

CONSCIENCE

Abstract

The purpose of this essay is to consider the meaning of the term “conscience” and its place in English equity. This undertaking will involve an analysis of the etymology of the term conscience as a form of private, self-knowledge, an examination of the use of this term in psychoanalytic theory, and finally a consideration as to whether or not a legal jurisdiction based on conscience can feasibly be based on objective or only subjective principles. Bound up in this essay is a consideration of the meaning of the term “conscience” in non-juristic terms and in the particular context of equity. The underlying thread of this discussion is then a consideration of whether or not a legal jurisdiction can be viably based on a notion of conscience.

The solution suggested below is that the conscience in its purest etymological or psychological senses is concerned with privity of knowledge of self within the self. However, in a broader, ethical sense the conscience can be considered to have been objectively constructed because the moral or ethical sense of an individual is absorbed from parents during the infant stage, and from society and third parties during the remainder of the individual’s life whether through training, schooling or other, ideological communications to the individual. Consequently, it is suggested that it is possible to judge the individual’s conscience precisely because, even though the conscience itself remains within the self only transmitting information from the unconscious mind to the conscious mind, the contents of that conscience are nevertheless objectively constituted to a great extent. Therefore, it is a valid exercise for the law to judge the conscience, provided that the conscience is conceived of in the manner suggested in this essay.

This essay remains in fact simply a work in progress towards a journal article on *The Legal Conscience*. Given the length of this piece, even in its part-finished form, any final journal article will have to be a completely rewritten précis of this larger work. While unfinished, I think there is enough here to suggest the core thesis. The fuller version – on my hard drive but not yet this site – includes many more references to and quotations from works of fiction where the notion of conscience has been important.

The meaning of “conscience”

In its vernacular sense, the term “conscience” connotes something private and something internal. Its shadow is present in Descartes ultimate epistemological epigram: “I think,

therefore I am”. For Descartes, this statement was the only assertion which could be proved objectively. That I think is the only thing I can possibly know for sure in the universe – every other phenomenon which appeals to my senses I cannot know to be true. That I think, however, suggests that I must exist. That I have a conscience is, etymologically at least, a significant part of that consciousness. The word “conscience” itself is derived via Old French from the Latin “conscientia” meaning variously “consciousness”¹; “one’s inmost thought”²; an “inward knowledge or consciousness, an internal conviction, mental recognition or acknowledgment”³; or, interestingly, “privity of knowledge”.⁴

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

There is an important separation between the conscious self and the conscience. In psycho-analytic terms this is the distinction between ego and super-ego. Psychoanalysis explains the conscience as being “part of the superego that passes judgments on thought and behaviour to the ego for further consideration”.⁶ The conscience thus inhabits a dimension apart from the conscious ego. The manner in which the conscience then speaks to the conscious self is as an automatic, one-way transmission of sensation. Predominantly, psychoanalytic theory considers that the conscience usually speaks of shame.⁷ When one behaves in a way which the conscience considers to be shameful, then the conscience passes a sensation to the ego. The manner in which we shall consider conscience in this discussion, however, is in a broader sense than simply that of shame but rather in the sense of any behaviour (whether in the form of action or omission)

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

² Shorter Oxford English Dictionary, 5th edn, 2002.

³ Shorter Oxford English Dictionary, 5th edn, 2002.

⁴ Shorter Oxford English Dictionary, 5th edn, 2002.

⁵ Shorter Oxford English Dictionary, 5th edn, 2002.

⁶ Encarta World Dictionary, 1999, p 403, under “conscience”.

⁷ S Freud

which is considered wrongful by the individual conscience, whether or not it amounts to so strong a sensation as shame.

In this analysis of the notion of conscience I shall attempt to demonstrate that, even though the notion of conscience might be considered at first blush to be one which operates subjectively within any individual, nevertheless as a philosophical or a legal construct it is appropriate to think of the conscience objectively. This objective notion of conscience will be founded on the manner in which the contents of any individual conscience are constituted by external stimuli such that it is appropriate for external agencies, such as the law, to consider such a person's conscience and to measure that person's behaviour and the contents of their conscience against socially-generated standards.

One of the definitions of conscience given above was that of “an internal conviction”⁸. It is suggested that this poses more difficult problems. A conviction suggests a pre-existing decision or opinion on a particular issue. The most common manifestation of the conscience is as an automatic reaction to circumstances rather than as a pre-planned opinion of some factor. A pre-formed opinion is more akin to the issue of morality considered below (...).

A reflection on a moral standpoint is not a primary exercise of the conscience; rather, it is a reflective exercise of the ego on the conscience. If the superego does indeed communicate with the ego, *inter alia*, by an automatic conscience, then any conscious assimilation of those communications is not properly a feature of the conscience itself. The word “communicate” is not perhaps the best word in this context. For Heidegger, for example, communication required listening and not simply speaking. Therefore the transmission of information is not communication, rather it is simply transmission. Only once it is heard and understood has it been communicated. Therefore, the conscience transmits, to use this same vocabulary, and it is only once the ego hears and assimilates the conscience's transmissions that there is communication. It is the only when the ego weighs the nagging of the conscience that there is communication between the two. The conscience will not communicate rationally, however, in the manner in which the ego will wish to communicate rationally because the conscience transmits only involuntarily from the individual's unconscious mind and therefore will not hear the ego's response. This is why, perhaps, any attempt by the ego to bluff the conscience that *x* is not contrary to good conscience will not silence the conscience. Rather, the individual will have a gnawing sense of guilt and shame caused by the unconscious mind continuing to transmit messages to the conscious mind. Therefore, what the conscious mind does *in response* to transmissions from the conscience is something other than the conscience itself – they are reflections. However, from the external point of view, these reflections on conscience by

⁸ Shorter Oxford English Dictionary, 5th edn, 2002.

the conscious mind are the target of any legal agency seeking to measure the good conscience of the individual. The law can only deal with the conscious mind because it is only the conscious mind, together with its indications of intention, honesty and so forth, which the court can hope to probe. What is more difficult, as considered below, is whether or not the law, in such a circumstance, is really imposing its objective views of what the defendant ought to have thought or whether it is truly capable of discovering what the defendant subjectively thought.

The legal notion of conscience

The paradox within equity

What I hope to do in this section is to confront one of the central paradoxes which lies unspoken within equity.⁹ Equity operates through judicial discretion against the conscience of the individual defendant and yet it based on formally-generated, juristic principles. Thus equity is at one and the same time a means of ensuring justice in individual cases whilst also constituting a code of abstract, technical rules which are applied by judges carefully in accordance with case law precedent. So, equity is free and yet constrained. The solution to this apparent conundrum, it is suggested, lies in a fuller understanding of the nature of “conscience” in this context and in understanding that equity is, in truth, a mosaic of doctrines, principles and patterns of justice provision.

Equity, it is said, is a doctrine based on conscience. What appears little in the modern literature on the juristic concept of equity is any discussion of what this notion of conscience means. It is suggested that conscience has a stylised meaning particular to its use in equity. Therefore, we must consider the nature of equity, then consider what conscience connotes in its more general sense, before attempting to assess the inter-action of the two terms.

The trust, used here as an example of an equitable device, is responsive to the conscience of the legal owner of property. This may manifest itself by means of express trusts through the action for breach of trust which compels the trustee to permit no conflict of interest, no loss to the beneficiaries nor any deviation from the terms of her trusteeship, or it may manifest itself by means of trusts implied by law which seek to prevent the legal owner of property or some other person from taking a benefit unconscionably from that property. The express trust suggests a formalised equity which has been rigidified to achieve specific legal and non-legal goals: the protection of beneficiaries, certainty in

⁹ This contradiction is evident from the growing gap between books in this area which deal with “Equity” (frequently in Australia) and books which deal only with “The Law of Trusts and Equitable Remedies” and yet which are in truth dealing with the same subject matter. The key distinction between the two approaches is that the former type of book typically begins with Aristotle’s *Ethics* and its ancient conception of equity as rectifying formal rule-making, whereas the latter begin with the formalities necessary to create express trusts to give effect to commercial transactions, marriage settlements and wills.

relation to title over property and so forth. The trusts implied by law suggest responses to factual situations which appear to be contrary to conscience or demanded by fairness more generally. These latter manifestations of equity display a much broader use of judicial discretion to achieve goals which we might consider to be broadly moral or ethical but which are nevertheless established in accordance with principle to a large extent and with precedent to a lesser extent. In this sense ‘principle’ refers to that body of equitable principles such as ‘you must come to equity with clean hands’ whereas ‘precedent’ is used here to suggest a slavish application of rules in earlier cases with a lesser use of discretion in any individual case which is more clearly associated with the common law.

Still, equity is said to be based on conscience. The principle within the equitable canon which best encapsulates the notion of conscience intended is the principle that ‘equity acts *in personam*’. This principle means that the court’s concern is to look to the conscience of the individual defendant and to respond to that defendant’s actions and omissions. At first blush, this would suggest that the court will inquire into the individual’s own conscience. As such it would be expected that equity would prefer subjective tests to objective tests. However, that is to misunderstand the manner in which equity acts. Historically, equity is, in theory at least, the embodiment in legal principle of the monarch’s conscience expressed through the powers delegated to the Lords Chancellor, or alternatively a development of the procedural notion of “*consentia*” whereby judges would seek to give effect to the correct decision even if all of the facts could not be proved objectively. A more modern understanding of that concept would be to recognise equity as being an embodiment of an objective ethics to which the individual is intended to aspire and by reference to which her deeds and misdeeds will be judged by the civil courts. In that sense, there might be broad parallels between the role of equity in the civil law and the role of the criminal law more generally. A marriage which is suggested by the expression that the old Court of Star Chamber was concerned with ‘criminal equity’.

Thinking about conscience within ethical philosophy

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

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

‘But what is conscience? It is the voice of others inside you.’¹⁰

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

The distinction between subject and object is, of course problematic. To talk of the subject meaningfully, one must mean an individual and particular person. As soon as discussion becomes discussion of similarities between subjects or of an idealised subject then one immediately begins to objectify that subject.¹¹ So, the conscience is most easily recognised as that small, still voice within us individually which speaks to us only of shame. For equity to seek to judge the conscience in accordance with decided principle is necessarily to seek to objectify that conscience. To judge the conscience even on the basis of total judicial discretion is to objectify it, is to take it outside the subject and to use it as a lens through which to view those acts or omissions which for which the defendant is on trial.

This perception of the vernacular sense of conscience is still troublesome. Is it correct to think of the conscience as a *still*, small voice. Or is the conscience something which moves, which grows and which develops? Further, is the conscience a still, *small* voice. If the individual is formed socially, at least in part, then the conscience is potentially a particularised rendering of a massive, public morality which is produced within the individual as an amalgam of socially-broadcast messages about right and wrong, of the products of inter-actions with other individuals (from immediate family, to work-mates to school-friends), and of more subtle phenomena like law, environment and so forth which shapes expectations and attitudes more subliminally still. In Elias’s view, individuals are necessarily socially-constructed.¹² Therefore, the internal world of even the particular individual must be considered to be objectified at some level.

At a further level, Levinas locates the essence of morality in a respect for other people. In this sense, equity might sensibly be said to operate on the externally-exhibited morality of the individual rather than on the internally-situated morality of that same person. Equity is responsive to the external manifestation and not inquisitive as to the contents of the internal morality. This is always assuming that the individual is *conscious* of her own internal morality until external factors challenge that individual, causing her *conscience*

¹⁰ Pirandello, *Each in his own way*, spoken by Diego in Act 1, trans. Firth, *Pirandello – Collected Plays*, Vol. 3, Calder, London, 1992, 71. Also rendered in other versions as ‘Don’t you see that blessed conscience of yours is nothing but other people inside you!’, for example in Williams, *The Wimbledon Poisoner*, Faber & Faber, London, .

¹¹ Adorno, ‘Subject and object’, .

¹² Elias, *The society of individuals*, .

to speak for the first time “out loud” even to herself about her own attitudes to particular ethical challenges. At this level, therefore, it is possible that the conscience – even at the level of the individual’s private mythology and concealed world-view which remains dormant and unexplored in many of us (our true feelings about strawberry yoghurt, an aversion to blue food dye, a thrill at the smell of warm road tar, a suspicion of sewing needles, a fear of accidentally chewing the tin foil wrapper on a Kit-Kat¹³) until something in the outside world calls it unexpectedly to our conscious perception. Conscience, that automatic censor, is therefore not only externally created in part, but the process of its generation in terms of our realisation of what our conscience likes and dislikes is frequently dependent on external stimuli.

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

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

The conscience as privity of knowledge of self

The conscience as a part of consciousness

That the conscience is objectively formulated

Conscience, social conscience and morality

Whereas conscience and morality would seem to have similar ends in view when applied by the law or by philosophy, it is not at all clear that as abstract notions that they are

¹³ Another brand name which is automatically familiar to my speller checker.

linked. Morality and ethics are, it is suggested, best considered to be the products of the conscious mind. So it is that a social conscience is a reference to a person who concerns themselves with questions as to the ordering of society, principally to do with the plight of the less advantaged and therefore, possibly, to do with question of morality and the division of social goods. However, this form of conscience is not necessarily an automatic comment by the superego to the ego as to that person's inter-action with the whole of society. Rather, the effects of conscience in the form of "pangs of conscience" are more likely to refer to incidents very local to the individual and which reflect on the individual's own behaviour.

It is possible that matters which are local to the individual – such as this writer's own experience of walking the length of the Strand in the late 1980's and 1990's past the many homeless people – might impact on that person's conscience, for example if that person considered themselves to be somehow responsible for those local factors. In relation to the example of the street homeless people just given, however, it is difficult to see how the individual could have considered herself responsible for the plight of those sleeping rough and therefore any sensation brought on by this sight would not be a feeling of conscience. Rather, the individual might experience compassion or pity or a reaction of anger caused by some deeper seated political, religious or spiritual conviction as to the rights of man and one's responsibility to help one's fellow man. No matter how distressing the plight of those people might be, it is not necessarily the case that a desire to help them is one borne truly out of conscience. Walking past a homeless person in some distress eating some delicacy which the individual might be eating out of greed and then disposing of the same in a rubbish bin rather than giving it to the homeless person might, however, cause a reaction from the conscience. That would be the result of the individual's own behaviour which the individual considered to be shameful or wrong, rather than the reaction caused by an appreciation of the social wrong of the riches of some and the poverty of others. A social conscience, therefore, is not, it is suggested, the same order of phenomenon as a conscience considered in this essay.

The line between morality and conscience is difficult to draw. From the foregoing discussion, there is a difficult line to draw between compassion and conscience. Compassion suggests an affinity with another's suffering or plight. It does not require that the individual feel that her own internal sense of right and wrong, relating to her own actions, has been challenged. Morality, however, may lie between these two poles. Kant suggests a broad and tentative definition of what might be a moral question, as opposed to some other form of question, in his *Groundwork for the Metaphysics of Morals* in terms that a moral question is a question which relates to any exercise of a person's pure, free will.¹⁴ The foundation of morality is said to be that morality is the exercise of freedom and the choices that are made in the exercise of that freedom. However, there is a further sense of a moral question which must relate to the values by which that individual seeks to live her life in relation to the choices which she makes. (...) The Kantian position, as considered by Hegel in the *Phenomenology of Mind*, makes a person responsible only for the intended and not for the inadvertent consequences of her behaviour. (... intentional and inadvertent acts)

¹⁴ In the Preface, at para 4.

The phenomenology of the conscience

[The question of the nature of conscience links to the question “how do we perceive the world?” Then we come to the question “How is conscience a part of this perception?”]

Do courts examine the conscience in truth?

It may be questioned whether or not what the law is doing is actually related to any individual’s conscience at all. Where a court of equity purports to look into a person’s conscience, what it could be said to be doing is evaluating that person’s behaviour against the objectively established principles of equity without reference to what that person may have thought was right or wrong. To put the same point another way: the court is judging a person’s conduct and not that person’s opinions. So, just because I know that the act of taking property without authority from a trust is wrong that does not save me from civil liability if once I have taken property from that trust. Contrariwise, just because I have an unusual conscience which conceives of no wrong in taking property from a trust without authority, I am not subjected to civil liability unless and until I take property from that trust. Thus, I am not punished for what I believe but rather only for what I do.¹⁵

In the criminal law, where the *Ghosh* test supposes that one is convicted on the basis of things which one consciously knew, then there is still no direct measurement of conscience. The conscience is that hidden part of the self which speaks only to the individual’s own conscious self: the individual conscience can never speak to another person because it can never speak out loud. The conscience can only be rendered externally by the conscious self. The process of filtration through the voice or hand or act of the conscious self means that it is not the unfettered conscience which speaks but rather the conscious self instead. Thus, the criminal law is not concerned with the conviction of the conscience but rather of questioning the conscious self of the defendant to ascertain whether or not that defendant had knowledge of some factor which constitutes a transgression of the criminal law.

As a practical point, of course, it would be very difficult to prove what a person thought and impossible to prove what her conscience had actually communicated to her conscious self: all one could do is to suggest that her conscience “must surely have communicated such and such”. This is an objective phenomenon because what one is saying is that “we expect or require that a person’s conscience *ought to have communicated* such and such to the conscious self”. As a philosophical point it would be unfortunate to impose liability on people for things which they think or for thoughts which appear to them unbidden but on which they do not act. What the law does is to deal with transgressions committed or

¹⁵ I may also be liable, of course, for what I omit to do where that omission is an omission to perform some act which I am obliged to perform by law or equity.

omitted by the conscious self; whereas the private kingdom of the mind, and the many things which may be thought and felt in that private place, are beyond the reach of any outside agency. In any event, to ask what a person knew or thought does not connect to conscience if we take conscience as being a feature of the superego and knowledge or thought as being a feature of the ego.

This is the key. The conscience is something which rests entirely within the individual. Within each individual is a conscience of some sort which communicates with that individual ego alone. Those consciences do not interact with the external world. Rather, the external world is concerned with the actions and omissions of the conscious self – a part of which is concerned not with the knowledge or opinions which that person actually has but rather with knowledge or opinions which that person is deemed to have in the abstract or to have had in the particular circumstances of a particular case. In other words, it is assumed that at some base level each individual will consider it is wrong to steal or wrong to take another person's life. The court does not psychoanalyse each individual defendant, however, to decide whether or not that person did indeed think in that way. Rather, even the most subjective formulation of a law or of a legal inquiry is concerned to question whether or not that person must be understood as having known that such-and-such was wrong, or that such-and-such was being done intentionally or recklessly.

So, in the textbooks we are told, in words to the effect, that a defendant must have known subjectively that state of affairs *x* was the case before liability will be attached to her. In practice what this means is that the court – in the person of the prosecuting counsel or the claimant's counsel – cross-examines that defendant in an effort to demonstrate or to elicit a confession to the effect that the defendant did indeed have such knowledge. The defendant may well deny that suggestion strenuously under such examination in the witness box but, if the court chooses not to believe her testimony, perhaps because it seems implausible on the facts or because she appears to have been lying under oath, then the court will consider her to have had that knowledge. Thus, liability is imposed on a person even though there has not been any proof of the subjective presence of the required state of mind. This is in truth an objective finding of that state of mind, albeit cloaked in a subjective formula: “this court believes that she knew *x* was the case, even though she denied it”. This is epistemologically equivalent to saying: “this court considers that any person in the defendant's position must have known that *x* was the case, we do not need to pry empirically into the defendant's mind”.

Admittedly, there is an important difference between subjective and objective formulations of legal tests in such situations. Subjective formulations of such tests require the court to attempt to put itself in the defendant's circumstances and to imagine how a person with her experience, background and so forth would have behaved or what they could be taken to have known. By contrast, the strictest objective formulation might oblige the court merely to consider how it considers a model citizen ought to have behaved and to ask whether or not the defendant behaved in that manner. That said, there is the slightest difference in most cases between the former approach and the latter. In the latter approach, the court will be considering how a model or average citizen would have behaved in the circumstances of the case and so will permit some consideration of the

particular situation in which the defendant found herself. Beyond that it is a question as to the attitude of the individual court. Suppose the taking of a loaf of bread. If a court chooses not to consider that the defendant was poor and therefore pre-disposed to steal bread to eat then there will not be a distinction made on subjective grounds, but even on an objective formulation if the court does take into account the fact that bread in question was (let us suppose) left at a bus stop so that it was not clear whether it was owned or abandoned then the court will be involved in some subjective evaluation of the “crisis of conscience” faced by any defendant when deciding whether or not to take that bread. Only a strict liability approach – for example, one which finds that any person who takes bread which they cannot prove they knew positively to belong to them – can purport to be truly objective. All other approaches operate on a sliding scale between true subjectivity – in which we might suppose that we need a psychoanalyst to reveal to us the deepest recesses of the defendant’s conscience – and true objectivity – in which strict liability is imposed by the law on people who perform prescribed acts no matter what their mens rea.