Published as "The 2013 Southin Lecture: The Tyranny of Equality and the Torment of Equity" 46 *The University of British Columbia Law Review* 187

"The Tyranny of Equality and the Torment of Equity"

The 2013 Southin Lecture[1]

Gary Watt, School of Law, The University of Warwick

The Southin Lecture has been established in honour of a pioneering judge, who, when she found herself at a fork in the road of just progress, was not afraid to take the road less travelled by – to take the hardest path. I am therefore humbled to be invited to deliver the first Southin Lecture on the subject of Equity, and to be given this opportunity to suggest a new path and to start to struggle along it together. The path that I propose we should follow is the path of personal equity. As a good judge will act with juridical equity in court, so a good citizen will act with personal equity in their everyday life. In truth, the path of personal equity is a very old path but the name of equity is nowadays so entangled with notions of political equality that we can hardly see it anymore. Progress depends upon wisdom to discern the point to which an ideal of equality can take us, and the point beyond which we need the nuance of equity to assist it.

Aristotle proposed the earliest developed version of the sort of personal equity I have in mind. He named it *epieikeia*, which might be loosely translated "conduct

[1] Delivered at The Faculty of Law, The University of British Columbia, Vancouver, on 31 January 2013.

befitting context" where such conduct is in the nature of "flexible forbearance". It is a call to bear with one another in the inevitable and ongoing struggle to fit the shape of our individual lives to formal (including legal) social frames. Aristotle took the dominant legal metaphor of the straight and regular architectural rule and suggested that instead of a rigid rule we should use a rule made of lead. This is what the builders on the island of Lesbos did in Aristotle's day. They wouldn't unnaturally level the ground to receive rectilinear square stones, but would lay the leaden rule along the natural contours of the land and would carve their stones to fit the shapes presented by life. *Epieikeia* is an accommodating ethic. It is the ethic that allows someone to jump the ticket queue when their train is leaving soon and yours is not. It is the ethic that will not sue the hospital worker for accidentally spilling hot water on your hand when yesterday the hospital surgeon saved your life. The opposite to Aristotle's ethic of *epieikeia* is the character of those who insist strictly upon their own rigid rights or who would insist upon the strict imposition of unaccommodating laws.

Aristotle's aim in promoting *epieikeia* was not to reform the political justice of Athens or the juridical system of Athens, but his aim, rather, was to transform the ethics and behaviour of the individual citizen. Accordingly, we find discussion of *epieikeia* in his books on Ethics and Rhetoric rather than in his book on Politics.[2] I would argue that the essence of his approach continues to be valid regardless of the formal nature of our political and juridical systems. Wherever we find ourselves; each of us is a critic, a judge, a decision-maker. Sometimes our decisions affect only ourselves; more often than not they also affect others. I want to invite us to consider

[2] Aristotle, *The Nicomachean Ethics* book 5 ch 10; Aristotle, *The Art of Rhetoric* 1374b.

what it might mean to exercise personal equity in the way we hear, read, and make decisions and judge.

We might wonder what Aristotle's personal equity can possibly have to say about juridical equity of the sort that is practiced in modern courts – the sort of equity that we teach as a standard part of a law degree. Can there be any overlap between Chancery equity and Aristotelian *epieikeia*?[3] At first sight it seems unlikely. After all, juridical equity is required to respect precedent and to be as predictable as possible. This, some might argue, leaves no room for personal judgment on the part of the judge. Against that view I would argue that in a common law case-based system, when the language of law combines with a complex factual matrix there will nearly always be room for a variety of judgments – especially in contested cases; more especially on appeal. Decisions in the highest courts at the cutting edge of legal developments are frequently unpredictable in advance. The point is borne out by numerous recent decisions in the field of property and trusts in the UK's highest court[4] – and no doubt the experience is similar here in British Columbia and in other

[3] I have examined the relationship between juridical equity and personal equity in further detail elsewhere, with a particular focus on Aristotelian virtues. (See, especially, Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart, 2009) and Gary Watt, "Having Gods, Being Greek and Getting Better: On Equity and Integrity Concerning Property and Other Posited Laws" (2012) 9 *NoFo* 119-143.)

[4] For example, *Yeoman's Row Management Ltd* v *Cobbe* [2008] UKHL 55; [2008] 1 WLR 1752; *Thorner* v *Majors* (a.k.a *Thorner* v *Curtis*) [2009] UKHL 18; [2009] 1 W.L.R. 776; *Stack* v *Dowden* [2007] UKHL 17, [2007] 2 AC 432.

Common Law jurisdictions. In any event, even if the latitude for discretion in a case is very small or practically non-existent, or if the judge feels compelled to reach a particular conclusion, he or she has great leeway regarding the language in which their decision is expressed. An inexact comparison may be made with theatrical performance, for even if a director or actor regards a dramatic script as a posited, pre-determined and unalterable thing, they nevertheless retain great scope as regards the style of their particular performance. And style, properly understood, is an aspect of the substance of a thing.[5] I might have no choice but to tell you the disappointing news that you didn't get the job, but I have the option to tell it in a way that is humane. How I speak, changes what is spoken.

A member of the superior judiciary – as Madame Justice Southin was - might hear hundreds of cases in a professional lifetime and some notable decisions might live on long after they have retired from the bench, but each one of us here is involved on a daily basis in making judgments on the lives of others that may have long-lasting impact. Academics are sometimes accused of living in ivory towers, but in fact we are also required to make crucial decisions in the lives of others. What grade to award? What reference to write? What career advice to give? What talent to encourage? What hopes to quash? Let me give you a concrete example of the sort of practical situation that might give a university tutor a headache.

Suppose a student comes to her tutor and asks to switch from her standard three-year degree course to a course which has the attractive feature of an extra year spent studying abroad. The student is currently in her first year and wishes to join the

[5] Benjamin N Cardozo, "Law and Literature" (1938–39) 48 Yale Law Journal 489, 490 (first published in the Yale Review in 1925).

special course at the start of her second year. The student is a good student and there is space on the course, so there is prima facie no practical problem in approving the switch. The problem that presents itself is a problem of fairness. All the students already on the course are currently undertaking modules which the newcomer has not studied. The pursuit of those first year modules is by no means a substantial prerequisite for success on the special degree, but it has traditionally been a formal requirement of that course. The newcomer would by-pass that formal requirement if she were permitted to join the course in her second year. Suppose the tutor were to say, "I would love to have you on the special degree course and I know that you would love to be on it, but it would not be fair to those who are already on the course and who have already suffered a certain lack of freedom in their choice of modules". Does that decision strike a fair balance between the interests of the newcomer and the interests of the current students? Or does the decision strike us as being substantially unjust, even if it is formally justifiable? What it boils down to, I think, is that the newcomer desires to be treated differently to the current students (that is, desires that she should be exempt from the formal requirement of pursuing the first year modules), whereas the current students are assumed to desire that the door to the newcomer's opportunity should be barred by the same obstacles that they had to overcome. In summary, we can say that the newcomer desires differentiation whereas the incumbents are assumed to desire equal treatment without differentiation. If the tutor feels bound to reject the newcomer's application for the reasons just described, we can say that a particular and concrete demand for differentiation has been denied on the basis of an assumed general and abstract duty to equality. This, I would suggest, is the sort of decision that can give equality a bad name. It is a decision that is bad on at least three levels. First, because a demand for equality is attributed to the

current students even though they have not been surveyed for their actual opinions. Second, because the sort of equality that is envisaged is achieved in order to prevent the newcomer from receiving a presumptively better experience than that experienced by the incumbents. In other words, it may be termed a type of equality that in its ethic prefers to treat all parties equally badly rather than confer a special benefit on one. Third, refusal of the request is the easiest decision to make and the one that entails the least practical difficulty and cost. This leads to the suspicion that a higher degree of sacrifice and struggle might have yielded a better outcome. Some economists would say that low cost and practical efficiency indicate the most rational route to take, but we follow the ethics of the self-interested economic actor at our peril. In any event, there is a competing economic argument on the newcomer's side, for the newcomer gains from her late admission whereas the incumbents lose nothing by it.

If the scenario of the student's request were not complicated enough, it becomes even more complex when we factor in another student – let us call him the "latecomer" - who comes along after the newcomer and requests to be admitted to the special course on similar terms. We might have anticipated that such a latecomer would present himself and we might have used that possibility as a pre-emptive basis for denying the newcomer's request. The explanation to the newcomer would be in familiar terms: "I would love to have you on the special degree course and I know that you would love to be on it, but if I let in one, I have to let all in…and since I cannot admit all, I will not admit you".

If we refuse the newcomer's request and give equality as our reason without struggling to do better, I think we are using equality in a way that is tyrannical. To improve on this approach we have, in theory, at least two options. One is to say that we need to make an exception to the general rule of equality. The other is to take

equality *more* seriously by acknowledging that equality requires that like cases should be treated alike only when they are substantially and not merely formally alike. Whichever of these two theoretical approaches we prefer, they amount in practice to the same thing – which is to sustain the general rule of equality by supplementing it with an equitable response to the context in which the rule is operating. When we look closely at the case of the three students - the incumbent, the newcomer and the latecomer – we are not forced to find the sort of identity between them that would justify strict equality as a basis for rejecting the newcomer's claim. We find, in fact, that the sacrifices already made by the incumbents has guaranteed them their places in the second year of the degree; and we find that the newcomer has made a different sacrifice which is compelling in its own way, for the newcomer does not have the security of a guaranteed place in the second year and therefore had to go to the effort of imagining the possibility of a place and had to go out of her way to establish a novel opportunity and had to risk rejection and failure. The latecomer, on the other hand, has made no real sacrifice, for he is effectively piggy-backing the sacrifice and pioneering efforts of the newcomer. It is slightly more problematic if we suppose that the latecomer had never heard of the newcomer's successful attempt and had come entirely on his own initiative. Where there is equality of desert between newcomer and latecomer the usual way to dispose of scarce resources or scarce opportunities is a simple rule of convenience, such as "first come first served". Some might call that the Darwinian law of the jungle. It is, however, the only law that can serve in practice, so let us call it the civilized law of the queue. This law of the queue is especially powerful in property disputes and where such disputes occur in colonial contexts one of the arguments in favour of justice for First Nations peoples is the simple fact that they were there first.

If I might be permitted a brief digression into more traditional equitable territory, it may be interesting at this point to consider two maxims of the Court of Chancery. The first is the maxim "equality is equity" and the second is the maxim "where the equities are equal, the first in time prevails". The wisdom of the first maxim indicates that formal equality is accepted as the best available equity as a last resort, when a more nuanced equity cannot be discerned. As Mr. Justice Vaisey said in *Jones* v *Maynard*:

> I think that the principle which applies here is Plato's definition of equality as a 'sort of justice': if you cannot find any other, equality is the proper basis.[6]

The maxim "first in time, first in right" operates on a similar basis of last resort. Allocation according to priority in time is resorted to where, the equities being equal, there is no better basis on which to proceed.

The approach suggested by these maxims as a guide to equitable judgment in court supplies a rough practical guide to equitable judgment in other contexts. It suggests that we should struggle for equity as far as we can and resort to blunt default rules, such as formal equality or temporal priority, only as a last resort. None of this is to say that formal equality and temporal priority cannot be considered a sort of justice, it is only that they are rarely as substantially just as we would hope when applied in particular cases.

Suppose that we are set the straightforward challenge of dividing three identical loaves between three non-identical people. The equality of one-loaf-each is

[6] *Jones* v *Maynard* [1951] Ch 572 at 575 per Vaisey J.

only one way, and it is the crudest way, of carrying out a just division. It is crude and it is potentially cruel, for it ignores the circumstances and characteristics of the individual claimant. It does not consider where the three individuals have come from or to where they are going. Has one just eaten a meal? Is one expending more energy in the pursuit of their common good? Is one a small child and are the other two adults? A distribution of one-loaf-each might be considered just where we are ignorant of context and individual characteristics, but where we can acquire knowledge of such factors only a more nuanced distribution – an equitable distribution – can be considered just. The example of the loaves illustrates just one of the difficulties that we will face if we attempt justice on the basis of formal equality alone – namely that we will be unable to agree upon the form that formal equity should take. Aristotle pointed this out more than two thousand years ago. And even if we agree with Aristotle that a just distribution should take the form of a proportionate distribution, we are thrown on to the question "proportionate to what?" Need? Talent? Labour? Formal equality is a powerful weapon in the fight for political justice, but it is a blunt weapon - useful when bludgeoning blind, but not suitable for striking a specific target. Equality will not cut it unless it is honed by equity. To understand just how blunt equality is in its untempered form, we need only look back to the time of the framing of the US constitution, when a group of men including many who were slave-owners could declare it to be self-evident that all men are created equal. The sad fact is that, even as things then stood, their declaration had a disturbing integrity to it, for, as Aristotle (another supporter of slavery) observed: we are only legally compelled to treat as equals those who are equal before law.

We have come a long way in our efforts to populate the starting line of equality before law, but this should not disguise the fact that we are politically

selective about those who have legal standing to appear at that starting line. Even today some animals are more equal than others, which is why human rights are legally enforceable but animal rights are not. The blunt rule of legal equality is a tool in the hands of those who have the present power, whether that power is democratically founded or not, and as such it is too easily turned into a tool for tyranny. It is only with great circumspection, self-critique and doubt that we should seek to swing the hammer of equality with the force of legislative authority. If we are not circumspect, we are in danger of behaving like Procrustes, the monster of Greek myth who invited travellers to sleep on his bed and if they were too big for the fixed frame would cut them down to size.

Let me offer an example from the world of sport.

Suppose that an athlete who was born without feet runs on artificial blades instead. Now suppose that this bladerunner claims to be entitled to run in the Olympics. Not the Paralympics, but the Olympics itself. (We shall leave to one side the somewhat distinct issue of the bladerunner who wants to compete in both athletic meetings, for in that case there is an aggravated problem of determining fair access to scarce opportunities. I will also leave to one side the specific case of Oscar Pistorius, the bladerunner who was in fact permitted to run in the Olympics and Paralympics at London 2012.) If you are the person who will decide whether our hypothetical bladerunner will compete in the Olympics, you have a choice. You can have regard for the athlete's distinctiveness or you can ignore it. If you have regard for the athlete's distinctiveness you must struggle to adapt the general rule (the one that requires competitors to be equally free of artificial assistance) to accommodate this athlete's particular physique. One very nuanced way to do this would be to create a new event of equal status and with an equal prize, but for athletes who run on blades.

This is what the Paralympic movement does very well. It takes the rule of the Olympics and adapts it in as precise a way possible to the diverse physiques of a wide range of competitors. It is a beautiful sight to see the starting line of a Paralympic event made up of competitors with two arms or one arm or no arm at all. It is beautiful because it makes no pretence to be an equal race but celebrates that it is an equitable race.

Suppose, on the other hand, that we conclude that the bladerunner's distinctiveness ought to be ignored. We decide that the bladerunner will be permitted to run in the Olympics against foot-runners. Suppose that we reached this decision on the ground that differentiation would be discrimination and that equality demands that the blades should be irrelevant. Would we be guilty of preferring an easy equality to the struggle to accommodate individual difference? Would this not be the behaviour of Procrustes? Would this not be a notional cutting off every competitor's foot in order to make them fit the frame? Would we have turned equality to tyranny? And does the bladerunner who asserts a general and abstract right to equality as a route to the race show a lack of personal equity? However we are inclined to answer those questions, we would no doubt be more indulgent in a world without a Paralympic movement, for in such a world the rule of equality would be otherwise unmodified by equitable respect for difference. In such a world, to let the bladerunner compete might even be considered an equitable bending of the rules. We might also be more indulgent in the case of a true pioneering role-model (here I *am* thinking of Oscar

Pistorius),[7] provided that we are free to distinguish his case from future cases that might claim a spurious similarity to his example.

Returning to our hypothetical case, let us ask the question "what if the bladerunner went on to win the Olympic race?" We would realize too late that no artificial blade can exactly replicate the performance that an athlete would have been capable of if they had been born with feet. We would realize too late that we have almost certainly been unjust to the person who, running without blades, came second and missed out on gold. Too late, because the unbendable rule of a race is quite rightly that everyone on the starting line is entitled to the prize if they run within the rules and win. The struggle to make an equitable accommodation of difference must come, as it does in the Paralympics, before the competitors line up together.

I should qualify that last statement by saying that there might exceptionally be equitable indulgence after the race has started…but not to the prejudice of other competitors. This is why the university tutor should be willing to allow the student discussed earlier, the newcomer, to join the second year of the course even though she did not line up with the others at the start of the first year. The field of sport supplies other examples of equitable indulgence. In 2005, Liverpool Football Club won the major club competition in European soccer, The Champions League. However, they finished fifth in the domestic league that year and only four English teams could go through to the next year's European Champions League competition. The English Football Association nominated the top four teams in the domestic league and it looked, therefore, as if Liverpool, the "Champions of Europe", would miss out on the

[7] This lecture was delivered exactly two weeks before Oscar Pistorius was arrested in relation to the tragic death of his partner Reeva Steenkamp.

chance to defend that title. In the event, the European governing body accepted the nomination of the four top-placed English teams but also exercised extraordinary discretion to enable Liverpool to compete. In practice this indulgence was facilitated by a small football club from Wales that had already secured a place in an early preliminary round of the European competition. They agreed to offer their place in the competition as the prize in a special play-off against Liverpool. Liverpool played the tie and won it and went on to participate in The Champions League. The small Welsh club gained finance, fame and friends. It was a torment to find a solution to the problem thrown up by Liverpool's predicament, but the struggle produced a beautifully nuanced equitable outcome in the end.

This modern example of equity in the world of sport resembles some of the earliest recorded exercises of equity's antique Greek counterpart, *epieikeia*. We find numerous instances of *epieikeia* in the context of a Chariot race that was convened by Achilles and described in Homer's *Iliad* centuries before Aristotle developed *epieikeia* into a practical philosophy. When used in the *Iliad*, "*epieikeia"* denotes a vague sense of doing that which is proper or fitting in the circumstances. So we find that the winner of the race, Antilochus son of Nestor, offered to forego his prize to the higher status Menelaus. Menelaus responded to this gesture reciprocally by allowing the winner, Antilochus, to keep the prize. Nestor, the father of the winner, was too old to compete in person, but he was awarded one of the prizes by special indulgence. And, most significant of all (not least because the word *epieikes* is expressly employed in describing the episode), Tydeus, who came *last* in the race, was given a prize because he was the best charioteer and would have won if the intervention of a god (Phoebus Apollo) had not robbed him of victory. Achilles proposed to give first prize to Tydeus, the one who came last, but when it was pointed out that this would

prejudice the formal winner, Antilochus, Achilles agreed to award Tydeus a new prize from out of his private wealth.[8]

Here, in the midst of fierce competition and the full physical and political force of the Greek world, the poet wants us to see that the chief virtue amongst the competitors was to forego might and right in order to the achieve that which was fitting in the context. The equitable outcome was achieved only after discourse and dramatic struggle, but it was a better outcome all round than formal status and the formal rules of the race would have yielded.

Simone Weil, who read *The Iliad* as a "Poem of Force", attributes an "extraordinary sense of equity" to Homer's description of the deaths of Greeks and Trojans, for in such descriptions, she observes that "One is barely aware that the poet is a Greek and not a Trojan".[9] The idea of equity that she has in mind is a generous humane spirit that respects the individual regardless of any formal label. Some might equate that sentiment with equality, but her word – "equity" - is the better word. Equity cannot be accused of formal, levelling justice. Equity accommodates the curves. Commenting on Weil's appreciation of Homer's equity, James Boyd White observes that it is:

> an "equity" that goes far beyond impartiality between Achaean and Trojan. It is an acceptance of the conditions of existence so strong as to become a

[8] Homer, *The Iliad* book 23.

[9] Simone Weil, "*The Iliad*, or The Poem of Force" *Chicago Review* 18:2 (1965) 5-30 at 26-27. The article was first published 1940-1 in *Cahiers du Sud*.

> marvelous hospitality to life in all its forms and aspects, a love of the world itself.[10]

Equity leads to a just equality when we try to read lives to the full and to hear their whole story. We turn equality to tyranny when we insist upon an abstract legislative rule at the expense of the particular shapes of lived lives.[11]

Let us return to the Olympic Stadium of London 2012, which witnessed the wonderful sight of Saudi-Arabian athlete Sarah Attar running the 800 metres race wearing *hijab* – an open-faced headdress. She thereby became the first female athlete to represent Saudi Arabia in the Olympics. Regarded with an equitable eye, her achievement is a cause for celebration. Equity looks to the individual in their context and will bend the political rule to accommodate her shape. Even if she had worn *niqab* – the full-face veil – we could take an equitable view. What do we see when we look at the same scene with the eye of equality? The answer depends, of course, upon our particular sense of equality, but it is clear that equality is sometimes aligned with

---

[10] James Boyd White, *When Words Lose Their Meaning: Constitutions and Reconstitutions of Language, Character, and Community* (Chicago: Chicago University Press, 1985) 40.

[11] I am aware that in the province of British Columbia, the prevailing juridical notion of equality is framed in terms of substantive equality that is distinguished from the simplicity of strict formal equality. The audience of this lecture includes distinguished scholars, judges and practitioners in the province of British Columbia. I will leave it to them to judge the extent to which local juridical notions and practices of substantive equality demonstrate the virtue of equity as I describe it.

political power in a way that would not celebrate the sight of a Saudi athlete competing in Islamic headdress; more especially if the headdress is of the face-covering form. Even the European Court of Human Rights has presumed to say that the Islamic headdress "appears to be imposed on women by a precept which is laid down in the Koran and which … is hard to square with the principle of gender equality".[12] We know from actual surveys that many of the Muslim women who wear headdress have no difficulty squaring that practice with the principle of gender equality,[13] even if their idea of gender equality is not in every case one that European courts would subscribe to.[14] No country has tried harder to achieve social integration of all its citizens regardless of religion or culture than The Republic of France. The problem is that the French government has sought integration on the Procrustean basis that one size fits all. In 1991, the *Haut Conseil à L'Intégration*, put it this way:

> The French conception of integration should obey a logic of equality not a logic of minorities. The principles…[of] the Revolution and the Declaration of the Rights of Man and of the Citizen permeate our philosophy, founded on the

[12] *Dahlab* v *Switzerland* 2001-V ECHR 447, as confirmed in *Şahin* v *Turkey* (44774/98) (2007) 44 EHRR 5 (ECHR (Grand Chamber)) and *Dogru* v *France* [*2008*] *ECHR 1579.*

[13] See, for example, Katherine Bullock, *Rethinking Muslim Women and the Veil* 2nd edn (London: The International Institute of Islamic Thought, 2007).

[14] See, generally, Anastasia Vakulenko, "Gender Equality as an Essential French Value: The Case of *Mme M*" (2009) 9.1 *H R L Rev* 143-150.

> equality of individuals before the law, whatever their origin, race or religion…to the exclusion of an institutional recognition of minorities.[15]

This is the tyranny of equality. It is the French ideal of *égalité* insufficiently tempered by the French ideal of *liberté*. For an alternative view we might look to a Frenchman writing before the Revolution. Alexis de Toqueville hoped "to see the day when the law will grant equal civil liberty to all", and he warned that:

> A government can no more be competent to keep alive and to renew the circulation of opinions and feelings among a great people than to manage all the speculations of productive industry. No sooner does a government attempt to go beyond its political sphere and to enter upon this new track than it exercises, even unintentionally, an insupportable tyranny; for a government can only dictate strict rules…[16]

Harm can be caused by a good thing – a rule of law or a rule of equality – if taken to excess. A poison will sicken the appetite, but so too will a surfeit of sweet things. The maxim *summum ius summa injuria*, which was already old when Cicero used it, informs us that the height of harm is to be found not in the height of anarchy but in

[15] This translation is from Cécile Laborde, *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: OUP, 2008) 38.

[16] Alexis de Tocqueville, *Democracy in America* (Henry Reeve trans. 1899) Chapter V.

the height of formal justice. The abuse of legitimate power is an aggravated abuse, not only because it is done in the name of a good thing but because the name of democratic law makes attempts to resist its power presumptively undemocratic and illegitimate. Tyranny in the guise of law and democracy is the hardest tyranny and the hardest to resist.

The original tyrants were sometimes welcomed as rulers of early city-states. The tyrant was not democratically accountable, but he was strong. It has been observed that:

> Tyrannies were often conceded, if not encouraged, by the governed. Indeed, many seem to have arisen in Greek states because of crises serious enough to persuade citizens to surrender their political prerogatives to single, popular leaders capable of meeting their current needs. Tyrannies ended because, with the crises passed, tyrants were no longer needed or wanted.[17]

Will we recognize when we have invited tyranny, and will we realize when the time for tyranny has passed?

But let us come back home. Not to my home, but yours. I recently had the pleasure of reading Richard Dawson's forthcoming book *Justice as Attunement*.[18] In it he refers to James Tully's book *Strange Multiplicity: Constitutionalism in an Age of*

[17] Michael Gagarin and Elaine Fantham (eds), *The Oxford Encyclopedia of Ancient Greece & Rome* Vol 7 (Oxford: OUP, 2010) 133.

[18] Richard Dawson, *Justice as Attunement: Transforming Constitutions in Law, Literature, Economics and the Rest of Life* (Abingdon: Routledge, 2013).

Diversity.[19] It is, as I'm sure many of you will know, a wonderful work of contemplation on Bill Reid's remarkable sculpture *The Spirit of Haida Gwaii*, in which he communicates the richness of Haida culture as a community of marvelous characters crowded into a canoe striving through the waters. I didn't realize until a matter of days before I arrived in Vancouver to give this lecture that the second casting of that splendid sculpture would be waiting to greet me at the airport. James Tully observes that:

> The spirit of Haida Gwaii…depicts in a striking manner a specific concept of equality as equity. All members are equally recognised and accommodated, as far as possible, in terms of their own cultural identity. The result is that the constitutional arrangement of the canoe is far from uniform. The members make up an association more akin to the irregular arrangement of an ancient, custom-based constitution than to a modern, uniform constitutional association.[20]

Modern, uniform constitutions are built on the rectilinear lines of general rules, but there is hardly a straight line in Bill Reid's sculpture so far as I can see. The contrast with the straight lines of the airport ceiling is striking. The canoe is a sculpture, but it isn't a statue. Modern constitutions sometimes aspire to create a stable political State (the words "constitution", "stable" and "State" all derive from the root word "to stand"), when they should be striving to create a moving state. If we have aligned our

[19] Cambridge: Cambridge University Press, 1995.

[20] *Ibid* at 26.

rule of equality with the strict rule of law, how will we know when we have aligned it too rigidly? How will we know when we have created tyranny through excess? James Tully asks:

> How do the citizens tell if the constitutional arrangement they have reached at this point in their journey is equitable and just? There is no transcendental standard beyond the discussion in the canoe from which it can be measured…The answer would seem to be that they practice the spirit they embody. They are always willing to listen to the voices of doubt and dissent within and reconsider their present arrangement…[21]

The day may come when we will realise that we have given too much power to the State in the matter of equality, for a State can only speak in strict rules. Will we recognise that day when it comes, and will we then have the language that we need to decry the tyrant? I don't know, but I am convinced that in the meantime it is incumbent upon individuals to cultivate a better language. It is exactly forty years since James Boyd White observed that "the language of equality…is widely accepted today - so widely accepted, in fact, that it is a cliché, a dead language".[22] We need to practice a new and living language, one that will accommodate the particularities of humanity in our decisions and in our everyday dealings with others. The language of equity has life to it. It has the potential to promote personal practice that can lead to

[21] *Ibid* at 27.

[22] James Boyd White, *The Legal Imagination* (Boston: Little, Brown, 1973) 841.

and from justice and equality without being absolutely bound to the inflexible ideology of any one political ideal.

So, I come back, at my conclusion, to the point I started with: the call to each of us to struggle to exercise personal equity. It is a call to work with the oar. (I mean o-a-r, but o-r works just as well.) Charlotte Brontë's *Jane Eyre* supplies a very nice example of the sort of personal equity I have in mind. Jane unexpectedly inherits twenty thousand pounds and resolves to divide it four ways with her three cousins. She says: "It would please and benefit me to have five thousand pounds; it would torment and oppress me to have twenty thousand; which, moreover, could never be mine in justice, though it might in law".[23] Jane does not insist upon her legal right, but responds to the torment – the struggle, literally the mental torture – that she would feel if she were to insist upon her formal right to keep the entire windfall within her familial context. Jane sensed the injustice "fully as much a matter of feeling as of conscience".[24] She felt the torment of equity. As she says:

> my cousins saw at length that my mind was really and immutably fixed on making a just division of the property – as they must in their own hearts have felt the equity of the intention.[25]

[23] Charlotte Brontë (under the pseudonym Currer Bell), *Jane Eyre: An Autobiography* (London, Smith, Elder and Co, 1847) vol III ch 33.

[24] *Ibid*.

[25] *Ibid*.

Recent scientific research (as recent as last summer) suggests that a fairness-driven desire to take less than our allotted share is an attribute that separates us from the animals.[26] Non-human primates have a keen sense of injustice when their allotted share is less than what they perceive to be a fair share, but they apparently show no discomfort when their allotted share is greater than a fair share. In the case of Jane Eyre, the endpoint of her equitable division was strict mathematical equality, but it needn't have been. Many of us, if we won a windfall, would feel an equitable compulsion to share our good fortune with others, but we might feel no compulsion to share it on the basis of a strict equality. Jane Eyre was subject to the torment of her own personal sense of equity, but she was not subject to the tyranny of a rule of strict division. Quite the opposite: the prevailing legal and social norm gave her a right to the entire fund, but she yielded her right in the interests of a more just disposition. To cultivate the personal equity of Jane Eyre is our best hope of equality without tyranny. I think this is what Victor Hugo had in mind when he wrote: "*Par bonne distribution, il faut entendre non distribution égale, mais distribution équitable. La première égalité, c'est l'équité*." ("By fair distribution one does not mean equal distribution but equitable distribution. The first equality is equity".)[27]

[26] Victoria Gill, "Puppet experiment suggests humans are born to be fair" BBC online (1 September 2012) http://www.bbc.co.uk/news/science-environment-19421644.

[27] Victor Hugo, *Les Misérables* (A. Lacroix, Verboeckhoven & Ce, Brussels 1862) iv.1.4.