) For the ways in which the government seeks to ‘close in’ on offshore tax evasion see HMRC, *No safe havens*, 2014)
of trusts has fallen for the third year in a row, and the total income reported in respect of trusts and estates also fell down 17 per cent.\textsuperscript{20} This, as the Financial Times reported, is becoming a real worry for professionals in the business as ‘\[w\]ealthy families are increasingly shunning the use of trusts for financial planning because of increased tax rates and concerns about privacy’.\textsuperscript{21} Wealth management consultants interviewed for the piece cite the compulsory registry, the Finance Act 2006 reform which extended the Relevant Property Regime to most trusts (= a lifetime charge of 6\% of the value of the settled property to at every ten-year anniversary of the trust and/or when property leaves the trust), and the way in which a trust’s income and gains are also now taxed at the highest rates applicable, as the main reasons for the continuing decline in the popularity of trust as instrument for saving on inheritance tax.

The government recognises that this is only the beginning of a long road, and that much more can be done to stop trusts from being used for illicit purposes. A consultation on the way to achieve a tax regime of trusts that embodies the values of transparency, fairness and simplicity closed in February 2019.\textsuperscript{22} The premise for the consultation is promising: ‘while trusts can offer privacy in managing a person’s affairs, there is a clear distinction between that privacy and keeping such arrangements deliberately concealed from a public authority such as HMRC for the purposes of tax avoidance or evasion’.\textsuperscript{23} Whether or not the reform is successful depends on the commitment of politicians to achieve these goals. The consultation, the set of wide-ranging measures, and the initial highly-promising effect they have is good news for my thesis. It shows that there is nothing inherently wrong with Equity’s most famous child. For a long time, it was indeed highjacked for purposes foreign to the values it serves – autonomy, efficiency and conscionability. The courts of Equity should have done more to guard it from the hijackers. But the abuse of trust mostly happens in the interaction of trusts with areas that lie way beyond the jurisdiction of the Chancery courts, mainly in the areas of tax and anti-money laundering laws. Moreover, some of the most useful responses to the abuse lie squarely in the field of the executive and parliament as they involve foreign relations and administrative measures like the introduction of public registers. We therefore we cannot learn much about the ethos that guides the Courts of Chancery from the fact that they did very little to combat the exploitation of trust for shunning one’s obligations to her community. Yes, the Chancery

\textsuperscript{20} This and other data on trust taxation is presented in an accessible way in HMRC, \textit{Trusts Statistics}, 2019
\textsuperscript{21} Emma Agyemang, ‘Trusts Remain Out of Favour With Wealthy Families’ \textit{Financial Times} (London
\textsuperscript{22} HMRC, \textit{The Taxation of Trusts: A Review’}, Consultation document, 2018)
\textsuperscript{23} ibid 4.2
Courts were too cautious at using the opportunities they did have to curb the abuse, but it is not in their power to introduce the most effective restraints on the use of trust for illicit purposes.

The next challenge in this strand hits closer to home. For even if ensuring that the trust is not used for illicit purposes was largely out of the hands of Equity courts, it was surely up to them to delineate the contours of liability of fiduciaries so that it maps on the moral reasons that underpin it. Yet, Katz argues, Equity chose in this instance to find legal responsibility ‘where there is no obviously moral wrongdoing… and so conscience is no good as a guide to what ought to have been done from the standpoint of equity’. For we know that a fiduciary may be found to be liable to account for a profit obtained in violation of his loyalty duty even where her conscience is clear as she behaved honestly and with the best of intentions. Is the phenomenon of innocent but liable fiduciaries common enough to pose a significant challenge to a theory that ties liability in Equity to moral wrongdoing? It is hard to tell without a complicated empirical research that takes into account cases settled outside court on the basis of the rule. But it is telling, I think, that textbooks and treatise on the subject cite only one seminal HL that dates back to 1967; one would think that a question as delicate as that, especially given the 3:2 division in the HL would make its way to the court a few more times if more innocent fiduciaries found themselves liable to their principals. But maybe the mere existence of a strict responsibility at the heart of a central doctrine of Equity is enough to unseat an account of equitable responsibility as means of tackling unconscionability? I wish to argue that in the case of fiduciaries there are good enough reasons from conscience to relieve the principal of the duty to prove that the fiduciary knew about the possibility of conflict; strict responsibility is thus the morally superior choice for the law to make in this instance.

In the normal case of a dispute over liability in Equity, the parties are taken as formally equal in their ability to summon the evidence needed to support their case. This is a requirement of justice that is necessary for the legitimacy of placing the burden of proof on the claimant. But in fiduciary relationship equality between the parties (in that respect) is by definition impossible. For the whole point of the fiduciary relationship is the ability to cede control over an aspect of one’s life with the reassuring knowledge that the person who takes the reigns will only use the powers given to her to promote the principal’s good, not her own. Can you expect a patient under anaesthetic do give evidence on what went on in the theatre during the operation?

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24 Katz, 'Conscience with a Filter'; FN 20, Miller, 'Conscience and Justice In Equity', section 2
25 Boardman v Phipps [1967] 2 AC 46 (HL)
26 Another HL case that is often cited to support the rule (Regal (Hastings) Ltd v Gulliver [1942] 1 All ER 378) in fact featured fiduciaries who were far from innocent, see Richard Nolan, 'Regal (Hastings) Ltd v Gulliver (1942)' in Charles Mitchell and Paul Mitchell (eds), Landmark cases in equity (Hart Publishing 2012), p.517
circumstances of the principal are very similar: having entered a relationship in which he trusts the fiduciary to act for him without the need to gather information and supervise her, the ordinary law of evidence would be totally unsuitable to achieve justice if he has a complaint her, as he would be required to show that profits that were generated in an environment he has neither expertise in nor control over actually belong to him. It is, I think, a clear case where the person in whom the claimant trusted to run his affairs for him cannot in good conscience insist that the claimant proves that she acted in a (potential) conflict of interest and had an illicit state of mind while doing so. It is difficult enough for the principal who entrusted his affairs with the fiduciary, thus placing her in a position to seed evidence, cook the books and conceal information, to demonstrate a (potential) conflict of interest; the fiduciary who thus acted cannot in good conscience expect him to establish in addition an illicit state-of-mind which is an element that is notoriously difficult to prove (or disprove). Thus, from the point of view of conscience, casting the net in a way that will catch some innocent fiduciaries is a necessity. The case for reducing the principal’s burden of proof to the factual element of (potential) conflict of interest by forgoing the demand that he demonstrates notice on the part of the fiduciary is also supported by strong considerations of efficiency. But this overdetermination should not blur the fact that considerations of justice can, on their own, justify the strict nature of fiduciary responsibility. The rule of Equity that fiduciaries who acted in conflict of interest are liable to hand over any profits to the principal regardless of their state of mind when doing so is perfectly in line with the idea that equitable liability is expressive of obligations of conscience.

The reluctance of Equity to impose a legal duty of easy rescue poses a different kind of challenge to the thesis that Equity acts to promote the legal ideal of Accountability Correspondence. The Common Law, in striking difference from morality and civil law systems, famously refuses to enact a duty to engage in easy rescue. By falling in line with the Common Law in this instance, says Katz, Equity partakes in maintaining one of the most conspicuous gaps between legal and moral duties. For The duty of easy rescue is a piece of morality which, like the link between responsibility and bad intentions, should form part of any body of law that is bent on promoting accountability correspondence. From the fact that Equity leaves the Common Law to stand out as a system in which people are not under a legal duty to make even a minimal effort to save the life of their fellow human beings, Katz learns that Equity is not in the business of aligning moral and legal duties. I believe that this conclusion is too quick. In the book Equity

28 Katz, 'Conscience with a Filter' P. 10 around FN 20
is taken as it comes, i.e., as operating in the fields of property, contract, unjust enrichment and civil remedies, but not in tort or criminal law. I make the argument that Equity did not venture into tort because in of tort, the Common Law does not show anything like the ROL obsession that marred its performance in fields like property and contract. Tort law, with its flexible principles that seem to follow moral norms quite closely and resist creative compliance, did not call out for external intervention to close dangerous gaps between legal and moral norms. The domains in which Equity is active are, in sharp contrast, doing poor job at balancing the legal ideals of the rule of law and accountability correspondence.

The stark difference in that respect between tort and contract law seems to be a fixture of our legal system. Thus, in demonstrating loyalty to the ethos of Smith v. Hughs, the UKSC decided in Arnold v Britton that a strict verbal interpretation of a contractual obligation to pay a service charge is appropriate, even when it meant that the service charge was to increase exponentially by 10% every year and reach £550,000 (!) by 2072.²⁹ Out of the five judges, only Lord Carnwath considered the consequences of the lessor’s interpretation to be so commercially improbable that the small ambiguity in the wording of the clause was enough to reject it. The other judges were willing to allow considerations of clarity and predictability to produce a result that would be perceived by many members of public as morally wrong. In an extra-judicial speech, Lord Newberger explained his reasons for the decision thus:

When it comes to the sort of issue raised in Arnold, I believe that a common law judge has to harden his or her heart, and to bear in mind that, while a decision on an issue of principle in a particular case will undoubtedly affect the parties in that case, it is very likely to affect many more people who are in a different and unknowable position. I come back to the fundamental importance of the law being certain, or, perhaps a better word, predictable…. As Professor Glanville Williams once said, “[w]hat is certain is that cases in which the moral indignation of the judge is aroused frequently make bad law.”³⁰ It is exactly such dangerous and unnecessary hardening of heart that Equity is set against. In such cases, as Sir Geoffrey Vos (Chancellor of the High Court) explains extra judicially, the ‘hard black-letter approach to contractual construction [and the hardening of] one’s heart to the injustice that that conservatism may cause’ should be replaced with

²⁹ Smith v. Hughes (1871) LR 6 QB 597 9 (famous for the assertion that ‘the question is not what a man of scrupulous morality or nice honour would do under such circumstances’, per Lord Cockburn); [2015] UKSC 36 ³⁰ David Neuberger, Express and Implied Terms in Contracts (School of Law, Singapore Management University 2016) sec.18.
a more flexible view of the law of mutual mistake rectification, which had been well-settled for many years… [for] it is better to interpret a written agreement in accordance with what the parties must obviously have agreed as judged from the other terms of the contract and the admissible factual matrix, rather than rectifying a contract for mutual mistake to say exactly the opposite of what one of those parties would or could ever agree.\[^{31}\]

The differences between this hard-nosed approach in contract law, and jurisprudence of the standard of negligence could not be more striking. Perhaps the Courts of Equity were too cautious in delineating the perimeter of its jurisdiction, and as a result missed local opportunities to bring the law in line with morality, like duty easy rescue. But generally speaking, the choice taken by the courts of chancery to leave tort law to its own devices attests to the corrective role assumed by Equity; when common law performs the job of balancing the legal ideals of rule of law and accountability correspondence, Equity sits back. We should look for the underlying principles of Equity in the areas where fixation on clarity and predictability threatens to derail the law from its quest to balance the ROL with the aspiration to align legal norms with the moral norms that govern the circumstances of the claim.

Moreover, in areas in which Equity \textit{does} operate, it enacted a duty of easy rescue.\[^{32}\] The equitable duty to alert another person to a mistake he is making about your property right, aka acquiescence proprietary estoppel, is a very rare (if not a single) example of a duty to easy rescue in English system. In Equity, an owner who learns that another person is relying to her detriment on a mistaken view about the owner’s right, will come under a duty to act to correct this mistake.\[^{33}\] Getting over a deeply entrenched reluctance on part of English law to instruct people to go out of their way and save other people, Equity pegs the legal duty of owners to their moral duty when, at a small cost to themselves, they can save a fellow human being from misfortune. The thorny issue of a legal duty to rescue may cast doubt on the wisdom of the conservative manner in which the Chancery Court chose to cast its jurisdictional net. But given their singular willingness to enact the moral duty within the jurisdictional boundary they set to themselves, the case of the duty to rescue \textit{supports} the thesis that Equity is out to promote accountability correspondence.

\[^{31}\] Geoffrey Vos, \textit{Contractual Interpretation: Do judges sometimes say one thing and do another?} (Canterbury University, Christchurch 2017) sec.47
\[^{33}\] Ramsden \textit{v} Dyson [1866] LR 1 HL (HL)
3. Is the morality of equity thick or thin?

If Equity is a device for injecting morality into law, to what extent, if at all, is this morality restricted by the values promoted by the legal norm at hand? Is the moral duty to which Equity fastens the legal duty completely independent, or is it bounded by what the legal norm sets out to achieve? This distinction between ‘thick’ and ‘thin’, or ‘internal’ and ‘external’ morality is invoked by Klimchuk and Bray, both of whom wonder where the book stands with respect to this question. According to Klimchuk’s version of the dichotomy, ‘[i]f the morality of Equity is external, its subject matter is the same in a particular case as the relevant area of common law to which it is adjacent (e.g. property), and it is expressed as a set of substantive first-order rules or principles. If the morality of Equity is internal, it is in a sense about (the common) law, and can be expressed in formal terms as a set of second-order principles or rules.’ The book, according to Klimchuk, equivocates about the sense of morality that is employed by Equity, as ‘in some elements of Samet’s account the virtue of accountability correspondence upholds an internal morality and in others an external one’. This may look as a problem of coherence or indeterminacy, but as Klimchuk observes, it makes perfect sense to argue, as I do, that different doctrines of Equity appeal to morality of different waste size – some are thick, other thinner. But while I agree with Klimchuk about the viability of the mixed model, I wish to comment on two applications of the external/internal dichotomy to the morality that operates in two of the doctrines discussed in the book: proprietary estoppel and clean hands.

With regards to the moral duty at the basis of liability in proprietary estoppel, namely, to compensate for detrimental reliance on one’s expression of commitment (LPO), Klimchuk finds that ‘the morality to or with which a doctrine of positive law must correspond to exhibit the virtue of Accountability Correspondence in an external morality’. In my view, however, the explanation offered in the book of the moral norm that operates in PE is a case of what Klimchuk calls ‘the integrated account’ in which external and internal moralities work in tandem. For Equity is not a straightforward conduit for importing moral norms into the law. Rather, it aims to close those gaps between moral and legal responsibility that are justified by Common Law judges as a necessary ‘hardening of the heart’ that is required for implementing the legal ideal of ROL. Where it intervenes in the parties’ common law rights, Equity restores a lost balance between the pursuit

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35 Klimchuk, ‘Two Moralities of Equity’ FN 10
36 Ibid open section 2
37 Ibid p.10
38 Ibid p.7
of ROL and the no less ideal state-of-affairs in which legal and moral norms coincide. Thus, the LPO duty is enforced on defendants who would be allowed by the Common Law to disown the moral ramifications of their commitments only because these were not made formal. And so, while the obligation enforced by Equity to compensate people who relied on your representation for the damage they incurred in doing so is indeed external, the reason why the Courts of Equity move to enforce it is specific to Equity in that it acts as an auxiliary mechanism that ensures that the legal system adopts the right balance between incommensurable legal ideals. The justification for Equity’s intervention is double-layered, comprising of a moral norm that applies equally inside and outside the law, and an explanation of why the state acts within its authority to enforce it which is given with reference to a standard of excellence which legal systems should strive to approximate. Going back for a minute to the duty to rescue, I wonder whether even if Equity had been active in tort law, it would find a similar external morality hook on which to hang such a duty. For while the moral duty of easy rescue is crystal clear, in what way is the person who failed to obey it taking refuge behind lofty ideals of ROL? In refusing to enact a duty to rescue the Common Law expresses commitment to political ideals of liberty, while the Rule of the law is not a focus of this particular decision not to use the state’s power to enforce one’s moral duties on him. It is hence difficult to see how Equity could intervene in the parties’ Common Law rights in the case of duty to rescue, given its mode d’emploi.

Another area in which it is complicated to pin down the sense of the moral norm that is in operation is the doctrine of clean hands. The place of clean hands in the large scheme of Equity is exceptional, and so is its relationship with the legal ideal of accountability correspondence. In its pre-fusion version, i.e. when clean hands requirement applies strictly to claims in Equity (and ex turpi operates in claims in Common Law), the doctrine is a case of ‘equity acting on itself. 39 In the pre-fusion version, the reasons for restricting the claimant’s options, while they are expressive of Equity’s commitment to the incorporation of moral duty into the law, are different from the reasons that operate in first-order doctrines. For, as Klimchuk and Katz argue, the party whose rights are curbed by Equity – the claimant – is not trying to use a hyper-ROL-promoting interpretation of her common law right to get away with breach of a moral duty she owes the other party. But the fused version of the clean hands doctrine that I discuss in the book, where the requirement applies to claims in common law is different. Here, I think, Equity operates much closer to its ordinary modus operandi; or, to use Klimchuk’s terminology, the fused version is an example of the integrated model, where thin and thick morality operate in tandem. In the fused

39 Katz, ’Conscience with a Filter’ FN 32/3
version, the clean hands requirement is often applied to claims for restitution. The Common Law (via the *ex turpi* doctrine) would only lower the barrier and block the claim if the claimant’s conduct around the matter at hand involved illegality. However, as is abundantly clear, not each and every illegality will suffice to rule out restitution. Even a criminal offence with serious sanction, like use of inside information, may not be enough to bar the claimant from getting restitution.

When Equity steps in, the picture changes as a new factor enters the equation: the moral wrongness of the claimant’s conduct. Going beyond the severity of the legal sanction that attaches to the claimant’s action, the court is called upon to examine the gravity of the *moral* wrongdoing that the claimant’s conduct involved. As the example of the lease of premises used to run a brothel shows, there may well be a deep mismatch between the seriousness of the criminal offence – as measured through the applicable sanction(s) – and the depth of the moral wrong it involves. Faithful to its commitment to aligning legal and moral norms, Equity allows judges to pull their hands off claims that involve deep immorality regardless of the price tag attached to the offence by the law. And so, while the doctrine of clean hands works on a secondary level, in the sense that it directs the actions of judges, not of litigants, the morality it invokes has the combined thick/thin structure that is familiar from other doctrines of Equity: it appeals to independent moral standards to evaluate the claimant’s actions, but it also works on the meta level in stirring the law away from a narrow test that pegs the courts’ discretion to the gravity of breaching *legal* norm, unto a wider test that takes into consideration the moral wrong that lies at the heart of the defendants action. The tests most clearly come apart when a moral wrong committed by the claimant was not even criminalised, but as the example of the premises used for brothels demonstrates, the result under the clean hands doctrine can be different from that arrived at by means of the *ex turpi* rule even with regards to criminal action.

4. Fusion

The last line of critique I would like to address concerns the form of fusion that is excluded by the thesis advanced in the book. Fusion projects come in many shapes and sizes. A sharp dichotomy between purely procedural and substantive fusion is not faithful to the reality of the process in a court of law, as the way the case is pleaded spills over to the content of the claim.41 But even within substantive fusion there is a wide continuum in terms of the breadth and depth of the merger.

40 *Patel v Mirza* [2016] UKSC 42
41 See Turner, ‘Fusion and theories of equity in common law systems’ pp.19-23
between Equitable doctrines and neighbouring Common Law ones. In his paper, Bray raises a concern that Equity, as it emerges from the book, can still be the subject of one type of fusion which he calls ‘sympathetic’: ‘An equity that consists of conscience and standards is one that can be assimilated without much difficulty into law’. A ‘sympathetic’ fusion project is based on a view that equity is ‘an instrument for accomplishing a goal, one that might be accomplished without equity at all, if only equity’s language and dispositions could be fully taken on board by law’. Applying this to the thesis advanced in the book, Bray concludes that ‘we could get to the same destination—accountability correspondence achieved through conscience and standards—no matter which route we take, and so the route itself would become a matter of indifference. Ergo, fusion’.43

I am happy to admit that a certain degree of mingling between Common Law and Equity is a welcome development of the law. Moreover, if all the targets set by an equitable doctrine can be achieved in a fused doctrine that is significantly better than its composites, then we should embrace the fused new doctrine.44 Undue influence and unconscionable bargain may be good candidates for fusion of that kind.45 But presumably, what Bray has in mind is a wider fusion project in which fundamental principles that underlie the entire system (or at least private law) take over the tasks Equity sets for itself (at least according to the book). One such principle can be ‘abuse of rights’. A right is abused when it is ‘formally exercised in conformity with the conditions laid down in the rule granting the right, but where the legal outcome is against the objective of that rule’.46 The principle is widely legislated in civil systems, but was never accepted (explicitly) in the Common Law world.47 The affinity between Equity and doctrines like abuse of right or good faith is conspicuous.48 This short note is not the right forum for a detailed comparison between Equity and its Civil counterparts. But I certainly believe that such examination is worthwhile and should be conducted in light of the goals Equity is set to achieve. The same goes

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42 Bray, 'A Parsimonious Equity'? FN 20
43 Ibid, p.6
44 The improvement must be significant though. For the normativity of tradition prescribes that we keep to the way things are done here, unless the replacement is considerably better than the current state of affairs, see Irit Samet ‘The normativity of Equity as a Tradition’ (forthcoming).
45 David Capper, "The Unconscionable Bargain in the Common Law World' (2010) 126 LQR 403
47 See for example, Articles 226 & 242 of the German Civil Code, Article 3:13 Dutch Civil Code. Larissa Katz has argued that the principle is in fact operating in Common Law albeit under disguise of legal rules that are best explained as giving effect to it, see Larissa Katz, 'Spite and Extortion' (2013) 122 Yale Law Journal 1372;
for local fusion projects. If a doctrine of common law is infused with conscience-based standards, flexible principles and other relevant characteristics of Equity it may well be a worthy substitute to a state of affairs where two separate doctrines – one that originated in the courts of common law and one conceived in chancery – operate on pretty similar sets of facts.

However, if the equitable aspect of the new doctrine is taken seriously, namely if it brings to the new setting all the baggage that reference to conscience and other characteristics of Equity carry according to the book, I am not at all sure where (if at all) such merging project lies on the continuum of fusion. Given a full administrative fusion (as in England & Wales) what is the difference between such ‘sympathetic’ fusion, and the current state-of-affairs, namely, Common Law with equitable gloss? take section 9 of the Wills Act 1837. We could add a sub section that would say something like ‘if a testator orally instruct another person that they wish to pass property to them to hold on trust for an intended beneficiary, the property shall pass on trust for the intended beneficiary on the testator’s death even if only a bequest to the purported trustee is mentioned in the will’. If such exception is sympathetically interpreted in light of the precedents on (fully) secret trusts as an obligation that ‘fastened upon [the apparent heir] conscience’, then, from the perspective of the book, there would be nothing wrong with this merger of Common Law and Equity on this occasion. But that, I dare say, is hardly the fusion that Worthington, Burrows, Langbein and other pro-fusionists dream of. A fusion that is so sympathetic to Equity seems to me to be a little more than an exercise in clarification of an exception to the Common Law rule, which, as precedents accumulate, became an alternative rout to acquiring a right in the first place. In the context of secret trusts, what started as sporadic imposition of conscience-based obligations on cunny heirs apparent, is now the basis of legal advice to testators who do not wish their gift to be made public in probate. An incorporation of the equitable doctrine of (fully) secret trust into the common law of wills, would be an auspicious systematisation of a thorny area of law. Both Equity and the common law (or, rather, the goals each serves) will benefit from such move. But I am in doubt whether such new piece of law that has taken on board ‘accountability correspondence achieved through conscience and standards’ lies anywhere near the dangerous side of the fusion continuum.

49 ‘No will is valid unless:
1. It is in writing, and signed by the testator, or by some other person in his presence and by his direction.
2. It appears that the testator intended by his signature to give effect to the will.
3. The signature is made or acknowledged by the testator in the presence of two or more witnesses present at the time…’

50 Lord Hatherley in McCormick v Grogan (1869) LR 4 HL 82

Ramsden V Dyson [1866] LR 1 HL (HL)
Smith v Hughes (1871) LR 6 QB 597
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