England's dreaming
equity, trust and conscience

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[*Inauguration, especially of a building*]

OVERTURE

I was appointed Professor of Law in 2004. It occurred to me that by the age of retirement, assuming the retirement age will indeed be put back to 70, I will have spent as much of my life as a professor of law as I have spent not being a professor of law. So, I thought I should use my inaugural lecture to describe the ideas which have informed me so far and to describe my project for the future in occupying this chair.

I will borrow a definition of the verb "to inaugurate" from Conor Gearty: that is, 'to open to the public, especially of a building'. What I shall be describing tonight, then, are my blueprints for my building as a professor of law.

What I will be considering in this lecture are different conceptions of equity:

1. first, the rules applied by the Courts of Chancery (particularly in relation to the law of trusts);
2. secondly, the general concept of a legal equity as understood by Aristotle and as predicated on a notion of good conscience;
3. thirdly, as equity is understood in finance theory in relation to securities law; and
4. finally the understanding of equity in the other social sciences where it is used as a rough synonym for "equality".

First, though, we must consider this idea of "England's dreaming".

THE DREAM

The England in which I grew up in the 1970's was ill-at-ease with itself. It was the England of the winter of discontent – three day weeks, power cuts and stagflation. It was a country of ugly, concrete precincts, man-made fibres and the end of empire. Two types of people stand out in my memory. If you were an eight-year old boy of my age and you got on a bus in your school uniform and dared to stand on that bus all flushed with youth, some elderly man in beige clothing from J Alfred Dunn would bark at you: 'I fought in two world wars for the likes of you'. Theirs was a country of Edwardian values, in which Britain was "great". The other type of person was the Mohican–sporting punk who swaggered around the precincts, terrifying the former type of person simply by reason of having green hair two feet high. The terror this person embodied was the end of deference, of the Edwardian certainties. A symbol of the end of everything that many of the English considered to be great about them. The former person is known now as a Little Englander; the latter is closer to DH Lawrence's "England, My England".

The little Englander's self-identity is best expressed by PG Wodehouse:

> 'There is a cosy fire in the study, and outside the wind is whistling. The ivy clusters thickly round the old grey stones. The king is on his throne and the pound is worth a pound. Over in Europe the comic foreigners are jabbering and gesticulating, but the grim, grey battleships of the British fleet are steaming up the Channel. … [Meanwhile] we are settling down to a tremendous tea of sausages, sardines, crumpets, potted meat, jam, and doughnuts. … Everything is safe, solid and unquestionable. Everything will be the same for ever and ever.'
>
> - PG Wodehouse

Bound up with this Englander's sense of self is a sense of English law. As George Orwell put it:

> 'Here one comes upon an all-important English trait: the respect for constitutionalism and legality, the belief in "the law" as something above the State and above the individual, something which is cruel and stupid, of course, but at any rate *incorruptible*.
>
> It is not that anyone imagines the law to be just. Everyone knows that there is one law for the rich and another for the poor. But no one accepts the implications of this, everyone takes it for granted that the law, such as it is, will be respected and feels a sense of outrage when it is not.'
>
> - George Orwell, *The Lion and the Unicorn – Socialism and the English Genius*, (Martin Secker and Warburg, 1941), p.44.

Within this affection for English law is a particular affection for equity – Dickens's *Bleak House* notwithstanding. Professor Roger Scruton, a sort of walking-talking-*Daily Telegraph* editorial, sees equity (especially the collected works of Lord Denning) as an integral part of what it means to be English:

> '… the [legal] system is of an admirable simplicity, embodying a vision of law that did not merely distinguish England and its colonies from almost all other

> countries in the world (except those, like the Scandinavian kingdoms, which had arisen from the same mysterious beginnings), but provided a paradigm of natural justice. It has begun to sink at last, under the weight of centralised legislation, the bureaucratic 'law' of the European Commission and the politicised judgements of the European courts. But it has retained until our day the noble aspiration which had always guided it, namely, to do justice in the individual case, regardless of the interests of power.'
>
> - Roger Scruton, *England: An Elegy* (Continuum, 2006), p.113

The idea that the common law system is "simple" may strike any student of law as an odd one. The reference to the English (and, oddly, not "British") colonies may strike one as being from another age. The reference to "mysterious beginnings" is bound up with the affection for Stonehenge, the legend of King Arthur and the rumour that Jesus once visited Glastonbury. And the reference to the "Scandanavian kingdoms" is a reference to the Viking heritage which the English love to claim for themselves. In common with the Romans, Angles and Saxons, an injection of Viking blood is thought to be an excellent thing. Given the English's caricatured distrust of foreigners, this may seem strange. However, the motto seems to be: if you can beat us, you can join us.

Scruton laments to loss of an England in which the English are attached to the land, and shies away from an England which is in any sense modern. He seems, as Fry and Laurie once put it, to be in love with "creamy old England". Ironically enough he now teaches in Virginia.

Indeed even the great Professor Maitland considered there was not only something great about equity, but also that there was something quintessentially English about it:

> 'I don't myself believe that the use came to us as a foreign thing. I don't believe that there is anything Roman about it.'
>
> -FW Maitland, *Equity* (Cambridge University Press, rev'd 1936), p.6.

When we come to talk about the Roman influence of restitution in a while, this assertion of equity's Englishness will be important.

For me, England is less the green and pleasant land in which Blake expected Jerusalem to be builded, and more Morrissey's rain falling hard on a humdrum town, or, in London, Robert Smith's living with desertion and 8 million people. A disaffection with the Victorian and Edwardian hagiography of England – with the dream of England – has of course been a staple of some of the best English literature of the 20th century: EM Forster, DH Lawrence, and so on.

My concern is that this mooted affection for law and for constitutionalism, part of the dream of what "England" is, overlooks the very real social problems of which English law is a part.

This leads into the second part of the dream of English law. It is a dream harboured by the legal positivists that law is rational, that law should be entirely predictable and that law should be subjected to a rigid taxonomy.

The architectural designs for my building will require that the dream of rigidity is not recognised as the only way to construct a legal system.

Let us begin at the beginning. Laws are simply things which have been said and which have acquired the authority and legitimacy of law because of the manner in which they were said. There is nothing immutable nor innate about the detailed content of our laws. They could be different; they could be unsaid.

With that in mind, we can re-examine the culture of, for today's purposes, our private law, and particularly our property law.

One of the key aspects of our legal culture, I would suggest, is an assumption in its rationality. This is a part of its mythology. It is a key part of the dreaming I allude to in the title of this lecture. The key zone of debate between the legal positivists and the natural lawyers is a difference of opinion, almost an attitudinal difference, as to their respective preferences for order or for fairness as the principal quality of their ideal legal system.

It is also, I would suggest, the key unspoken distinction between supporters of traditional equity on the one hand and supporters of a putative theory of restitution of unjust enrichment on the other.

3. DIFFICULTIES WITH TOO MUCH RATIONALITY

(A) AGAINST RESTITUTION OF UNJUST ENRICHMENT

Four things can be said about restitution of unjust enrichment, for present purposes.

1. First, there can be no doubt that, within its own carefully defined perameters, restitution scholarship is very fine.
2. Secondly, however, the core cases on which much of restitution is predicated have little or nothing to say directly about restitution.
3. Thirdly, restitution as a principle in practice in relation to property law specifically and equity more generally is clearly in full scale retreat.
4. Fourthly, and most importantly for present purposes, restitution scholarship lacks an entire dimension of jurisprudential justification for its existence. Principally, the notion of "restitution on grounds of unjust enrichment" lacks any philosophical concept of the "unjust" factor which must be established to make out the claim.

This last point, I would suggest, is its principal, intellectual weakness. Furthermore, I would suggest, that all of the fundamental pillars on which its intellectual validity could be said to rest can be rebuffed. I will start with those pillars.

What exercises me most about the mooted principle of restitution of unjust enrichment is that its proponents are suggesting that we should do away with equity altogether. Among those proposing this interesting development are:

Beatson, *The Use and Abuse of Unjust Enrichment*, (Clarendon Press, 1991), 245.

Jaffey, *The Nature and Scope of Restitution* (Hart, 2000), 421.
Birks, *Private Law*, (OUP, 2000), 261.
Burrows, 'We do this at common law but that in equity' (2002) 22 OJLS 1.
Worthington, *Equity*, (Clarendon Press, 2003).

Before we come to the benefits of equity, I think we need to understand the shortcomings in what is being proposed to fill in the gap left by its abolition.

1. The organisation of unjust enrichment based on *Moses v Macferlan*

The case of *Moses v Macfarlan* is generally taken to be a fons origio for restitution by restitution scholars even though at no stage in the judgment does the court use the words "restitution", "unjust" or "enrichment". Instead, remarkably enough, the court refers exclusively to "equitable" concepts. Nevertheless, the case is said to create a pattern by reference to which restitutionary ideas can be identified.

Moses v Macferlan (1760) 2 Burr 1005, *per* Lord Mansfield CJ:

> 'The action for money had and received, an equitable action to recover money which the defendant ought not in justice to keep … [The action] lies for money paid by mistake; or upon a consideration which happens to fail; or for money got through imposition (express or implied;) or extortion; or oppression; or an undue advantage taken of the plaintiff's situation, contrary to laws made for the protection of persons under those circumstances. In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.'

> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61, *per* Lord Wright:
>
> > "It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."

What is remarkable is that many legal historians have started to pretend that this notion of unjust enrichment has always been a part of English law, instead of recognising that it can only have been part of English law since 1991, and arguably part of English legal-scholarly culture since 1966.

> See, for example: Ibbetson, *A Historical Introduction to the Law of Obligations*, (Oxford: OUP, 1999).

It is the bedrock of restitution's taxonomy, and yet it is a decision predicated clearly on equity. It is only if you fail to read what the judge actually said in *Moses v Macferlan* that you can kid yourself that it has something to do with unjust enrichment. Claiming that this case is about restitution is like me claiming a writing credit for "Hey Jude". It was all written before I was born, my name isn't mentioned once, but I might claim that it is exactly the sort of song I would have written had I been there at the time.

2. The example of Justinian and his equity

The thirst for restitution was drawn from Roman law by Peter Birks, and from the American *Restatement of Restitution* by Goff and Jones. Prof Birks was enthusiastic in his affection for Justinian's *Institutes*. Not as to their detail necessarily but certainly as to their form. Their form offered, and this is key to restitution scholarship, a visually neat taxonomy for private law. Thus "actions, things and people" in Justinian's *Institutes* were translated to "consents, wrongs and unjust enrichment" in the first version of the restitutionary schemata. However, this overlooked the presence of "aequitas" in Justinian's *Pandects*: itself a close cousin of English equity, drawn it would seem from Aristotle ultimately. This Roman law did not operate without a pressure valve which would permit judges to achieve equitable results: so, why should English restitution survive without it?

> Birks, 'Definition and division: a meditation on *Institutes* 313', in Birks (ed), *The Classification of Obligations*, (Oxford: Clarendon, 1997), 1.
> Zimmerman, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, (Oxford: OUP, 1996) generally.

3. Neatness: rights necessarily include their remedies

It is supposed that restitution is neater than equity, where the latter has a large historical baggage which includes, in side pockets and under flaps, many fragmentary doctrines. However, restitution has not taken hold of the judicial imagination precisely because nobody knows that it means.

One key proposition in amongst the debates about restitution was that all rights necessarily carried with them their remedy. This, I would suggest, is a key example of the shortcomings of restitution: an obsession with neatness means we overlook the fact that many remedies under English law are discretionary (see, for example, the remedy applicable to a claim for proprietary estoppel which differs from case-to-case) and that many rights under English law carry with them a right to more than one remedy, hence the need for the equitable doctrine of election.

Furthermore, the third version of Birks's scheme provides that the law on unjust enrichment (as it is now to be called) operates in relation to any set of facts which is "analogous to mistake". This version of restitution – the last before Birks's untimely death – had moved from certainty into metaphysics.

> Birks, *Unjust Enrichment* (2nd ed, Clarendon Press, 2005)

Prof Birks himself was onto his third version of his theory before his death. Behind him lay a veritable bar fight made up of restitution scholars arguing over the number of unjust factors which could give rise to a right to unjust enrichment, the viability of the so-called "quadration thesis", what exactly might be meant "by analogy with mistake"; whether a remedy can achieve restitution or whether restitution is itself the remedy; and other intellectual niceties. For Birks, there were about 47 unjust factors giving rise to unjust

enrichment (Birks and Chambers, *Restitution Research Resource*, (Mansfield Press, 1997)), whereas for Meier and Zimmerman there is only one (Meier and Zimmerman (1999) 115 LQR 556).

Restitution is not neat: rather it is bedevilled by the uncertainties which are all part and parcel of any properly functioning system of private law – namely, the need to reach the best result on the facts of any given case.

The retreat from restitution

It seems that there has been a retreat from unjust enrichment, and a restoration of equitable thinking in recent cases. For example, in *Niru Battery v Milestone* [2003] EWCA Civ 1446, Sedley LJ and Clarke LJ suggested that they considered the doctrine of change of position as being an equitable doctrine and not a restitutionary doctrine. Similarly in *National Westminster Bank v Somer* [2002] QB 1286 it seems that the doctrine of change of position is now to be replaced by a recast, equitable doctrine of estoppel by representation. The loss of change of position to equity-thinking is equivalent to the German army losing Stalingrad: it is suggested that the end of this war become inevitable as a result.

My approach to restitution is set out generally in the essay on restitution in earlier editions of *Equity & Trusts* (e.g. 3rd ed., 2003, Ch.35) and now on: www.alastairhudson.com/trustslaw/restitutionofunjustenrichment. The following are the key points:

- It is not possible to legislate in the abstract with certainty.
- Recovery of an enrichment will not compensate the loss suffered by a claimant.
- Restitution is a jumble of currently existing odds and ends which will cause more confusion by leaving ragged, unattached elements of equity, etc..
- The word "unjust" is given a purely "technical meaning", which overlooks its jurisprudential force (e.g. Rawls, *A Theory of Justice*).
- Restitution has nothing to say about non-pecuniary, non-proprietary claims.
- Judges require flexibility to achieve fair results.

By contrast, in defence of equity, it is suggested in *Equity & Trusts*, 5th ed., Chapter 32 that:

- Human beings are fragile and need someone to "listen to their story"
- The world is fundamentally chaotic and equity is required to meet that chaos.

It is suggested, for example, in Prof Story's *Equity Jurisprudence* (1886), 4: the concept of equity was a part even of Roman law in the *Pandects*, and further that "Equity must have a place in every rational system of jurisprudence, if not in name, at least in substance." (Story, *op cit.*, 6).

As to any artificiality in equity, well it must be remembered that law functions by using fictions and artificial models to achieve desirable effects: Fuller, *Legal Fictions* (Stanford University Press, 1967). For example, there is nothing innate about the trust. Rather, it is a made up concept which is useful (which is why we created it). The same is true of the contract. We created a fiction whereby action *x* leads to legal rule *y* (whether the creation of a contract or of a trust, or whatever). So why is there necessarily any greater artificiality in a doctrine which achieves the socially-useful goal of preventing unconscionable misuse of another person's property?

4. Unjust is a word with a purely technical meaning

My greatest difficulty with the restitution project is its determined amorality and its equally determined refusal to explain what its philosophical underpinnings are. While one might expect that a theory of "*unjust* enrichment" has at its heart a moral project, in truth its goals are entirely positivist, and so not concerned with morals, nor even with Hart's rule of recognition. Birks was clear on this point:

> "'Unjust" here is technical. An enrichment is unjust if the circumstances are such that the law requires its recipient to make restitution.'
>
> - Birks, 'Rights, wrongs and remedies' (2000) OJLS, 1, 6.

This is deeply problematic. Not only have we arbitrarily selected one judgment by one judge (in *Moses v Macferlan*) as establishing the basis for this new area of law (which will eradicate hundreds of years of authority at a stroke), but we are not even going to state the basis on which we are intending to do so.

In fact this is an entirely Nietzschean project, with Birks as its superman. As Nietzsche told us in *The Will to Power*:-

> 'It is the powerful who made the names of things into law, and among the powerful it is the greatest artists in abstraction who created the categories.'
>
> - Nietzsche, *The Will to Power*, para 513.

This project is about dominating the discourse of private law and about subjugating it to a new model the philosophy of which is obscure.

What restitution thinking overlooks is that, while clarity and certainty may be desirable in most legal circumstances, there will be many circumstances in which certainty is a less desirable characteristic than achieving just results. This is why equity remains significant, and why restitution on the Birksian model will never hold sway in the way its adherents would like.

Let us consider a context in which a rigid principle has proved unworkable in just such a way: viz. cases in which the plaintiff is seeking to establish a right in the home where there is no express trust or equivalent resolution of the question.

5. Conscience-thinkers are fascists: the lesson from Heydrich

There was one argument marshalled against defenders of equity which, I would suggest, demonstrated an astonishing level of puerility, love of rhetoric for its own sake, and historical insensitivity. That was the argument that those who advanced a notion of "conscience" were falling into the same trap as the authors of the Nazi's final solution.

This argument is set out by Prof Steve Hedley in the following terms, ("The taxonomic approach to restitution", in Hudson ed., *New Perspectives on Property, Obligations and Restitution*, Cavendish Publishing, 2004):-

> 'Indeed, a noticeable recent tendency [in restitution scholarship] has been to accuse equity lawyers of being no better than Nazis. This (slightly surprising) argument relies on the point that, like one famous Nazi, they sometimes appeal to conscience. It appears that Reinhard Heydrich, chief of the Gestapo and director of the 'final solution', once used justified his conduct by reference to his conscience.
>
> > "*For the fulfilment of my task I do fundamentally that for which I can answer to my conscience ... I am completely indifferent whether others gabble about breaking the law*"
> >
> > (Quoted in AH Campbell 'Fascism and legality' (1946) 62 LQR 141, 147).
>
> This is, apparently, too uncomfortably close to the reasoning employed by others who do not subscribe to restitution of unjust enrichment.'

This argument has now become absurd. First, it says that conscience thinking can be jettisoned because it is capable of leading to Nazism. Oddly, everyone who advocates conscience-thinking in equity seems as far from being a fascist as it is possible to get. Secondly, this argument is monumentally insensitive to the memory of the Holocaust: to use the views of the author of the Final Solution to score a cheap debating point is truly appalling.

Now, I must admit at this point that I had found at one time another quotation attributed to Heydrich in which he suggested that order and clear rules were the most important thing for any society. I found it entirely by accident one afternoon reading something other than law. I cannot now find it. I remember very well my joy on discovering it, recognising the perfect refutation of Birks's point, setting it aside and settling myself back with a feeling of satisfaction. Lamentably, I tidied up my study subsequently and cannot for the life of me remember where I put it.

However, some good has come of it. I launched a search of my home from top to bottom. I re-read at speed every book I suspected I had so much as opened during that summer. Ditto every article and fragment I could find. While doing so, I re-encountered a number of better ideas than simply meeting one quotation with another. As though such a process would *prove* anything. Instead I spent a lot of time with Hannah Arendt's work and with Zygmunt Bauman's work (two people I suspected of harbouring the quotation I sought). In so doing I was required to think through what was so wrong with Birks's approach from a methodological standpoint and also, more importantly, to think again about why I consider equity to be quite so important.

The real reason why Birks's argument strikes me as being so stupid is that it suggests an ignorance of the history of national socialism. The Nazis were painfully precise.

They spent an extraordinary amount of time satisfying spurious legal niceties. The vile blood and honour laws were detailed documents born out of detailed debate between fine but vile minds. The legal powers for taking Jews' property from them were carefully drafted and enacted. In the 1930's there was even a view that under international law there was nothing wrong with these laws because they complied with German law principles. Stunning to think of it now. The "final solution" itself – after the first and second solutions (expulsion and concentration, respectively) had been abandoned – was the result of bureaucratic skill and technological advancement. Zygmunt Bauman's *Modernity and the Holocaust* explains how the Fordist production line made the holocaust logistically possible. It was then a complete absence of morality and of an appropriate conscience which allowed Eichmann's bureaucracy, under Heydrich and Himmler, to put the holocaust into operation.

It was precisely an absence of thinking of the sort required by an idea of conscience which facilitated the holocaust. Precision and clear rules were simply part of the bureaucratic machinery which made it all possible.

Hannah Arendt is particularly powerful in her account of Eichmann's trial in Jerusalem in talking about the absence of "conscience" – that word rings out in her narrative again and again like a bell – as part of the context in which the holocaust took place. But I am getting ahead of myself. I will come to the idea of conscience soon enough. For present purposes I wanted to show – I confess by taking one of the most alarming episodes from the whole of human history – how mindless affection for rules without a philosophically-grounded morality or conscience can give way to Arendt's notion of banal evil on an unimaginable scale.

The other reason for finding Birks's argument so objectionable is that it trivialises the real impact of the holocaust. It is the very worst sort of debating society puerility.

Now I have spent far too much of my inaugural lecture talking about restitution and talking about Nazis. I want to talk about the alternative approach: conscience.

CONSTRUCTIVE TRUSTS

Restitution does not have answers for the issues which constructive trusts resolve.

The principal shortcoming in unjust enrichment thinking

It was said by Peter Birks that the principal defect in constructive trusts is that the term "constructive trust" tells us the result of an analysis but does not tell us the event which brought that analysis into being; unlike unjust enrichment which tells us that it is the injustice of the enrichment which gives rise to restitution. The answer to this argument is that it is knowledge of some unconscionable factor in dealings with property which brings a constructive trust into being.

The more interesting observation is that there are a number of cases which could only be resolved satisfactorily by constructive trusts, and which could not have been resolved at all by unjust enrichment. Here follows a brief outline of some of them.

Recovery of property in *Att-Gen Hong Kong v Reid*

It is a feature of restitution of unjust enrichment thinking that the enrichment must have been made at the plaintiff's expense. In *Reid*, however, the defendant's enrichment came directly from criminals who bribed him, whereas the plaintiff was the Attorney-General acting on behalf of the people of Hong Kong. There was no direct enrichment at the plaintiff's expense. The only sense in which there was an enrichment was in a moral sense. And morality is usefully the root of the constructive trust which Lord Templeman imposed by reference to the equitable doctrine that "equity looks upon as done that which ought to have been done".

Unjust enrichment has nothing to add here.

Tax avoidance in *Jerome v Kelly*

Restitution thinking does not help with the conceptualisation of the fiduciary duty which arises "sub modo" in relation to tax avoidance schemes like that in *Jerome v Kelly*. The equitable interest does not necessarily pass where the fiduciary has a right to deal on her own account in relation to the property which is to be passed under the contract. It would therefore be unclear how unjust enrichment would explain at what time title would pass in that property.

Westdeutsche Landesbank insolvency

One the reasons why the theory of restitution of unjust enrichment was rejected by Lord Browne-Wilkinson in *Westdeutsche Landesbank v Islington* was that it provided no workable understanding of how a restitutionary resulting trust, imposed by the court, would not generate injustice in insolvency proceedings if the trust came into existence after the insolvency, whereas the traditional equitable notion of a constructive trust takes the creation of the trust from the date of the defendant knowing that there was some unconscionable activity in relation to the use of property.

Dishonest assistance

Liability to account as a constructive trustee for dishonest assistance in a breach of trust is based on the compensation for any loss caused to the beneficiaries by a breach of trust. The defendant will not have received the trust property at any stage. The defendant need not have been enriched for the claim to lie.

Knowing receipt – mostly

While Prof Birks has claimed that knowing receipt can be restitutionary, what is clear is that the claim does not have to be based on the presence on an unjust enrichment and that the remedy is not restitutionary. The remedy is to recover the loss suffered by the beneficiaries as a result of a breach of trust. That is a compensatory and not a restitutionary remedy in that it compensates loss as opposed to subtracting an enrichment from the defendant. The defendant is not required to have made some enrichment, although it might be possible for some enrichment to have been earned.

Trusts of homes

The law on trusts of homes in Canada is based on a notion of unjust enrichment but it is a notion of unjust enrichment which includes within the enrichment receiving the services of a housekeeper from a spouse which is deemed to be unjust if that spouse does not receive an equitable interest in the home. These ideas of enrichment and of injustice in the Canadian law on the home are entirely different from the English notion of unjust enrichment based on the list of unjust factors in the *Restitution Research Resource*.

No comparator to proprietary estoppel – e.g. *Baker v Baker*

Unjust enrichment in the English sense of the term (that is, without any meaningful notion of "injustice") offer no comparator to proprietary estoppel. In proprietary estoppel the claimant bases a claim on her detrimental reliance on the defendant's representation. The remedies provided by proprietary estoppel are, seemingly, entirely at the court's discretion, and consequently can range from mere monetary compensation through to transfer of the absolute title in land. A good example of what equity is able to do through proprietary estoppel is given by *Baker v Baker*. In that case, an elderly man who needed sheltered accommodation more than he needed a proprietary right in the home he had bought with his son and daughter-in-law in Torquay, was awarded an amount of money adequate to acquire him an annuity to pay for that sheltered accommodation. English unjust enrichment has no mechanism either for identifying an enrichment in the hands of the son and daughter-in-law, nor does it have a mechanism to give that elderly man what he needs. Frankly, unjust enrichment is not particularly good when it comes to helping people.

The root of the problem…

The root of the problem is the insistence of unjust enrichment theorists that the claim is based on an unjust enrichment. This is in truth a very brittle notion. Put simply, if the enrichment is earned by one person due to an unjust action perpetrated by a different person, then literally it seems that neither person can be liable for restitution. In company law terms, it would be comparatively easy to organise that one company in a group makes the enrichment through the action of another group company. The doctrine of separate corporate personality would prevent both companies bearing the liability for one another's involvement in the unjust act. So, how do we prevent an unconscionable benefit being taken by this group of companies? Answer: by using the equitable notion of unconscionability to hold that enrichment on constructive trust. Ultimately, it will always come down to a need for principles based on morality.

Is there one doctrine of constructive trusts or are there many doctrines of constructive trusts?

The trust itself is a fiction. We deem certain rights into existence. The company too. What is important is that we understand why these fictitious devices are said to come into being. Trusts and companies are not naturally occurring phenomena. Rather, they are cultural phenomena. So it is pointless saying that constructive trusts are too incoherent when the trust itself is an artificial construct.

(B) BRIGHT-LINE DEVELOPMENT IN *LLOYDS BANK V ROSSET*

The retreat from Lord Bridge's test in *Lloyds Bank v Rosset*

To do this, let us consider the "bright-line development" which is suggested by Lord Bridge in *Lloyds Bank v Rosset*.

The troublesome notion of common intention

Gissing v. Gissing [1971] AC 886; [1970] 3 WLR 255
Lloyds Bank v Rosset [1991] AC
Stack v Dowden [2007] UKHL 17, [2007] 2 WLR 831

Cases only concerned with money: the balance sheet cases

Springette v. Dafoe (1992) HLR 552; [1992] 2 FLR 388
Huntingford v. Hobbs [1993] 1 FLR 936

Cases concerned to undertake a survey of the whole course of dealing: the family assets cases

Hammond v. Mitchell [1991] 1 WLR 1127
Midland Bank v. Cooke [1995] 4 All ER 562

Cases concerned with avoiding unconscionability in general terms

Jennings v Rice [2002] EWCA Civ 159, [2003] 1 P&CR 100
Cox v Jones [2004] 3 FCR 693, [2004] EWHC 1486
Crossley v Crossley [2005] EWCA Civ 857
Turner v Jacob [2006] EWHC 1317 (Ch)

Cases concerned with fairness and with supplying the common intention

Oxley v Hiscock [2004] 2 FLR 669, [2004] Fam Law 569, *per* Chadwick LJ:

> '… what the court is doing in cases of this nature, is to supply or impute a common intention as to the parties' respective shares (in circumstances in which there was in fact no common intention) on the basis of that which, in the light of all the material circumstances (including the acts and conduct of the parties after the acquisition) is shown to be fair … and it may be more satisfactory to accept that there is no difference in cases of this nature between constructive trust and proprietary estoppel.'

Drake v Whipp [1996] 1 FLR 826
Thompson, 'Constructive trusts, estoppel and the family home', (2005) *Conv.* 1
Gardner (2004) 120 LQR 541.
Hudson, *Equity & Trusts*, 2007, p. **…**
Stack v Dowden [2007] UKHL 17, [2007] 2 WLR 831

The problem with this test in *Oxley* is that it is pointlessly fictitious. This is not a test based on common intention at all. The court is not looking for the parties' common intention – i.e. a meeting of minds which only the parties themselves can reach – but rather is *supplying* that common intention. The court is making that common intention up.

We need the judges to own up to the ideas which are actually propelling their thinking. For example, the reference to "fairness" in the judgment of Chadwick LJ is an idea we used to find in those judgments of Lord Denning which created the "deserted wife's equity". And this is something which should concern us. Lord Denning, for example, was concerned only to help "wives", and we must be concerned as to how he might have treated women whom he considered less deserving. In his memoir *The Due Process of Law* (Butterworths, 1980, at p.194), his lordship lets us in on his personal vision of the war between the sexes:

> 'No matter how you may dispute and argue, you cannot alter the fact that women are different from men. The principal task in life of women [sic] is to bear and rear children: and it is a task which occupies the best years of their lives. The man's part in bringing up the children is no doubt as important as hers, but of necessity he cannot devote so much time to it. He is physically the stronger and she the weaker. He is temperamentally the more aggressive and she the more submissive. It is he who takes the initiative and she who responds. …'

It goes on in this vein for some little while. Now, if we knew that this was the thinking which was underpinning the allocation of rights in the home, we might be less confident in the use of an idea of "fairness". And yet, the majority judicial opinion is in favour of reaching "fair" conclusions. But we need the judges to be honest about their attitudes so that we, as a society and also as a community of legal scholars, can comment on those principles. This sort of honesty – as opposed to the obfuscation of Chadwick LJ – can lead to the generation of clear principles. For example, the Australian courts have been much the clearer. As with Kirby P in *Bryson v Bryant* ((1992) 29 NSWLR 188):

> 'It is important that the 'brave new world of unconscionability' should not lead the court back to family property law of twenty years ago by the back door of a pre-occupation with contributions, particularly financial contributions … Nor should those who have provided 'women's work' over their adult lifetime … be told condescendingly, by a mostly male judiciary, that their services must be regarded as 'freely given labour' only or, catalogued as attributable solely to a rather one-way and quaintly described 'love and affection', when property interests come to be distributed.'

The courts must make their intentions clear if equity is to work at all: Hudson, 'Equity, individualization and social justice' (in *New Perspectives on Property Law, Human Rights and the Home*, (London: Cavendish Publishing, 2004), 1).

A social justice understanding of these cases

Rather than conceive of "social justice" purely rhetorically, I would suggest that it is possible to create a model of social justice which allows us usefully to measure the way in which the legal system allocates rights in the home. Principally this discussion will be concerned with Miller's model of social justice (Miller, *Social Justice* (Oxford University Press, 1976)).

- **Rights** – *Rosset*; express trusts; contracts for the sale of land

- **Deserts** – (a) proprietary estoppel due to the detrimental reliance on a representation (whether proprietary rights (*Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498) or mere financial compensation (*Jennings v Rice* [2002] EWCA Civ 159) or a mix of the two (*Gillett v Holt* [2000] 2 All ER 289)), and (b) (uncomfortably) the "deserving wives" (as with the warm bath doctrine in family law
- **Needs** – *Baker v Baker* use of estoppel; Children Act 1989, s.1

This bifurcation in principle demonstrates a need to understand the philosophy which we are seeking to prosecute here. A *rights*-based conception of a just conclusion which awards rights in property solely on the basis of some recognised pre-existing entitlement, such as contribution to the purchase price of property, or purchase of the property outright and receipt by way of conveyance, and so forth. By contrast, an approach based on *deserts* is concerned to allocate an equitable interest in the home on the basis that the claimant has contributed something the denial of which would cause her to be hard done-by is itself the thing which means that she deserves to be compensated for that. (There is a problem here, of course, in deciding what we consider to be "deserving" behaviour – particularly when it is a mostly male judiciary seemingly allocating rights to women.) By contrast, again, a *needs* approach focuses on the condition of the claimant's life and welfare, without considering any quasi-moral question as to whether the claimant *deserves* an equitable interest or has some pre-existing *right.*

It is important if we can identify that different approaches lead to different results, that we identify which approach we prefer in which circumstances before we begin "supplying the parties' common intention", as Chadwick LJ suggests.

Standard deviation

The age in which we live values the self over all else. We none of us consider that we are expendable or average or just part of the crowd. Instead we develop our own legitimate strangeness. In the trusts of homes cases, these are the "standard deviationists" (drawing on Hans Magnus Enzenberger, *Mediocrity and Delusion, Collected Diversions* (Verso, 1992), p.179):

- a farmer who makes friends with pubescent boys and (worse) trainee solicitors (*Gillett v Holt* [2000] 2 All ER 289);
- a cross-dressing drummer in a heavy metal band (*Lissimore v Downing* [2003] 2 FLR 308);
- an elderly man moving to Torquay to die (*Baker v. Baker* [1993] 25 HLR 408);
- a live-in gardener with an angry, suspicious wife (*Jennings v Rice* [2002] EWCA Civ 159);
- an entrepreneur's young Welsh boyfriend who doubles up as his chauffeur and scullery boy (*Wayling v. Jones* (1995) 69 P&CR 170);
- a selfless stepdaughter (*Re Basham* [1987] 1 All ER 405); and
- a middle-aged second-hand car dealer from Essex who picks up a Playboy Bunny girl in Epping Forest (*Hammond v. Mitchell* [1991] 1 WLR 1127).

- The only couple who sound like they ought to be fun are "Drake" and "Whipp" – but they're not (*Drake v Whipp* [1996] 1 FLR 826).

These people undoubtedly see themselves as being *people*; not as being *units of flesh* to be allocated to a legal category selected for them by academics from the University of Oxford. How could we possibly create a single, rigid rule which would deal justly with all of these different circumstances? We would feel compelled to do as family law does and to apply general principles to specific cases in a way that is sensitive to context. In this sense, family law is the purest form of equity.

How does equity work with this idea of the individual?

Individualisation

The need for respect of the individual

The core to our need for equity is that the legal system has to take into account the needs of the individual. In our age, it is not sufficient to treat human beings as just another unit. Somewhere on the trajectory from Kant's categorical imperative – requiring, in effect, that each person is equally valuable – through to the advent of human rights law in the UK, it became impossible to think exclusively of individual human beings as simply expendable units within a mass of humanity.

The following, well-known idea from Simone Weil reminds us that we cannot overlook the individual:

> ' "You do not interest me." No man can say these words to another without committing a cruelty and offending against justice.'
>
> - Simone Weil, 1943,
> 'La Personnalite humaine, le juste et l'injuste',
> in *La Table Ronde* (1950);
> trans. Rees, 'Human Personality',
> collected in *Simone Weil: An Anthology*, ed Miles,
> (Virago Press, 1986), p.70.

This is the ultimate expression of Kant's categorical imperative. It is the ultimate recognition of the fact that we cannot ignore the individual importance and significance of each individual person. Unfortunately, it is a notion which makes taxonomies of law problematic, because a taxonomy of law requires that the rules are applied without listening to a plea in mitigation from any individual. All that can happen is that the case is allocated to its legal pigeon-hole. What can happen if we retreat into such taxonomies is the following statement from Blackstone on the rights of women on marriage:

> '… the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband…'
>
> - Blackstone, *Commentaries on the Laws of England*, 1765,
> (reprinted by University of Chicago Press, 1979), p.430.

Thus, all of the wife's property passed to her husband. The rules on real property were more complex. Hence the popularity of family settlements to preserve the rights of women in rich families before marriage. (See, for example, Cretney, *Family Law in the Twentieth Century* (Oxford University Press, 2003), p.91 *et seq*.) As Dicey put it: the

> 'daughters of the rich enjoyed … the considerate protection of equity, the daughters of the poor suffered under the severity and injustice of the common law'
>
> (Dicey, *Lectures on the Relation between Law and Public Opinion in England During the Nineteenth Century* (2nd ed., 1962), p.383).

Now this does not mean that all taxonomies will lead to this conclusion. What is important is that taxonomies are, first, locked in time and therefore not in themselves susceptible to change; and, secondly, that they do not permit any plea by an individual that her circumstances are different.

In a chaotic world it is important to be able to react to change

Chaos and relativity

In a chaotic world it is important to be able to react to change.

Simply reading the rules out of a big book of rules requires no more brains than does filling a kettle. It is designing those rules and being capable of applying those principles suitably to any given set of facts which requires more subtle thought.

We have turned from "the law of restitution", with its difficulties over the word "unjust" and its "taxonomies" into the law of "restitution of unjust enrichment" to the "law of unjust enrichment" and the concept of "analogy with mistake". The underpinning concepts are constantly consumed by themselves, until all that is left is the metaphysical notion that "unjust enrichment" operates "by analogy with mistake". Truly, restitution will eat itself. But always pretending that it is rational, predictable and conforming to a taxonomy.

We live in an infinitely complex world. Our thinking must be flexible enough to cope with complexity and change. Restitutionists and similar sorts of positivist are still stuck in the world of 'atoms as building blocks', whereas the rest of us have got used to the presence of chaos.

At the most basic level, Einstein's theory $E=MC^2$ is a proof of change. It is a proof that everything is relative to everything else.

Taxonomy is so masculine

Taxonomy is such a masculine response to the messiness of the world, a little like the road-map approach to peace in the Middle East or bombing Iraq: you press one button and all the problems in the world are solved. It's an approach which has never worked before, so why do we suppose that it will work this time?

Perfect questions and perfect answers

A part of the problem with relying entirely on perfect taxonomies of law and on the rigid application of rigid rules is that we cannot even come up with perfect questions, let alone perfect answers. Consider that characteristic question of eight year-old's maths classes:

> Albert fills a bath with a volume of 150 litres with water which flows at a rate of 2.5 litres per minute. How long does it take Albert to fill his bath?

Well the question is hopeless. Nobody fills their bath like that. Nobody fills up their bath completely for a start. If you did, the water would spill out onto the floor. So we cannot know how much water Albert uses unless at the very least we know how much water Albert will displace. Anyway, when people fill their baths, they have a routine.

Maybe they run their bath for as long as it takes them to shave or to brush their teeth or while waiting for the bread to toast. In most bathrooms you have to put in a little cold water first, or else the bathroom mirror steams up. Waiting for the bath to fill is boring if you are not doing something else in the meantime, so you are likely to start doing something else and – because it's early in the morning and you're not yet properly awake – you will often accidentally put in too much cold, and then it will take longer to put in enough hot water.

Maybe you have to empty some cold water out. Maybe the pilot light for your water-heater has gone out, requiring you to hop from foot to foot on the cold kitchen tiles as you wait for it to catch. Maybe, in your wandering early morning mind-set, you put in too much hot. Maybe, you just get into the bath when it's neither full nor perfectly warm because you are in a hurry (because you've spent so long getting the pilot light going, or simply because you're normal and you stayed in bed as long as possible hitting the snooze button again and again until you were late). So, the reason why this seemingly perfect question is difficult to answer, is that the perfect mathematical answer takes no account at all of how people actually live.

This is, in essence, my point tonight: because people often do not behave in predictable ways, it is important never to assume too much nor to require too much rigidity in our expectations of them.

The importance of equity

That is why equity is so important.

Only through equity are we able to measure each case according to its own facts and against a set of principles based, in all honesty, on contested value

judgments. It is here that the confident logic of unjust enrichment theory reaches its limits because there are cases – such as those relating to trusts of homes – which will not respond to the binary pattern "enrichment causes subtraction" without a value-laden concept of "injustice" to go with it.

If I move into your house, have children with you and work to maintain your home, is it unjust for you to turn me out without a penny; and contrariwise, if I move into your house, have children with you and then throw you out of that house you have worked to maintain, is that unjust too?

There is no perfect answer to either question.

All that we can do is to be honest about the way in which we answer those questions – we must make value judgments, make them openly and debate them openly. To do anything else would be inhuman. To do anything else would be believe that the law which governs this area is simply magic and nothing for which we are morally responsible.

Alastair Hudson, 'Equity, individualization and social justice', *New Perspectives on Property Law, Human Rights and the Home,* ed Hudson, (London: Cavendish Publishing, 2004), 1, 35.

'Not everything that counts can be counted.'

The unbearable lightness of property

The unbearable lightness of property – there are different forms of property in the world now that there were when the earliest forms of property law began. In our modern "soft capitalism", the capitalist has lines of flight in that she does not have to be burdened with factories and so forth – instead the uber-capitalist is only concerned with the protection of her patents, copyrights and trade marks, not with the maintenance of burdensome property. It is soft and light property ownership.

For the property-proletariat, we are bound to our property by weighty ties of ownership – this is why we are not permitted to abandon property – like the dead horse in the road. Unless, of course, we are sufficiently well-advised to ensure that our ties are only to intangible (or, light) forms of property, such as patents and copyrights and franchise agreements, so that we can abandon the burdensome forms of property.

This has meant a revolution in some fundamental concepts of property – unlike Penner's assertion that "property" is "anything which can be transferred", we see in cases like *Don King* that non-transferable contracts are capable of constituting the subject matter of a trust, because it is the benefit which is to be taken from that contract which forms the property.

> *Don King Productions v. Warren* [1998] 2 All E.R. 608
> *Re Celtic Extraction* [1999] 4 All ER 684
> *Swift v Dairywise Farms* [2000] 1 All ER 320
> *Fletcher v. Fletcher* (1844) 4 Hare 67

And then we look at the local authority swaps cases and see the difficulties which some of this very modern property has caused. The interest rate swap in *Westdeutsche Landesbank v Islington* – held off-balance sheet as though it did not exist – caused money to be paid from WDL to Islington both to alter the interest profile of Islington's outstanding debts and to make an off-balance sheet loan. When Lord Browne-Wilkinson considered whether or not this money could be traced, his lordship began by analogising these electronic funds transfers with "a stolen bag of coins".
To our property law, then, all property must be treated as being tangible.

Let us think about this same idea in a different way. "Certainty" is said by Prof Goode to be the "philosophy of commercial law". So, we would expect a rule which bolstered certainty of subject matter in trusts law to be popular with commercial lawyers. So, in *Goldcorp* we see the need for the identity of the property – chattels, bullion – so that there is sufficient certainty of subject matter. In *Hunter v Moss* it is suggested that there is no need for the identification of the property – there is a lightness in these dealings with these securities. Looked at more closely, however, Dillon LJ does not say that. His argument is weak. He seeks merely to distinguish other cases, without explaining why. Instead he is seeking to equity by ensuring that

an employee is paid the "value" to which he is contractually entitled. It is as though property law may not be used as an engine of fraud.

Ironically, it is the commercial lawyers – with their lust for certainty – accept *Hunter v Moss* because they hope it gives them security. Oddly, they use expressions like "case law provides that" (e.g. Wood, Goode, and Benjamin) without the need to delve more deeply into the content of those decisions. The further irony is that the Uncertificated Securities Regulations 2001 will not permit this free-wheeling attitude to ownership of shares, even though title is dematerialised.

> *Re Goldcorp* [1995] 1 A.C. 74
> *Hunter v. Moss* [1994] 1 W.L.R. 452
> *Re Harvard Securities* [1997] 2 BCLC 369
> *MacJordan Construction Ltd v Brookmount Erostin Ltd* [1992] BCLC 350

Liquidity is the key metaphor for our social relationships, for our attitude to property. Compulsory obsolescence in so much of our property means that our relation to that property is now very different.

Property law is therefore about so much more than "ownership". It may be about recovering damage in relation to a contract for the sale of property; it may be about tracing into substitute property which will provide us with property of equivalent value; it may be about emotional or sentimental attachment to property – for example in relation to the home.

Consequently, property law is not limited to questions of "who owns this thing?", but rather it relates to "how do I want to deal with my rights in relation to this thing as part of my life more generally".

Hence the oddity in relation to tracing property rights in equity of having some remedies which are not proprietary, or which are not proprietary in the same ways. Thus a charge gives a right to property only on application to the court (regardless of *Spectrum Plus*); a lien gives only a right to possession; a constructive trust gives a proprietary right, but one which is not identical to having absolute title (particularly if there is more than one beneficiary under that trust).

So, our property law is not about imposing order in advance. It is about resolving disputes by giving litigants the tools with which they can achieve their objectives.

'*A common mistake that people make when trying to design something completely foolproof is to underestimate the ingenuity of complete fools.*'
- Douglas Adams, *Mostly Harmless*, p.113

THE LEGAL CONSCIENCE

Is it possible to have a "legal conscience"?

We must consider how we can understand the notion of "conscience" which underpins equity as being a viable notion. It's a question of how far back you go in looking for your central organising principle. Consider the following:-

Aristotle's *Ethics*:

> "*For equity, though superior to justice, is still just … justice and equity coincide, and although both are good, equity is superior. What causes the difficulty is the fact that equity is just, but not what is legally just: it is a rectification of legal justice. The explanation of this is that all law is universal, and there are some things about which it is not possible to pronounce rightly in general terms; therefore in cases where it is necessary to make a general pronouncement, but impossible to do so rightly, the law takes account of the majority of cases, though not unaware that in this way errors are made. … So when the law states a general rule, and a case arises under this that is exceptional, then it is right, where the legislator owing to the generality of his language has erred in not covering that case, to correct the omission by a ruling such as the legislator himself would have given if he had been present there, and as he would have enacted if he had been aware of the circumstances.*"

Earl of Oxford's Case (1615) 1 Ch Rep 1, *per* Lord Ellesmere:

> "*the office of the Chancellor is to correct men's consciences for frauds, breach of trusts, wrongs and oppressions … and to soften and mollify the extremity of the law*"

This talk of conscience was endemic in 17th century England in the lead-up to the Civil War – as evidenced by Tristram Hunt's book, collecting contemporary documents, *The English Civil War – At First Hand* (Phoenix, 2002).

Lord Dudley v Lady Dudley (1705) Prec Ch 241, 244, *per* Lord Cowper:

> "*Now equity is no part of the law, but a moral virtue, which qualifies, moderates, and reforms the rigour, hardness, and edge of the law, and is an universal truth…"*

The objectivity of "conscience" in truth

'*Conscience is the aboriginal vicar of Christ.*'

- Cardinal Newman

The conscience. That still, small voice which speaks to us mainly of shame.

The word "conscience" itself is derived via Old French from the Latin "conscientia" meaning variously "consciousness"[1]; "one's inmost thought"[2]; an "inward knowledge

[1] Shorter Oxford English Dictionary, 5th edn, 2002; Encarta World Dictionary, 1999.
[2] Shorter Oxford English Dictionary, 5th edn, 2002.

or consciousness, an internal conviction, mental recognition or acknowledgment"[3]; or, interestingly, "privity of knowledge".[4]

This last, particular sense of "privity of knowledge" emerges from the derivation of the word "conscience" from the Latin "conscire" meaning "to be privy to": that is by a conjunction of the prefix "con" with the verb "scire", "to know".[5] Thus a conscience contains the sense of being privy to knowledge of oneself *with oneself*. Such a meaning of the term conscience displays two important facets of the meaning of conscience. First, one has private knowledge of oneself coming from the unique state of being-in-oneself (unique in the sense that no other person can be within one's own self, although each individual has a being within themselves, explained by psychoanalysts as the superego, which is separate from one's own conscious self, or ego). Secondly, there is a separation within the self such each individual shares knowledge of herself unconsciously with the conscious self – that is, the conscience has knowledge of oneself which it shares with oneself. That is, I would suggest, the conscience speaks to the conscious self by passing a sensation to the conscious self. This bifurcation between the conscious self and the conscience is present in Macaulay's comment that "David can do as he likes … it is between him and his conscience", suggesting that David's view of the matter would need consideration by his conscious self and by his conscience as two distinct entities albeit contained within one self.

There is an important separation between the conscious self and the conscience. In psycho-analytic terms this is the distinction between ego and super-ego. Psychoanalysis explains the conscience as being "part of the superego that passes judgments on thought and behaviour to the ego for further consideration".[6] The conscience thus inhabits a dimension apart from the conscious ego. The manner in which the conscience then speaks to the conscious self is as an automatic, one-way transmission of sensation. Predominantly, psychoanalytic theory considers that the conscience usually speaks of shame.[7] When one behaves in a way which the conscience considers to be shameful, then the conscience passes a sensation to the ego.

If equity were said to act on the basis of 'a public morality expressed through the courts' then that would not lead to the uncomfortable muddle which is generated by the modern usage which suggests that equity is concerned with the individual defendant's conscience rather than with the embodiment of the sovereign's conscience through the actions of her officials and delegates. The term conscience suggests a subjectivity at first blush. However, matters are perhaps not so easy. To suggest that conscience is something entirely within the individual and is something other than a public ethic expressed through legal principle, is to suggest that the individual conscience and the consciousness to which it is both etymologically and metaphysically connected is not socially constructed at some level. This notion is beautifully expressed by the playwright Luigi Pirandello in his play *Each in his own way* when the character Diego challenges the other characters who are talking about

[3] Shorter Oxford English Dictionary, 5th edn, 2002.
[4] Shorter Oxford English Dictionary, 5th edn, 2002.
[5] Shorter Oxford English Dictionary, 5th edn, 2002.
[6] Encarta World Dictionary, 1999, p 403, under "conscience".
[7] S Freud … .

giving confession (itself that classical objectification of the conscience) and claiming that their self-contained consciences are clear:

> 'But what is conscience? It is the voice of others inside you.'[8]

What this idea suggests is that conscience is formed by our inter-actions with other people and is not something which we develop inside our own heads in a vacuum. This raises a range of important philosophical questions considered below. At root, perhaps, it reflects those debates about whether or not the law should operate objectively or subjectively.

The distinction between subject and object is, of course problematic. To talk of the subject meaningfully, one must mean an individual and particular person. As soon as discussion becomes discussion of similarities between subjects or of an idealised subject then one immediately begins to objectify that subject.[9] So, the conscience is most easily recognised as that small, still voice within us individually which speaks to us only of shame. For equity to seek to judge the conscience in accordance with decided principle is necessarily to seek to objectify that conscience. To judge the conscience even on the basis of total judicial discretion is to objectify it, is to take it outside the subject and to use it as a lens through which to view those acts or omissions which for which the defendant is on trial.

This perception of the vernacular sense of conscience is still troublesome. Is it correct to think of the conscience as a *still*, small voice. Or is the conscience something which moves, which grows and which develops? Further, is the conscience a still, *small* voice. If the individual is formed socially, at least in part, then the conscience is potentially a particularised rendering of a massive, public morality which is produced within the individual as an amalgam of socially-broadcast messages about right and wrong, of the products of inter-actions with other individuals (from immediate family, to work-mates to school-friends), and of more subtle phenomena like law, environment and so forth which shapes expectations and attitudes more subliminally still. In Elias's view, individuals are necessarily socially-constructed.[10] Therefore, the internal world of even the particular individual must be considered to be objectified at some level.

At a further level, Levinas locates the essence of morality in a respect for other people. In this sense, equity might sensibly be said to operate on the externally-exhibited morality of the individual rather than on the internally-situated morality of that same person. Equity is responsive to the external manifestation and not inquisitive as to the contents of the internal morality. This is always assuming that the individual is *conscious* of her own internal morality until external factors challenge that individual, causing her *conscience* to speak for the first time "out loud" even to herself about her own attitudes to particular ethical challenges. At this level, therefore, it is possible that the conscience – even at the level of the individual's private

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[8] Pirandello, *Each in his own way*, spoken by Diego in Act 1, trans. Firth, *Pirandello – Collected Plays*, Vol. 3, Calder, London, 1992, 71. Also rendered in other versions as 'Don't you see that blessed conscience of yours is nothing but other people inside you!', for example in Williams, *The Wimbledon Poisoner*, Faber & Faber, London, .

[9] Adorno, 'Subject and object', .

[10] Elias, *The society of individuals*, .

mythology and concealed world-view which remains dormant and unexplored in many of us (our true feelings about strawberry yoghurt, an aversion to blue food dye, a thrill at the smell of warm road tar, a suspicion of sewing needles, a fear of accidentally chewing the tin foil wrapper on a Kit-Kat[11]) until something in the outside world calls it unexpectedly to our conscious perception. Conscience, that automatic censor, is therefore not only externally created in part, but the process of its generation in terms of our realisation of what our conscience likes and dislikes is frequently dependent on external stimuli.

All that can be said is that the conscience is *privately situated*. This suggests that the individual hosts her conscience. What remains at large are both the *contents* of that conscience and the *process* by which the conscience is formed. The contents of that conscience are prey to constant change and adaptation. Furthermore, the contents of that conscience at any particular time will be objective material, even if passed through ostensibly subjective filters.

In conclusion, it is suggested that the conscience on which equity purports to act is necessarily a partly objective phenomenon in any event. Indeed, the most striking example of the action of public morality on the privately-situated conscience would be a judgment from a court of equity that a particular action breaches that equitable code. Law exists to measure the behaviour of individuals up against the objective conscience of society as expressed through law – therefore, equity is simply expressing that general prescription.

Dishonest assistance and the problem caused by *Twinsectra v Yardley*

> *Royal Brunei Airlines v. Tan* [1995] 2 AC 378, 387, *per* Lord Nicholls: "… *acting dishonestly, or with a lack of probity, which is synonymous, means simply not acting as an honest person would in the circumstance. This is an objective standard.'*
> *Twinsectra Ltd v. Yardley* [2002] 2 All E.R. 377, 387, *per* Lord Hutton: '*There is, in my opinion, a further consideration [than deciding whether the test is one of knowledge or dishonesty as set out by Lord Nicholls] which supports the view that for liability as an accessory to arise the defendant must himself appreciate that what he was doing was dishonest by the standards of honest and reasonable men. A finding by the judge that a defendant has been dishonest is a grave finding, and it is particularly grave against a professional man, such as a solicitor. Notwithstanding that the issue arises in equity law [sic] and not in a criminal context…'*
> *Dubai Aluminium v Salaam* [2002] 3 WLR 1913
> *Barlow Clowes v Eurotrust* [2006] 1 All ER 333, [2006] 1 WLR 1476
> *Abou-Rahmah v Abacha* [2006] EWCA Civ 1492, [2007] Bus LR 220.

Theodor Adorno – subject/object
Adorno refers to 'a subjectively mediated but objective aesthetics'.

> - Adorno, 'Subject-object', in *Aesthetic Theory*, ed. Adorno and Tiedemann, trans. Hullot-Kentor, (Continuum, 2004), p.216.

This is the way to understand the notion of dishonesty and conscience – as …

> ['Subjectivity, however, though a necessary condition of the artwork, is not the aesthetic quality as such but becomes it only through objectification…' (p.223) and later 'The totally objectivated artwork would congeal into a mere thing, whereas if it altogether evaded objectification it would regress to an impotently powerless subjective impulse and flounder in the empirical world' (p.230).]

[11] Another brand name which is automatically familiar to my speller checker.

The hermeneutics of Lord Hoffmann

Hans Gadamer, *Truth and Method* ()

> 'A person who is trying to understand a text is always projecting. He projects a meaning for the text as a whole as soon as some initial meaning emerges in the text. Again, the initial meaning emerges only because he is reading the text with particular expectations in regard to a certain meaning. Working out this fore-projection, which is constantly revised in terms of what emerges as he penetrates into the meaning, is understanding what is there.' (p.269)

> 'In view of the necessary imperfection of all human laws, the idea of natural law is indispensable for Aristotle; and it becomes particularly important in the question of what is equitable, which is what first really decides the law.' (p.317)

> In relation to the interpretation of laws by judges: 'to understand and to interpret means to discover and recognize a valid meaning.' (p.324)

CG Jung, *Letters*, vol. II, p.57:

> 'The psyche for me is something objective that sends up effects into my consciousness. The unconscious (the *objective psyche*) doesn't belong to me; rightly or wrongly I belong to it. By making it conscious I separate myself from it, and by so objectivating it I can integrate it consciously.'

EQUITY AND FINANCE

Integrity and conscience

The most successful, the most modern form of commercial regulation – the FSA rulebooks – just like equity are founded on general principles which are then applied to particular context. There is no irony in the observation that financial services regulation – orientated around a central principle of "integrity" – is coming to resemble equity more and more.

The following discussion is taken from my book *Securities Law* (Sweet & Maxwell, 2008):-

The nature of high-level principles in financial regulation

3-97 The principles of financial regulation are coming closer to principles of private law all the time. In paragraph 3-94 above I considered how private law is likely to take principles of financial regulation as the best guide to the appropriate test to apply in many private law circumstances. The different point considered here is as to the methodology by which financial regulation which is organised around a combination of high-level principles and detailed rules will operate. As was considered in chapter 2, EC securities law is organised around the high-level principles contained in the EC securities directives and the very detailed, technical rules contained in the Commission's technical regulations. Therefore, at the European level there is a combination of high-level principle and detailed rules. The *FSA Handbook* is intended to follow this format more closely with more of the Handbook being presented in the form of high-level principles in the future, although at present it already follows this format. The FSA's *Principles for Businesses* constitute the starting-point for the FSA rulebooks. Observance of the detailed rules elsewhere in the rulebooks is only satisfied if these overarching principles are also complied with. It is a little like the "spirit" of the rulebook being contained in the over-arching principles, and the "letter" of the rulebook being contained in the more detailed rules. Each sub-division of the rulebook begins with a statement of the application of the rules to follow and also a statement of the general obligations which inform the operation of those rules – frequently culled from the provisions of FSMA 2000. Therefore, we have high-level principles – for example the principle that regulated persons must act with "integrity" – being applicable to all observance of more detailed regulatory rules thereafter. That is, one cannot comply with the "letter" of any given rule unless one also complies with the "spirit" of the need to act with integrity. Indeed the guidance notes which also make up the FSA rulebooks could be said both to inform regulated persons about the nature of their obligations and also to reinforce the spirit of that rulebook.

3-98 To an English lawyer this combination of high-level principle and detailed rule should be familiar. It is the meat and pith of equity, for example. To some people the notion of regulated persons acting with "integrity" may seem to be a vague notion. What might "integrity" mean? How could it apply to the hurly-burly of a trading floor, or to a large merger transaction? How could one know from context to context what it meant? The same could be said, and occasionally is said, of the notion of "conscience" which is the heart

of equity.[12] And yet, the law of trusts, which is a part of equity, is a marriage of the general notion of "conscience" with detailed rules as to the creation, management and remedy for the breach of trusts. For trusts lawyers, the notion of conscience is not a vague notion – for all that it may sound like that in the abstract – but rather it is a concept which operates in a nuanced way in different types of circumstance. So, the idea that a trustee must act in good conscience in relation to property which is held on trust is a notion which underpins the imposition of trusts *de novo* as well as the nature of the trustee's obligations once a trust has come into existence. And so technical rules as to certainty of subject matter in trusts law co-habit in the textbooks with the imposition of constructive trusts to prevent conflicts of interest – where that constructive trust is operating so as to prevent unconscionable benefit being taken from the trustee's position. Within the law on constructive trusts – to select the most obvious example of "conscience" at work in English trusts law – it is clear that the courts are concerned to avoid conflicts of interest in relation to fiduciaries dealing on their own account with trust property[13] and are concerned with the prevention of the corruption of fiduciaries in relation to bribes:[14] but in both situations the underling notion of "conscience" can be understood as applying equally to both so as to impose proprietary constructive trusts over any property received by those fiduciaries.[15] Thus the concept "conscience" has become flexible enough, and well enough understood by English jurists, to apply in those and many other specific contexts while still being predicated on a large underlying principle.[16] In a similar vein, the notion of "integrity" and the other FSA *Principles for Businesses* in finance law will therefore have to be understood as applying in subtly different ways in different contexts too but always based on the same fundamental principle.[17]

3-99 The law of finance will have to develop and understand how "integrity", for example, operates across the whole of the law of finance. It is suggested that the sense of "integrity" is to be found in the obligation to obey the rules contained in the FSA rulebooks as well as to comply with the spirit of the rulebooks as contained in its guidance notes and other Principles for Businesses. Thus, seeking to take advantage of loose drafting of a rule or acting in contrary to a guidance note (but not a rule) may be considered to be examples of behaviour without "integrity". The standard of "integrity" should also, it is suggested, require compliance with the substantive law such that any breach of a requirement of "reasonableness" or "good conscience" or "honesty" in English, Scots or Northern Irish law, as applicable, should be taken automatically to constitute behaviour which does not display integrity. Clearly, fraud – whether active deceit or undue influence of clients or recklessly making misleading statements or otherwise – could not constitute acting with integrity. One cannot be said to have acted with integrity if one has acted fraudulently, in its colloquial sense. What is suggested here is that lack

[12] See AS Hudson, *Equity & Trusts* (Routledge Cavendish, 5th edition, 2007), section 1.1 and 32.2; *Earl of Oxford's Case* (1615) 1 Ch Rep 1; *Westdeutsche Landesbank v Islington* [1996] 1 AC 669.
[13] E.g. *Bray v Ford* [1896] A.C. 44; *Boardman v Phipps* [1967] 2 A.C. 46.
[14] *Attorney-General for Hong Kong v Reid* [1994] 1 A.C. 324; *Daraydan Holdings Ltd v Solland International* [2004] 3 W.L.R. 1106.
[15] See *Westdeutsche Landesbank v Islington* [1996] 1 AC 669.
[16] For an analysis of this issue see AS Hudson, *Equity & Trusts* (Routledge Cavendish, 5th ed., 2007), 562, and the detailed discussion of the various forms of constructive trust in the preceding Chapter 12 of that book.
[17] See AS Hudson, *The Law of Finance* (Sweet & Maxwell, 2008).

of integrity should also be identified with the common law of deceit or recklessness as to truth.[18]

3-100 The technique of applying high-level principles to individual cases, and also the technique of developing the application of those high-level principles in subtly different ways in different contexts, are well-known to English equity, and to English common law. They are also the mainstay of EU treaties and now of EC securities directives after the Lamfalussy methodology was introduced. This way of thinking, it is suggested, is also typical of civil code systems' private law: general principles are applied to individual cases by the courts, like the FSA Market Tribunal, without any necessary development of a stream of binding precedent. The consequence is the development of culturally-specific legal norms of two types – the core principles and the manner in which they are applied in identified contexts – which is typical, for example, of English trusts law. It is not simply a question of the notion of "integrity" being too vague for its purpose or not too vague for its purpose. Rather, the manner in which the FSA will put that principle into effect will need to become understood by market professionals and to become a part of the financial markets' culture. What will be important in that process of establishing a notion of integrity in the context of the UK securities market will be the publicising of the FSA's decisions together with a clear indication of its understanding of how the principles underpinning individual decisions form part of a whole. A jurisprudence needs to emerge. A jurisprudence based on fundamental principles applied coherently and consistently to subtly different situations.

Equity is keen to deny the existence of positive obligations on financial people. So, in *Armitage v Nurse* we are told that trustees can exclude their liability for gross negligence (but not dishonesty), even though pension fund trustees and trustees in unit trusts cannot – indeed, statutory regulation of trustees always denies the right to exclude liabilities, whereas the case law does not. In *Polly Peck v Nadir (No.2)* Scott LJ found that there was no positive obligation on a banker to inquire in the source of a payment of £46 million that had been obtained from a group of companies by breach of fiduciary duties. By contrast, banking regulation and money laundering regulation do impose exactly those sorts of obligations on bankers, such that a banker by extrapolation from those principles could be treated as having imputed knowledge of things which she was under an obligation to find out by compliance with regulatory standards.

Equity out of step with financial law and commercial practice
Armitage v. Nurse [1998] Ch 241
Polly Peck v Nadir (No 2) [1992] 4 All ER 769
FSA Principles for Businesses: "integrity"
FSA Conduct of Business Sourcebook; EC Markets in Financial Instruments Directive ("MiFID")
Criminal Justice Act 1988, s93A
Money Laundering Regulations 2007

- Hudson, *The Law of Finance* (Sweet & Maxwell, 2009)

The privatisation of commercial law, and the need for principles and mandatory norms

[18] *Derry v Peek* (1889) 14 App. Cas. 337.

By contrast, there are areas in which equity is in tandem with financial regulation. There is a slew of cases in which the courts have held that in deciding whether a defendant, who is a commercial person, has acted appropriately (whether conscionably or honestly or whatever) the court should find out what commercially reasonable conduct would have been for that person, and if that person has not acted in a commercially reasonable manner then that person will be held to have transgressed the private law test. Similarly, then, when a banker fails to comply with FSA regulation, that banker will be treated as having transgressed the standards required of an honest banker or of a conscionable banker, and so on.

> *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All ER 700, 761, *per* Knox J: *"commercial unacceptable conduct in the particular context"*
> *Polly Peck v Nadir (No 2)* [1992] 4 All ER 769 (*liability of financial advisors dependent on context and whether they ought to have been suspicious*)
> *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511, at 535, *per* Colman J (*contravention of financial regulation*)
> *Bank of Scotland v A Ltd* [2001] 3 All ER 58 (*contravention of financial regulation*)
> *Sphere Drake Insurance Ltd v Euro International Underwriting Ltd* [2003] EWHC 1636 (Comm) (*taking unacceptable risk in contravention of conduct of business regulation = dishonesty*).
> *Manolakaki v Constantinides* [2004] EWHC 749 (*clear dishonesty where contravention of financial regulation, backdating of documents and including untrue statements in documents; absence of personal profit would militate against finding of dishonesty*)
> E.g. Financial Services and Markets Act 2000 – FSA Conduct of Business Rules: Hudson, *Securities Law* (Sweet & Maxwell, 2008), para 3-60 *et seq*.

The following passage from my book *Securities Law* considers this question:

> 25-43 It is clear from the case law that when judges are asked to frame tests relating to the honesty or knowledge of regulated finance professionals and others that the judges will take existing financial regulation as embodying the behaviour which should have been expected from such a professional or as to the knowledge which such a professional could be expected to have.[19] The case of *Bankers Trust v Dharmala*[20] is a good indication of how a judge may use financial regulation to develop principles of substantive law. The issue is this: a judge faces a question relating to the liability of a financial advisor (whether fund manager, intermediary, or otherwise) and is required by the substantive law to identify the standard against which the behaviour of that financial advisor falls to be measured in objective terms, whether framed as a test of dishonesty, good conscience, imputed knowledge of factors which that advisor ought to have known, reasonableness at common law, or whatever. Whichever of these tests is at issue the judge is then left with the task of measuring that *mens rea* against some objective standard: but how to identify that objective standard? The most obvious embodiment of objective standards in relation to the functions of financial advisors, in the United Kingdom, is contained in the *FSA Handbook*. More generally, recent cases have considered the question, again in relation to fiduciary law and the personal liability of strangers to a trust, as to proving misfeasance at substantive law by reference to standard market behaviour, whether or not embodied in financial regulation. So, in *Cowan de Groot Properties Ltd v*

[19] See AS Hudson, 'The Liabilities of Trust Service Providers in International Finance Law', in *The International Trust*, Glasson and Thomas (eds) (2nd ed., Jordans, 2006), 639.
[20] [1996] C.L.C. 252.

Eagle Trust plc[21] it was held that the defendant would be held to have acted dishonestly if he had been guilty of "commercially unacceptable conduct in the particular context". The court was thus inviting us to identify what would be acceptable conduct in the commercial market at issue and then to ask whether or not the defendant had complied with such standards. The standards for commercially acceptable conduct in financial markets, particularly in the EU, are made clear in the appropriate EU legislation: norms which are embodied in English law by FSA regulation further to FSMA 2000. Thus, a person who treats a customer in a way which would be, for example, contrary to conduct of business regulation as required by the FSA, would prima facie be acting unacceptably and so be at risk of being found to have acted dishonestly or unconscionably, as appropriate. This approach in *Cowan de Groot v Eagle Trust* has been approved in a number of more recent cases.[22]

[21] [1992] 4 All E.R. 700, 761, *per* Knox J.

[22] *Cowan de Groot Properties Ltd v Eagle Trust plc* [1992] 4 All E.R. 700, 761, *per* Knox J; *Heinl v Jyske Bank (Gibraltar) Ltd* [1999] Lloyd's Rep Bank 511, 535, *per* Colman J; *Bank of Scotland v A Ltd* [2001] 3 All E.R. 58; *Sphere Drake Insurance Ltd v Euro International* [2003] EWHC 1636 (Comm); *Manolakaki v Constantinides* [2004] EWHC 749; *Tayeb v HSBC plc* [2004] 4 All E.R. 1024.

EQUITY AS UNDERSTOOD IN THE OTHER SOCIAL SCIENCES

Let us begin at the beginning with a reminder of Foucault's idea that 'the language of power in our Western societies is law, not magic, religion or anything else'. We know that access to law is vital to our social life and to the civil liberties of our citizens. And yet, acquiring equity is beyond the reach of many of our fellow citizens because litigation is so expensive. Trust, according to EM Forster, is "*a luxury in which only the wealthy can indulge; the poor cannot afford it.*" (*Howard's End*). As a character in *The Wire* says: "*conscience do cost*". You cannot have equity if you cannot afford to buy it. Equity and English property law are concerned exclusively with bourgeois property ownership.

Thanks to Lord Woolf's reforms to civil procedure published in *Access to Justice*, no-one whose claim falls beneath the requisite value is entitled to anything other than second class justice. If you are rich, then you can access the High Court. Otherwise, you have to make do with "fast track justice" or the small claims court. Your pitiful, tiny claim is too insignificant for English judges to waste their time on. You don't matter. Fast-track justice is the "economy" queue in the English justice system. You're in the cheap seats in England's EasyJet justice system. (See Alastair Hudson, *Towards a Just Society* (Pinter, 1999)).

These principles are an obscenity. You cannot claim on the one hand that all citizens have equal rights, and then declare that those whose claims are worth less than a given amount have to join the fast-track queue. Law offers citizens a means of speaking, of shouting, about their rights. The poor are not allowed access to equity, and therefore they are silenced. The limitations placed on access to legal aid mean that most citizens in this country are denied access to law at all. Therefore, they are silenced in the discussion about their rights. Justice is not only blind; it is now also apparently dumb.

In spite of Aristotle's idea of equity as being a means of correcting legislative mistakes, it is essentially a bourgeois activity now.

Housing and homelessness

The ways in which the courts treat public sector homes is very different from the way in which it treats private sector rights in the home. For example, in *Pulhofer* Lord Brightman was prepared to allow a couple with infant children to live in appalling conditions on the basis that the legislation provided no requirement that their local authority accommodation be "suitable". Even after the legislation was altered to reverse *Pulhofer*, Lord Hoffmann (the great defender of human rights, he would say) in *Awua* upheld the same idea as in *Pulhofer* because to do otherwise would be to place a strain on local authorities' resources, regardless of the change in legislation which introduced a requirement that accommodation be "suitable".

Housing and homelessness

Alastair Hudson, *The Law on Homelessness* (Sweet & Maxwell, 1997)
Pulhofer v. Hillingdon BC [1986] AC 484, Lord Brightman
Awua v. Brent LBC [1995] 3 All ER 493, Lord Hoffmann
R v. Kensington and Chelsea RLBC, ex p. Ben-el-Mabrouk (1995) 27 HLR 564
R v. Purbeck DC ex p. Cadney [1986] 2 FLR 158

Law as our servant not our master

Co-operatives and the use of law

As Roger Cotterrell told us, Durkheim favoured contract law over property law because contract law enables organic combinations between people so that they can work together, whereas property law enforces separation by hiving off different pieces of property to be owned by some people and not others.

Co-operatives are an example of how this distinction is not always useful. In a co-operative - an industrial and provident society – the members share all of the rights in the society's property but no individual member owns any property rights individually. It is a co-operative equivalent of a joint tenancy, a perfect communist allocation of property rights. Together we own everything. Separately we own nothing.

By contrast, contracts typically privatise areas of our social relations. A good example is an arbitration agreement. An arbitration agreement is an agreement to keep disputes out of the courts, and so out of the sight of the ordinary legal system. They are compacts between commercial people that they will keep their activities separate from the rest of the world. Each contract is about concealment and a hidden locus of power relations.

Durkheim was evidently writing about a world two centuries old.

Judges as public servants

Access to law and access to justice are key – this is only possible if we have a seismic shift in our thinking about law: we must acknowledge that the law belongs to the people and that it is not simply something which is made by judges and which then in some way belongs to judges. The principal shortcoming in the positivist account is seeing the law as a sovereign giving commands which then are imposed on the masses, as a usurpation of the decrees of a human sovereign / monarch who gave commands: what we have not done is go the final yard and accept that law must come from the people and so be geared up to serve those people, as opposed to ruling over them and looking down as a benign dictator (benign in terms perhaps of human rights or a benevolent judiciary) – so judges must be thought of a public servants.

For Aristotle, equity existed to rectify shortcomings in the law so as to achieve a pure form of justice. Now equity is limited to procedural devices like interim injunctions or specific performance, or to allocation of rights in bourgeois homes or commercial property. This is the dream, in this understanding of equity as a bourgeois property

law device. This explanation of equity is not sufficient. It is not fit for purpose in a democratic age. In the immortal words of John Lydon: "There's no future in England's dreaming".

Equal access to justice

'Law is the servant of freedom; but freedom without equality is just a word.'

The connection between "equity" as understood in the social sciences generally and "equity" as understood by property law specifically, requires that equity is available as a technique across the whole of English law. In my book *Towards a just society* I consider how a workable principle of "equality of access" is the keystone for left-wing politicians; and that it is the sword which can splice the Gordian knot which binds debate over the meaning of "equality" in socialist thought. Equal access to justice should be the core principle of a socialist policy on access to justice and to citizens' rights.

Working in the law school at QM, there are problems with seeing order and certainty. If one works in the law school on the Mile End Road you have a selection of view. My own is east-facing and is a view of the west wall of the Arts building. If you have a west-facing view then you can see the east wall of the maintenance building and the car parts shop. If you have a north-facing view then all you can see is the graveyard. If you have a south-facing view then you are faced with the Mile End Road, Limehouse and Canary Wharf. In the distance are the clearest symbols of London's aspirations as a financial centre with those Citibank and other towers huddled around Canary Wharf, processing trillions and trillions of dollars every day. Right in front of you, however, is the Ocean Estate opposite the college on the Mile End Road with (so legend has it) the highest infant mortality rate in Europe. For a lawyer at Queen Mary then there is confronting you the two poles of our society: the bustle of an area which has been for centuries the first point of entry for immigrant communities which are currently experienced tuberculosis and which minute-by-minute are serenaded by the sirens of the emergency services, and the headquarters of the richest corporations operating in Europe: one in the shadow of the other. This creates a moral challenge to us in the way in which we choose to think about law and to inter-act with that community.

It is not reasonable to expect that law will conform to predictable patterns. Why are we so determined to be taxonomically predictable when everyone in this room is irrational about so many other areas of their lives? For example, we all know that each new day begins by the sun coming up. Everyone in this room agrees with that statement. Only the sun does not rise in the morning. The sun stays in exactly the same place. Instead the Earth revolves and orbits around the sun. Yet we talk constantly in the language of these fictions. We need them.

And it's because we're human.

If we are going to accept that law is a human creation and if we are going to value the individual significance of each human being, then we must continue to think about that law as containing equity in the sense I have discussed it. We must think of law as

being something that *comes from* those people, and not as an expression of something powerful that is being *done to* them.

When you go out of this lecture theatre tonight onto the Mile End Road, I want you to look into the faces of the strangers as they pass and I want you to think (possibly for the first time) that all this law belongs to them. It is an expression of their humanity and of our collective endeavour as a society. If you really mean it, then it is an incredibly powerful idea. Law becomes a means of enabling those people to write their biographies and to achieve their ambitions: it is not simply an expression of force which is imposed on them. Law becomes something which *belongs* to those people, and it is not merely something which governments do to them. To us. It becomes a means of enabling our fellow human beings to live together and to co-operate with one another. It genuinely becomes law for all.

We have to drop forever our sepia-tinted dream of England and its law. In the immortal words of John Lydon: 'there's no future in England's dreaming'.

The goal of our justice system – whether dealing with criminal law, or with rights to our homes, or whatever – should be to facilitate an open and equal access to justice. It should give our citizens an equal opportunity to write their own biographies with the support of the law. To paraphrase the words of John Smith:

> 'The scourges of social exclusion and the denial of access to justice are barriers, not only to opportunities for people, but to the creation of a dynamic and prosperous society. It is simply unacceptable to continue to waste our most precious resource – the extraordinary skills and talents of ordinary people.'
>
> - Rt Hon John Smith QC MP,
> Foreword to *Social Justice – Strategies for National Renewal*;
> The Report of the Commission on Social Justice, (Vintage, 1994).

What we need is a legal system which supports equality of opportunity for our citizens. A legal system which ensures equality of access to justice for our citizens. A law that values our humanity.

Those are the blueprints for my building.

Thank you.