Equity, individualisation and social justice

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Abstract

This essay seeks to analyse the nature of equity. At one level equity is a means by which any system of dispute resolution can circumvent dogmatic application of rules in favour of either "doing justice" on the facts or reaching the conclusion which the legislator who created the rule would have reached had she been appraised of these particular circumstances. Alternatively, Equity is that body of principle developed in the main by the Courts of Chancery which we know descriptively if not by reference to any intellectually coherent set of ideals. Within the scope of English law's notion of equity in the twenty-first century are a range of remedies and institutions which respond to either or both of these views, ranging from express trusts and trusts implied by law, through injunctions, specific performance, account, subrogation and so on. A further challenge for equity rests in the development of human rights law as another means of recognising individual rights, although human rights operate (it is suggested) by reference to a different set of philosophical principles.

The question then is as to the basis on which we might wish these equitable principles to operate in the future. The example used here to consider this question is that of the allocation of equitable interests in the home. Two different approaches are taken. First, an approach based on "individualisation theory" which appears to chime in with the notion that equity ought to be concerned, in Aristotle's conception, to do justice for the individual. However, in relation to disputes of ownership of the home it is clearly not possible to treat any individual in isolation. Therefore the second approach questions whether a variety of approaches to allocation of rights in the home across the Commonwealth achieve socially just results.

Ulrich Beck suggests that postmodernity's drift towards ever greater individualisation – by virtue of transforming citizens into consumers, presenting them with ever more fragmented lifechoices and weakening traditional social bonds – is a positive force which permits individuals ever greater freedom. By contrast, Zygmunt Bauman sees the same process as creating ever greater anomie and generating greater poverty. The first question addressed in this essay is the manner in which equity, as a legal jurisdiction permitting broad discretion to judges to reach conscionable decisions in individual cases, correlates with this drift towards individualisation. The further question is then whether or not this individualisation can generate social *justice despite the social atomisation it promotes. To establish the possibility of social justice, Miller's tri-cameral model based on right, desert and need is used to measure the way in which various areas of the law – trusts law, restitution, family law, housing law and so forth – measure up to this standard. What emerges is the observation that each area of law operates on a different basis.*

INTRODUCTION – JUSTICE IN THE WORLD OF THE INDIVIDUAL

An inquiry into the role of equity

This essay focuses on the particular problem of founding equitable interests in the home to consider how we balance respect for the individual with socially just results. More fundamentally, this requires us to inquire into the very nature of equity itself. That, in turn, requires some sensitivity to the way in which the individual and the legal system inter-act. In an attempt to conceive of the individual's condition before the law, I will consider the plight of one powerless individual wrestling to make sense of the higher powers who control the world around him through a consideration of John Fowles's *The Magus.*[1]

Equity occupies an interesting position in relation to the rest of the legal system. Historically, equity can be observed as that collection of principles which resulted from the deliberations of the Courts of Chancery over time and from the expanding jurisdiction of the Lords Chancellor to issue writs.[2] It should not be forgotten than there was once, in parallel with the civil equity which we know today, a jurisdiction of criminal equity embodied in the procedures of the Court of Star Chamber where sedition and so forth was rooted out in late medieval England and beyond. Philosophically, equity is accepted by a number of philosophers (Aristotle,[3] Hegel,[4] Kant[5] and so forth) as being a means of reaching what is considered to be a fair decision on any particular set of facts where the application of strict legal rules would be considered undesirable.

No particular, coherent theory of equity can be identified in any of these sources; rather, equity is typically seen as a useful exception to strict legal rules necessary to prevent manifest injustice. It is not clear, for example, whether the motivation for retaining equity is to recognise that judges require strong discretion from time-to-time to reach desirable results, or whether its motivation is a respect for the personality of the individual beyond the power of the state, or whether its motivation is an acceptance of the imperfection of any system of rules in constantly evolving universe. In the English context its role as a stream of conscience is bound up with the Lord Chancellor's role as the keeper of the monarch's conscience and therefore connected to some inalienable right of the sovereign as an instrument of god to dispense justice.[6]

The way in which a society can accommodate the freedom of the individual within its collective goals is one of the most complex questions for our age.[7] It is suggested that it is a question which ought, however, to be addressed at a time when our sociological observations indicate that the bonds which hold our society and its communities together are undergoing profound change; whether under a process of modernity or

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[1] Fowles, *The Magus*, Pan, 1977, revised edition.
[2] Thomas, "James I, equity and Lord Keeper John Williams" (1976) *English Historical Review* 506.
[3] Aristotle, *The Nicomachean Ethics*, 1955, 198, para.1137a17, x.
[4] Hegel, *The philosophy of right*, 1821, trans. Knox, 1952, 142, para. 223.
[5] Quoted in Murphy and Roberts, *Understanding property law*, Sweet & Maxwell, 1998: "a silent goddess who cannot be heard", 1797, tr. 1965, 40.
[6] Hudson, *Equity & Trusts*, 2nd edn., Cavendish, 2001, 9.
[7] Elias, *The society of individuals*, Continuum, 1998.

postmodernity will be considered below. The kernel of this essay is the possibility of reconciling a legal jurisdiction which is focused on the individual (and arguably the conscience of the individual) with the reality that the courts who maintain this jurisdiction are creating principles of general application which will be disseminated under the doctrine of precedent as with any other legal rule.

A map of the discussion to follow

To evaluate these questions, the discussion is structured as follows. First, a discussion of the theory of individualisation developed by Beck and Beck-Gernsheim[8] which suggests that late modern society is focused primarily on the individual and that this is a positive force for the future development of democratic politics. Second, a consideration of the extent to which equity can be said to be a set of rules or principles which permit the judiciary strong discretion[9] in each case or whether equity is in truth developing into another code of legal principles subsidiary to the common law and statute which judges are obliged to enforce on the basis of the rules of precedent. Third, relating specifically to the judicial treatment of trusts of homes, a model of social justice distinguishing between rights, deserts and needs is borrowed from Miller[10] and applied to the various conflicting doctrines which may have a role in any decision relating to rights in the home.

The connection between individualisation and social justice here is the observation made by Beck and Beck-Gernsheim that for all the separateness which individualisation might seem to require, there is nevertheless a need for a sense of security among the populace before there could be a desire for individual freedom and therefore a need for a level of equality between those individuals.[11] Hence, the theory of individualisation, to be internally coherent, must correlate social justice with liberty.

This essay is concerned with nothing less than the place of the human condition before the law. It is concerned to identify the way in which equity might offers potential means for providing socially just conclusions. All this is set against the backdrop of a world in which increasing individualisation conceals ennui and uncertainty behind its promise of liberty and unfettered choice.[12] A corpus of recent work in sociology has recognised the need in the midst of this social development to understand what is means to be an individual being who is quite literally embodied, with all of the frailties, the anxieties and the questions of perception of the outer world that that entails.[13] There is no more intensely personal context for the individual than the shelter and security of the home. No question more relevant for this discussion, then, than the way in which equity treats the allocation of interests in the home. And yet, as soon as one asks a court to consider the application of such principles in general terms or in relation to more than one individual, there is necessarily a question of the social impact of the decision reached.

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[8] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002.
[9] Cf. Dworkin, *Taking rights seriously*, Duckworth, 1977, 31.
[10] Miller, *Social justice*, Oxford University Press, 1976.
[11] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, 163: "freedom presupposes security".
[12] Bauman, *Postmodernity and its discontents*, Polity, 1997.
[13] Turner, *The body and society*, Sage, 1994.

The purpose of this paper, within the confines of a consideration of social justice, is then to consider the various ways in which disputes concerning the family home are analysed by different areas of the law. Within this potentially enormous topic there are questions of family law, property law, trusts law (to the extent that that is different from property law), social security law (in relation to the availability of housing and other benefits), and human rights law. That is too broad a front to tackle in one essay and therefore the following discussion will restrict itself to a few observations on the way in which the principles of equity permit the judges to exercise discretion in ways that are similar too and different from the broad discretion permitted under statute in family law and the emerging principles of English human rights law. To measure the impact of these various applications of discretion Miller's structures of social justice will be deployed in an effort to identify whether those discretionary remedies are aimed variously at reinforcing rights, rewarding deserts and recognising needs.

Equity is a means, in James LJ's expression, of ensuring that any individual defendant can "have his story heard", a means of raising one's voice over the noise of the machine.[14] Therefore, equity potentially contains a means of enhancing the liberty of individuals in front of the law (whether conceived of as "the justice system" or more technically as "the common law") by permitting judges to step outside the strictures of legal principle or statute to "do justice" between the parties. A number of potential objections stand in the way of this potential use of equity. First, equity has tended to be deployed primarily in relation to commercial disputes and to disputes over property. The Woolf reforms of civil procedure, it is suggested, will deter many litigants from seeking to expand these principles into new areas when their cases are assigned to the cheaper, fast-track case management procedures.[15]

Secondly, equity is problematic in that it appears to grant judges the power to ignore clear statutory rules where those judges consider them to be inappropriate. The clearest examples of this tendency in equity are secret trusts, the principle that statute must not be used as an engine of fraud, and also that form of proprietary estoppel used in *Yaxley v. Gotts*[16] to exhume the doctrine of part performance of agreements (itself expressly overruled by statute). In each of these examples, the justice which the courts were attempting to do on the facts before them is evident. Nevertheless, the complaint of the creation of a *juristocracy*,[17] whereby judges abrogate constitutional power to themselves through bills of rights, which greeted the enactment of the Human Rights Act 1998 must also apply here: the judges are potentially abrogating to themselves a form of power which is unconstitutional in that those judges consider themselves empowered to overturn parliamentary rules.

Thirdly, the very project of an equity, or indeed any reservoir of discretionary judicial power, which permits the creation of "law" (or rather the exercise of the power of the law) on a case-by-case basis is both destructive of social solidarity and generative of the social atomisation which many sociologists of the left would identify as being a

[14] *Fowkes v. Pascoe* (1875) 10 Ch. App. 343.
[15] This is an issue beyond the scope of this essay, although it is discussed elsewhere and constitutes a vital further dimension to this project: Hudson, *Towards a just society*, Pinter, 1999, generally.
[16] [2000] 1 All ER 711.
[17] Ewing, "Democracy or juristocracy in Britain?", in Ewing, Gearty and Hepple, eds., *Human rights and labour law*, Mansell, 1994, 147.

cause of many social ills.[18] This process would exist were it the case that equity operated solely in relation to the application of principle to individuals in a way which might permit uneven application of rules to different citizens. That question is in itself linked to the more general problem as to whether equitable principles can be said to apply only to individuals or, more accurately, whether they are in truth principles of general application.

The first step, however, is to understand how individuals experience law and how equity might be expected to act as English law's mechanism for responding to such individual needs.

THE MAGUS AND THE INDIVIDUAL

The place of the individual – why there is a question for equity theory

This essay will have three principal components which might appear to be unconnected unless I pause here to identify the linking question which this essay will seek to address. In short, the question is the role played by equity in achieving justice, particularly in cases relating to ownership of the home, in a world which is promoting ever more individualisation. The result of individualisation, for good or for ill, is separation of individuals one from another, at least in legal terms. This legal distinctness is so fundamental to our law, and indeed to our polity, that it may otherwise escape observation. This separation means that each human being is entitled to have her rights and claims heard distinct from all other human beings. The law recognises the individual personality of each human being. So far has this legal cult of personality development that it stretches to non-human persons.

From the legal perspective, this individualisation is a necessary part of recognising one's humanity (or non-humanity in the case of corporations). This process may be analysed qualitatively as causing unfortunate social atomisation such that individuals are separated from each other or as promoting beneficial respect for human rights and the freedom of individuals. Those qualitative questions need not concern us at this stage. What is more useful is to observe that such differences of view might exist. That these notions might be contested brings us the question of the role of equity. This essay will attempt to analyse equity to identify its relationship to the individual. One the one hand, equity will be shown conceptually to be a means by which courts are able to overturn abstract legal rules where to apply those rules normally would be unjust to the individual. On the other hand it will appear that often the principles on which equity operates are themselves abstract legal rules which seem to do little more than to create further categories of legal analysis into which litigants are pigeon-holed not on the basis of their individual humanity but rather on the basis of their categorisation by legal bureaucracy. It is suggested that understanding this tension between a claim to protection of the liberty of the individual and to the mere categorisation of cases is vital to considering equity's utility as part of the legal

[18] Bauman, *Liquid modernity*, Polity, 2000.

system – particularly at a time when there are some who would replace equity altogether with civilian notions of unjust enrichment and so forth.[19]

In the light of this possible de(con)struction of equity, the theory of individualisation which will be unpacked below contains one very important seed of socialisation. Whereas the idea of individualisation – both as an observation of current sociological conditions and as a programme for future social development – necessarily promotes the separateness of individuals, its proponents are eager to point out that it does not dismiss altogether the utility of social bonds.[20] On the contrary, while individualisation might seem at first blush to be a programme of the political right, it is suggested that equality between individuals is a necessary pre-requisite of the proper functioning of individualisation as a liberating social force. It is said that there can only be individual freedom provided that there is first a feeling of security among those individuals and that there can only be a feeling of security among those individuals if there is an appreciable level of equality between them.[21] Emboldened by this link between individualisation and equality, this essay will then consider how one might construct a model of social justice within which to evaluate how various legal doctrines which are ostensibly directed at protecting the rights of the individual correlate with benchmarks of just and unjust outcomes.

And it is there that we identify the true motivating energy of this inquiry. How do the individual and the social inter-act? How can we identify which claims made by individuals ought to be recognised and protected by society and its organs? The form of individualisation considered here will advance a thesis that we ought to be sufficiently confident to *generate* new norms and not simply to be caught in a hyper-cycle of justifying whether or not the norms we currently hold are capable of objective justification.

The Magus; an exemplar of the place of the individual before the process of law

The plight of the individual rests in his or her embodiment: inhabiting a fragile, corporeal shell and perceiving the world from behind two eyes and through the filtering process of one brain.[22] To be human is to be embodied; to be human is also to inhabit a mind; to be human is also to live among other stimuli, other minds and other bodies. In the sociological literature, the question of the body and society has acquired great recent significance, coming as it does in the wake of the postmodern philosophical turn which declared itself to come after the self-reflecting subject. The question "who am I?", or its common sociological comparator "who are we?", is itself a site of conflict between those who would base perception squarely within each individual, those who see societies as made up of autonomous selves, those who see

[19] E.g. Beatson, *The use and abuse of unjust enrichment*, Oxford, 1991, 245; Jaffey, *The nature of restitution*, Hart, 2000, 421.
[20] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002.
[21] The question of what is meant by equality in that conception is a larger question not dealt with satisfactorily by Beck. As this writer has suggested, *Towards a just society*, Pinter, 1999, within the common philosophical categories of equality (equality of outcome, equality of opportunity, and so forth), there is equality of access to rights, to the legal system and to social goods such as rights protection which dovetails most neatly with discussions of rights and that is the notion which is advanced below.
[22] Turner, *The body and society*, Sage, 1992.

society as being made up of the inter-actions between selves which are themselves socially conditioned, and those who see selves as being the products of language and so forth and therefore of no independent significance philosophically.[23]

The inter-action between law – as something external to the self – and the self may operate at any one of these levels. What is important for our purposes is the fragility of the self in the process of shaping law and imposing law on an individual. This is particularly so if the law itself applies one of those philosophical systems which have decided that they have reached beyond the self and are concerned only with systemic communications and linguistic products. For each individual who comes into contact with the law this creates a Kafka-esque moment of being lost in anonymous corridors and excluded from technical conversations which clearly concern you but which do not communicate anything comprehensible to you. From the perception of the individual, in Heidigger's terms, the purpose of communication is not simply to speak but also to understand the other speaker; without understanding there is no communication.[24] For the individual before the law, where the language is technical and too abstract for the litigant to understand it then the litigant is excluded from that discussion. And so systemic closure may operate to exclude those people who ought properly to expect that they would be included within those communications. For the purposes of this paper, it will be important to understand whether or not equity is able to include the individual's aspirations both to speak and to understand what is said to her in return.

To illustrate the nature of the individual's plight before the law, I need to retreat into fiction for a suitable example. The John Fowles's novel *The Magus* is a spell-binding example. Nicholas Urfe is the novel's propositus. He leads an ordinary and fairly unfulfilling life in London. A university graduate, he is replete with masculine foibles, insensitivities and insufficiencies. He has a relationship with an Australian woman which stutters and fails messily and not without regrets before Urfe accepts a job teaching English at a boarding on a remote Greek island. Urfe is an outsider at the school among his colleagues and the pupils. He has been given a cryptic warning before reaching the island by a previous holder of his post that he should avoid "the waiting room". On exploring the island he encounters a sign on a piece of land which reads "sale d'attente"; the land is marked as being private property and guarded by barbed wire. This land contains the idyllic home of the mysterious Conchis who becomes Urfe's tormentor, teacher and talisman over the months of his stay.

The strength of the novel is the way in which it heaps surprise on surprise, lie on lie and so forth with the result that the reader cannot know (and one suspects the writer does not know or care) who is telling the truth and even quite what is going on. Urfe meets a young woman at the house who tells him she is in danger, he witnesses her take part in remarkable, sexual dumb shows choreographed for his confusion on the beach in front of the house. He falls in love with her, then finds she is one of two twins with whom he falls in league, by whom he is betrayed, with whom he falls in league again, and so on. At each turn in the plot as he confronts the charismatic Conchis after each theatrical device or after each new revelation, the reader is left panting, wondering whatever can happen next.

[23] Moran, *Phenomenology*, Routledge.
[24] …

Urfe becomes addicted to this experience, to the manipulations which Conchis (at one stage apparently a psychoanalyst of some sort himself) imposes on him, before the experience is suddenly terminated. He tracks down his tormentors only to be kidnapped and subjected to a surreal trial by them – a truly existential trial which probes his own *mauvais foi* – before judgment, torture and, the reader notes, still hundreds of pages to go.

The relevance of that tale to this paper is that this is how litigation may seem to the individual. Conchis, it must be assumed, is the magus (or, magician) referred to in the title. It is this magus who conjures up Urfe's torment, who salves his hurts and who rubs salts into them again. It is nothing new to recollect that many theorists draw clear parallels between magic and the process of law; indeed between magic and many social processes.[25] The rites of the magus, principally in casting spells or hex on third parties by following the precise details of a ceremony, are similar to the ways in which judges (similarly adorned in ridiculous clothes) act on pleadings drafted in specified formats and then, following prescribed rules of procedure, generate the incantations necessary to cast a legal spell or judgment over third parties. All of the litigants are supplicants before the judge in the same way that the shaman would be consulted by tribesmen. In *The Magus*, Urfe is as much to be pitied for his predicaments as he is to be marvelled at for his resourceful responses to those same events, and may be chastised for his own shortcomings.

The individual before the law is just such a person. Each of us comes before the law replete with our own personal mythologies, our own histories and our own predicaments. For Urfe it is unacceptable that he be treated as a mere plaything by others or that their surreal ethic and aesthetic should be indulged at his expense; similarly the claimant will feel slighted to have her own circumstances ignored by an impersonal legal system determined to speak in its own language among lawyers dressed in remarkable court dress. The trial scene in *The Magus*, aside from its assertion that it is a trial, is remarkable in its similarity to a courtroom precisely because the panel of grotesques who sit in judgment over Urfe are adorned in jackal's heads, wolf's heads and so on. The macabre drama of the setting is equivalent to the musty lifelessness of the Royal Courts of Justice or (at the other end of the scale) the equally stale architecture of those anodyne, badly-lit school rooms which so frequently serve as county courts.

When subjected to the law, the individual experiences events arising at her full-armoured from the ground. The extraordinary impersonality of the process is familiar to any reader of Kafka: the incantations of the court-room, the stultifying process of one's own life experiences being translated into dessicated legal jargon in the conference room, and the interminable, gnawing panic of the years of claim, defence, interrogatories and so on. No matter what the philosophical turn *de jour* nor the popular doctrinal creed *de siecle*, there will always be a disjointed litigant anticipating communication with the law in Heidigger's sense of "understanding" what is said (and not simply speaking). That is all that makes us human and one evolutionary hop ahead of the other animals – our ability to communicate, our ability to understand in

[25] Mauss, *The general theory of magic*, Routledge; Cotterrell, *Emile Durkheim: law in a moral domain*, Edinburgh University Press, 1999, 94.

the way we can, and our ability to demonstrate compassion through empathy for the predicament of our fellow human.

From these beginnings, we move to consider how the three key elements inter-act, in reverse order: the law on ownership of the home, the possibilities of a model of social justice for that law, and (first) the notion of individualisation.

INDIVIDUALISATION

The growth of individualisation from the modernity/postmodernity debate

In social theory the debate remains, like an ever-present threat of rain, as to whether the process of modernity is complete, or whether we have progressed into and beyond a process of postmodernity, or whether we are entered into a second modernity. There are questions then as to the quality of these various propositions – as to whether they are capable of being presented as being purely historical developments which overlap slightly at the edges, or whether there is something more difficult to define about them as cultural or demographic states of being. Perhaps it is easiest for present purposes to conceive of them as being periods of social and economic history. The definitions are perhaps of lesser moment to us than the social processes which are under discussion.

Proponents of the first school of thought, like Habermas,[26] suggest that the business of modernity is not yet complete. For them there are too many aspects of the differentiation of modern society which have not yet been resolved for us to declare that we have succeeded in progressing to another phase. The postmodernists like Bauman[27] and Lyotard suggest that the modernist period in human history was passed when citizens became thought of as being consumers rather than producers, when norms of behaviour were challenged and deconstructed so that it became possible to liberate individuals to behave differently, when it was possible to observe that traditional patterns of work, family and personal life had changed sufficiently radically. Postmodernists like Jameson, with an interest in cultural phenomena like architecture, identify as postmodern those developments which demonstrate an escape from the constraints of classical or modernist design, which are self-reflexive, and which undergo a process of pastiche of old styles combined with an ironic use of those styles.[28]

Those who advance a late modernist thesis include Beck and Beck-Gernsheim. They have two strands to their thought: risk theory and individualisation theory: the latter will be our principal focus here but both are worthy of some initial consideration. By "late modernity" is meant that current social phenomena are the result of the process of modernity and so are necessarily linked to it rather than being a state of affairs which has somehow moved beyond it. In his best know work *The Risk Society*,[29] Beck presents a category of manufactured risks which have resulted from modernity and

[26] Habermas, *The Philosophical discourse of modernity*, Polity.
[27] E.g. Bauman, *Liquid modernity*, Polity, 2000.
[28] Jameson, *Postmodernism, the cultural logic of late capitalism*, Verso, 1991.
[29] Beck, *The risk society*, Sage, 1992.

which have been caused by human beings and the advance of human technology, in particular ecological risks like climate change, acid rain and nuclear radiation. These manufactured risks are compared with the natural risks which human beings have always faced – such as volcanic eruption, meteor strike or earthquakes – which are risks not created by human technological advance. In this sense, late modernity is a period of social change prompted by the need to cope with the risks generated by modernity itself.[30]

Whereas those manufactured risks mentioned so far relate to external threats to society or to the individual caused by changes in the natural world, there are a large number of existential risks created by modernity which relate to the choices and challenges posed to individuals by the possibilities which are offered to them by modernity.[31] Beck suggests that while most people were offered traditional patterns of work and family life in well-established geographic communities, modernity has developed a far wider range of lifechoices for individuals.[32] This sort of observation is a common feature of much social theory and sociology. What is important is that Beck argues that it offers positive opportunities to individuals to dictate their own biographies in contradiction to traditional social patterns which have tended, it is suggested, to dictate to individuals far more the narrow range of options which were open to them. This is a staple of Giddens's thought, as the new intellectual guru of the New Labour administration.[33] It has been a feature of much of Giddens's work in the 1990's that one of the fundamental effects of late modernity for individuals has been a re-drawing of self-identity, a destabilising of the family unit as having been merely a standard form property contract, and a rise of self-help groups as expressions of new communities of common interest between people who do not necessarily occupy the same geographic space.[34]

Beck and Beck-Gernsheim have developed a tapestry of ideas relating to individualisation out of these threads. Already present as a second current in *The Risk Society*, these ideas have been pulled together in the recently-published collection titled *Individualization*.[35] It is to those ideas I know turn.

The components of individualisation theory

The book published as *Individualization* is in truth a collection of papers covering issues as diverse as the progression of norms beyond the traditional, the staying power of outmoded "zombie categories",[36] the political context of globalisation, the possibilities for women in a life lived for oneself rather than for others, new conflicts in the family structure and changing demographics, society's inability to care for its elderly, and the philosophical progenitors of freedom in our politics from De Tocqueville and Nietzsche. In essence, individualisation theory recognises that

[30] See generally, Beck, Giddens and Lash, *Reflexive modernity*, Polity, 1994.
[31] Giddens, "Risk and responsibility", [1999] 62 M.L.R. 1.
[32] Beck, *The risk society*, Sage, 1992.
[33] E.g. Giddens, *The third way*, Polity, 1999.
[34] Giddens, *Modernity and self-identity*, Polity, 1991.
[35] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002.
[36] That is, ideas which are out-of-date but to which people nevertheless cling out of habit, ideology or sentiment.

traditional socially-imposed models of lifestyle, ethics and so forth have been displaced by a "standard deviationism" in which we each develop "our own legitimate strangeness". Globalisation necessarily carries with it this resultant hotchpotch of lifestyles, ambitions and so forth. The message of individualisation is that our politics can be reinvigorated by celebrating this individualisation and by allowing each individual an equal voice in our social development rather than the rough approximations of traditional democracy which allows people only to choose from a narrow range of set menus. Beck's conception is optimistic, in contrast (as will emerge below) to Bauman who sees in this process only a weakening of security and of communal bonds with a resultant creation of greater anomie than ever.

The process of individualisation; "the average exoticism of everyday life"

The core of the thesis is that the traditional is on the wane. Societies in which inhabitants lived within walled towns, shared common values and had broadly equivalent life experiences and expectations are now a figment of history.[37] There is no longer a simple, single shared religious faith in most countries, for example.[38] Key changes have been wrought by the rise of feminism, the alteration of family structures and the fact that economy is organised globally to an extent it was not before.

The core to individualisation theory is an understanding that there is no longer, in Western societies, anything which could properly be described as a normal person. Rather, "everyone is into something", and each of us is said to identify herself by reference to her own context, her own mythology and her own foibles. Beck quotes Hans Magnus Enzensberger's exuberant examples of what he terms the "average exoticism of everyday life":[39]

> 'It is most obvious in the provinces. Market towns in Lower Bavaria, villages in the Eifel Hills, small towns in Holstein are populated by figures no one could have dreamed of only thirty years ago. For example, golf-playing butchers, wives imported from Thailand, counter-intelligence agents with allotments, Turkish Mullahs, women chemists in Nicaragua committees, vagrants driving Mercedes, autonomists with organic gardens, weapons-collecting tax officials, peacock-breeding smallholders, militant lesbians, Tamil ice-cream sellers, classics scholars in commodity futures trading, mercenaries on home leave, extremist animal-rights activities, cocaine dealiers with solariums, dominas with clients in top management, computer freaks community between Californian data banks and nature reserves in Hesse, carpenters who supply golden doors to Saudi Arabia, art forgers, Karl May researchers, bodyguards, jazz experts, euthanasiasts and porno producers. Into the shoes of the village idiots and the oddballs, of the eccentrics and the queer fish, has stepped the average deviationist, who no longer stands out at all from millions like him.'[40]

[37] The extent to which this is true for everyone is question by dissentient voices like Bauman, considered below.
[38] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, 9.
[39] *Ibid*., 13.
[40] Enzensberger, 1992, 179.

The pattern is familiar. Put like this – although it may feel a little like a television scheduler's blueprint for post-watershed documentaries – there is a familiar ring to the notion that each one of us is different. Or, possibly, that everyone else is different from how we perceive ourselves when safe behind our own front doors; different from what we might think of as "normal" even if that definition of normality is by reference simply to the way we live our own lives and not a judgment on the foibles of others. Rather than it being a passive observation that people are different, possibly individual citizens determinedly seek their own differences out by way of forging an identity.

It might not be too far-fetched to suggest that among the only things which make us the same are the facts that we are expected to be subject to the same laws, that our common biology makes us react in broadly similar ways to medical treatment and the same problems of phenomenology apply to us all – that is, how do we account for ourselves as embodied entities encountering the world from inside our own minds through our five senses. The question is therefore, in relation to equity, how should the law account for these differences between us as individuals or are there sufficient and suitable reasons for the law to treat us all as identical units when we appear before the justice system.

Identities in a runaway world

The notion of a runaway world is familiar in this order of social theory.[41] Beck is concerned that individuals are left "to wander between functional worlds"[42] in an increasingly differentiated society. The weakness of the welfare state is then said to be in its continuation in making individuals and not groups the recipients of benefits and thus underlying the principle that people are required to organise more of their own lives.[43] The result is "elective biographies" for citizens and a resultant atomisation of social relations which leaves individuals responsible for their own lives more and more.[44] The new social connection must be based on "altruistic individualism" rather than on any pre-existing social connections.[45] The changes are most evident for women[46] and in the proliferation of family models as alternatives to the nuclear model.[47]

Philosophical bases for individualisation

Beck and Beck-Gernsheim set out their individualisation as being concerned with a very different sense of modernity from many of the key philosophical conceptions of that idea:

[41] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, 22; Giddens, *The Runaway World*, Profile, 1999.
[42] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, 23.
[43] *Ibid*.
[44] *Ibid*., 24.
[45] *Ibid*., 28.
[46] *Ibid*., 54.
[47] *Ibid*., 85.

> 'The question is: what is modernity? The answer is: not just "instrumental rationality" (Max Weber), "optimal use of capital" (Karl Marx), or "functional differentiation" (Talcott Parsons, Niklas Luhmann), but supplementing and conflicting with these, it is *political freedom*, citizenship and civil society … meaning morality and justice are not pre-ordained … Quite the reverse is true. Modernity has an independent, living and simultaneously ancient and highly up-to-date wellspring of meaning in its midst: political freedom. … Modernity accordingly means that a world of traditional certainty is perishing and being replaced, if we are fortunate, by legally sanctioned individualism for everyone.'[48]

The centrality of political freedom is what the authors assert, based in part on changing social aspirations towards a better quality of life rather than simply higher incomes or greater consumption.[49] This is a form of lifechoice which may sound familiar to the academic lawyer: less money but a better lifestyle with more control over one's own time. Within this hankering for freedom, it is said, there is also a greater understanding of the need for increased co-operation and an understanding that one's choice of lifestyle may impact on the environment and on the rights of others.

What is more problematic is the evidence of social exclusion which theorists such as Bourdieu have been astute in pointing out to the individualists, arguing instead that a welfare state is the only viable solution. Beck's response to that is to reflect that more community is not necessarily a positive thing by pointing to the German experience in the 1930's of persecuting minorities. This is not, it is suggested a full response to Bourdieu's assertion that the phenomenon of poverty nevertheless constitutes a very great challenge to this idea of individualism. Beck deals with Bourdieu's complaint by compacting (incorrectly in my view) Bourdieu's approach with that of the American communitarians,[50] for whom community is an artificial result of imposing conservative norms of behaviour on societies on pain of loss of benefits and other social goods. By examining the communitarian approach to these issues it is easier for Beck to suggest that enlightened individuals making their own lifechoices are more likely to subscribe to broadly permissive approaches to such questions.[51]

The roots of this freedom are identified first with de Tocqueville who saw in the American democracy the need for a great level of political freedom such that individuals will become connected with that polity and develop social attachments organically.[52] The question bound up with this freedom is whether people will drive for freedom without a sense of security and in the absence of some level of equality. Beck enthuses over the need for equality to act as a base for political freedom. His conception of equality here is that sort which is necessary to promote a sense of security and which does not require an homogeneity among people but rather constitutes an equality which ensures the basis of their political freedoms. This, it is suggested, tallies with the conception of equality of access to legal rights and so forth which is considered below. This understanding of equality is loosely connected in

[48] *Ibid*., 157.
[49] *Ibid*., 161.
[50] E.g. Etzioni, *The moral dimension*.
[51] Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, 166.
[52] *Ibid*., 172.

Beck's narrative with Nietzsche's creative individualism whereby this political freedom will set people free to express themselves and to create their own lifeworlds.[53]

Among the questions they leave unanswered are the way in which the individual is shaped by the social, how we account for globalisation's apparent contentment to ignore the plight of the poor around the world, how individuals currently excluded from social goods are to be included within them, why they think that atomised individuals can always be relied upon to act altruistically when the experience of the poor indicates that that is far from the case, and how exactly we can expect patterns of individual goals to mesh into communal spirit. These issues will be considered in the following discussion. They are necessary to found our notion of how the individual will appear before the law.

The socially-constructed individual

What remains within the concept of individualisation is an understanding that being individual in the sense of being distinct and apart from all other people would be insufficient. Human beings are necessarily weaned through a process of inter-action with other human beings, as considered below. Within Beck and Beck-Gernsheims' terms, individualisation relies on a level of security to be successful. It is said that for individuals to be sufficiently free to become the sorts of individuals which they model, then they need to feel sufficiently secure. In times of insecurity, the concern for freedom retreats behind a desire that society provide a bulwark against insecurity. The welfarism which grew in the wake of the 1939-45 war in the West is something which sought to remedy that insecurity and to provide a metaphorical "social family" which would carry the individual from cradle to grave. With the confidence of western society in its democracy and in the absence of the total wars of the first half of the twentieth century in mainland Europe, the popularism of welfarism and the obligation to pay for such welfare became electorally less popular than an individualism floated on (promises of) greater economic security. However, Beck and Beck-Gernsheim point out that this security in itself is not possible without a measure of equality such that everyone understands themselves to be secure precisely because they occupy the same entitlements as each other in relation to society's basic goods. The nature and extent of this equality is not explored in detail. It is an interesting notion that individualisation is not a process which could possibly proceed without sufficient equality to reassure people that there is a level of security for them as individuals.

This possibly surprising turn in the theory raises two further questions. First, to what extent is the individual socially-generated in any event? Second, to what extent can we say that there is sufficient social confidence in the minimum levels of equality necessary to found security.

[53] Beck and Beck-Gernsheim are at their weakest perhaps in making clear their own political programme, once they have declared themselves to be stepping out into the political arena. Their polemic, as the argument becomes at this stage, is directed against pessimists of the new era – indeed it is probably generally addressed at anyone who considers us to be experiencing that form of dystopian postmodernity associated with Bladerunner as opposed to a late modernity in which the modern world is throwing up new opportunities for us.

The thinking underpinning much social theory at the turn of the millennium was that the onset of civilisation had constituted a decisive turn in the relations between individual human beings and the societies of which they formed a part. In Freudian terms this constituted an uncomfortable match of instinctive desires with socially-imposed restrictions.[54] Means of socialisation were developed by those societies which entered an industrial revolution, although the changes themselves were evident before the process of industrialisation and urbanisation. The changes, principally, were connected with the training which was required of individuals before they would be considered suitable for the roles which were either selected for them or which latterly they selected for themselves.[55] For example, training to become a lawyer, to take holy orders or simply to be apprenticed to a trade all took young people and subjected them to a regimented period of training. The broadening of access to schooling and subsequently of compulsory schooling created a novel hiatus between childhood and adulthood because it introduced between those two stages a period of time when the biological adult was still considered not to be an adult because he or she was still undergoing schooling or training. In the twentieth century such people became the more important demographic of teenagers with their own youth culture and so forth. What is significant is that this period of training inculcated into the young many of the values of the dominant social ideology,[56] only vesting them with the badges of success once they had graduated from school or training.[57] At one level failure to be properly inculcated led to exclusion from the technical social sub-groups which controlled law, medicine and other professions, whereas at another level to deviate significantly from these social norms gave rise to a risk of incarceration as part of the great confinement of the late medieval period.[58]

Thus the socially-conditioned human being was generated over time, not simply as a passive recipient of feudal power but as a contributor to industrial society. Such societies became dependent upon the technical expertise of individuals skilled in their own areas of expertise and not simply another unit in a general pool of unskilled labour.[59] Behind that social conditioning, however, human beings remained individual in that they continued to perceive the world through their own eyes, to hear the world through their own ears and feel the world through their own touch. The difficulties of phenomenological philosophy are grounded in this awkward combination of social conditioning and individual perception. As Elias conceives of the middle ground between these two poles, individuals are socially generated in that they require inter-action with other human beings to wean them initially, conversation with other human beings to develop their language faculties and so forth.[60] The individual is necessarily linked to society, that is to other human beings, from the moment of birth. It is impossible to conceive of human beings, in both senses, without the presence of other human beings.

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[54] Freud, *Civilisation and its discontents*, Penguin.
[55] Elias, *The society of individuals*, Continuum, 1998.
[56] *Ibid*.
[57] Founcault, *The archaeology of knowledge*, Routledge.
[58] Foucault, *The birth of the clinic*, Routledge.
[59] Elias, *The society of individuals*, Continuum.
[60] *Ibid*.

Who is the subject?

The individual is then the most complex problem we face. The individual before the law may have gone through a number of ages. The first age might be said to be a recognition straightforwardly that the individual is entitled to appear as a claimant or a defendant before the law and to have the principles of that law applied in such litigation. For many socio-legal thinkers, the individual may have been created in a second age in which the Freudian concept of the self places us in front of the law precisely so that our basest desires and uncontrollable urges are capable of some control by this civilisation.[61] A third age belongs to the postmodernist's deconstruction of the self. That is a legacy with which we are still wrestling. To say that the individual no longer exists and that there are no more truths, *pace* Nietzsche, leaves us nothing to believe in, not even a raft in the storm. When the state caught ahold of this notion of the individual as a tempest of uncontrollable urges, it attempted to control those urges. In Marcuse's terms this was done by destroying the notion of the individual and replacing her with "the masses" in which the Freudian father is replaced by the urges fed to us by mass industry, the political system and possibly by the Weberian bureaucratic machine. The result was the creation of the "one-dimensional man" who is fed opinions, aspirations and desires by the state. When this idea of the mass was unpacked by the monetarist, libertarian politics of the Reagan-Thatcher era we became addicted to our own individuality. It is a commonplace now to suggest that this increased individuality offers us less quality of self than we might have had in an era of shared aspirations. Solidarity has arguably been replaced by shopping.[62] The self which we seek is now a self which we buy rather than a personal project which we create.

The post-structuralists decided that the subject was no more. Foucault's history was a history, in the Nietzschean conception, without a subject. For Foucault, power was the positive force which made thoughts transform into effects, actions into reactions. The removal of the focus on the individual permitted his well-known parallel between Bentham's Panopticon, a design for a prison the structure of which meant that prisoners would behave as though being watched constantly even if they were not being watched, and the effect of discipline on individuals through their schooling, prisons and so forth.[63] Collectively these become, for Foucault, technologies of the self in which it is possible to exert power through the development of governmentality which is an extension of mere sovereign power into a web of more subtle and localised expressions of control.[64]

The removal of the subject as the central locus of this form of social thought was at the heart of the differences between Luhmann's enthusiasm for understanding society as being made of systems which communicate one with another[65] and Habermas's preference for communicative action in which individuals would take part in reaching a consensual position in which all of their needs were accounted for.[66] This

[61] Freud, *Civilisation and its discontents*, Penguin.
[62] Bauman, *Liquid modernity*, Polity, 2000.
[63] Foucault, *Discipline and punish*, Penguin.
[64] Foucault, *The history of sexuality*, Penguin.
[65] Luhmann, *Social systems*.
[66] Habermas, *Theory of communicative action*, Beacon Press.

determination to exclude the individual is an approach criticised by Giddens[67] who in his theory of structuration prefers to conceive of social activity comprising inter-actions of active individuals who may nevertheless not be knowledgeable about the effects of their actions. This is akin to Marx's view that "men make history, but not in conditions of their own choosing". Instead Giddens defends the liberal, bourgeois capitalism which arose in the modern era as not necessarily putting the factory on a par with the prison in the way that Foucault tends to do; Foucault's thought frequently replaces Marx's focus on the place and means of production as the central feature of social action with the prison, the clinic and the school.[68]

There is, however, a question for any area of law which, like equity, seeks to decide questions relating to the conscience of individuals, then it requires some concept of the individual which is before it. Foucault's conception accords with one version of equity as developed by means of judicial application of pre-existing principles. In this sense, equity is not concerned with any particular subject but rather looks to models by which certain forms of behaviour are rewarded with rights in property and so forth, whereas others are not. Alternatively, one could say that these principles are necessarily developed by reference to the individual litigants on a case-by-case basis. The reference to the body of principle from which any decision flows is therefore difficult to allocate between a straightforward application of principle and a reaction entirely to the facts of the case before the court.

Of course, different judges decide in different ways in different cases. As considered below in relation to the caselaw on trusts of homes, there are clear divisions in the cases between decisions like that of the House of Lords in *Lloyds Bank v. Rosset*[69] which attempts to set out clear, concrete principle and that of Waite LJ in *Midland Bank v. Cooke*[70] in which his lordship declared himself mystified by the division in the cases between decisions based on a money consensus between the parties and those based on an interest consensus, so that he considered himself entitled instead to survey the whole course of dealing between the parties and to reach whichever result he wished. However, in reaching the result he considered appropriate on the facts, his lordship did have reference to another old principle of equity – namely that equity requires equality between the parties. Therefore, an ostensibly strong discretion (in Dworkin's terminology[71]) was masked in observance of an ancient principle as though no discretion at all had been exercised.

That question arises in equity: to what extent has the subject been taken out of equity by virtue of the development of more rigid principle? For all the courts' ritual setting out of the facts of the case at the beginning of each judgment, is that merely by way of a prelude to the business of fitting the abstract of the facts into the matrix of recognised principle? The question is then as to the place of the individual within the technology of the law.

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[67] Giddens, *Profiles and critiques in social theory*, Macmillan, 1981, 218.
[68] *Ibid*.
[69] [1991] 1 A.C. 107.
[70] [1995] 4 All ER 562.
[71] *Taking rules seriously*, Duckworth, 1977.

Lost in the machine

One of the most challenging visions of the place of the individual in a technologically-advanced, global world is that of Virilio. In a series of books over the last three decades, Virilio has explored the nature of the human being before technology. In *Speed & politics*,[72] Virilio traced the history of the technologies of warfare from hand-to-hand combat on the battlefield, to missiles which could reach further than a man's arm, to explosive projectiles which overshot the individual soldier completely. The nuclear age, clearly, removed the notion of a traditional theatre of battle with the development of inter-continental ballistic missiles which could destroy entire cities, making them uninhabitable for some considerable time and necessarily embroiling the civilian population in what had been for a period of time a purely professional activity between professional soldiers. This idea of overshooting the individual is key to Virilio's thought. The technology of transportation has also removed the locus of activity from the action of individuals and even from movement in the city centre by virtue of cars, aeroplanes and satellites which carry human beings, information and power over the heads of the civic population. Where once control of the city streets was the essential locus of power, technology now allows communications, movement and so forth to bypass the static dynamic of the street. The individuals become "dromomaniacs" in Virilio's terminology.

The apotheosis of the human being before technology now is the jet fighter pilot. Cocooned inside the most sophisticated, the fastest and the most deadly machine, the pilot becomes an invalid precisely because he is unable to move himself other than through the medium of his machine. The motor functions of technological man is therefore neutered by the most powerful machine.[73]

The question is whether the law, with its increasing sophistication, leaves us in the same position. Has the legal system left behind the possibility of a vision of equity which is entirely responsive to our needs in favour of a vision of equity which responds solely to technical procedures, to rigid principles and to bright line doctrines? In short, have we developed a technology of individuality in place of the possibility of completely responsive judgments in which the judgment becomes a response to a spirit of place in the courtroom? Where once we might have conceived of Aristotle's equity as being the possibility of a judgment divorced of the need to follow binding precedents and simply to do the "right thing" between the parties, it is instead concretised as a series of techniques which are all-the-more opaque to the outsider precisely because they are subtle, difficult to describe in the abstract and more akin to literature than to rules.

Individualisation – boon or bust?

The question is how we understand this individualisation, either as a threat or as an opportunity. We have heard from Beck and Beck-Gernsheim. The counter-view is perhaps best summarised by Zygmunt Bauman in his foreword to *Individualization* when he says: "the other side of individualization seems to be the corrosion and slow

[72] Virilio, *Vitesse et politique*, Editions Galilee, 1977.
[73] Virilio, *Polar Intertia*, Sage, 2000.

disintegration of citizenship".[74] His concern is principally a weakening of the ethical self which Beck requires to drive the altruistic connections which he hopes will come from this individualised society. In place of social connections have come an increased focus on consumption mixed with a decreased focus on people as producers. In consequence, our focus is turned inward onto our own wants – wants which we satisfy through consumption and through the acquisition of artificial identities which are fed to us through mainstream media. The more we respond to these media and the magazine culture, the more of these magazines (whether in hard copy, on the internet, or those staccato television and radio programmes aimed at those with goldfish attention spans also called "magazines") are produced. As considered below, when we talk of equity as a means of dealing with each case on its merits we need to be concerned as to the possibility that such phenomena do mirror the greater focus on self, which is also observable in human rights law.

Equality of access

"Equality" is term used by Beck and Beck-Gernsheim in constructing their notion of individualisation. The content of the term "equality" has always been a vexed one, whether choosing between "equality of opportunity", in relation to people having equivalent opportunities in life after which they are left to their own devices as to how they exploit them, or "equality of outcome", which seeks to ensure that all people are equal throughout their lifetimes although with difficult questions as to how one achieves equality logically between adults and children, physically able and physically disadvantaged, lazy and resourceful.

The notion of equality has transformed into a concept of "inclusion" in Giddens,[75] and to a notion of "equal worth" in Blairite public policy.[76] For Giddens, inclusion relates to an ability for all citizens to participate socially by virtue of a social investment state which will educate them so that they have opportunity, but which will also nurture them through the rest of their lives where that initial injection fails. Blair is concerned to provide opportunity and prosperity by ensuring policy which gives equal democratic worth to citizens. While both these conceptions have an impact on the economic context in which citizens live, it is apparent that equality is given a more spiritual (and a less economic) spin.

Ironically, it is in relation to access to justice that the notion of equality has the greatest claim to truth. It is in the sphere of legal affairs that equality is an easy concept to apply. It is an uncontentious statement in democratic societies that everyone should be equal before the law. It also follows that the standard of equality is something which can be different in different contexts.[77]

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[74] Bauman in Beck and Beck-Gernsheim, *Individualization*, Sage, 2002, xviii.
[75] Giddens, *The Third Way*, Cambridge, Polity Press, 1998.
[76] Blair, *The Third Way* Fabian Pamphlet 588.
[77] Rather than resiling from principle, it is important to measure the appropriate social good and to conceive of the appropriate level of equality for the purpose. Thus in relation to welfare state benefits, employment-related benefits replace income in a way that makes the recipient unequal in terms of receipt of social goods but more equal in terms of income than unemployment would otherwise mean. However, access to the National Health Service is equal to all in that there are no eligibility criteria. Therefore, it is necessarily the case that there is no such thing as total equality in society in any event - it is not suggested that those in employment ought to be entitled to unemployment benefits as well as

In opposition to the egalitarian socialist and social democratic viewpoint, is one based on the autonomy of the individual which emphasizes liberty rather than social structure. The libertarian position emerges from Nozick, who has referred to the autonomous subject as:-

> "a being able to formulate long-term plans for its life, able to consider and decide on the basis of abstract principles or considerations it formulates to itself and hence not merely the plaything of immediate stimuli, a being that limits its own behaviour in accordance with some principles or picture it has of what an appropriate life is for itself and others."[78]

This individualist subject makes decisions and choices in a way that is unfettered. The measure of that freedom is therefore in its equal application. None should be more free than others to make these choices. The question arises then as to whether or not this is a useful way of considering equality. To be equally free to make mistakes or to succeed, necessarily means that equality is a transitory value which will apply to selected groups of people only for a short period of time until their lifechoices make them either unequal or simply different. The antithesis to Nozick's libertarian position is that of the social contract championed by Rawls. In A *Theory of Justice* Rawls extended a conception of equality and social justice combined:-

> "Justice is the first virtue of social institutions ... in a just society the liberties of equal citizenship are taken as settled; the rights secured by justice are not subject to political bargaining or to the calculus of social interests."[79]

In the calculus of providing social justice through law, it is contended that only social institutions will create an environment in which individual citizens will be empowered to shape their own rights and responsibilities. There is a trade-off between individual autonomy and the systemic pressures which come to play an important part in the discourse about rights in particular contexts.

The context of equality which is most apposite in a society where citizenship is predicated on a balance of rights and responsibilities conceived of and enforced by law, is equality of access. As Held imagines the operation of this principle:-

> "Democracy … entails a commitment to a set of empowering rights and duties. To deny entitlement capacities in any significant domain of action is to deny human beings the ability to flourish as human beings and it is to deny the identity of the political system as a potentially democratic system. A democratic legal state, a state which entrenched and enforced democratic public law, would set down an axial principle of public policy - a principle which stipulated the basis of self-determination and equal justice for all and,

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the unemployed. Therefore, in relation to access to justice it is important to understand the appropriate context of equality.

[78] Robert Nozick: *Anarchy, State and Utopia*, Blackwell, 1974, 49

[79] Rawls, *A Theory of Justice*, Oxford, 1972, 4.

accordingly, created a guiding framework to shape and delimit public policy."[80]

This third context of equality is equality of provision focuses on the rights of citizens to receive public services. As an echo of the universality principle, it argues for the all citizens to have equal rights to use public services as a result of their citizenship.[81] Equality of access is central to a properly functioning legal system. Equality of outcome is not a useful concept in this context. The outcome of an application to court will be dependent on the merits of the case, the availability of credible witnesses, and the opinion of the judge on the proper interpretation of the law. The only meaningful outcome is in the context of a dispute being heard by a court, or otherwise processed by the justice system, in accordance with principles of fairness and procedural propriety.

Equality of access is closer to equality of opportunity. Each citizen is to be entitled to access legal services, regardless of wealth or other factors. The opportunity in this case is the access to advice and possibly representation in the resolution of a dispute or in the development of a legal right. In the context of law it is easier to achieve equal opportunity from the outset, and then leave it to the court to reach a decision on principles of fairness. The only weakness is in respect of cases which do not reach a court or tribunal and which are settled by the parties either on the basis of a realistic assessment of their chances of success or after bargaining.

Access to social goods is all important if the theory is to be reflected in the experience of individuals. In the same way that, just because all are free to go to court, few can afford to without legal aid, not everyone can make a return on their equal lifechances. In working towards equality of opportunity, we must address the power structures that prevent equality of opportunity.

EQUITY & THE INDIVIDUAL

Equity and the individual – a problematic relationship

The relationship between the individual and the legal system through equity is problematic. Equity promises to set aside strict common law and statutory rules to achieve conscionable results in individual cases. However, it will do so in English law only by reference to settled equitable principles and only by reference to decided cases which have considered similar issues. As will be suggested below, these equitable principles are themselves becoming ever more rigid and less discretionary, in marked contrast to the approach of family law statutes. What is therefore at issue in relation to equity is whether, as a legal jurisdiction, it is indeed based on the individual, separate personality of the claimant/defendant, or whether it is better to consider it to be another branch of the law which applies a solid body of principles

[80] Held, "Inequalities of Power, Problems of Democracy", *Reinventing the Left*, ed. Miliband, Polity, 1994, 58.

[81] The National Health Service is a good example of this. Regardless of income, a citizen is entitled to treatment regardless of the cost of that treatment. Where the principle has broken down in practice is by the introduction prescription charges and flat rate charges by dentists for services.

(albeit involving greater judicial discretion than many common law claims) without any genuine connection to that individual. By "genuine connection" I mean that it is not the personality nor the individuality of the claimant/defendant which is in issue but rather the claimant/defendant is treated as though a propositus in any other legal claim – in effect a cipher to whom rules will be applied without force or favour.

One may wonder why this is thought to matter at all. The reason is that the roots of the notion of equity in the writings of Aristotle and others is as a means of dealing with individual human beings *as individual human beings*, aside from the abstract demands of any internal coherence between any particular decision and the body of the rules making up "the law". In Aristotle's *Ethics* the role attributed to equity is as something which trumps even his sophisticated and multi-layered notions of justice:

> "For equity, though superior to justice,[82] 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."[83]

So it is that equity provides for a better form of justice[84] because it provides for a more specific judgment as to right and wrong in individual cases which rectifies any errors of fairness which the common law would otherwise have made. The superiority of equity emerges in the following passage continuing from the last quoted:

> "The explanation of this is that all law is universal,[85] 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[86] 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."[87]

Thus, equity exists to rectify what would otherwise be errors in the application of the common law to factual situations in which the judges who developed common law principles or the legislators who passed statutes could not have intended.

What will be important in this discussion will be the extent to which equity can be concerned to achieve justice, or whether there is some context of "justice" (as

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[82] The concept of justice in the work of Aristotle is too complex to consider here. In short, it divides between various forms of justice: justice in distribution, justice in rectification, justice in exchange and mean justice. On these categories of justice see Bostock, *Aristotle's Ethics*, Oxford, 2000; Leyden, 1985. Equity is presented in Aristotle's work as a flexible counterpoint to these formalistic attitudes to justice.

[83] Aristotle, *The Nicomachean Ethics*, 1955, 198, para.1137a17, x.

[84] A philosophically-loaded term in the Aristotlean tradition but here limited to the context of legal justice as provided for by common law and statute.

[85] That is, law aims to set down general principles and not to deal with individual cases.

[86] Or judge.

[87] Aristotle, 1955, 198, para.1137a17, x.

Aristotle suggests) which is outside the purview of equity. So it is that we will consider whether equity can be remodelled so as to achieve justice (in the terms that that concept is conceived by the ancient philosophers like Plato and Aristotle[88]) or in terms of social justice as conceived by modern social theorists. Within this debate are potentially competing claims by human rights law and equity to constitute the principles on which the legal system will attempt to provide for fairness in litigation and in the dissemination of social norms.

Equity, human rights and the trend for individualism

What we might mean by "equity" in this sense is then something which will be addressed further below. However, there is another important sense in which we must think of equity and that is as one of the many jurisdictions which make up the English legal system. The Courts of Equity (with a capital "e") are an historical fact, as well as a phenomenon of judges using their discretion to give effect to an intellectual construct, covering the powers of the Lords Chancellor during the Tudor reign to exert naked political power and subsequently to retain immense political presence. Therefore, for an English lawyer "equity" is also that body of rules which have in fact been developed by the Courts of Chancery before 1873 and other courts thereafter. However, if it is possible to ground these ideas as footnotes to many philosophical systems identified with Aristotle, Kant, Hegel and others then it could be said that the general principles of equity in applying the letter of the law to the circumstances of individual citizens pre-date the medieval Lords Chancellor.

Therefore, the place of history is significant in our understanding of this flexible jurisdiction. That history, however, stretches forwards as well as backwards. The advent of human rights law offers a further dimension to the question of the manner in which the law relates to the individual. The precise genesis of human rights in philosophical thought is difficult to place. There was an increasing humanism evident in post-Enlightenment thinking, of course. Hobbes and Locke were even prepared to admit that the justification for laws and for their administration might rest otherwise than in god's law. The idea of human rights as a set of liberties which attached to the individual solely by virtue of her personhood has its seeds perhaps in Paine's *The Rights of Man* but it has become a mantra only in the second half of the 20th century as the aftermath of a century of horrific wars encouraged those aligned broadly with an egalitarian humanism which might previously have advocated collectivism to advocate in its place codes of fundamental freedoms which should attach to each individual human being and so offer some protection against the might of the state.

It is suggested that it is this focus on the rights and on the personality of the individual which is bound up with the postmodern turn in sociology.[89] The civilising turn in human beings required their participation as producers in social life – whether in the early phase as unskilled labour or latterly with the greater differentiation of society.[90] The postmodern turn has emphasised instead the role of individuals as consumers rather than as producers.[91] In this world has come ever greater choice for the

[88] See Morrison, *Jurisprudence: from the Greeks to the postmodernists*, Cavendish, 1998.
[89] Bauman, *Community*, Polity Press, 1999.
[90] Elias, *The society of individuals*, Continuum.
[91] E.g. Bauman, *Life in fragments*.

individual in terms of career patterns, lifestyle and so forth.[92] As considered in the following section this has given rise to the contested notion of individualisation: "contested" in the sense that there are those (Beck, Giddens) who consider that it offers tremendous opportunities not only for individual freedom to choose but also for politics more broadly to represent the individual, and those (Adorno, Bauman) who consider that it offers only ever-greater weakening of social bonds and individual anomie.

WHO IS THE PROPOSITUS IN EQUITY?

Individualisation and equity

The further question is how we are able to understand this individualised individual through equity. How ought we best to shape our equity to accommodate this new individual? In a world in which we are required to make ever more choices, cannot we expect our law to recognise our individual lifechoices and to accommodate them. For equity, perhaps this means developing models which come from within rather than which are imposed from without.

An important aspect of individualisation theory, then, is unspoken. That is, its need for there to be a freedom of social discourse, a freedom of communication. I would suggest that one of two models is possible to make the point. First, the ideal speech situation advocated by Habermas to reach a consensus on all social questions by means of an open discourse in which all can contribute freely.[93] Second, the veil of ignorance approach advocated by Rawls which assumes a choice of social roles by a population which would not know the roles which they as individuals would play in such a society and which, in turn, would result in those citizens plumping for equality so that none would be advantaged or disadvantaged.[94] Both of these models are open to attack on the basis that they assume that consensus would result, whereas Lyotard and others would argue that in place of consensus a healthier response would be one which permitted complete freedom within which the freedom of each is protected from the freedom of others.[95] I would suggest that the most useful way to think about Habermas or Rawls is to think of them as aspirational conceits: that is, models which do not necessarily expect that the world will stop for a week while we make all of these choices but rather are conceits which enable us to suggest that if we were to start over again then we would make choices which permitted open discourse and/or equality. In short, they are arguing for the way things ought to be.

In relation to the application of individualisation theory to the operation of equity, it is important that we understand equity as operating from behind a veil of ignorance. Let us suppose that we will devise a new society, like Borges's Babylonian lottery whereby our roles for any given year would be decided by chance.[96] On any given day in the year we would down tools and choose that piece of paper which contained our

[92] Giddens, *Modernity and self-identity*, Polity, 1991.
[93] Habermas, *Theory of communicative action*, Beacon Press.
[94] Rawls, *Theory of justice*, Oxford, 1972.
[95] Lyotard, *The postmodern condition*.
[96] Borges, *The book of sand*.

fate for the coming twelve months: priest, sultan or convict. Knowing of this lottery, how would we conceive of our legal system. First, we would undoubtedly argue about the content of our statutes. Secondly, I would suggest, we would want to know that there would be a power of mercy or a right to disapply those rules to recognise the lottery our lives have become. In short, we would want there to be sufficient fairness to get us through the next twelve months in case our choice of future was unfortunate.

What is important about all of these models used to argue for a new social order promoting fairness and freedom is that they assume that it is the people who will (or, who would) agree on the detail of the social order. Nothing is handed down from god or from a sovereign. In short, there would be no place for a legal order based on positivism. Of course, it is possible to construct a positivist account of equity on the basis that there is a secondary procedural rule which permits the use of an equitable principle in place of the primary common law rule. That is not the point. The point is that equity is useful precisely because it need not respond to positivist principles to be most effective. Rather, equity would be useful if it allowed everyone to contribute equally to the discussion as to the application and nature of these principles to their own lives. More fundamentally, it requires us to think of the justice system as being a public service. Not as something which is done to the people, but rather as something which they own and which operates on their behalf.[97]

One explanation for an equity which protects the rights of individuals on an individual basis is that in a world where we must face the bows and arrows of outrageous fortune alone, we are entitled to reach for any shield which comes conveniently to hand. The human condition is one of frailty and of seeking effective connection with others, and the individual's expectation of the law may well be that it protect the individual and listen to her story.[98] To put that same concern another way, perhaps it echoes Bevan's warning that our thirst for social justice and common solutions should never allow us to be blind to the individual suffering of many.[99] That is, that within our social world we must always ensure the protection of the individual.

Conscience-based trusts

While some writers identify order and certainty as being the first virtue of most legal systems, what is equally true is that chaos and uncertainty are the common characteristics of most disputes brought before them.[100] The resolution of disputes and the generation of legal norms must be sensitive to their context and to the principle that law is *of the people* and not something which is simply used to control them.

In its English legal practice, equity has evolved from being a means of petitioning the King as early as the end of the thirteenth century,[101] via the broad principles

[97] Hudson, *Towards a just society*, Pinter, 1999, 199.
[98] Turner, *Body and society*, Sage. That is to say, if things are as bad as you say then the least we can do is to let people protect themselves.
[99] Bevan, *In place of fear*, (1952), Quartet, 1978.
[100] Oakley, 1997, 27.
[101] A general jurisdiction described in Maitland, *Equity*, 1936, 1-11.

enunciated in *Snell's Equity*,[102] into an ever more concrete set of rules.[103] For example, the acquisition of an interlocutory injunction has continued to be an ever more institutional remedy with even the continued development of the *American Cyanamid*[104] principles. The creation of the express trust has continued to be an ever more formalised procedure reliant in compliance with statutes on perpetuities, certainties principles and other rules of formalities. The suspicion of the use of equity in commercial contexts has added to this policy of applying equitable remedies and trusts only in situations in which those more concrete rules are satisfied.

At first blush, the *Westdeutsche Landesbank v. Islington*[105] litigation looked to have reclaimed the heritage of the trust as a creature responsive to the conscience of a person entitled to property at common law.[106] However, Lord Browne-Wilkinson speaking for the majority denied the equitable remedy of compound interest on the basis of general justice which had been sought by the minority. The general principles of trust, while founded on the very mutable notion of "good conscience", were set out with clinical precision but without any clear idea of what is meant by the term "conscience" itself in that context. The recasting of the decision in *Chase Manhattan v. Israel-British Bank*[107] was a good example of greater rigidity of principle at work even in the otherwise flexible area of constructive trust.[108]

In *Westdeutsche Landesbank v. Islington*[109] Lord Browne-Wilkinson set out his version of the core principles of the law of trusts and also set about re-establishing traditional notions of equity as being at the heart of English law. As opposed to the new principle of unjust enrichment developed (principally) by Lord Goff and a group of academics centred in Oxford, Lord Browne-Wilkinson has re-asserted a traditional understanding of the trust as being based on the conscience of the person who acts as trustee. So, in *Westdeutsche Landesbank v. Islington* his lordship went back-to-basics with the first of his "Relevant Principles of Trust Law":

> "(i) Equity operates on the conscience of the owner of the legal interest. In the case of a trust, the conscience of the legal owner requires him to carry out the purposes for which the property was vested in him (express or implied trust) or which the law imposes on him by reason of his unconscionable conduct (constructive trust)."[110]

This draws on a thesis that the basis of the trust (and arguably the whole of equity) is concerned with regulating the conscience of a person where the common law might otherwise allow that person to act unconscionably but in accordance with the letter of the law. In tandem with this view are a range of equitable doctrines to do with the

[102] McGhee, *The proprietary rights of cohabitees*, Hart, 1999.
[103] Hudson, *Equity & trusts*, Cavendish, 2001, 17.
[104] [1975] AC 396.
[105] [1996] A.C. 669.
[106] This jurisdiction being described by Maitland, *Equity*, 1936, 8, as a combination of "rules of equity and good conscience".
[107] [1981] 1 Ch 105.
[108] It is acknowledged that doctrinally this decision is said to create more uncertainty than it clears up (see perhaps Birks, 1996, 3) – the reference here is to the attempt to introduce clarity in the first place.
[109] [1996] AC 669.
[110] [1996] 2 All E.R. 961, 988.

prevention of fraud (e.g. secret trusts, preventing a defendant using statute as an engine of fraud, constructive trusts) and a wide range of decisions which appear concerned to achieve similar results on their own facts which might otherwise be difficult to explain or reconcile with extant principle (e.g. *Fletcher v. Fletcher*,[111] *Re Rose*[112]). It is suggested that at the first level, *Westdeutsche Landesbank v. Islington*[113] re-asserts this basic principle of good conscience.[114]

This question of "conscience" is, however, a particularly difficult one. The derivation of the term conscience in this context is the early statements of the English jurists that the courts of Equity were courts of conscience[115] and that the Lord Chancellor was the keeper of the monarch's conscience. The post of Lord Chancellor was frequently referred to as the position of "Lord Keeper"[116] and Sir Christopher Hatton[117] in particular was known during his time in the position as being "the keeper of the Queen's conscience" during a part of the reign of Elizabeth I.

While Lord Browne-Wilkinson has stated the law as we must assumes it exists today (if not tomorrow), there are many reasons to be concerned by this decision and the direction in which the substantive law has been pointed by it. There may be a number of contexts in which this standard of "conscience" will not be the most useful one in all contexts. In particular, it is unclear whether or not a single standard can be created which will cater, for example, both for commercial cases involving cross-border transactions and for family cases involving rights to the home. If his lordship does not intend to create a single standard but rather to erect a concept which will be different in different contexts, it is not clear on what intellectual basis that notion of conscience is to be constructed.

Maitland, writing in 1929, would have us believe that equity is founded on "ancient English elements" and rejected the idea that equity was taken from Roman law in part.[118] In truth the provenance of the English courts of equity is a mixture of the ecclesiastical courts and a body of law which developed in terms of a line of precedent from 1557 onwards.[119]

Purely discretionary equitable remedies

Those who argue for the eradication of equity by amalgamating it into an expanded notion of unjust enrichment reckon without that range of equitable remedies which are entirely discretionary like injunctions, specific performance, rescission and so forth.

So, let us consider the general point that Equity is said to be a doctrine based on the conscience of the defendant. One initial question is whose conscience is being

[111] (1844) 4 Hare 67.
[112] [1952] Ch. 499, [1952] 1 All E.R. 1217.
[113] [1996] AC 669.
[114] This author has considered that case in detail in another book: Hudson, *Swaps, restitution and trusts*, 1999.
[115] As noted by Meagher, Gummow and Lehane, *Equity – doctrines and remedies*, 1992, 3.
[116] Thomas, *op cit.*, 1976, 506.
[117] Lord Chancellor from 1587-1591.
[118] Maitland, *op cit.*, 1936, 6.
[119] *Ibid*., 8.

considered: the claimant or the defendant? The classical matrix is, of course, that Equity is typically concerned with the conscience of the defendant – in particular the avoidance of fraud by the defendant. However, in so doing, Equity may be considering whether or not a rule of common law ought to be enforced against the defendant or whether the claimant is entitled to evade such a principle. For example, a claim for secret trust brought by the person claiming to be a beneficiary under that secret trust does not inquire into that person's conscience but rather the conscience of the person named as a legatee in the will. In the alternative, a claim for an interim injunction is decided on the basis of the "balance of convenience" rather than straightforwardly on conscience.[120]

Furthermore, the question arises whether or not the claimant is able in truth to claim a right, or whether the claimant is simply seeking an entitlement to precluding the defendant from causing detriment to the claimant? That is, does the claimant acquire a right which subsists independently of the claim which is brought against the defendant. Again a comparison of trust and injunction might be instructive. An equitable interest under a trust, if successfully established, entitles the beneficiary to a right which exists independently of the litigation which first recognises it and so enables the claimant to transfer that asset to third parties and so forth. However, an interim injunction grants a right which subsists only against the defendant for the purposes of that litigation and does not, in itself, grant any right independent of that claim. Therefore, the simple point is evident that Equity does not grant the same quality of right across all of its various doctrines.

What is notable about those remedies listed is that, while they are avowedly at the discretion of the court, they are nevertheless effectively hemmed in by principles in relation to whether a court will usually award that remedy or not. These doctrines have progressed from being a form of socio-technical observation that judges tend to do such-and-such and instead have become rules by reference to which judges decide whether or not it is appropriate to exercise their discretion. What is clear is that none of these doctrines responds wholly and exclusively to the binary pattern of reversal of unjust enrichment.

Proprietary estoppel versus unjust enrichment

Proprietary estoppel is very different, in a number of ways, from the institutional resulting and constructive trusts considered above. The aim of proprietary estoppel is to avoid detriment rather than to enforce the promise. Whereas the common intention constructive trust appears to be quasi-contractual (in that it enforces an express or implied agreement), estoppel is directed at preventing detriment being caused by a broken promise. In *Walton Stores v. Maher*[121] Brennan J. held that:-

> "The object of the equity is not to compel the party bound to fulfil the assumption or expectation: it is to avoid the detriment which, if the

[120] *American Cyanamid v. Ethicon Ltd* [1975] A.C. 396; *Series 5 Software v. Clarke* [1996] 1 All E.R. 853. Cf. *Cambridge Nutrition Ltd v. British Broadcasting Association* [1990] 3 All E.R. 523.
[121] (1988) 62 ALJR 110.

assumption or expectation goes unfulfilled, will be suffered by the party who has been induced to act or to abstain from acting thereon."[122]

Lord Browne-Wilkinson has held in *Lim v. Ang*[123] that the purpose of proprietary estoppel is to provide a response where "it is unconscionable for the representor to go back on the assumption that he permitted the representee to make". That is, to avoid the detriment caused from retreating from that representation. This approach is important because the court's intention is not merely to recognise that an institutional constructive trust exists between the parties, but rather to provide a remedy which prevents the plaintiff from suffering detriment.[124] The narrow line between proprietary estoppel and the (at the time of writing, heretical) remedial constructive trust is considered at the end of this chapter.

The determination of the courts to prevent detriment therefore requires the court both to identify the nature of the property rights which were the subject of the representation and to mould a remedy to prevent detriment resulting from the breach of promise. Typically, this requires the demonstration of a link between the detriment and an understanding that property rights were to have been acquired. Thus in *Wayling v. Jones*[125] the Court of Appeal held that the claimant was entitled to acquire proprietary rights under proprietary estoppel because his detrimental acts were directed at the acquisition of rights in property and were not merely the sentimental ephemera of their relationship.

In Hayton's view,[126] the court is not here giving effect to pre-existing rights but rather is fitting a remedy to a particular wrong. This remedy may be in the form of a prospective, remedial constructive trust. Indeed, it was held in *In re Sharpe*[127] that proprietary estoppel right exists only from the date of the court order. The award appears to be remedial in its effect - providing a remedy for the detriment suffered. However, it is worthy of note that in a number of cases, the court appears to be awarding expectation loss (that is, giving to the claimant rights which the claimant had expected to receive), rather than simply avoiding detriment.[128]

By contrast, the doctrine of unjust enrichment operates so as to reverse the unjust enrichment itself: that is, the extent of the remedy available to the claimant is contingent entirely on the size of the enrichment which the defendant has received. It is not a jurisdiction which seeks to compensate the claimant. Suppose the following. A derivatives trader promises to deliver to me a given number of bonds at a given price when I give notice of my intention to buy. The bonds are bearer bonds and are held separately from all other assets. The trader is aware that I require the bonds to make a delivery to my own client: failure to do so will result in an actual loss to me of £100,000 and a further loss of profit of £30,000, that much is also known to the trader. I give notice under the contract and pay the trader the £5,000 fee which we have

[122] *Ibid*., 125.
[123] [1992] 1 WLR 113, 117.
[124] *Westdeutsche Landesbank v. Islington* [1996] AC 669.
[125] (1995) 69 P&CR 170.
[126] Hayton, 1990, 370; Hayton, 1993, 485.
[127] *In re Sharpe (a Bankrupt)* [1980] 1 WLR 219.
[128] *Pascoe v. Turner* [1979] 2 All E.R. 945, *Greasley v. Cooke* [1980] 1 W.L.R. 1306, and *Re Basham* [1986] 1 W.L.R. 1498, all considered below.

identified as her commission but the trader reneges on the contract claiming that there has been some fundamental mistake between us. A claim based on unjust enrichment would entitle me only to subtract from the trader the enrichment which she has made from the transaction – that is, £5,000. A claim based on compensatory proprietary estoppel would be worth £100,000 and the £5,000 fee, that is the extent to which I have actually suffered loss. A claim based on a form of proprietary estoppel which enforced promises would be able to take into account my opportunity cost also – that is, £30,000 on top of £100,000 and the £5,000 fee.

Therefore, identifying whether or not Canadian unjust enrichment[129] in relation to the family home is intended to include opportunity cost is important. This discussion is taken up in the following section. In particular it considers what is meant by "injustice". The greatest challenge for the doctrine of unjust enrichment is whether or not it wants to develop a notion of "injustice" which goes beyond its purely technical sense. Birks and other have been content to leave matters at that purely technical sense[130] and to ask no questions about whether or not there is a more profound meaning to the notion of injustice.

A MODEL OF SOCIAL JUSTICE

Is there such a thing as social justice?

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 (while also considering some of Rawls's model of achieving social justice).[131] This section will adopt the definitions of that term considered by Miller[132] to highlight the philosophical differences between the norms exacted by three different sub-systems of law: English property law, English family law, and the Canadian law of unjust enrichment.

As considered above, the term "justice" has been the subject of complex philosophical debate since before the time of Aristotle. "Social justice" more particularly relates to the applications of these theories of justice to social goods beyond simply claims between individuals. In Miller's analysis the forms of social justice can be divided into two: conservative and ideal. First, *conservative* social justice seeks to apply principles of justice so as to preserve a status quo: such justice may, for example, seek restitution to vindicate the property rights of some person so that the pre-existing division of property rights is maintained.[133] Second, *ideal* social justice seeks to change existing social conditions in line with some political ideology – the particular

[129] *Pettkus v. Becker* (1980) 117 DLR (3rd) 257; [1980] 2 SCR 834.
[130] Birks, "Private Law", in Birks and Rose, ed., *Lessons of the swaps litigation*, Mansfield Press, 2000, 6.
[131] It is suggested that Miller's model is more useful for descriptive purposes whereas Rawls's model is more aspirational in the sense that Miller has no agenda – he does not assert any particular political point of view – whereas Rawls's agenda is to promote equal right to a basic liberty as set out in the two principles of justice: Rawls, 1972, 61.
[132] Miller, *op cit.*, 1976.
[133] Such as in *Foskett v. McKeown* [2000] 3 All ER 97.

ideology need not matter for that categorisation.[134] This marks out two political philosophies: the radical and the conservative. The purpose of using a model of social justice here is to create some form of benchmark against which various approaches to rights in the home can be measured.

Beyond that initial delineation it is said that social justice operates on one or more of the following three bases: rights, deserts, or needs. Social justice based on *rights* is orientated around the vindication of some recognised entitlement to property.[135] Social justice based on *deserts* allocates goods to a deserving person because that person is said to be deserving on account of their talents, their social position, and so forth. Social justice based on *needs* measures neither a pre-existing entitlement nor a deserving case but rather identifies a category of person who requires a transfer of goods to them so that their lack of such goods can be alleviated. It would be possible to imagine situations in which a persons needs might give rise to a right under a particular legal system,[136] or where we might argue that to have a right to something means that you are deserving of it under a positivist system of law: there is unfortunately neither space nor time for such detailed questions here.

A worked example

The example which Miller gives to tease apart the three forms of social justice[137] relates to two boys being asked to clean my windows on the basis that I will pay them £1 each for the work. I notice that one boy works diligently and performs an excellent job, whereas the other boy is slovenly and cleans the windows poorly. I have the following dilemma: do I pay the boys equally for their unequal work? A *rights* theory would require me to pay them according to our agreement: that is, a contract which entitles each to be paid £1 and which creates common law rights for each boy. A *deserts* theory might suggest that I pay £1.25 to the diligent child and only £0.75 to the slovenly child on the basis that the diligent boy's personal characteristics and hard work mean that he *deserves* to receive more than the lazy boy. Alternatively, it might require me to reward the diligent boy with an extra £0.25 and to respect the lazy boy's rights to receive his £1. A *needs* theory may make me take into the account the possibility that one boy is from a rich home whereas the other is from a poor home – perhaps this would prevent me from refusing to pay the slovenly boy less than I owed him under our contract if he was poor. Alternatively, a needs thesis might encourage me to withhold the money from the lazy boy if he was rich and did not need the full £1 so that some of that money could be redistributed to a diligent, poor boy.

Rights-based approaches to social justice

If we consider the manner in which English law deals with the home we will see that there are different concepts of justice at play. English property law provides that on

[134] This is primarily a radical political agenda but may also be reflected in doctrines like proprietary estoppel which frequently create rights which had never existed before.
[135] There is insufficient space here to consider the ways in which "rights" may come into existence philosophically.
[136] As evidenced in housing law or the family proceedings considered above.
[137] Miller, 1976, 28.

relationship breakdown only a person who has contributed to the purchase price of the property is entitled to take property rights in it.[138] The decision of Bagnall J. in *Cowcher v. Cowcher*[139] sought to conceptualise the different possible approaches to the form of constructive trust used in cases of common intention. This approach had not been followed explicitly for some time until the decision of the Court of Appeal in *Midland Bank v. Cooke* [140] where Waite LJ adopted it as a suitable exposition of the principles in *Gissing v. Gissing*. It is considered here as a reasonable introduction to the development of the principle of constructive trust in this context. Bagnall J. began by explaining that proprietary rights are *not* to be determined simply on the basis of what is considered to be 'reasonable, fair and just in all the circumstances', thus underlining the courts' determination to avoid the development of a remedial constructive trust approach in relation to family homes. Rather, the constructive trust will rest only on pre-existing entitlements.

The decisions in cases such as *Cowcher v. Cowcher*,[141] *Grant v. Edwards*,[142] and *Coombes v. Smith*[143] offered a variety of readings of the concept of "common intention" which ranged from divisions between the forms of consensus, the need for common intention to be coupled with detriment, and proprietary estoppel respectively. In the light of this welter of contradictory and difficult authority, there was some momentum for rationalisation of the law. Particularly in an area of such great social importance there was some momentum for clearing up the difficulties and making the law more straightforward. Just such a rationalisation was set out in what is now the leading authority on the operation of the constructive trust in this area in the leading speech of Lord Bridge in *Lloyds Bank v. Rosset*.[144] Lord Bridge appointed himself the task of setting out the terms on which a claimant may acquire an equitable interest in the home on grounds of "constructive trust or proprietary estoppel". In either case, the entitlement to some equitable interest in the home is dependent upon an express agreement or on a cash contribution to the purchase price or to the mortgage repayments. The contractarian basis of this area of law is evident. Where there has been some agreement, arrangement or understanding, the court will enforce that as a common intention; or similarly where there has been some cash consideration paid over there will be a right to property.

The Australian unconscionability approach is founded on concepts from commercial partnership law. In *Muschinski v. Dodds*[145] the analogy developed by Deane J was those rules "applicable to regulate the rights and duties of the parties to a failed partnership or joint venture" ought to be incorporated into a case in which two people had brought severally their money and their brawn to the development of a piece of land on which they intended to live together until their relationship failed.[146] As a result the partners should be entitled to a share of the property in proportion to their

[138] *Lloyds Bank v. Rossett* [1991] 1 AC 107.
[139] [1972] 1 All ER 948-951, 954-5.
[140] [1995] 4 All ER 562.
[141] [1972] 1 All ER 948.
[142] [1986] Ch 638.
[143] [1986] 1 WLR 808.
[144] [1991] 1 AC 107.
[145] (1985) 160 CLR 583.
[146] *Ibid*., 618.

contribution to the joint venture.[147] This permits a broader conceptualisation of the sorts of contributions which are made to a joint venture between two people although it leaves at large how one will go about valuing significant but intangible contributions like child-rearing and so forth.

This is a *rights*-based conception of a just conclusion which awards rights in property solely on the basis of some recognised pre-existing entitlement. What is concealed is the court's value judgment in preferring expressed, contractarian models to any other. So it is that the purchase price resulting trust recognises a right as arising from the payment of money: it is this right which gives rise to an equitable interest in property but it is blind to any question of the needs of the parties.[148] This attitude is similar to contract law which enforces my obligation to the other contracting party on the basis of our freely created contract. It is ostensibly value-neutral except to the extent that it supports commercial morality by requiring that a contract once made is inviolate – however, that ostensible neutrality by means of a failure to disclose its true underpinnings of course speaks most eloquently as to its true underpinnings.

Deserts-based approaches to social justice

Canadian unjust enrichment law takes a more creative approach to rights in the home by finding that property rights come into existence when a person participates in a relationship such that the other party receives valuable services, albeit not payments in cash. This is an approach based on *deserts* – to contribute to a relationship over a period of time means that the individual acquires some claim to just treatment by way of a transfer of some right in that property.[149] The very fact 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. More precisely, it means that the defendant can be precluded from being enriched in some way that is unjust.

Similarly, the approach taken by Waite LJ in *Midland Bank v. Cooke*[150] in recognition of a wife's contribution to a marriage recognises that she *deserved* some right in the property sufficient to defeat the claim of a mortgagee to take possession of that property from her. What is difficult about that decision is that Waite LJ is determined to protect the Cooke family from the mortgagee and so grants Mrs Cooke an entitlement in the home based on exactly the sort of ephemeral contributions which had been rejected in *Lloyds Bank v. Rosset* and *Burns v. Burns*.[151] Waite LJ returned to the speech of Lord Diplock in *Gissing* and to the decision of Browne-Wilkinson V-C in *Grant v. Edwards*, before holding the following:-

[147] The requirement of a joint venture is now diluted slightly so that a personal relationship with co-habitation will constitute a joint venture – it does not also require a business undertaking: *Baumgartner v. Baumgartner* (1988) 62 ALJR 29, (1987) 164 CLR 137; *Hibberson v. George* (1989) 12 Fam LR 725.
[148] *Tinsley v. Milligan* [1994] 1 AC 340.
[149] (1993) 101 DLR (4th) 621.
[150] [1995] 4 All ER 562.
[151] [1984] Ch. 317.

> "[T]he duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that 'equality is equity'."

On these facts, the matter could not be decided simply by reference to the cash contributions of the parties. The court accepted that the parties constituted a clear example of a situation in which a couple 'had agreed to share everything equally'. Facts indicating this shared attitude to all aspects of their relationship included evidence of the fact that Mrs Cooke had brought up the children, worked part-time and full-time to pay household bills, and had become a co-signatory to the second mortgage.

Possibly my favourite case is *Hammond v. Mitchell*, [152] a decision of Waite J (as he then was) in which the question arose as to rights in real property, business ventures and chattels. Hammond was a second-hand car salesman who was aged 40 and who had recently left his wife. He picked up Mitchell when she had flagged his car down to ask directions in Epping Forest. She was then a Bunny Girl (or, nightclub hostess) at the Playboy club in Mayfair, then aged 21. Very soon after that first meeting they began living together. It was said by Waite J that "[t]hey both shared a zest for the good life."[153] The history of the equitable interest in their personal and their real property followed a familiar pattern in that "[t]hey were too much in love at this time either to count the pennies or pay attention to who was providing them".[154] In time they bought a house in Essex in which they continued to live until the break-up of their relationship. There were no formal accounts and no formal agreements as to rights in any form of property. They had two children and an exciting, 11-year relationship. Aside from the house and its contents, they both acquired interests in restaurant ventures in Valencia, Spain.

Waite J. was clear that he considered the question of finding a common intention "detailed, time-consuming and laborious"[155] and therefore, in the light of all the facts, it was found that her share of the house should be one half of the total interest, on the basis that it appeared that the couple had intended to muck in together and thereby share everything equally. On this basis we might say that Mitchell *deserved* her interest in the home because of her contribution to their relationship and to the business. However, she was granted no rights in the restaurant business in Spain because she had contributed nothing towards it and therefore had neither a right nor a desert to any interest therein.

The extraordinary facet of the "family assets doctrine"[156] is that it eschews all of the carefully prescribed rules in *Rosset* and other similar cases. Rather than concern

[152] [1991] 1 WLR 1127.
[153] *Ibid*., 1129.
[154] *Ibid*., 1130.
[155] *Ibid.*, 1130.
[156] Terminology adopted in Hudson, *Equity & trusts*, Cavendish, 2002, 447.

himself with the niceties of the time of contributions and so forth, Waite LJ appears to be either a great realist or a great romantic. Waite LJ is a great realist in that he acknowledges that life is a chaotic muddle for many people in which they do not pay careful attention to their property rights when seeking to cope with the many vicissitudes of life. Chaos is not so much a feature of the law as of the circumstances on which the court is asked to rule.[157]

It is the possibility of drawing careful distinctions which is mystifying: particularly when those distinctions will not fall easily between an interest consensus and a money consensus on competing authorities. Waite LJ is a great romantic when he acknowledges the passionate confusion personified by Hammond and Mitchell and acknowledges that their real intention was to treat everything as shared between them.

It could be said that proprietary estoppel is similarly based on deserts. When a right to the fee simple in property is awarded to a claimant who has been promised that she will receive the property in its owner's will, it could be said that she deserved that transfer of title in the light of her acts to her detriment in reliance on the promise made to her.[158] Of course the outcome and the extent to which the claimant in *Pascoe v. Turner*[159] could be said to have *deserved* it, is questionable. Only by reference to the biblical parable of the widow's mite could it be said that her contribution of a few hundred pounds to the decoration of a house worth tens of thousands ought to entitle her to a transfer of the fee simple in possession. In that case the court justified its award on the basis that there was no other means of protecting her interests because she had no registered rights under land law.

The form of desert at issue her is difficult. In classical philosophical discussions of desert, the question is always whether or not the claimant of the desert would have some unfair, natural advantage – such as a gift for music or athleticism – such that anything she won would not necessarily be as deserving as somebody less naturally advantaged who had perhaps worked harder for less attainment. And so it is with desert in this context in another sense: desert must be distinguished from *rights* or else we might say that the person who had paid for the home *deserved* it as well as having the rights granted to her under resulting trusts principles. The *Pascoe v. Turner* decision measures desert in part by reference to the lack of pre-existing wealth in the claimant – but does not that intrude into a question of needs or simply of feeling sorry for the needy claimant?

Needs-based approaches to social justice

English family law takes different approaches. The Children Act 1989 places the welfare of the child as the paramount consideration – in consequence, the legislation takes a *needs* approach to a just conclusion. The child will not have contributed to the purchase price nor will it necessarily have formed an integral part of the family unit for long enough to deserve property rights (or even occupation rights). Similarly the Inheritance (Family Dependents) Act 1975 provides a power for the court to rewrite a

[157] Dewar, 1998.
[158] *Re Basham* [1986] 1 W.L.R. 1498.
[159] [1979] 2 All E.R. 945.

will on grounds either of some overlooked proprietary right or on grounds of need – an alternative choice of rights and needs respectively.

Property law is directed at the recognition of pre-existing rights. Purely remedial, equitable doctrines such as proprietary estoppel are concerned to ensure both good conscience and also that someone who has suffered detriment receives their just deserts. Family law, housing law and social security law are concerned to meet the needs of applicants.[160] Within these subtly different approaches to social justice are the true differences between these various aspects of the English law treatment of the home. One point should be made in relation to social security law in this context. Whereas one would ordinarily expect social security payments to be responsive to need, with the advent of the job-seeker's allowance and the increasing tendency towards linking benefits to preparedness to seek work, there is a seismic shift in the social justice balance. Benefits under this newer type of regime would be based on desert, by reference to having sought work sufficiently diligently in the foregoing period. This is to be contrasted with the requirement that someone seeking advice and assistance under the Housing Acts on grounds of homelessness be in "priority need" – a category predicated on the social obligation to assist those who are without suitable accommodation on the basis that they are pregnant, elderly or, otherwise, considered sufficiently vulnerable.

There is no single approach to the home in the common law nor in equity, in spite of developments in the legislation since the housing statutes of 1977,[161] the Children Act 1989 and the variety of family law, housing and property legislation passed in 1996.[162] It is submitted that this lack of common principle is true of the various departments of common law and equity, covering the well-established divisions between trusts law, family law, child law, public law and housing law. Rather, each area of law appears to advance its own understanding of the manner in which such rights should be allocated, resulting in an inability to understand the changing nature of the family nor to account for it in the current jurisprudence. The result is a hotchpotch of rules and regulations coming at the same problem from different directions. A comprehensive legislative code dealing with title to the home, the rights of occupants, the rights of children and the rights of creditors is necessary to reduce the cost and stress of litigation, and to ensure that this problem is given the political consideration that it deserves.

How can social justice and individualisation inter-sect?

The purpose of identifying a taxonomy of social justice here is to enable a more careful dissection of the varying outcomes which result from the differing approaches to allocating rights in the home. Much of the discussion of this area among property lawyers and in property law courts proceeds on the basis of technical differences as to

[160] Although, it could be argued that with the possibility of losing entitlement to the job-seekers' allowance on grounds of failure to attend interviews that such social security provision is now based on a weak form of right which stems from attendance at interviews and not simply from an assessment of needs.

[161] That is the Housing (Homeless Persons) Act 1977, the Protection from Eviction Act 1977 and, of course, the Rent Act 1977.

[162] Principally the Family Law Act 1996 and the Housing Act 1996.

the appropriate principles. The leading case-manque, *Lloyds Bank v. Rosset*, was the clearest example of an attempt to tidy up the law without paying particular attention, in the judgment itself, to the social ramifications of that decision. Rather, *Rosset* concealed, thinly, a rights-based attitude to title in the home which was predicated on very particular contributions to that home. It is suggested that being able to label the underpinnings of that approach makes it easier to muster one's concern about it and, co-terminously, to identify those approaches which might be considered preferable to it.

Individualisation theory has more to say about families than it does about property. In relation to the family it speaks intelligently about the importance of understanding the roles which women want for themselves outwith the strictures of the traditional family; more than that, it moves beyond merely "understanding" those aspirations and advocates instead that respect for them is a necessary pre-requisite of founding secure, happy societies. Women are currently caught it is said between "no longer" and "not yet" in that conditions of gender parity have improved but are not yet close to equilibrium.[163] Rather, what is needed is a recognition of a need for a "life of one's own" outwith the socially constructed roles of carer, wife and mother.[164] Taken in this regard, individualisation theory is concerned with respect for individual biographical choices. It is also sensitive, however, to the need for society to recognise its ethical duties to those communities, such as the elderly, who are entitled to support and respect in a way which goes beyond merely cheering their existential decisions from the sidelines and instead requires social policy on a range of issues including healthcare, housing and pensions to add quality to their lives which a value-free pursuit of individual liberty would not give them.[165] As Beck and Beck-Gernsheim point out, the word "care" is too often dropping out of our vocabularies in this context. Talk instead is of taking action during one's working life to provide for one's own old age. The increasing experience of those in work is also of the need to care for an elderly relative. The concern which they have with current public policy in this area is that too often the state decides to construct old age in a number of ways ranging from setting retirement ages to, more importantly perhaps, deciding what is and is not possible for the elderly to achieve economically and socially.[166]

Therefore, in relation to gender politics and life politics, individualisation theory has identified some of the key trends in the claims to greater liberty of the ordinarily dispossessed in our societies: senior citizens and women, two massive social categories too frequently excluded from complete liberty in their lifechoices despite their size. What is more problematic, is how this thinking translates directly into, for example, rights in property. There is, I would suggest, a situation in which it is impossible to reach a perfect answer to the problems associated with rights in the home. By virtue of the fact that there is conflict, one person is likely to lose out against another. Taking victory[167] in litigation from one category of claimant and

[163] Beck and Beck-Gernsheim, *Individualisation*, Polity, 2002, 54.
[164] *Ibid*., 56.
[165] *Ibid*., 129.
[166] *Ibid*., 135.
[167] And I use the word "victory" here because it is so useless – to frame these cases in terms of winning and losing is, self-evidently, counter-productive. What point in talking of socially just conclusions if the metaphors are entirely comprised of the war metaphors of victory, establishing a position, attacking one's opponent, etc.?

handing it to another does not reduce the amount of misery in the world, rather it re-allocates it. Even if one party is a financial institution seeking arbitrarily to recover the capital lent on a mortgage, refusing to allow mortgagees victory[168] in such cases does not create a perfect answer, rather it creates an answer which responds to a different set of values from the current approach in cases like *Re Citro* and *Lloyds Bank v. Byrne* which favour creditors automatically in order for sale proceedings.

What is necessary instead is to recognise that there is no problem with a failure to create a perfect answer. The inability among many property lawyers to accept that is at the root of the concern over the legal allocation of rights in the home. It is perfectly acceptable to identify a value judgment which for reasons of politics, ethics or even aesthetics is considered to be superior to all others, and to place that value judgment at the heart of each decision. That is why breaking out the various approaches in accordance with their attitudes under Miller's matrix is so useful – because it exposes the underlying value judgments to view. The success of the Canadian approach is precisely its acceptance as a value judgment that certain types of work in the home are of a type which ought to be accepted as founding claims to an equitable interest. By throwing over the pretence to be giving effect to institutional trusts which arise in some primal way "by operation of law", it is possible to admit that such cases ought to be decided on the basis of value judgments and not on the false premise that there is some "perfect answer" to the question "who owns this home?".

In that acceptance it is possible to marry the search for social just conclusions with a process of individualisation. In tune with Bauman's and Levinas's search for the ethical self in a world without values – and even without a "self" – it is only honesty about our values and debate as to those values which can open out equity into something which belongs to the litigants and not being simply something which is done to them. The process of individualisation is not an entitlement to victory on every occasion – but rather an entitlement to participate and to be heard. Society must be conscious of need but it must remain flexible in its definition of what constitutes a right or a desert from time-to-time.

Finally, I would suggest that that is the power of equity. Precisely because it is caught between this concern for the conscience of the individual and the application of general principles, it is uniquely well-placed to host the debate about the content of those principles. However, this can only be the case if there is sufficient equality of access to this discourse and if we can be confident that those who judge over us at this level are equally responsive to and representative of the society which generates these questions.

CONCLUSION

By drawing analogies with fiction – particularly fictions which purport to say something honest about the human condition – we remember that the law is itself something that we make up, fabricate, imagine, conjure or create. If it is positivist, then it is simply something that has been made by a human sovereign agency. In Foucault's expression it is a collection of *choses dites*; that is, something which is

[168] *Ibid.*

merely said and which could be unsaid. The law is only this way because we say that it is. Or, more importantly, it is only this way because people in whom we vest the legitimacy to speak – judges, legislators – say that it is. Fiction therefore offers us a useful analogy. As Shelley told us, the poets are the unacknowledged legislators of the world. Our ideas of the world must come from somewhere. A legal system which is merely positivist is akin to mere magic, the manufacture of a conjurer. A legal system which is based on some element of natural law is in itself equally problematic when our
beliefs change.

Change. That is the mantra here, I would suggest. We humans are pretty sure of ourselves now with our internet, and our cures for many diseases and our conferences on property law. But this confidence generally assumes that we are last word in evolution. At some point a dog is going to ask one of us the way to the Post Office and then there will be trouble. If evolution theory is correct then evolution and change are the only things we can expect. If relativity theory is correct then the only thing we can know epsitemically about where we are now is that it is entirely relative to everywhere else; and also that our position in relation to everywhere else is constantly changing. Similarly, chaos theory shows that the Cartesian certainties on which we instinctively build much of lifeworld – who among us doesn't say "the sun has just come up" rather than the more accurate "the Earth has just revolved slightly"? – are actually based on chaotic (but patterned) flows of energy and not just on solid atomic building blocks. If the laws of physics are malleable then the laws of England must be too.

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 responsible.