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**The Art of Equity/The Equity of Art; The History and Future of a  
Malleable Concept**

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## The Art of Equity/ The Equity of Art The History and Future of a Malleable Concept Luke Mason

1. ART/EQUITY/FINANCE: Financialisation is a creative tool which takes advantage of the fluctuations in the value of assets. It rests on the existence of proprietary interests in things. This process allows people to make money out of ownership and the surplus value which exists within things. It also allows for the creative use of a cascading series of derivative sources of value and investment. The daring work of Vermeir & Heiremans plays creatively with these processes to ask whether artists might not be able to leverage the surplus value which art institutions possess through its financialisation. This would, following Vermeir & Heireman's logic, allow artists to benefit from the use of the equity which such institutions possess. *A Modest Proposal* is anything but modest in reality. It forces a radical reconceptualisation of the ways in which artists might be able to exploit modern structures of value and wealth generation and redistribution. While *A Modest Proposal* seems to focus attention on the mysteries of finance, evocatively captured by the *Black Box* containing the secrets of their exploitation, the project in fact rests on a deeper and more mysterious legal concept: equity. In the context of *A Modest Proposal*, the idea of equity is crucial. The financialisation of art institutions rests on the sharing of surplus value which exists within those institutions, that is the difference between the market value of the institution and its artworks on the one hand and any debts or liabilities on the other. Equity in this brute sense therefore rests on notions of ownership and the idea that you might somehow 'own' that excess value, and be able to exploit it and trade it. This begs a deeper question of why anyone owns any form of value and how you come about acquiring it. The answer, sometimes, lies in the concept of equity. Property is, first and foremost, a legal concept. Its distribution depends on the application of legal rules and principles. In the legal tradition often labelled Common Law, such as the English legal system, such questions have been answered through the application of Equity, a mysterious parallel system of rules, principles, ownership and value acquisition. It is this set of rules which generates the 'equity' which *A Modest Proposal* seeks to exploit. However, *A Modest Proposal* is too modest. It does not take its exciting propositions to their logical conclusion: an insistence on artists enjoying the equity they own in the real estate of the urban spaces outside art institutions.

2. ART/VALUE/REAPPROPRIATION: Since Aristotle, justice has often been said to be a question of each receiving what he or she deserves. Artists are interested in this question as much as anyone else. It is incontrovertible that artists produce value in all manner of ways in the urban environment, including in forms which cannot be captured by the simple transactional arrangement whereby they sell an artistic output of some kind. Like all

people who work to produce value, artists have a legitimate interest in seeking to share in the value which their labour produces. The value which artists produce is far from unique in its benefitting many people who have no direct relationship, contractual or otherwise, with the artist. The mystery of how those who work in the so-called creative industries can extract a fair proportion of the value which they create rests on an ability to correctly identify the nature of that value and ensuring that legal structures and concepts are alert enough to capture it in some way to allow artists to benefit from it. The paradigmatic way of imagining this value of course is through the transactional arrangement whereby an artist sells her work to a buyer, thus generating wealth for the artist through the consideration paid, reflecting the value which the purchaser places on the artwork. Efforts by artists to recoup additional value through secondary sales seek to rely on contractual restrictive covenants or reimagining the intellectual property of artworks after their original sale. An alternative model is that of patronage or the relational contract, whereby the artist's risk is shared throughout an ongoing contractual relationship. Artists' residencies in all manner of institutions are one form in the urban space through which this is achieved. However, these models of appropriating value produced by artists are relatively conservative, in that they recognise only the value which artists create within their own work or for the institutional partner which they are engaged by. Artists give form, meaning and identity to urban spaces in ways which cannot be captured by these transactional and relational contractual forms. If artists can find a way of demonstrating ownership of that portion of value which they bring to urban spaces, in particular in cases of urban generation, Vermeir & Heiremans' proposal is capable of a radical reimagination. If artists own a share of the equity in real estate which they themselves have contributed to the value of, they would have a far more powerful tool to re-appropriate the value which they produce. Urban regeneration has long been based on the expectation on the part of investors that they will benefit from rising equity in their investment in property. Such expectations within the modern urban environment rest, at least partly, on the cultural cachet of the modern urban space, which, in turn, is created, at least in part, by artists. Perhaps artists could be said to own some of that equity therefore, given their role in its generation.

3. **EQUITY/EQUITY/EQUITY:** Equity in this manner is simply the value which the owner or owners possess in an asset. It is therefore the net amount once any debt is taken into account, such as the amount owed on a loan secured against the property. This is a non-legal definition of both equity and ownership: it reflects an assessment of market value and is primarily an accounting tool, making it useful for financial calculations. The use of the term 'equity' is however instructive. It reveals a deeper source of the nature of this calculation and its basis within the deep structures of property law. It is known as the equity in property by virtue of the structure and history of English law (and by extension that of the 'Common Law world'). That legal framework structures property, and other rights, entitlements and remedies, through the principles of Equity, a legal system within a legal system. While equity is therefore the surplus value owned in a house or other real estate, it is also the system of legal rules, a structure of legal ownership and a set of legal principles which provide remedies and solutions to legal problems.

4. **HISTORY/PLURALISM/TRUSTS:** The history of Equity is a curious one, even in its potted version. Following the Norman invasion of 1066, the so-called Common Law began to develop. This slowly turned into a

rather anti-intellectual or formulaic system of justice whereby plaintiffs could bring problems before the court only if they could frame their claim in a recognisable way, and courts began to resolve cases not according to their merit but by their superficial resemblance to preceding cases. A parallel system of justice emerged, administered by the Courts of Chancery, in which judges developed an alternative system of justice, 'Equity,' based, broadly, on the traditions of Roman and canon law, where cases were resolved in a more flexible manner and according to principles and maxims of justice. Although this system of dual jurisdictions was seemingly brought to an end in the nineteenth century by the Judicature Acts, the two systems continue to co-exist, but are simply applied by the unified court system. In cases of conflict between the rules of Equity and those of the Common Law, it is Equity which triumphs. Although the principles of Equity have long since hardened into clear rules in many cases, which in many ways resemble the harsh realities of the Common Law which they served to temper, their legacy and continued impact are still significant. The pluralism of legal systems, where Equity and Common Law co-exist, creates a playfulness and creativity within the law which allows for innovative solutions and legal arguments. Moreover, the principle-based nature of Equity remains in place, with broader ideas of fairness seemingly at play when Equity gets involved. In practical terms, some of the most significant and idiosyncratic aspects of the English legal system stem from Equity. The existence of trusts, whereby the legal ownership and management of property is separated from the equitable, or beneficial, ownership of the same property allows for endless creativity in structures of property. It is this Janus-faced nature of property ownership which leads to the term equity being used to describe the surplus value of property. It is also surely no coincidence that it is in legal systems such as those of England and the United States where financialisation and other similar tools for wealth generation have emerged, making use of these complex forms of ownership. While such structures are often used for purposes such as tax avoidance, they have their roots in deep notions of fairness, whereby reliance on the formalities of the law should not be allowed to trump the demands of justice. In England and Wales, all real estate is owned in this dual form through a trust of land. Regardless of any formal legal ownership, there remains the potential for equitable or beneficial ownership to be shared by different or additional parties if the rules, principles or remedies of Equity can be used to demonstrate such ownership. The application of these rules has changed over time, and they continue to evolve in the gradual development of Equity's maxims and remedies.

5. **CREATIVITY/EQUITY/JUSTICE:** Equity provides an avenue for deep forms of creative re-engineering of the legal imagining of artists' ownership of the value which they create and the consequent fostering of the structures which encourage the creation of that value. Lawyers are specialised in the creative use of normativity, of rules, rights and obligations, to achieve different goals. Such creativity includes, at times, the radical reimagining of the function and application of long-standing rules to reveal immanent qualities which were previously neglected. At times, this can appear to possess the qualities of a parlour game or mindless semantic manipulation, however legal creativity goes much deeper than this. Due to Equity's historical and continued reliance on broad ethical principles, it is particularly ripe for this kind of creative reimagination. However, all law, to the extent that it relies on the language and justification of morality and justice, exposes itself to the possibility of a critical reworking making use of those same moral tenets. Once the law claims not only legal but also moral jurisdiction

in some way, the law opens itself up to convincing moral arguments shifting the meaning of the legal concepts which rely, directly or indirectly, on those same moral concepts. If the law seeks to rely on fairness or justice as a justification for its imposition, it must be ready for fairness and justice to question its assumptions and application. Within the Common Law legal tradition, equitable principles and maxims, such as *those who seek equity must do equity*, and *equity regards as done that which ought to be done* have operated in part as deep pervasive norms which serve to act as a countervailing force within the legal system and its operation, allowing for a correction of injustices done by other parts of that legal system and for law to provide its own redemption. In this manner, such principles act in a similar way to fundamental constitutional rights and values which radiate out across a legal system. To the extent that Equity provides such a toolkit, it provides the potential to resolve questions of distributive and restorative injustices, and *a fortiori* in the area of property and ownership, where Equity provides a major structuring framework in the form of the trust, in particular the trust of land.

6. ART/VALUE/EQUITY: This discussion allows us to return to the question of the value which artists generate, in particular within the context of the urban environment and its regeneration, where vast sums of value are generated through the growth of equity in property due to rising property prices. The rules, principles and remedies of Equity are capable of generating mechanisms which lead to artists' contribution to this rising value being recognised with a share of that equity in the form of property rights through beneficial ownership under the trust of land. While artists do not own this property according to the formal rules of ownership, there might be other means of showing beneficial ownership. Real estate ownership is generally an outlier within the English legal system, in that various formalities are required in order to establish property rights. As well as the requirement for various written evidence and documents, this has recently been extended to include the compulsory registration of ownership at the Land Registry, which intends to develop into a comprehensive arbiter of questions of property. However, it is in such circumstances that Equity comes to the fore, capable of creating interests in property through the trust of land, even where these contradict those on the register or in other documents. While it is often said that "equity follows the law," that is, it assumes the law's distribution of rights and understanding of the situation to be correct all things being equal, the rules and remedies of equity are capable of finding solutions to problems which the law generates. Equity can make use of these rules and remedies to generate solutions to complex networks of transactions whose best characterisation is contested. These solutions are often known by obscure names, such as *Vandervell* and *Quistclose*, reflecting the names of the parties in the cases where such solutions were first endorsed by appellate courts, and which have struck terror into the hearts of generations of law students. However, this toolkit can also be used in a rather simpler manner, providing proprietary remedies where the parties' actions would seem to fit a pattern of behaviour in which the allocation of beneficial ownership of property would seem to be an appropriate solution. In many cases, such as that of the resulting trust, this is when a monetary value has been contributed to the purchase of property. However, there exist remedial devices within the law of equity which reflect non-financial contributions to the value of a property, awarding a share of the equitable ownership of the property, and consequently of its equity or net surplus value. The two primary mechanisms which exist within the remedies of Equity to do this are the *constructive trust* and the

device of *proprietary estoppel*. In both these cases, courts are able to recognise behaviour which has contributed in some way to the ownership or value of the property, such as in the case of the partner of the legal owner of a house, who contributes to the household in all manner of ways but who does not pay directly for the house which is formally owned by the other party. In cases such as these, and others, Equity has come to recognise that the formalities of legal ownership are not sufficient to do justice to the value which the other parties have contributed to the property in some way. It is not a huge analogical leap from there to the case of the artist, and the artistic community, who bring value to the urban environment, and who generate the net surplus worth, or 'equity' of real estate in areas undergoing urban regeneration. Such projects depend on the role of the artist and her creative endeavours and presence to give meaning and cachet to the urban environment, which, in turn, generate the envisaged rise in prices, in tax revenues and in net wealth. Equity is more than capable of recognising non-financial contributions to property values which should be rewarded with property rights. The artist needs to create the right narrative to argue in favour of it applying to the type of value which she brings to cases of urban regeneration and development. Fifty years ago, it would have been outlandish to argue that an unmarried partner of the legal owner of a house would be able to establish an equitable property interest in the house in the manner which is possible now. What has changed is the general perception about the nature of the value which such a person adds and what their due is. It is this argument which artists have to make. Equity possesses the remedial toolkit to do the rest.

7. CONSERVATISM/ARTIST/OWNERSHIP: The law's image is often one of conservatism. In many ways, this is a deserved reputation. However, the law, through its deeply normative nature, possesses the redemptive qualities capable of remedying its own flaws, if these can be identified using its own concepts. Law's reflexive self-regeneration can be deeply transformative and radical in the right creative hands. However, it is often the artist whose self-image is conservative, revelling in the exceptionalism of the talented individual, reflecting the mythical nineteenth century atomistic man of Common Law ideology, whose brilliance will be repaid if only he is rewarded justly for the fruits of his labour, which can be allocated through the use of transactional contracts freely entered into. In reality, the artist's value is deeply located within her community, just as the allegedly separate individual is ultimately rooted within her interactions with others. While it is right that the artist should seek to extract a fair proportion of the value of her work through fair rates of remuneration for their work in more traditional ways, the artist should also be creative in the way she seeks to ensure a just redistribution of other forms of real value which she generates. If she adds value to the equity in property which can form the basis of the financialisation envisaged in *A Modest Proposal*, she has a strong case rooted within robust notions of justice that she has a claim on a proportion of that equity. The rules and remedies of Equity show that the law's immanent logic is capable of comprehending this, however this is not the only way of recognising property rights of this type. Such rights can also be formally inserted into ownership structures *ab initio* if artists and their advocates are able to communicate their added value in a clear way and demand that it be recognised.