Equity, Property, and the Ethical Subject

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Abstract

Orthodox ideas of ownership tend to depict property as a private domain that expresses the owner's formal rights. Yet equity does much to resist this outlook, deploying ethically-loaded ideas such as conscience and articulating an interpersonal and distinctly duty-driven character to property relations. Focusing on English case law, this article suggests that we can gather various strands of equitable property norms, particularly those derived from the constructive trust, around relationships of responsibility and vulnerability. Furthermore, the article asks what such equitable ideas about property might therefore tell us about the purportedly (self-)possessive character of human subjectivity. Rather than constructing people as sovereign, autonomous proprietors, we might read equity as tracing an ethical quality to the way we perceive ourselves and others through property-related ideas.

Keywords

Equity – property – subjectivity – ethics – conscience – Levinas

Introduction

Equity does not fit very well with orthodox ideas about property. The conventional view typically sees property as an expression of people's ownership powers to enjoy and control a resource. When we encounter property that is not ours we immediately, and often unreflectively, experience the proscriptive feeling of the owner's rights. Property feels like a sphere of personal dominium. This outlook does not just reflect pervasive cultural assumptions in modern Western societies, but also the corresponding legal and philosophical traditions, which tend to conceptualise property relations through people's singular rights to possess, to use, and to exclude. Yet, equity often tells a different story. It understands property using ethical ideas such as 'conscience.' It subordinates possessors' rights to their duties. It also gives greater priority to the relational dimension of property, which mediates people's connections with each other instead of serving to map the boundaries of their separation.

This article claims that equity ought to be taken more seriously as expressing alternative ideas of the nature of property, and as a source of critique of the theoretical orthodoxy rather than its pragmatic sidekick. The first two parts explore the limitations of conventional property theory, and then the manner in which alternative philosophical sources provide a crucial but under-theorised means of understanding property's intersubjective significance. The work of Levinas in particular allows us to conceive property not merely as central to how we understand ourselves, but also as giving rise to an ethical dynamic of responsibility on the part of the possessor towards vulnerable others around them. The latter half of the article seeks to draw out parallels between this alternative theoretical approach and the juridical life of equity, focusing on English chancery case law. Without making any claim to a comprehensive theory of equity, it is concluded that equity's jurisprudence might be a signifier of a more radical relation between person and possession, revealing property's centrality to an expropriative ethics and an affective social bond.

The ethical boundaries of property

The concept of 'property' has a peculiar ability to feel intuitively obvious whilst managing to puzzle academics. Kevin Gray puts it well when he says that property's deceptive nature means it "slips elusively from signification when it seems most attainably three dimensional."[1] The idea that we can enjoy possession of a thing that we 'have' appears simple, but is revealed to be highly complex when we question precisely how our relationships with property are justified, distributed and expressed through normative concepts. There are many aspects to this spectral quality,[2] but here I want to focus on one question, which is of how property is connected to people.

What we could call the orthodox view is summed up by Joseph Singer: "[p]roperty is about rights over things and the people who have those rights are called owners."[3] I will adopt Singer's critical labelling of this set of ideas as the 'ownership model' for the sake of convenience. This outlook ushers us towards foundational questions of how we distinguish different degrees of ownership, and what distinctive rights such owners possess. Typically, the most important rights are conceived as the right to exclude others and the right to assign the property to someone else.[4] The principal relationship occurs between the owner and the property itself; relations with other people, such as the duty of others not to trespass or steal, are derived negatively from the owner's rights. This superficially obvious idea proves to be crucial in understanding why proprietary rights *in rem* are more powerful than personal rights,[5] and how

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[1] Kevin Gray, "Property in Thin Air," *Cambridge Law Journal* 50.2 (1991): 252-307, 305.
[2] For example, questions arise as to what defines an item of property and how we recognise or limit the recognition of new forms of property.
[3] Joseph Singer, *Entitlement: The Paradoxes of Property*, (New Haven and London: Yale University Press, 2000), 2.
[4] For example, see J.W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996), 13; James Penner, *The Idea of Property in Law* (Oxford: Clarendon, 1997); Gray, *Property in Thin Air*.
[5] In practical terms making a claim *in rem*, a claim over the property rather than personally against an individual, is advantageous because it grants priority over the possessor's creditors and confers the benefit of any increase in value.

law posits a distinct idea of 'property' that is not just a species of contractual agreement.[6] Of course, in reality property relations are frequently more complicated than the trope of the singular absolute owner might suggest. Interests in one asset can be fragmented and distributed amongst several parties (e.g. landlord and tenant). In both theory and practice, therefore, the ownership model tends to tackle this by conceiving the 'thing' one owns as a particular bundle of rights over the resource in question,[7] granting property a quasi-metaphysical status.

There is evidently something appealing about the idea that property is a sphere of personal dominium that works against the whole world. Not only does it grant a sense of security, it also informs the way we think about ourselves as persons, and gives meaning to our individual autonomy.[8] Little wonder, then, that so many writings continue to cite and adapt the ideas of Locke and Hegel, who both argued in different ways that ownership derives from the human subject putting herself into the world. For Locke, we have a natural right to keep ourselves alive, safe and healthy, which we exercise by taking possession of the products of our labour. Such possessions rightfully belong to us because we have property in ourselves and therefore, by extension, also the value of our work.[9] Hegel meanwhile sees property as an important way in which we transform our abstract personhood into something concrete, something that can embody our free will such that we recognise ourselves in our property.[10] Both give a sense of intellectual rigour to our familiar experiences of ownership and selfhood, which of course reflect contingent cultural, political and economic norms. Property is a product of history. The emergence of the modern state, the enclosure movement, the processes of industrialisation and the virulent hegemony of capital all prompt us to see our species as an

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[6] Penner, *Idea of Property*; Thomas Merrill and Henry Smith, "The Property/Contract Interface," *Columbia Law Review* 101 (2001): 773-852.
[7] On the contradictions embedded therein, see Robert Gordon, "Paradoxical Property," in *Early Modern Conceptions of Property*, ed. John Brewer and Susan Staves (London: Routledge, 1995), 95-110. See also, Singer, *Entitlement*, 10.
[8] In particular, see Margaret Radin, *Reinterpreting Property* (Chicago and London: Chicago University Press, 1993); Margaret Radin, "Market-Inalienability," *Harvard Law Review* 100.8 (1987): 1849-1937; Jennifer Nedelsky, "Law, Boundaries and the Bounded Self," *Representations* 30 (1990): 162-189.
[9] John Locke, *Two Treatises of Government and A Letter Concerning Toleration* (New Haven and London: Yale University Press, 2003), 111-121.
[10] G.W.F. Hegel, *Outlines of the Philosophy of Right* (Oxford: Oxford University Press, 2008), 53-93.

aggregate of rights-bearing possessive actors in a market. Even English land law, which has been characteristically sluggish to cut its feudal roots, has in the last century articulated an unambiguous ideology of subordinating relations of possession and customary usage to the registration of ownership rights in estates and interests.[11]

But what exactly is so debatable about any of this? The core issue is expressed well by Jennifer Nedelsky when she describes a basic tension: the autonomy of the owner is only meaningful insofar as this autonomy is recognised and respected by everyone else.[12] Ownership rights therefore seek to both isolate the subject from the community and embed her within the community in the very same gesture. The 'ideal' of property in the ownership model, depicting a singular owner enjoying full and separated sovereignty over her property, is, in the perceptive words of Aston and Davies, "fundamentally misguided."[13] Property is meaningless if not a term in the intersubjective relations between people. And once the relational dimension of property is recognised to its fuller extent, it becomes possible if not necessary to be both critical of the power relations articulated by ownership rights[14] as well as utopian in the imagining of new possibilities for property to mediate our relationships with each other.[15]

By focusing on the formal structure of the subject's individual entitlement, the ownership model shies away from any substantial idea that property can be a term in our ethical responsibilities towards each other. It expresses moral ideas only insofar as there might be a moral propriety in regarding a person as entitled to the things they have produced, bought or been given. Ethical debates about property within the ownership model therefore tend to be

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[11] See Lorna Fox-O'Mahony, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart, 2007), 245-286.
[12] Nedelsky, "Law, Boundaries and the Bounded Self."
[13] Rhys Aston and Margaret Davies, "Property in the World: On Collective Hosting and the 'Ownership' of Communal Goods," *Law Text Culture* 17.1 (2014): 211-239, 226. In a similar vein, Robert Gordon describes this model as "paradoxical": Gordon, "Paradoxical Property," 102.
[14] For example: Cheryl Harris, "Whiteness as Property," *Harvard Law Review* 106.8 (1993): 1707-1791; Race: Whiteness as Property, Derrick Bell, "Property Rights in Whiteness – Their Legal Legacy, Their Economic Cost," *Villanova Law Review* 33 (1988): 767-779; Margaret Davies, "Queer Property, Queer Persons: Self-Ownership and Beyond," *Social and Legal Studies* 8.3 (1999): 327-352.
[15] Davina Cooper, "Opening Up Ownership: Community, Belonging, and the Productive Life of Property," *Law and Social Inquiry* 32.3 (2007): 625-664; Sarah Keenan, *Subversive Property: Law and the Production of Spaces of Belonging* (Abingdon: Routledge, 2014); Davies, "Queer Property."

preoccupied with questions of *what* can be owned or *who* things belong to.[16] Orthodox property ideas are typically very wary of articulating responsibilities in the possession of property, except where duties merely derive from another party's rights.

Property and ethics: reimagining the propertied subject

What makes Locke and Hegel so powerful in property theory is that they root the customarily familiar idea of ownership in philosophical arguments about the nature of the human subject. They provide an intellectual authority to our feelings that we are self-possessive individuals who express ourselves through our property within a market-structured society. But, of course, these philosophers' writings have the advantage of sailing with the historical winds of our industrialised free-market political economy. Confronting such ideas necessitates delving into some less pervasive philosophical ideas which might disturb the linkage between ownership and selfhood. What we seek is a way of thinking about property and people that resists giving primacy to the possessive and exclusionary characteristics of the subject, in favour of a relational and ethical sensibility. The later sections of the article will build the argument that such ideas, far from being a mere theoretical indulgence, find a contorted juridical expression in equity.

Much of post-Nietzschean philosophy could be of potential use here, but Margaret Davies gets to the root of the problem in her claim that standard property theory is rooted in a conflation of 'having' and 'being'.[17] Exclusionary and exclusive possession, of both oneself and one's assets, is presumed to be a base characteristic of what it means to be.[18] One can therefore undermine this conflation by attacking the very narrow idea of being that it expresses. Heidegger, on the contrary, would argue that being is expressed through our reflections upon the

[16] For example, consider the debates on how far rights over human body materials extend: Anne Phillips, *Our Bodies, Whose Property?* (Oxford: Princeton University Press, 2013); Donna Dickenson, *Property in the Body: Feminist Perspectives* (Cambridge: Cambridge University Press, 2007); Rohan Hardcastle, *Law and the Human Body: Property Rights, Ownership and Control* (Oxford: Hart, 2009); Muireann Quigly, "Property in Human Biomaterials—Separating Persons and Things," *Oxford Journal of Legal Studies* 32.4 (2012): 659–683.
[17] Davies, *Queer Property*, 341-345.
[18] "I have, therefore I am": Davies, *Queer Property*, 341.

world and other people.[19] The idea that our relations with property are based on a bounded possessive domain risks our descent into inauthenticity, a failure to properly understand our situatedness in the world around us. Authenticity, on the contrary, is found in being at home in the world, which requires us to understand ourselves as 'Dasein,' [being-there]. This means relinquishing the idea that property is an object to be mastered by the metaphysical subject, and understanding the things around us as part of the exposition of ontology. Property is not primarily a quality or expression of one's being, but a modality through which being can unfold.

Rather than deploying the usual terminology of the ownership model—ideas like possession, exclusion, rights, etc—Heidegger's writings considered the significance of dwelling.[20] For Heidegger, dwelling describes the unfolding of being through the essential relation between people and the space they inhabit. A physical structure in the built environment is not merely an instrumental 'thing'. It is a site in which the world[21] is gathered and delivers sense, and can allow Dasein to feel at home. In this view, exterior space is not a traditionally proprietary domain of the subject's sovereign expression and recognition of itself. Instead, Heidegger describes the way that space allows Dasein a site in which it is appropriated by being. Of course, it is no mean feat to try to derive normative positions from Heidegger's work here. David Gauthier does an admirable job, highlighting how, for example, Heidegger would support the limitation of our rights to exploitatively appropriate the Earth's resources, such that our being at home within the natural environment is protected.[22] But nevertheless, Heidegger's legacy grants a mandate to decentre the sovereign rights-bearing subject for whom property is a mere extension of self, and to explore property's underlying ontological significance.

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[19] Any one of innumerable texts could be cited here, but the fundamental claims made about ontology are expressed most forcefully in Heidegger's magnum opus, *Being and Time* (Oxford: Blackwell, 1962).
[20] Martin Heidegger, "Letter on Humanism," in *Martin Heidegger: Basic Writings*, ed. David Farrell Krell (London: Routledge, 1993), 217-265; Martin Heidegger, "Building Dwelling Thinking," in *Basic Writings*, 347-363.
[21] For the sake of simplicity I use the term world, yet by this point Heidegger had turned to the language of the fourfold: earth, sky, divine and mortal.
[22] David Gauthier, *Martin Heidegger, Emmanuel Levinas, and the Politics of Dwelling* (Plymouth: Lexington Books, 2011, 86.

In order to connect this trajectory of thinking to ideas of property and interpersonal ethical duties, it is useful to turn to Levinas.[23] Heavily influenced by Heidegger, whilst also one of his most fervent critics, Levinas too reflected on the significance of dwelling, as well as the possession of property in general.[24] What Levinas seeks to capture first is the way we *need* a private personal domain. Having a place to call home allows us to draw inward upon ourselves, and shut out the expansive and overbearing terrain of the world outside. It allows us to understand the dynamics of our own being, our agency and identity, as against the anonymity of being 'in general'.[25] Having a dwelling gives us a grip on the world around us, and crucially works to give a sense of withdrawal from exteriority. Of course, Levinas speaks semi-figuratively. With the 'dwelling' he talks of the way we inhabit our own subjectivity in the abstract. But in evoking the possessory character of the most basic sense of self, he also lends phenomenological significance to how we experience possession in a more applied manner. He taps into the intuitive feeling of the security of the home, whose intimately familiar character separates us from the exteriority of the outside by more than the thickness of one's front door.

The inwardness and interiority that Levinas attributes to the dwelling gives rise to the possibility of personal property. It allows us to possess, and therefore to attribute meaning and permanency to things.[26] Framed by the dwelling, things can be laboured upon and mastered. This is starting to sound positively Lockean. But what Levinas understood much better than Locke is that every act of taking possession—whether the inhabitation of a dwelling, or the appropriation of property that dwelling enables—has a relational effect, an impact upon the human 'other.'

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[23] This is to build on a few tentative suggestions from others that Levinas might be relevant to equity: Alasdair Hudson, *Equity and* Trusts, 8th ed. (Abingdon: Routledge, 2015), 1311; Marty Slaughter, "Levinas, Mercy, and the Middle Ages," in *Levinas, Law, Politics*, ed. Marinos Diamantides (Abingdon: Routledge, 2007), 49-69; Simon Chesterman, "Beyond Fusion Fallacy: The Transformation of Equity and Derrida's 'The Force of Law'," *Journal of Law and Society* 24.3 (1997): 350-376. On Levinas and property generally, see Aston and Davies, "Property in the World."

[24] See the chapter, "The Dwelling," in Emmanuel Levinas, *Totality and Infinity: An Essay on Exteriority* (Pittsburgh: Duquesne University Press,1969), 152-174.

[25] This is perhaps the most focused point of Levinas's critique of Heidegger. On this specifically, see: Emmanuel Levinas, *Existence and Existents* (Pittsburgh: Duquesne University Press, 2001).

[26] Levinas, *Totality and Infinity*, 158. Problematically, Levinas characterises the way we are welcomed into the home as the gesture of the woman, the feminine other (155).

Levinas claims that possession is never a truly isolated act of subject dominating object. There is always already a familiarity in the way we are at home with ourselves, which implies the trace of another person. Withdrawing inward into the dwelling, we find "solitude in a world already human."[27] The dwelling is more than a mere possession for us to use—it is the domain that allows us to make sense of possessions as such. It grants a space in which we can represent things to ourselves. The dwelling is a place in which we master our property, but it is not itself mastered. With this rather roundabout argument, Levinas seeks to justify the idea that the dwelling is not merely a neutral space requiring an owner. It is a space that already bears the traces of human habitation. It expects and welcomes us.

The image painted by Levinas is as abstruse as it is poignant. Can it tell us anything grounded about how we think of property? In one sense, Levinas is counselling us about the fallacy of property being exhausted in the relation of ownership between an autonomous, bounded subject and the place they call theirs. Property is only meaningful in the way we experience it because possession, even private possession, is something conditioned and enabled by our relatedness to each other. Against the cold anonymity of its outside, dwelling has a gentle familiarity of the human, felt as an "understanding without words".[28] Moreover, Levinas allows us to take a revealing perspective on the trope of first appropriation, i.e. the idea that we have ownership rights to things we appropriate before they are taken by anyone else. The act of taking a place, appropriating a domain for oneself, does not occur in a vacuum, and is always implicated in the presence of others. What makes a place feel 'mine' is, almost paradoxically, the way in which it is opened to me by the other. I am not referring to the empirical fact that the property I possess might have previous legal owners. More profoundly, having a dwelling for myself in which I can shut out the world means I take a place that could be occupied by an other, and is embedded in the ethical significance of what that means for both the other and me. It is a singular and exclusionary human act that is only meaningful in a collective human capacity.

[27] Levinas, *Totality and Infinity*, 155.
[28] Levinas, *Totality and Infinity*, 155.

Dwelling means that we are always already entwined in the ethical dynamics of our relations with other people.

An ethical weight also bears upon the way the dwelling allows us to possess things. Having things involves imbuing them with meaning, representing them to ourselves. The dwelling facilitates this, allowing us to situate and contemplate the thing, and to take a reflective distance from it. But by taking this step back from the property, our separation from the possession means we are also confronted with the exteriority of the other. The interiority of possession is therefore only made meaningful by this encounter with its exteriority, which in the very same gesture issues an ethical challenge. The 'exterior' other delivers an ethical contestation of possession, in the sense that their exclusion would commit violence.[29] This contestation is not experienced as the assertion of the other person having a more *rightful* claim, but rather as the responsibility that hangs upon the possessive character of the subject in the face of the other's destitution. If we follow Levinas's thinking, we find that not only is property subject to ethical contestation, but that contestability is its precondition. It it precisely the act of subordinating the thing as an object of ownership that opens the apprehension of the violence that possession can commit against the other person. Furthermore, it is the vulnerability of the other, their very exteriority, pared against the capacity for violence in the self's proprietary freedom, that gives rise to ethical responsibility. The interiority that enables possession is only made possible in relation to the exterior other, whose fate is implicated in the boundary that the dwelling asserts. Possession therefore is never ethically neutral, and entitlement cannot be separated from responsibility in our encounters with the disentitled. Vitally, this ethical sensibility is not a denigration of subjectivity, but on the contrary a defining aspect of what it means to be human. The perpetual interrogation of the propriety of the self by the other is what makes us who we are, and expresses our position within the social bond.

[29] Levinas, *Totality and Infinity*, 171.

Levinas challenges us to rethink property in the most fundamental manner, reappraising both the primacy and the validity of individual, sovereign dominium. But as I argue in the following sections, one may trace a gesture towards such thinking in the juridical manifestation of equity. For this comparison to be possible, it is necessary to take the liberty of trying to distil two crucial and mutually-constitutive components of his idea of property. Firstly, having property invokes ethical responsibility in our encounters with others, which exists independently of the other's rights. Secondly, such responsibility flows from the vulnerability of the other with respect to one's possession. By allowing us to conceive property not as a thing we have rights over, but as the term of an intersubjective relation characterised by the responsibility-vulnerability pairing, I claim that Levinas lends support for equity as a meaningful source of alternative ideas about the nature of property. In this light, the suppression of equitable ideas from conventional property theory appears not so much as mere disapproval of equity's vague and discretionary nature, but as an ideological contest about what property really means.

Before moving on, however, it is necessary to pre-empt a couple of potential objections. Firstly, it might be tempting to dismiss this sort of ethical injunction as mere bourgeois guilt. No-one needs to read philosophy to be made aware that there exist many millions of people rendered destitute by their lack of property, and that there is moral value in seeking to alleviate that through charity. But this would be to miss the point. The ethical power of the other to call into question one's possessions is a grounded intersubjective experience, not a general moral imperative. As is the case with equity, such an ethics does not provide a charter of what behaviour is substantively virtuous, but a set of ideas about the formal structure of our obligations to other people. Secondly, could one not complain that acting ethically through property compels us not to an idea of property but to its dissolution, in that it draws us towards abandoning private ownership altogether such as to avoid its ethical violence? But this position elides the way that entitlement and responsibility are only made meaningful by each other. Only the one who has, can give. As Derrida counsels, hospitality has a double edge, offering a gesture

of welcome to the guest, but only by virtue of the property of the host.[30] The dynamics of responsibility and vulnerability do not negate ownership, but articulate its irreducible ethical significance.

Conscientious property

Not only does equity tend not to get a prominent mention in property theory,[31] but in law it also tends to be conceived as beyond property's essential conceptual sphere.[32] Despite this, and by examining current English case law, I argue that equity gives partial support to property understood as a term in the intersubjective movement of responsibility and vulnerability, considered above. We can start with a few immediate general observations. Firstly, equity's ideas about property are neither primarily relational, nor primarily proprietary. They recognise the entwined linkages between people, and between people and things, more directly than the traditional concept of ownership. Secondly, equity loads morally- or ethically-weighted concepts onto the holding of property, principally the ideas of conscience and unconscionability, as well as the duties of loyalty within fiduciary relationships. It must also be emphasised that these initial two observations are mutually reliant upon each other: the 'conscientiousness' of holding property is determined by its relatedness between people. Thirdly, the obligations of conscience are not exhaustive of equity's position on property relations, and the following analysis is therefore not intended to provide a comprehensive, unifying theory.

[30] Jacques Derrida, "Hostipitality," in *Acts of Religion*, ed. Gil Anidjar (London and New York: Routledge, 2002), 356-420. See also, Aston and Davies, "Property in the World," 215-220; Gilbert Leung and Matthew Stone, "Otherwise than Hospitality: A Disputation on the Relation of Ethics to Law and Politics," *Law and Critique* 20.2 (2009): 193-206.

[31] One notable exception to this general trend is the debate concerning the boundaries between property rights that are *in personam* and *in rem*. See Henry Smith, "Property, Equity, and the Rule of Law," in *Private Law and the Rule of Law*, ed. Lisa Austin and Dennis Klimchuk (Oxford: OUP, 2014), 224-246.

[32] See Margaret Halliwell, *Equity and Good Conscience in a Contemporary Context* (London: Old Bailey Press, 1997), 4-5.

Equity has always been concerned with upholding good conscience,[33] but the constructive trust is where the latter has been brought to bear on property relations most directly.[34] Beleaguered by constant judicial debate,[35] subject to occasional academic scorn,[36] the constructive trust nevertheless continues to prove its resilience and its indispensability. Its breadth is illustrated by an unusually succinct definition given by Millet LJ in the Court of Appeal in 1998: the constructive trust arises whenever it becomes "unconscionable" for a legal owner "to assert his own beneficial interest in the property and deny the beneficial interest of another."[37] In other words, it works to compel a legal owner to hold property for another's benefit if in the circumstances it would be against conscience to hold it for themselves.

A modern statement of the doctrine's good health, and an illustration of its application, is found in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[38] One party had received property from the other, but due to misunderstandings in their course of dealing the transaction was effectively made in error. The House of Lords held that the recipient could be deemed to hold the property on constructive trust for the transferor—so long as the recipient's conscience was affected by their awareness of the mistake. In this case, as the recipient was unaware of the error right up to point at which the property was later dissipated, no trust arose. The judgment makes clear that the duty of trusteeship does not flow from the objective propriety or fairness of the transaction, but the relationship between transferor and recipient. Liability stems from the unconscientiousness of the recipient's awareness of the impact of trying to hang on to the property for themselves.

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[33] As an influential judicial statement of equity's role, see *Earl of Oxford's Case* (1615) 21 ER 485. For an historical account, see Dennis Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* (Aldershot: Ashgate, 2005).

[34] As Benjamin Cardozo once noted, it is the constructive trust that describes the "formula through which the conscience of equity finds expression." *Beatty v Guggenheim Exploration Co.* (1919) 225 NY 380, 386.

[35] Examples are too numerous to list exhaustively, but consider Lord Denning's ultimately futile attempt to give the constructive trust jurisdiction whenever needed in the interests of justice: *Hussey v Palmer* [1972] 1 WLR 1286.

[36] E.g., Sir Peter Millett, "Equity—The Road Ahead," *King's College Law Journal* 6 (1995): 1-19.

[37] *Paragon Finance v DB Thakerar* [1999] All ER 400, 408.

[38] *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 705, per Lord Browne-Wilkinson. The House of Lords confirmed that the question of the recipient's conscience being affected was the justification for the finding of a trust, rather than the slightly more convoluted application of restitutionary principles used by the Court of Appeal in a previous case of mistaken payment, *Chase Manhattan v Israel-British Bank* [1980] 2 WLR 202.

In a domestic setting, constructive trusts are used to identify partners' respective shares in their family home where they failed to take the unromantic step of determining this in writing. A court should presume that the parties share the property in equity in the same way as it is held at common law. But this is rebuttable by evidence of a common intention between the parties that is should be shared in some other proportion. The appellate courts have been preoccupied with debate on how such a common intent can be established,[39] but the underlying idea as to exactly *why* this gives rise to a trust can be traced back to the 1971 House of Lords judgment in *Gissing v Gissing*.[40] Lord Diplock explained that the trust arises where one party's conduct, typically conduct that would induce the other party to believe they have an interest in the property which they then rely upon, would make it "inequitable" for them to deny the other party such an interest.[41] The trust that binds the parties does not arise to honour a formal agreement; nor is it there to enforce some objectively determined 'fair share' between the parties. It cannot be rationalised as a mechanism for merely protecting or realising the claimant's pre-existing proprietary interests.[42] Instead, it arises out of the parties being bound together in an ethical commitment where each party reciprocally recognises the position of the other and, therefore, the iniquitous consequence of breaching that bond. A similar rationale can be found to support the principles of proprietary estoppel, which allow courts to award proprietary remedies where a person relies on a false belief that they have an interest in property. Questions of the conscience of the legal owner, flowing from their leading of the claimant to hold this belief, have proved vital in establishing why the owner should not be able to renege on the expectation in question.[43]

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[39] See *Stack v Dowden* [2007] UKHL 17, *Jones v Kernott* [2011] UKSC 53, *Lloyds Bank plc v Rosset* [1991] 1 AC 107 and *Gissing v Gissing* [1971] AC 886. Preceding the approach developed in *Gissing* and *Rosset,* see *Pettitt v Pettitt* [1970] AC 777.

[40] [1971] AC 886.

[41] Viscount Dilhorne phrased this as "breach of faith": *Gissing v Gissing*, 900.

[42] The detriment suffered by the claimant need not represent a loss correlative with the interest eventually recognised under the trust. See: *Eves v Eves* [1975] 1 WLR 1338; *Grant v Edwards* [1986] 3 WLR 114.

[43] *Jennings v Rice* [2002] EWCA Civ 159; *Gillett v Holt* [2001] Ch 210; *Crabb v Arun* [1976] Ch 179.

Similar ideas have emerged to solve some rather narrower property problems. *Pennington v Waine*[44] concerns the extent to which equity can give effect to a transfer of property when the legal formalities of the transaction have not been completed. The common law treats the matter as a technical issue of ownership. Person A owns the property up until the point at which they complete the formalities for transferring it to B. For some time, equity has offered a lower threshold, such that a purported assignment is effective by virtue of a constructive trust from the point at which A did everything they could to effectuate the transfer, irrespective of whether subsequent formalities are frustrated by circumstances beyond their control.[45] But *Pennington* went further still, finding that despite a transferor failing to do everything in their power to convey the legal title, the constructive trust may still arise where it would be "unconscionable" to deny the property to the intended transferee. In this case, it was held unconscionable to defeat a transfer of shares from an aunt to her nephew, as he had already acquiesced to his aunt's wish that he become a director of the company in anticipation of becoming a shareholder. Whilst the technical justification of the judgment has been be criticised (even by those otherwise sympathetic to the role of conscience),[46] the outcome manifestly represents the doctrinal expansion of the duty binding upon unconscientious possession. Conscience emerges again to solve an apparent deficit in the ownership-based solution at common law, by addressing the ethical significance of the relation between the two parties.

Next, take a situation where a trustee breaches an existing trust by transferring trust property to a non-beneficiary. The beneficiary will have a proprietary claim that the property should be held on constructive trust by 'following' it into the recipient's hands in cases where the recipient's knowledge of the trust means their conscience is affected by taking receipt.[47]

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[44] [2002] EWCA Civ 227.

[45] *Milroy v Lord* (1862) 4 De GF&J 264; *Re Rose* [1952] Ch 499.

[46] Margaret Halliwell, "Perfecting Imperfect Gifts and Trusts: Have we Reached the End of the Chancellor's Foot?," *Conveyancer and Property Lawyer* 67 (2003): 192-202; Alasdair Hudson, *Equity and Trusts*, 8th ed. (Abingdon: Routledge, 2015), 261-262.

[47] Two important comments must be made with respect to this general principle. Firstly, interests and estates in land are now largely covered by the question of whether they were registered. (This is at least analogous with the doctrine

Furthermore, a claimant may be able to seek an alternative remedy where a proprietary claim is not viable, for instance where the asset has already been dissipated. The rule that the recipient could still be *personally* liable as a 'constructive trustee' on the grounds that they knew about the breach is well-established. But for some time the courts have debated the question of exactly how much the recipient should know to be culpable. Various theories have filtered through appeal judgments in the past few decades.[48] Then, in *BCCI v Akindele*,[49] the Court of Appeal decided to address the root question head-on: did the recipient's extent of knowledge make it *unconscionable* to keep the property for themselves? In other words, the amount of knowledge is not decisive alone; it is the ethical dimension of knowledge that attaches to their receipt of the property. This ethical element is not simply awareness of the objective impropriety of taking receipt (akin to criminal law idea of dishonesty). It has a relational basis, measured by one's awareness that there must be another party affected by the breach.

It is tempting to think that the last example is merely restitutionary, i.e. it seeks to restore property interests to their rightful holders, and that on it can therefore be explained via the ownership model. I would question that conclusion for reasons I set out in the next section, but for now it is worthwhile pointing out how far equity can go in constructing property relations that, quite categorically, are not dependent on parties' pre-existing rights. The Supreme Court recently reaffirmed that unauthorised personal gains made by a fiduciary can be subject to a constructive trust in favour of the 'principal' (the party the fiduciary is meant to represent) even in cases where the principal would not otherwise have been entitled.[50] The classic example is a

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of notice, in that registration is a form of notice to the entire world. It is also worth noting that certain equitable interests in land, such as restrictive covenants and estate contracts, were born out of the doctrine in the first place. It was notice that allowed such interests to bind successive purchasers and take on a proprietary rather than purely contractual status.) Secondly, on the basis that equity does not assist mere 'volunteers,' a recipient who does not give valuable consideration will have no defence even where they lack notice of the trust.

[48] Notably, see *Baden v Société Générale* [1993] 1 WLR 509; *Re Montagu* [1987] Ch 264; *Polly Peck International v Nadir (No. 2)* [1992] 2 Lloyd's Rep 238.

[49] [2001] Ch 437.

[50] *FHR European Ventures LLP v Cedar Capital Partners LLC* [2014] UKSC 45. The judgment overruled the Court of Appeal in *Sinclair Investments (UK) Ltd v Versailles Trade Finance Ltd* [2011] EWCA Civ 347, which had restricted claimants to personal remedies in cases where they lost no asset or opportunity at the expense of the fiduciary.

nefarious fiduciary who takes a bribe.[51] The case law in this area is a little more idiosyncratic than other uses of the constructive trust, and the notion of conscience tends to be reflected in the specific structure of the fiduciary relationship, particularly the duty of undivided loyalty. If the rationale for such a remedy is not intuitively obvious, given that it allows a principal to gain a windfall via another's illicit behaviour, it might be comforting that the courts have struggled to agree on the precise justification.[52] But the dominant idea is that the fiduciary's loyalty entails that all unauthorised gains are made, effectively, *for* their principal, who can therefore assert an interest in equity.[53] There is of course a degree of artificiality in claiming that illicit gains, potentially the products of criminal behaviour, are made 'for' the person represented by the wayward fiduciary. But it is enough for our purposes to demonstrate that the trust is grounded in the duty-conferring nature of the particular relationship, and not the claimant's pre-existing proprietary rights. The principal can gain property that not only was never previously theirs, but also which they would never otherwise have a legitimate opportunity to possess. It is also strongly arguable that this scenario falls implicitly within Millet LJ's broad vision of the constructive trust's role in restraining the unconscionable exploitation of property at the expense of another. Whilst a determinate basis for fiduciary obligation, beyond the slippery notion of loyalty, is the subject of unsettled debate, there is a persuasive existing argument that it originates in the vulnerability of a party at the hands of another's discretionary power.[54] Such a viewpoint could not be expressed as succinctly as it was in the following remark by Dawson J in the Australian High Court: "inherent" in the fiduciary relationship is "a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other

[51] E.g.: *Reading v Attorney-General* [1951] AC 507; *Attorney-General for Hong Kong v Reid* [1994] 1 AC 324.
[52] See Andrew Hicks, "The Remedial Principle of *Keech v Sandford* Reconsidered," *Cambridge Law Journal* 69.2 (2010): 287-320.
[53] Per Lord Neuberger in *European Ventures*, para 33.
[54] Smith argues that such discretion is exercised with respect to a 'critical resource,' a concept that includes but is not limited to property: D. Gordon Smith, "The Critical Resource Theory of Fiduciary Duty," *Vanderbilt Law Review* 55.5 (2002): 1399-1497. Similarly, although from a practical deterrent perspective, see Irit Samet, "Guarding the Fiduciary's Conscience: A Justification of a Stringent Profit-Stripping Rule," *Oxford Journal of Legal Studies* 28.4 (2008): 763-781.

and requires the protection of equity action upon the conscience of that other."[55] It is only in the dynamics of this relationship that the duty to give over illicit gains, to which the principal has no pre-existing rights, coheres.[56]

There are other examples that could be mentioned. Secret trusts, mutual wills, and constructive trusts that obviate the abuse of statutes all similarly rely upon a party's legal ownership rights being curtailed by the interpersonal duties they have assumed towards another person. But irrespective of how many examples can be raised, some might still take umbrage with the centrality of ethical concepts to equitable ideas of property. Cynics would say that all this conscience-talk attributes an undue dignity to the manner in which judges can fudge the answer to hard questions. Peter Birks has written of the dangers of conscience becoming a mask for capricious discretion, allowing the whim of legal officials to masquerade as solid doctrine.[57] William Swadling has criticised conscience for unjustifiably becoming conflated with mere knowledge of another's existing interest.[58] Nevertheless, one cannot claim that such ideas are dusty artefacts of legal history. Their persistent renewal arguably point to, if anything, their capacity to grant a unifying coherence to equity.[59]

Part of the problem is that the concept of conscience, even when constrained to equitable property relations, is nebulous enough to resist a settled definition. So far I have avoided going further than saying that it has an ethical significance. But to give a flavour of the

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[55] *Hospital Products v. U.S. Surgical Corp.* (1984) 55 ALR 417, 430. The passage was quoted approvingly in the English Court of Appeal: *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248, 255-256. See also, Dennis Klinck, "The Nebulous Equitable Duty of Conscience," *Queen's Law Journal* 31.1 (2006): 206-258.

[56] Contrast with the following, which treats the doctrinal and ethical justifications of fiduciary duties as if they are separate: Paul Miller, "Justifying Fiduciary Duties," *McGill Law Journal* 58.4 (2013): 969-1023.

[57] Peter Birks, "Equity, Conscience and Unjust Enrichment," *Melbourne University Law Review* 23.1 (1999): 1-30, 21. See also, Ernest J. Weinrib, "The Fiduciary Obligation," *University of Toronto Law Journal* 25.1 (1975): 1-22.

[58] William Swadling, "Property and Conscience," *Trust Law International* 12.3 (1998), 228-239.

[59] Hilary Delany and Desmond Ryan, "Unconscionability: A Unifying Theme in Equity," *Conveyancer and Property Lawyer* 5 (2008): 401-436. See also, Nicholas Hopkins, "Conscience, Discretion and the Creation of Property Rights," *Legal Studies* 26.4 (2006): 475-499 for an argument for the utility of conscience beyond the principles of constructive trust.

breadth of theoretical debate, it has been posited variously as a form of scholastic morality,[60] an inner moral voice,[61] private knowledge of the judge,[62] and as a signifier of modern law's desire of repressed ethical judgment.[63] However, the more important question for now is not the conceptual lineage of conscience, which risks deference to the concept having some sort of intellectual authority in itself, but what conscience *does*. Specifically, the way it solves problems by identifying and grounding property duties in responsibility for another's vulnerability, rather than upholding formal ownership-based notions of property.

Your rights flow from my responsibility: the primacy of duty

If this rebellion against the ownership model is to ring true, we need to further justify the idea that the core of these property relations is duty, rather than a mere redistribution of property rights.[64] Some would disagree with this. Gary Watt, for example, talks of the trust as originating in the "division of rights in property" and forming a "tension maintained between states of ownership."[65] Sarah Worthington similarly describes equity as a mechanism for splitting the "bundle of rights" that was already associated with ownership by the common law.[66] Intuitively speaking, these positions are not unreasonable in cases of an express trust, where property is deliberately put into the hands of a trustee for the benefit of other parties. But in the case of the constructive trust, there are cogent reasons for understanding the relation to be rooted in the burden that the property bestows upon its holder.

Take, once again, the case of a mistaken transaction. If the basis for the transferor's claim boiled down to them merely asserting their continuing retention of rights to the property that is

[60] Richard Hedlund, "The Theological Foundation of Equity's Conscience," *Oxford Journal of Law and Religion* 4.1 (2015): 119-140.
[61] Irit Samet, "What Conscience Can Do for Equity," *Jurisprudence* 3.1 (2012) 3(1): 13-35.
[62] Mike Macnair, "Equity and Conscience," *Oxford Journal of Legal Studies* 27.4 (2007): 659-681.
[63] Maria Drakapoulou, "Equity, Conscience and the Art of Judgment as *Ius Aequi et Boni*," *Law Text Culture* 5 (2000): 345-375.
[64] See Katy Barnett, "Distributive Justice and Proprietary Remedies Over Bribes," *Legal Studies* 35.2 (2015): 302-322.
[65] Gary Watt, *Equity Stirring: The Story of Justice Beyond Law* (Oxford: Hart, 2009), 118.
[66] Sarah Worthington, *Equity*, 2nd ed. (Oxford: Oxford University Press, 2006), 63.

now in another's hands, then it is hard to understand why such rights should be defeated by a purchaser without notice. Why should the ethical status of the purchaser's extent of knowledge matter if the root of the trust is the beneficiary's rights, and what sort of 'right' can be made so conditional? Rather than relying on such a weak and qualified right, it is neater to understand the relation being rooted in the recipient's duty to hold the property for transferor's benefit.[67] This duty has the advantage of not needing to be qualified *ex post facto*, as it only ever arises in the circumstances where the transferee's conscience is actually affected. The claimant may therefore be understood to have right to the property only because the holder has a duty, and not vice versa. In such cases where the legal title does change hands, it might be tempting to say that the beneficiary's rights *do* precede the obligations of a knowing subsequent purchaser, as the beneficiary may have an equitable interest before the purchaser ever arrives in the scene. But this idea slips into the error of thinking that equitable property relations are constituted fully *in rem*, without their crucial relational basis. The rights the claimant held initially under the constructive trust were against the first legal owner. Whether they also gain further rights against the successive legal purchaser is dependent on the ethical significance of this new character's state of knowledge, and their duty therein.

Whilst rights and duties may often appear to be correlative to each other,[68] it is wrong to claim that neither can be logically prior in the justification of a legal relationship.[69] The question of their respective priority might be approached by asking the persistent 'why?' question. In the ownership model the 'why?' is typically quite easy to solve without leaving the language of rights: I can use the property because I have rights over it; I have rights over it because I own it; I own it because the previous owner used her rights to transfer ownership to me, etcetera. Contrast this

[67] See Penner's discussion of this point: *Idea of Property*, 137. Contrast with Swadling, "Property and Conscience," 236.

[68] On the general correlativity of rights and duties, see: Wesley Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning," *Yale Law Journal* 23.1 (1913): 16-59; Wesley Hohfeld, "The Relations Between Equity and Law," *Michigan Law Review* 11.8 (1913): 537-571.

[69] As Dworkin puts it, "[t]here is a difference between the idea that you have a duty not to lie to me because I have a right not to be lied to, and the idea that I have a right not to be lied to because you have a duty not to tell lies": *Taking Rights Seriously* (London: Bloomsbury, 1977), 171. See also, Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988), 68-73.

with the examples in the previous section. I can claim the proceeds of my fiduciary's bribery because I have a right to whatever unauthorised personal gains they make; yet I have this right because of the interpersonal *duty* they owe me. That duty can be justified by the relational power imbalance that makes loyalty a paramount concern, whilst the principal's rights cannot persuasively be justified without reference to the fiduciary's duty. Meanwhile, in cases of a mistaken payments or misapplied trust property it makes similarly little sense to say that the recipient's duty derives from the claimant's rights, not least because it would necessitate an awkward notion of rights that are only activated in unconscionable situations. Finally, to recall the *Pennington* case, it is hard to say that it was unconscionable for the aunt (or her estate) to hold on to the shares *because* of her nephew's rights under the constructive trust. Those rights only emerge as a result of the circumstances that make it unconscionable for the property to stay with the aunt.

Responsibility and vulnerability

Having argued that equity imbues the holding of property with duties that are more than just the flipside of other parties' rights, I want now to flesh out the basis of this duty in the pairing of responsibility and vulnerability. Vulnerability is both particular in character and relational in effect. Clearly, equity would not intervene to obligate people to give to charity, for example. Whilst this might be a virtuous use of property, any duty to do so would be general and universal. Vulnerability derives from a particular relationship between people which leads to one party, by virtue of holding a determinate asset, having a unidirectional power to affect the position of the other.[70] Vulnerability addresses an ethical demand to the possessor—commonly articulated through juridical ideas of conscience—that imbues the possession of property with a

[70] Such a conception is posed in direct agreement with the claim that fiduciary relationships arise from respective positions of trust and vulnerability. See Smith, "Critical Resource Theory," 1413-1414. See also, Paul Miller, "A Theory of Fiduciary Liability," *McGill Law Journal* 56.2 (2011): 235-288.

responsibility. This ethical demand is singular; it is *in personam*. In this sense, we can understand that the duty does not manifest in the general antagonisms of daily life. Buyers and sellers of property have interests that are in competition, but only as a matter of the generic position they take relative to each other in the marketplace. Yet if, say, a buyer receives property in a *particular* and *relational* position of being able to exploit the seller's vulnerability, then equity can intervene.[71]

The principles of the constructive trust make clear that vulnerability need not be caused by the responsible party's actions. Consider the example of mistaken payments, where the recipient's duty may arise out of the transferor's mistake. However, there must exist a power dynamic in which the vulnerable party is not capable of preventing their own exploitation. Vulnerability is therefore more than merely a party's need of or reliance upon a piece of property in another's hands. A person might offer a friend in need a room to stay in their house, this arrangement carrying on for some time such that the guest becomes expectant or even reliant on its continuation. But in cases such as this, it is clear that equity will require some further form of vulnerability before intervening to protect that arrangement. The classic example would be where the guest has been led to a belief that they have some interest in the property upon which they rely to their detriment.[72]

The intersubjective character of responsibility-vulnerability means that the responsible party must be capable of reflecting on the other's position. As all of the examples revealed earlier, duty always flows in part from the property holder's recognition, or their capacity to recognise, that there is some weakness over which the property gives them power. This might

[71] Consider *English v Dedham Vale Properties Ltd* [1978] 1 WLR 93 where a purchaser of land had purported to represent the seller in applying for planning permission. With the permission granted, and the seller oblivious, the purchase represented considerably less than the property's newly inflated market value. It was held that the purchaser has assumed fiduciary responsibilities and was liable for their unauthorised gains. It is necessary, also, to note the overlap with contract law here, and the availability of remedies via the doctrine of undue influence.
[72] See, e.g., *Ramsden v Dyson* (1866) LR 1 HL 129; *Inwards v Baler* [1965] 2 QB 29.

not entail detailed knowledge of the vulnerable party's position, or even their precise identity,[73] but the property holder must be capable of reflecting on the existence of a party whose vulnerability they can exploit. Meanwhile, at the firmest end of the spectrum are situations where this responsibility is voluntarily assumed, such as the taking of fiduciary duties.

Finally, the ethical bond is not reducible to a rebalancing of the parties' material interests. Responsibility extends further than restoring the vulnerable party to the position they were in before some sort of wrong was committed, and does not even require a loss of property or a breach of good faith. It cannot, therefore, be thought of as essentially restitutionary. This is made clear by the fact that equity intervenes in the property relation even where the parties' interests are aligned. In *Boardman v Phipps*,[74] for example, a solicitor took personal advantage of an opportunity to invest and restructure a company using information gathered in his fiduciary role. The trust he represented already held shares in the company, but the trustees declined Mr Boardman's suggestion to purchase more and in any case were not authorised by the trust to do so. Mr Boardman's subsequent restructuring of the company caused the share price to rise, meaning that the trust gained significantly from his breach of fiduciary duty. Nevertheless, the House of Lords decided that his shareholding must be held on constructive trust. In this case, the vulnerability in question does not derive from being put in a materially disadvantaged position.[75] Instead, the vulnerability here lies in the essential structure of the fiduciary relationship, in which the agent has a power to use the property in her hands to betray the trust and confidence of the person they represent. The objective is evidently not to restore actual material loss.

[73] Many examples could be cited, but consider someone who knowingly receives property transferred in breach of a trust. Awareness of the breach, and by extension the fact that someone stands to be exploited by the property dealing, is sufficient.

[74] *Boardman v Phipps* [1967] 2 AC 46.

[75] Incidentally, it would make little sense to claim that the material disadvantage is the failure of Mr Boardman to give over his gains. His duty to do so flows from the ethical demand issued by the principal's vulnerability; it would be tautologous to say that this duty also constitutes that vulnerability in the first place

A cautious conclusion

In the latter half of this article I have claimed that one can trace a set of core characteristics to the way property relations are understood via constructive trusts and fiduciary duties. Rather than regarding such mechanisms as rooted in the recognition and reallocation of property *rights*, they may be understood as expressing duties towards those who stand in a vulnerable position regarding the property in question. Those duties are justified not by formal notions of ownership, but through overtly ethical concepts. The incompatibility of this approach with the traditional ownership model should prompt us to seek philosophical authority for a responsibility-vulnerability modality of understanding property. Such theoretical support may be found, I argue, in the ideas explored in the earlier half of this piece. By revealing the correspondence between certain juridically-deployed ideas and a philosophical account of ethical subjectivity, it is possible to resist the temptation to write off ideas like 'conscience' as archaic remnants of judicial pragmatism. It may also lend to equitable property relations a degree of the philosophical dignity that Locke and Hegel grant to the ownership model. Rather than representing the supplemental tempering of common law doctrine, equity might be recognised as tapping into an alternative way of conceiving possession, selfhood and intersubjectivity, one that imbues property with an ethical weight lacking in the orthodoxy of ownership rights.

However, it is important not to get too misty-eyed about equity's ethical voice. Even if rooting obligations in duty, equity still allows for property to be delineated and allocated as a wealth asset. Whilst equity might protect property from alienation in a market, this has historically proved most favourable for the propertied elite,[76] and it would be naïve to think that the operation of conscience is immune to ideological instrumentalisation. There are also certain instances where equity does, quite manifestly, subscribe to the ownership model. We might think of those equitable mechanisms that give creditors a way of retaining proprietary rights in the

[76] Note the function of the trust as a mechanism for keeping property within a family. The same has been argued for equity's protection of land-owners against their mortgage lenders: David Sugarman and Ronnie Warrington, "Land Law, Citizenship and the Invention of 'Englishness': The Strange World of the Equity of Redemption," in *Early Modern Conceptions of Property*, ed. John Brewer and Susan Staves (London: Routledge, 1995), 111-144.

subject-matter of commercial transactions, such as *Quistclose* trusts and *Romalpa* clauses. The former allows a creditor to claim equitable title in property transferred to another party for a contracted purpose, up until that purpose is fulfilled. The latter allows a retention of title clause to be extended to the creditor's right to trace in equity any proceeds of the property in question.[77] When Lord Wilberforce in *Quistclose* spoke of how, through the parties' deal, "the lender acquires an equitable right to see that [the property] is applied for the designated purpose,"[78] he reflects a common line of thinking in these cases. Equity *can*, in these commercial contexts, invoke rights that are anterior to ethical duties. What we see, therefore, is equity being used to give proprietary structure to what is essentially a contractual deal between two market actors, and furthermore to give effect to an even more powerful domain of ownership of the creditor, allowing rights to be extended over property even once possession is relinquished within the commercial bargain.

I will end by trying to make sense of this. It is worth starting by saying once again that regardless of the profile of claims ending up in the Chancery Division, ideas such as conscience are not going away. Cases such as *Akindele* and *Pennington* reveal the ways it still operates as a live concept, animating rather than stagnating equitable reasoning. We also have to draw a distinction between the ethical content of equitable concepts, and the motivations of parties that bring disputes to court. Parties to litigation might pursue their own material interests, but this does nothing to undermine the fact that the court solves their problem by recourse to an ethical test.

The fact that equity clearly has more than one way of interpreting property relations might be subject to various hypotheses. It is possible that what this represents is not a foundational cleft in the thinking of equitable property, but a pragmatic colonisation of property norms by essentially contractual ideas. The *Quistclose* and *Romalpa* examples are united by the proprietary remedy being deployed to give effect to the parties' agreement with greater strength

[77] We might also note courts' willingness to recognise creditors' rights using express trust principles, even in cases where it is hard to say a trust really reflects the 'settlor's' intent. See *Re Kayford Ltd* [1975] 1 WLR 279.
[78] *Barclays Bank Ltd v Quistclose Investments Ltd* (1970) AC 567, 581.

than contract law can muster. The particular demand for certainty and security of credit within the commercial context might go some way to justify this.

If this nebulosity in equity's thinking of property runs deeper though, it may be tempting to suggest this reveals a degree of fragility in the ethical ideas of property relations. But I will finish with a counter-suggestion. The standard trope of what equity *is* follows an historical narrative, constructing it as a discretionary antidote to the common law's rigidity. Hence, equity is regarded as an occasional supplement to proper legal doctrine, suggesting that what I have tried to outline in this article will always struggle to find a comprehensive, doctrinal legal form. Equity's resistance to the ethical deficit in the ownership model, by its very nature, eludes the rationality of law in the modern liberal milieu, hence its awkward expression through ideas such as conscience. Yet the fact that the ownership model also finds moments of expression within equity suggests that this dynamic of responsibility and vulnerability has significance independent of the trope of equity's remedial purpose. Perhaps it might be thought of as an enduring story of property, people and their ethical bonds, of which equity is merely a narrator.

The purpose of this article has not been to offer a comprehensive theory of what equity is, but rather to show how equity articulates a way of thinking about property that resists many of the pervasive assumptions of our legal and cultural traditions. Equity should be regarded as a source of material and debate that can inform alternative theoretical accounts of the relation between property and personality. Taking seriously the idea of a broad (albeit not comprehensive) theory of equitable property grants legitimacy to concepts such as conscience and the constructive trust, and allows us to reflect on how its principles might be extended and adapted. But further, its correspondence with alternative philosophical critiques of ownership prompts us to listen to what equity says about ourselves and our relations with others as propertied subjects.