

Falstaff and the Highwaymen: Equity as Outlaw

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There was once a foolish highwayman who resolved to rob travellers upon the public road and give the plunder to the poor. He said to himself, "for this venture I will borrow a hood, a horse and a gun from some rogue, in return for which I will promise him one half of the fruits of my robbery. In truth the rogue will get nothing of the spoils, for the poor will have it all; and I shall keep the hood, the horse and the gun for myself, for no court will enforce the rogue's bargain against me". When the rogue heard that the spoils were given to the poor, he sued the foolish highwayman for the return of the hood, the horse and the gun. He told the judge, "I entrusted this foolish fellow to hold the hood, the horse and the gun while I made a journey to a far off place. I did not know of his wicked design. Although he seems now to hold them as the true owner, I say that he holds them on trust for me, and I claim my title to them in equity". The highwayman was aghast: "but you bargained that I would keep the hood, the horse and the gun in return for half the spoils of the robbery". The rogue denied this: "you may say so, but I say that no such bargain was made; and if it had been made, you have not performed your side of it". The judge frowned and donned a black cloth upon his head. To the highwayman he said, "you have admitted that the hood, the horse and the gun belong to the plaintiff here; so he shall have them. You hold them in law, but he owns them in equity; it is a trust. You admit also that you have robbed travellers upon the public road; so you will this day be hung from a tree in accordance with the law". The foolish highwayman raised his arms to heaven and cried, "I acted in accordance with a higher equity, for my only design was to steal from the rich to give to the poor and to trick a rogue out of his goods. Is it not a maxim of this court that equity sees as done that which ought to be done?" The judge nodded, "Aye, so it is, but equity sees as done that which ought to be done in accordance with the law, for equity is only a branch of the law. But let it not be said that this court is unyielding. Since you plead a higher equity, you shall be hung from a higher branch of the tree".

The moral of the fable of the foolish highwayman is that the force of law cannot be deflected by appealing to transcendental notions of equity. Equity will soften the hard edges of the law, but always in conformity to the law. Aristotle’s metaphor of equity as a leaden rule, which bends to conform to the rigid contours of the law still holds good. The rule bends, but does not break. Legitimate equity does not break the rules, but merely fills the gaps between them or softens them by the admission of limited exceptions. All this means that there is an inevitable disjunction between the aspiration that equity should transcend the law, and the reality of equity’s operation as an internal feature of the law. This disjunction between equity within the law and equity above the law has been subjected to scholarly analysis over the course of many centuries, but relatively little attention has been paid to the possibility that there might be a similar disjunction between equity within the law and equity beneath the law. Equity beneath the law would include the fair-division of proceeds of crime amongst thieves. The foolish highwayman in the fable was correct in his assumption that no court will enforce an equitable bargain of that sort, so it must be enforced according to the outlaws’ own brand of equity; that so-called “honour amongst thieves”. The present study considers both equity above the law and equity beneath the law. We will see that each aspect encounters in different ways the fundamental conflict between equity out with the law, and equity within the law – between equity as outlaw and equity as the keeper of the law.

Equity as Outlaw

Equity as outlaw exists above the law and below it. When outlaw equity is above the law it is the personification of a subversive ideal of distributive justice. In this form it is the

revolutionary principle of taking from those who have to give to those who have not. It does not respect private property but invalidates it in the pursuit of an alternative conception of public good. It echoes the communism of Karl Marx in which private, “bourgeois” property is abolished¹ and replaced by a system of wealth distribution which takes from “each according to his ability, to each according to his needs”.² It also echoes Proudhon’s allegation that property is theft,³ and since property is theft, theft of property may be proper. It is the equity of revolutionaries and Robin Hood. It is not justice according to law, but justice contrary to law. It must therefore defeat the law or be itself defeated. This is the equity asserted by the foolish highwayman in our tale. Since he did not overcome the law, he was overcome by it. In contrast, when outlaw equity is below the law, it does not aspire to any transcendental ideal, but merely operates as a convenient system of wealth-distribution amongst outlaws *inter se*. As John Locke observed:

“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”.⁴

Equity as keeper of the law

Equity as keeper of the law is a personification of equity as an internal dimension of the law. It supervises and corrects the law as a parent might supervise and correct a child. To return to the metaphor of the tree, it is equity as a branch of the law. Where the branch is

¹ Karl Marx, *The Manifesto of the Communist Party* (1848), Chapter 2: “Proletarians and Communists”.

² Karl Marx, *Critique of the Gotha Program* (1875).

³“La propriété, c'est le vol!” (Pierre-Joseph Proudhon, *Qu'est-ce que la propriété? ou Recherche sur le principe du Droit et du Gouvernement*, 1840).

⁴ John Locke, *An Essay Concerning Human Understanding* (1690) Chap.2 pt.2.

old, it tends to become rigid and over time the equity branch may be almost indistinguishable from the common law. The best example of this phenomenon is the trust. The rogue in the fable of the foolish highwayman recovered his hood, his horse and his gun under a trust, and the foolish highwayman’s appeal to higher and lower equity could not deflect the court from its respect for the rogue’s equitable entitlement. The rogue did not seek the court’s discretion in the matter, but claimed as a matter of right. Where an equitable branch of the law is young, it is flexible; as it grows into new territory it develops cautiously through the discretion of judges and is careful to find a route between established branches of law and equity. In this growth stage, equity does not seek to remove or revolutionise the law, but gently and gradually reforms it in accordance with the maxim, “equity follows the law”.

Equity stirring

The basic distinction between equity within the law and equity out with the law is only as true as it is basic. The relationship between equity and law is inevitably more sophisticated and more subtle than the dichotomy of “inside and outside” would suggest, and a great deal of the subtlety has its source in the fact that equity within the law aspires (or purports to aspire) to ideals of equity above the law. The perennial fascination of the idea of equity lies in the fact that it never stays still. It is perpetually dynamic and perpetually dramatic because it exists in perpetual tension between the extremes of subversion of law and subservience to law. This subtle relation cannot be defined in terms of legal science, but it can be appreciated by means of humane arts. It is for this

reason that it is useful to resort to the fable of the foolish highwayman. The fable demarcates the perimeters of equity, placing transcendent equity at one pole, equity between thieves at the other pole and equity within the law, including the rigidity of equitable property rights, at the equator. To explore the rest of the territory is the work of a life-time, but we will find that Falstaff and other fabulous felons have done some of the work for us.

Falstaff's Appeal to Equity on the Road by Gadshill

I have argued elsewhere that the peregrination of equity across the fields of human culture can be compared to the peregrination of a falcon and that the processes of law can be compared to the capture and taming of the falcon.⁵ Where the law succeeds, Falstaff fails; but it is not for want of trying. He attempts to catch the falcon at every turn. This is the nature of Falstaff, to fetter all things to his own freedom. He is a hawker, a hunter, a “literal poacher of deer...a metaphoric poacher of wives”.⁶ In the scene of Falstaff's robbery on the road by Gadshill in *I Henry IV*,⁷ in which Falstaff begins as the robber and ends as the robbed, Falstaff appeals to large and liberal notions of equity, but only to enthrall the concept to his own base advantage. Falstaff's use of the word is the subject of an entire book: *Falstaff and Equity: An Interpretation*.⁸ What the book does not observe is that on every other occasion on which one of Shakespeare's characters utters “equity”,

⁵ (2007) 1 *Law and Humanities* 140 (book review of Mark Fortier's *The Culture of Equity in Early Modern England*).

⁶ Edward Berry, *Shakespeare and the Hunt: A Cultural and Social Study* (Cambridge: Cambridge University Press, 2001) 138.

⁷ Act II Sc.ii.

⁸ Charles E Phelps, *Falstaff and Equity: An Interpretation* (Boston: Houghton, Mifflin and Company, 1902). This book is considered in depth below.

it has regal status: twice appearing on the lips of a king⁹, and once on the lips of a duke addressing his monarch on the state of the kingdom.¹⁰ Shakespeare’s equity seems to have that quality which Portia ascribes to its cousin, mercy. It is “mightiest in the mightiest; it becomes the throned monarch better than his crown...it is enthroned in the hearts of kings”.¹¹ In the mouth of Falstaff, equity is debased to serve the rogue’s caprice. The ignoble Falstaff appeals to equity to vindicate his false assertion that the future King Henry V is a coward; the inversion of Shakespeare’s normal usage is absolute. It will be efficient to set out an abridgment of the whole scene:

Falstaff: Where's Poin, Hal?

Prince: He is walked up to the top of the hill; I'll go seek him.

Falstaff: I am accursed to rob in that thief's company; the rascal hath removed my horse and tied him I know not where. ... A plague upon 't when thieves cannot be true to one another! ...

[Exeunt Prince and Poin...]

[Enter Travellers.]

...

Thieves: Stand!...

Travellers: O! we are undone, both we and ours for ever.

Falstaff: Hang ye, gorbellied knaves, are ye undone? No, ye fat chuffs; I would your store were here! On, bacons, on! What! ye knaves, young men must live. You are grand-jurors, are ye? we'll jure ye, i' faith.

[Here they rob them and blind them. Exeunt.]

[Re-enter the Prince and Poin.]

Prince: The thieves have bound the true men. Now could thou and I rob the thieves and go merrily to London it would be argument for a week, laughter for a month, and a good jest for ever.

Poin: Stand close! I hear them coming.

[Re-enter Thieves.]

Falstaff: Come, my masters: let us share, and then to horse before day. An the Prince and Poin be not two arrant cowards, there's no equity stirring: there's no more valour in that Poin than in a wild duck.

⁹ “[H]is yoke fellow of equity, Bench by his side” (*King Lear* Act IV scene 6); “For this down-trodden equity, we tread In war-like march” (*The Life and Death of King John* Act II scene 1).

¹⁰ “And equity exiled your highness' land” (*King Henry VI, Part II* Act III scene 1).

¹¹ *The Merchant of Venice* Act IV scene 1.

...

[As they are sharing, the Prince and Poins set upon them. They all run away, and Falstaff, after a blow or two, runs away too, leaving the booty behind...]

Most commentators agree that Shakespeare wrote the play towards the end of 1596 or early in 1597.¹² So acute was the problem, or the perceived problem, of highwaymen at that time, that in 1597 parliament passed a statute to deal with the fact that “divers lewd and licentious Persons...do continually assemble themselves weaponed in the Highways”.¹³ The wording indicates that the increasing use of pistols was a particular concern, as had been intimated in a letter from the Privy Council to the Lord Keeper and the Lord Treasurer some years earlier.¹⁴ The statute, which described itself as an “Act against lewd and wandering Persons, pretending themselves to be Soldiers and Mariners”,¹⁵ anticipates Falstaff, right down to the penultimate scene of the play where he pretends to have killed Hotspur in battle. The scene of the robbery by the road to Gadshill also contains the theft of Falstaff’s horse by Poins and this comic inversion of stealing a horse from a thief is another allusion to contemporary crime. Horse-theft had been subject to a specific statutory measure less than a decade before Shakespeare wrote his play.¹⁶ It has even be asserted that in Shakespeare’s time, “men who offered to hold travellers’ horses by the wayside not infrequently made off with them”.¹⁷

¹² It was entered in the *Stationers’ Register* on the 25th of February 1598.

¹³ 39 Eliz c. 17 (1597).

¹⁴ 4th Dec. 1575, Windsor. (*Historical Manuscripts Commission: Calendar of the Manuscripts of the Marquis of Salisbury at Hatfield House, Part II* (London, HMSO, 1888), p.123.

¹⁵ *Ibid.*

¹⁶ *An Act to Avoid Horse-Stealing* 31 Eliz c.12 (1589).

¹⁷ Charles Hughes, “Land Travel” in *Shakespeare’s England* (Oxford: Clarendon Press, 1916) vol 1 at p.208.

Popular interest in highwaymen was undoubtedly very high when Shakespeare wrote *I Henry IV*, and this was surely one reason why Shakespeare included highway robbery amongst Prince Hal's sporting diversions, despite the fact that Holinshed's *Chronicles of England*, Shakespeare's major historical source, makes no reference to it.¹⁸ The reference to the Prince as robber was probably acquired from the earlier play, *The Famous Victories of Henry Fift*, in which it appears, or from the historical writings of John Stow.¹⁹ Stowe's account, which is ultimately derived from the anonymous English translation (1513) of Tito Livio's *Vita Henrici Quinti* (1437) recites that the disguised Prince sported in robbing his own receivers only to discharge them of liability and to compensate them for their trouble when they related their misfortune to him. We should put to one side the unlikely possibility that Shakespeare had a personal interest in highway robbery on account of his having been a victim of it, which has been conjectured.²⁰

Shakespeare was not the only writer to tap the spring of popular interest in highwaymen. Robert Greene had already exploited it to great profit through various books and pamphlets including *The Blacke Bookes Messenger* (1592), the autobiography of the fictional highwayman Ned Browne. The playwright Anthony Munday, who claimed to have been himself a victim of highway robbery,²¹ seems to have been especially interested in the character of Robin Hood, who was already a popular and

¹⁸ 2nd Edition, 1587.

¹⁹ *The Chronicles of England* (1580) or *The Annales of England* (1592).

²⁰ Charles Hughes suggests that there is good reason to believe that Shakespeare was amongst a company of players robbed by the famous highwayman Gamaliel Ratsey (*Land Travel in Shakespeare's England* (Oxford: Clarendon Press, 1916) vol 1 p.208.

²¹ Anthony Munday, *The English Romaine Life* (1582).

ubiquitous character in traditional May Games plays.²² Philip Henslowe's diary reveals that in February 1598²³ he purchased a play by Anthony Munday on “the downfall of earlle huntynghton surnamed Roben hoode”²⁴ and in the same month made a down payment on a sequel, which in [due course] appeared as *The death of Robert, Earl of Huntingdon*.²⁵ Henslowe's diary also reveals that on 25th November 1598, Henry Chettle was paid to correct the first play. Neither play contains much in the way of dramatic or literary merit,²⁶ but they were successful in their time. This goes some way to supporting the theory that the theme of outlaws and highwaymen was an inherently popular one. Robin Hood also appears, in somewhat superficial form, in *Look About You*, an anonymous play written sometime between 1594 and 1600, possibly by Henry Chettle or Anthony Munday.²⁷

The 1597 statute was probably enacted for diplomatic and commercial reasons due to the relatively high incidence of attacks upon foreign merchant travellers,²⁸ but the statute would also have responded to pressure from the domestic upper classes; the traditional victims of highway robbery. The upper classes certainly shared the commoner's interest in outlaws and highwaymen, for at least one of Munday's

²² “God will not haue us occupied like little children in puppets or hobbie-horses, as players and Robin hoodes” (from L. Tomson's English translation of *Calvin's Sermon vpon the first Epistle of Paul, to Timothy* (London: G. Bishop and T. Woodcoke, 1579)): “A boy in the church, hearing either the summer-lord with his May-game or Robin Hood with his morris-dance going by the church, out goes the boy.” (from “Martin Marprelate”, *Hay, Any Work For Cooper* (White Friars, Coventry: 1589)). See, generally, W. E. Simeone, “The May Games and the Robin Hood Legend” (1951) *The Journal of American Folklore*, 64(253) 265..

²³ 1597 old calendar. The modern calendar will be applied throughout the remainder of this paper.

²⁴ *Henslowe's Diary (Part I: Text)* (London: W.W.Greg, 1904) folio 44v.

²⁵ Imprinted for William Leake, 1601.

²⁶ John Carney Meagher agrees that they are “not great drama; not even very good drama”. *The Huntingdon Plays: A critical Edition* (New York: Garland Publishing Inc, 1980)

²⁷ Fred L. Jones, “Look about You and the Disguises” 44(3) *PMLA* (1929) 835.

²⁸ J. Hall, *Theft, Law and Society* (Indianapolis: Bobbs-Merrill, 1939) 23. Cited in William J. Chambliss, “Sociological Analysis of the Law of Vagrancy” 12(1) *Social Problems* (1964) 67, 72.

Huntingdon plays was performed at Court during the Christmas festivities of 1598.²⁹ If the number of reprints is any indication, none of Shakespeare's plays was more popular during his lifetime than *I Henry IV*. Its popularity was attributable in large part to the character of Falstaff, archetype of the loveable rogue, of whom it was later written "it is impossible to hate honest Jack Falstaff...it is impossible to avoid loving him",³⁰ but one should not underestimate the general fascination with highwaymen and outlaws.

Within a few years the fashion for outlaws matured into farce, as fashions do, and in 1602 Shakespeare used *As You Like It* to send up the foppish image of the outlaw's forest idyll. In the first Act, Charles the wrestler identifies the true Duke, now usurped and banished by his younger brother, with Robin Hood. This invites the grand motif of the exiled noble, but Charles instead portrays the comic vision of the self-indulgent escapee:

"They say he is already in the forest of Arden, and a many merry men with him; and there they live like the old Robin Hood of England. They say many young gentlemen flock to him every day, and fleet the time carelessly, as they did in the golden world."³¹

In the following Act, Shakespeare shatters the indulgent illusion of the ideal outlaw with a reminder of the brutal reality, when Orlando protests that he would rather suffer life under his abusive brother than "with a base and boisterous sword enforce a thievish living on the common road?"³² It is Shakespeare, typically, who captures the ambiguity of life outside the law: that it is at once idyllic and ignominious.

²⁹ *Ibid.* p.7.

³⁰ Dr Goldsmith, *The Diverting History of Sir John Falstaff* (London: H Lemoine, 1789) introduction vii.

³¹ *As You Like It* Act I scene 2.

³² *As You Like It.* Act II Scene 3.

In the earliest versions of Shakespeare’s play the character of Falstaff was named Sir John Oldcastle, but, as is well-known, the name of Oldcastle was dropped, apparently due to pressure from the descendants of the historical Sir John Oldcastle. When Anthony Munday, Michael Drayton, Robert Wilson and Thomas Hathway wrote their own play *The Life of Sir John Oldcastle*,³³ they took the politic course of portraying Sir John in a more favourable light and they took the further precaution of publishing anonymously. However, the success of Shakespeare’s play was such that by chance or design the 1600 imprint of *Sir John Oldcastle* erroneously attributed authorship to Shakespeare. If the error was deliberate, it was a brazen attempt to jump on the bandwagon of Shakespeare’s success, a form of highway robbery one might say. If it was accidental, it indicates the popular association between Shakespeare and Oldcastle. For present purposes the play is notable for a lengthy allusion to Shakespeare’s account of the Gadshill robbery:

Sir John Oldcastle: Stand true-man says a thief³⁴...come, come, give me the money you have, dispatch, I cannot stand all day.³⁵

King Well, if thou wilt needs have it, theretis: just the proverb, one thief robs another...Falstaffe the villaine is so fat, he cannot get on’s horse, but methinks Poines and Peto should be stirring here abouts”.³⁶

The use of the peculiar word “stirring”, which is employed a bare twenty times in the entirety of Shakespeare’s plays, is surely no accident. It seems clear that at least one of the collaborative playwrights of *Sir John Oldcastle* had seen or read *I Henry IV* and the

³³ *The first part of the true and honorable historie, of the life of Sir John Oldcastle*, by Anthony Munday, Michael Drayton, Robert Wilson, and Richard Hathwaye (London: Thomas Pavier, 1600).

³⁴ Malone Society Reprints, *The Life of Sir John Oldcastle*, (Chiswick Press, 1908) line 1365.

³⁵ *Ibid.* 1380-81.

³⁶ 1382-86. There is a further reference to Falstaff at lines 1418-19.

notion of “equity stirring” had lodged in his imagination. (Perhaps Anthony Munday was the one. One may even speculate that there is a faint echo of Shakespeare’s line in Munday’s *The Downfall of Robert Earl of Huntingdon* when King John receives a supplication and asks “dost thou thinke there is one moving line to mercie here?”)³⁷ In the original Gadshill scene, Falstaff uses the word stirring to describe equity; the King in *Sir John Oldcastle* uses it to describe the Prince and Poins, with Peto taking the place of Shakespeare’s Prince. Munday might not have intended it, but his reference reveals what we should have already realized from our reading of Shakespeare’s text: that the royal Hal is the personification of true equity at Gadshill. Equity is stolen by Falstaff’s, but it belongs to the Prince. As soon as Falstaff finishes the line in which he claims there’s no equity stirring, the Prince stirs. The suddenness of the Prince’s demand for “Your money!” (so sudden, it appears *before* the stage direction “*As they are sharing, the Prince and Poins set upon them*”) suggests that the Prince is stirring not only in sport but with righteous indignation at Falstaff’s insult and with a hasty passion to undo Falstaff’s crime. The disguised Prince thus becomes a dramatic figuring of justice outside the law; akin to the nobleman in disguise that is Munday’s version of Robin Hood. When the Prince is crowned King, his first act is to banish Falstaff through the agency of the Lord Chief Justice.³⁸ He thereby removes his disguise and completes the rebuke of Falstaff, who had said in *II Henry IV*:

Let us take any man's horse; the laws of England are at my commandment. Blessed are they which have been my friends, and woe unto my lord chief justice!

³⁷ Anthony Munday, *The Downfall of Robert Earl of Huntingdon* (OUP: Malone Society Reprints, 1964) lines 1698-99.

³⁸ King Henry IV, Part II. Act 5 scene 5. See Edna Zwick Boris, *Shakespeare’s English Kings, the People, and the Law* (Rutherford, Madison, Teaneck: Fairleigh Dickinson University Press, 1978) 221.

The disguised Duke in *Measure for Measure* has something of the same quality as the disguised Prince Hal, but the Duke’s choice to disguise the law was borne of whim and not designed to reverse any wrong; the Duke’s actions therefore represent a perversion of justice rather than a perfection of it. A hood is no guarantee of virtue, as that play informs us: *cucullus non facit monachum*.³⁹ The idea that Prince Hal is a Robin Hood is emphasized in *I Henry IV*, Act Scene 4, where the Prince resolves to pay the stolen money back to the travellers. The scene contains two references to outlaws dressed on Kendal-Green, and even one reference to “tuck”, Friar Tuck being already well-known as a somewhat Falstaffian character in the traditional Robin Hood element of the May Games.⁴⁰ There are, however, significant distinctions between Prince Hal and Robin Hood. An obvious distinction is that the Prince did not steal directly from the travellers (whereas according to Stow's *Chronicles* the historical Prince apparently did). Another distinction is that the Prince is merely returning the wealth to its rightful owners, with “rightful” defined by law. Robin Hood distributed wealth amongst its rightful owners, with “rightful” defined by morality, distributive justice and (according to Munday’s play) a new egalitarian code. The point is that Prince Hal is not really an outlaw at all. He is, in fact, merely a disguised version of equity within law.

To conclude this part, we can record that equity appears in the robbery at Gadshill in a whole wardrobe of guises. There is Falstaff’s belief that thieves can “be true to one

³⁹ *Measure for Measure* Act 5 scene 1.

⁴⁰ Henry Machyn records, for example, that “The xxiiij day of June ther was a May-game, ...with spechys, and a goodly pagant with a quen . . and dyvers odur, with spechys; and then sant Gorge and the dragon, the mores dansse, and after Robyn Hode and lytyll John, and M[aid Marian] and frere Tuke”. (from *The Diary of Henry Machyn: Citizen and Merchant-Taylor of London (1550-1563)* (J.G. Nichols ed.1848), pp. 184-201.

another”, and his resolution to “share” with his fellow robbers. This is equity beneath law, which is the focus of the next section. There is also, when Falstaff laments that “there is no equity stirring”, a faux appeal to transcendental equity, to the idea that there is a higher justice abroad in the world. Then there is equity within the law, juridical equity, which the Prince upholds, but which Falstaff mocks when he derides the travellers for being simultaneously “knaves” and “grand-jurors”.

Before proceeding to the next section, we must acknowledge Charles E Phelps’ book *Falstaff and Equity: An Interpretation*,⁴¹ which is wholly devoted to Falstaff’s reference to “equity stirring”. Phelps says that Falstaff’s is referring not merely to equity in the transcendental sense (what Phelps calls the “Bible sense”⁴²) but that he is also referring to “the juridical sense of the equity of the court of chancery” and in the “professional sense of an equitable cause of action”.⁴³ Phelps acknowledges that by the time of his book, the transcendental usage had been universally acknowledged whereas the juridical usage had been unanimously overlooked. The greatest part of the remainder of his book is devoted to proving that Shakespeare had an intense personal interest in Chancery matters at the time the play was written and to proving, also, that there was, when the play was written, a widespread interest in the idea of equity because the courts were at that time considering a very significant case on the proper limits of the Chancery jurisdiction. Phelps largely succeeds in his proofs. There is a great deal of fine scholarship in his book, but one cannot help but feel that it has been misplaced. It would suffice for Judge Phelps to have observed that equity is a complex word (“quadruplex”,

⁴¹ Boston: Houghton, Mifflin and Company, 1902. (Reprinted 2002 by The Lawbook Exchange, Ltd.)

⁴² P.11. He cites Isaiah 59:14, which in the King James Version reads “And judgment is turned away backward, and justice standeth afar off: for truth is fallen in the street, and equity cannot enter”. (p.10 n.1)

⁴³ *Ibid.* p.11

he calls it)⁴⁴ and one with a contemporary legal significance, but to suggest that Shakespeare in any way intended Falstaff’s words to carry the technical legal sense of equity is, with respect, to hollow out the humour from the phrase and to misunderstand the nature of Falstaff. Phelps does not seem to get the joke, for he erroneously concedes that Falstaff’s appeal to equity “throws no light upon the Gadshill incident”. That is quite wrong. The reference throws a great deal of light on the drama, because it heightens the humour and it carries the deep theme of inverting and perverting natural nobility. To suggest that Falstaff’s words are illuminated by a knowledge of technical law, but that Falstaff’s words do not illuminate the drama is evidence of a somewhat depressing and didactic approach to the play. Falstaff is not a man who comes anywhere near to making a technical and accurate, let alone scholarly, reference to the latest legal developments. On the road by Gadshill he is a fun-loving, drunken outlaw. He might have picked up the technical sense of equity from some conversation in a tavern, but the reference to “equity stirring” is funny because in the course of a highway robbery, the outlaw appeals to a word normally reserved to the higher God-ordained justice of Kings, only to be immediately robbed by a man ordained to be King.

Finally, there is yet another reading of Falstaff’s appeal to equity which cannot be ignored. It is a cynical and troubling reading. It is the possibility that equity in the mouth of a rogue is equity in its proper place.⁴⁵ If equity really is a roguish thing, as John Selden famously argued,⁴⁶ equity is Falstaff’s native tongue. Falstaff and the falcon are one. This cynical reading would extend to pointing out that King Lear’s reference to equity is

⁴⁴ *Ibid.*

⁴⁵ Falstaff *Twice in Act 2II Falstaff says* “I am a rogue, if...”. He did not intend it to be a confession, but it will serve for one.

⁴⁶ *Table Talk of John Selden*, compiled by Richard Milward, ed. Frederick Pollock (London: Selden Society, 1927), 43.

delusional,⁴⁷ that it is “down-trodden” according to King Philip⁴⁸ and “exiled” according to the Duke of Gloucester.⁴⁹ Such a reading would, in short, turn Shakespeare into a prototype for the Chancery-cynicism exemplified by John Selden and Charles Dickens. We must, however, reject such a reading. First, because Falstaff’s reference to equity is more successful as a comic inversion than as a political critique; second, because Shakespeare wants his audience to lament the fact that equity is “exiled” and “down-trodden”, not to celebrate or to affirm it; and, third, because King Lear’s delusional reference to equity is not to be mocked, rather it symbolises the anguished search for justice which is the quest of every exiled and downtrodden soul.

Equity Beneath the Law: The Case of the Highwaymen

It will be informative to set out the entire passage from which the earlier quotation of John Locke was taken.

Justice, and keeping of contracts, is that which most men seem to agree in. This is a principle which is thought to extend itself to the dens of thieves, and the confederacies of the greatest villains; and they who have gone furthest towards the putting off of humanity itself, keep faith and rules of justice one with another. I grant that outlaws themselves do this one amongst another: but it is without receiving these as the innate laws of nature. They practise them as rules of convenience within their own communities: but it is impossible to conceive that he embraces justice as a practical principle, who acts fairly with his fellow-highwayman, and at the same time plunders or kills the next honest man he meets with. Justice and truth are the common ties of society; and therefore even outlaws and robbers, who break with all the

⁴⁷ *King Lear* Act 4 Scene 6.

⁴⁸ *The Life and Death of King John*, Act 2 scene 1.

⁴⁹ *King Henry VI, Part II*, Act 3 scene 1.

world besides, must keep faith and rules of equity amongst themselves; or else they cannot hold together.⁵⁰

In this passage Locke argues that equity amongst thieves is a practical social arrangement based on convenience rather than conscience. This sets down a simple truth, but it raises a troubling question: is equity within law more akin to the convenient equity of the thief or to the conscientious equity of revolutionaries and Robin Hood? We will have an answer to that question before the end of this paper.

When Falstaff cries, “A plague upon ‘t when thieves cannot be true to one another!” and later says to his fellow felons, “Come, my masters: let us share”, he is expounding a fundamental paradox of justice and law. The paradox is that values such as honour, truth, fairness and justice have currency even amongst thieves. It is a kind of justice that thieves share their bounty equitably. It is a kind of honour; a kind of honesty.⁵¹ Conversely, it is a kind of theft when a thief steals from a thief. In *Sir John Oldcastle*, Munday put the paradox into the mouth of the King: “theretis: just the proverb, one thief robs another”.⁵² Current law still confronts this paradox, as we will shortly see, but we will begin with the fabulous *The Case of the Highwaymen*,⁵³ which has come to be regarded as the first modern decision on the problem. The earliest judicial reference to the *Case of the Highwaymen* was Lord Kenyon’s statement in *Ridley v. Moore* that he had heard of a bill “to obtain an account of the profits of a partnership trade carried on at Hounslow, but when it appeared that the trade was taking the purses of

⁵⁰ John Locke. *An Essay Concerning Human Understanding* (1690) Chap.2 pt.2.

⁵¹ Sir Francis Bacon on several occasions uses the word honestie as an exact synonym for equity in his *Elements of the Common Lawes of England* (London: The Assignes of J. More, 1630)

⁵² Note 33 above 1382-3.

⁵³ *Everet v Williams* (1725); reported 9 LQR (1893) 197; referenced *The European Magazine*, vol. i May, 1787 p.360); discussed in W. D. Evans (ed) *Pothier on the Law of Obligations or Contracts* (London: A. Strahan, 1808) Vol. II at p. 3; and W. R. Riddell, ‘By-Gone Phases of Criminal Justice in England’ 22(4) *Journal of Criminal Law and Criminology* (1931) 517.

those who travelled over the heath, the court would not endure the Bill”.⁵⁴ For a long time *The Case of the Highwaymen* was considered to be legal apocrypha and not a real case at all. In 1875 Vice Chancellor Bacon V-C referred to it as the “*legendary* case of a highwayman against his comrade of the road for a partnership account of his plunder” (emphasis added),⁵⁵ and in 1893, Sir Frederick Pollock, having examined the story in the *Law Quarterly Review*, concluded: “We still decline to believe it and can only suppose it took rise from some otherwise forgotten jest or hoax in an Equity draftsman's Chambers”.⁵⁶ However, in the next issue of the same journal he reported that court records supported the existence of the Bill, and so this pearl of a story was found all along to have had a grain of truth at the heart of it.⁵⁷

Pollock's historical research revealed that a Bill was presented by John Everet against Joseph Williams in the Equity side of the Exchequer,⁵⁸ which was quickly dismissed with costs against the plaintiff.⁵⁹ So scandalous was the Bill that the tipstaff was ordered to arrest the plaintiff's solicitors William White and William Wreathock for bringing it.⁶⁰ They were then fined £50 each for bringing judicial proceedings into disrepute.⁶¹ According to Pollock's note, the Bill asserted that the plaintiff, who was “skilled in dealing in several sorts of commodities”, had entered into an informal partnership with the defendant after which they had “proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a

⁵⁴ Gloucester Summer Assizes, August 1797 (reported in H. Clifford, *Report of the Two Cases of Controverted Elactions of the Borough of Southwark*, London, 1802, Appendix p. 372)

⁵⁵ *Ashurst v. Mason* (1875) 20 Eq. Ca. 225, 230.

⁵⁶ 9 LQR (1893) 105, 106.

⁵⁷ 9 LQR (1893) 196, 197.

⁵⁸ Exchequer (Orders, vol. 34), Michaelmas Term 12 Geo. I, 1725 (No. 43), Saturday, October 30, 1725.

⁵⁹ 13th November 1725.

⁶⁰ 29th November 1725.

⁶¹ 6th December 1725.

gold watch” and “dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things to the value of £200 and upwards”. The Bill recites a further £2000 worth of joint profits and prays for the procedural remedy (by tradition an “equitable” remedy) of “account”. According to Pollock’s note, the Bill even contained the following very thinly disguised description of a highway robbery, which appears too fabulous to be true. Indeed, one has to believe that some mischievous clerk has finessed the wording of the Bill to ensure that the fact that we are here dealing with a highway robbery can clearly be seen. It recites that:

“there was a gentleman at Blackheath who had several things of this sort to dispose of, which defendant represented 'might be had for little or no money, in case they could prevail on the said gentleman to part with the said things;' and how, 'after some small discourse with the said gentleman,' the said things were dealt for 'at a very cheap rate.’”

There certainly was a highwayman by the name of John Everet “working” at the time (although there is, as far as this writer has been able to discover, no reference to a Joseph Williams engaged in that capacity). A John Everet is mentioned in the trial on 27th August 1725 of John Little and his wife for burglary, theft and receiving stolen goods.⁶² Everet is said to have performed the curious role of fixer or mediator between victim and the criminals. He is similarly portrayed, as being something of a reliable rogue, in the 1735 publication, *The Lives of the Most remarkable Criminals... Collected from Original Papers and Authentick Memoirs*,⁶³ so the picture emerges of someone who might indeed have been brazen enough to think there was sufficient legitimacy in his profession to attempt to enforce a roguish bargain in the civil court.

⁶² *The Proceedings of the Old Bailey* ref: t17250827-56 (1725).

⁶³ (London, 1735) Vol. 3.

It is not at all surprising that the court in *Everet v Williams* refused to entertain the claim by one highwayman for a fair account from his partner in crime, since the subject matter of the claim was the very proceeds of crime. When seeking a discretionary equitable remedy such as an account of profits from a partner in trade, the maxim of the court is that the claimant must come to equity with clean hands. The question, of course (and “fair Verona” is a most appropriate place to ask it), is this: what makes “civil hands unclean”?⁶⁴ The answer is that the clean hands maxim only applies to bar a claim where the claimant’s wrongdoing is factually inseparable from his claim. It follows that *Everet* would have succeeded had his claim been against *Williams* for an account of unpaid profits from some legitimate business. The fact that *Everet* was a highwayman or a fence or a forger in his spare time, if factually unconnected to his claim against a legitimate business partner, would have left his hands perfectly clean in the eyes of equity. Justice is in this context wilfully blind. What is more, the requirement of clean hands only applies where the claimant requires the court to exercise discretion in his favour. If *Everet* had sought to recover his property from *Williams*, the issue of unclean hands would never have arisen. One’s hands must be clean when praying for the exercise of judicial discretion in one’s favour, but they do not have to be clean when one is asserting a right to recover one’s own property. It is for this reason that the rogue in our own fable succeeded in recovering his hood, his horse and his gun from the foolish highwayman. The rogue at no stage admitted or pleaded facts which would incriminate him, so his proprietary claim succeeded without objection. The point is that the court could order the return of the rogue’s property without any risk that the court’s own proceedings might be brought into disrepute by the order. It would have been different if the rogue had tried to

⁶⁴ William Shakespeare, *Romeo and Juliet*, Act I scene 2.

recover assets which did not belong to him, but which had been stolen from a third party. That was the nature of the foolish highwayman’s claim, and we know what became of him. The following opinion delivered by the judicial committee of the Privy Council in 1960 confirms that the courts are great respecters of private property, and will ignore illegality if it has no direct bearing on property rights:

There are many cases which show that when two persons agree together in a conspiracy to effect a fraudulent or illegal purpose—and one of them transfers property to the other in pursuance of the conspiracy—then, so soon as the contract is executed and the fraudulent or illegal purpose is achieved, the property (be it absolute or special) which has been transferred by the one to the other remains vested in the transferee, notwithstanding its illegal origin . . . the transferee, having got the property, can assert his title to it against all the world, not because he has any merit of his own, but because there is no one who can assert a better title to it.⁶⁵

The relatively recent decision of the House of Lords in *Tinsley v Milligan* demonstrates just how reluctant judges are to allow criminality to disturb property rights.⁶⁶ 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

⁶⁵ *Sajan Singh v. Sardara Ali* [1960] AC 167 at 176, PC.

⁶⁶ [1994] 1 AC 340, HL.

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 *legal* entitlement should be left undisturbed—following Lord Chancellor Eldon’s longstanding exhortation to ‘let the estate lie where it falls’.⁶⁷ Applying that approach to the facts of *Tinsley v. Milligan* would have confirmed Tinsley’s legal title unencumbered by the equitable interest claimed by Milligan. For Lord Goff the defendant’s claim to be entitled in equity ought to be denied because she had not come to equity with clean hands. In contrast, Lord Browne-Wilkinson (with the majority) stressed that a transaction might have proprietary consequences in equity without the need to establish clean hands. His Lordship reasoned that the arrangement between the parties in *Tinsley v. Milligan* was of this sort. The defendant had acquired an interest under a trust (a resulting trust)⁶⁸ on the basis of legal presumptions that applied generally. The defendant 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 the claimant under the general law of property, quite regardless of the illegality of their joint design. Lord Browne-Wilkinson applied the so-called ‘Bowmaker rule’,⁶⁹ which provides that a party to a transaction tainted by illegality is entitled to that which property law (including equity) would

⁶⁷ *Muckleston v Brown* (1801), 6 Ves 52, 69.

⁶⁸ G Watt, *Trusts and Equity*, 2nd Edn (Oxford: OUP, 2006), Chapter 5.

⁶⁹ *Bowmakers, Limited v Barnet Instruments, Limited* [1945] KB 65.

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.

Equity Above the Law: The Equity of Robin Hood

The equity of Robin Hood is well known. It is justice contrary to law and it claims to be justice higher than the law. Courts of law enforce property entitlement according to the rights of the parties regardless of need and just deserts. Robin Hood distributes assets according to needs and just deserts regardless of juridical entitlement. He robs from the rich to give to the poor. He takes from each according to his ability to bear the loss and gives to each according to his needs. It is no surprise, then, that Robin Hood became such a popular character, except, perhaps, amongst the propertied classes. The claim that courts do not enforce property entitlement in accordance with the parties' just deserts might seem doubtful. The claim would be wrong if juridical, court-based justice were absolutely just, but in the context of claims to property, juridical, court-based justice is not absolutely just. The very nature of the just resolution of a property dispute is that the justice of the outcome is assessed against the legitimate allocation of property rights without regard to the possibly conflicting allocation of benefits according to need or desert. The very fact that property rights may be inherited demonstrates that proprietary rights in law respond to the call of entitlement rather than to the demands of need and desert. A further illustration is the fact that when a man owns a house in his sole name, the woman who lives with him for twenty years and bears his children has no automatic

entitlement, if she is not his wife, to a share of the house in the event of their relationship breaking down.⁷⁰

The iniquity of equity within law is nothing new. When Shakespeare wrote I Henry IV, the law operated in a quite opposite way to Robin Hood, for if a traveller was robbed, the common folk in the locality would be required to compensate the traveller. There was communal liability for the robbery, rather than communal enjoyment of the spoils. This was a consequence of the Statute of Winchester (1285),⁷¹ which required local inhabitants to assist in the apprehension of felons and reasoned that if they did not apprehend them, they must be treated as “receivers or abettors of felons”.⁷² It is entirely sensible to suppose that Robin Hood’s evolution from common criminal to loveable rogue was a direct popular reaction against the legalised injustice of this Statute. The statute might have inclined the common folk to hate outlaws, but one imagines that they would have felt a closer kinship with the downtrodden outlaw (real or imaginary) than to the authorities who no doubt appeared to use local crimes (real or fictional) as an excuse for taxation.

When hearing one action upon the Statute of Winchester in 1576-7,⁷³ Manwood J recalled another:

“when I was a servant of Sir James Hales, one of the Justices of the Common-Pleas, one of his servants was robbed at Gadds Hill, within the hundred of Gravesend in Kent, and he sued the men of the hundred upon this statute; and it seemed hard to the inhabitants there, that they should answer for the robberies done at Gads Hill, because robberies are there so frequent...”

⁷⁰ *Burns v Burns* [1984] Ch 317, Court of Appeal.

⁷¹ *13 Edw. I of Winchester*, 8th October 1285.

⁷² *Action upon the Stat. of 13 E. 1 of Winchester* (19 Eliz. 1576-7) 2 Leonard 12; 74 Eng. Rep. 317 (In the Common Pleas), per Manwood J.

⁷³ *Ibid.*

The Statute of Winchester also authorises law enforcement officers to commandeer horses to assist in the pursuit of felons (the medieval precedent for the modern-day commandeering of motorcars). This is “horse-theft” in accordance with the law; something which Shakespeare might posited at the back of Poins mind when he misappropriated Falstaff’s steed.

The Equity of Robin Hood is an externalised equity which challenges the law. A similar appeal to “equity” for the common person is set out in express terms in the tale of *How Ratsey robbed a Lawyer*. (Gabriele Ratsey was an outlaw reputed to be at large during Shakespeare’s day.) Having robbed the lawyer, Ratsey challenges the lawyer to consider that a highwayman might exercise a higher equity than a lawyer:

thou art worse then I, that take it by the highway, for let me meet with a poor man, and take his money, if I perceiue him indigent, and needy I giue it him again, & somewhat back to boot, but you picke euerye poore mannes pocket with your trickes and quilletts... Yet I must needes say, there are some among you verye vpright and of good Conscience, that will not take fees on both sides, that wil not leane more to the one partie then the other. But euen as Equity requires, and will be as comfortable with their councell to a poore cottage-keeper, that comes in Forma Pauperis, as to a riche Farmer that brings with him a ful-fed fee. And it may be that thou art one amongst them fewe.⁷⁴

Gabriele Ratsey is like our foolish highwayman. His appeal to higher equity was hung with him in 1605, and this tale of his appears in the anonymous publication *Ratseys Ghost* published the same year. It is left to Robin Hoods and revolutionaries to succeed

⁷⁴ *Ratseys Ghost, or the Second Part of His Madde Prankes and Robberies* (1605), reprinted in *The Life and Death of Gamaliel Ratsey*, Shakespeare Association Facsimiles No. 10 (London, Oxford University Press, 1935)

where Ratsey failed. But, a word of caution: Robin Hood is successful as a representative of equity in its higher sense because he operates against bad law, and, crucially, he operates in a kingdom from which the king is absent. When royal equity is not enthroned within the law, when it is exiled, the outlaw may assume the equitable function. Falstaff's great folly was to assume that there was no true equity in the land when in fact the King was still on his throne and the Prince was still within earshot, hence his appeal to equity was suddenly cut short and in an instant his Robin Hood was transformed back into a Friar Tuck.

Conclusion

Earlier we asked whether equity in law is more akin to equity between thieves or to that higher equity which seeks justice across society as a whole. We should not be surprised to discover that the former is the case. Thieves may practice equity amongst themselves for convenient or pragmatic reasons, but in doing so they are exercising a form of equity which is not very different to that exercised by courts of law. True, outlaws overlook the fact that they are dealing equitably between themselves with regard to assets which in law belong to other people, but courts of law overlook the fact that they are dealing equitably between the parties with regard to assets which according to a higher ideal of distributive justice might belong to more needy members of society. To borrow from Locke, we might say that the difference between the two is that thieves overlook wider considerations for reasons of convenience, whereas courts overlook wider considerations as a matter of principle. After all, one ideal of juridical justice is to treat all people equally regardless of their particular circumstances, so if a rich man has a good legal

claim against an impoverished man, and all other factors are equal, the law will deliberately blind itself to the imbalance of wealth between the parties. Courts will say that higher justice does not lie in taking from those that have to give to those who have not, regardless of right and wrong, but rather to award according to right. For this the courts will find a precedent in the moral of the parable of the talents: “to everyone who has, more will be given and he will grow rich; but from the one who has not, even what he has will be taken away”.⁷⁵ This is a moral for Falstaff, for his great error was to appropriate royal equity for his own base purposes and to assume an equality of honour between himself and the Prince. In the event, to the Prince more honour was given, and from Falstaff whatever honour he had was taken away. It may seem hard upon the loveable rogue, but who will deny that in his final undoing Falstaff at last received that equity which was his just deserts?

⁷⁵ *The Gospel of St. Matthew* Chapter 25 vs 29.