

The Contradictions of Conscience: Unravelling the Structure of Obligation in Equity

1. Introduction

In his famous turn-of-the-20th century text *Principles of Equity*, Walter Ashburner attempted to describe the relationship between the Court of Chancery and the phenomenon of conscience. He said the court

was a court of conscience in two senses. In one sense the jurisdiction was exercised according to the conscience of the Chancellor, although his conscience, as has been shown, was fettered more and more by authority;

In the other sense the jurisdiction was exercised on the conscience of the defendant. (Browne 1933, p. 38.)

Ashburner affirmed what was then and continues now to be well-accepted: that historically the courts of equity have had conscience as a central object of concern. But moreover, he seeks to address the harder question of where conscience is located, and to whom it belongs. His answer, that it belongs to *both* Chancellor and defendant, and manifesting in different ways, provokes a difficult question about the nature of equity itself. Whilst the idea that judgments should be made in accordance with good conscience is unremarkable, Ashburner evidently also felt that Chancery

had a cathartic role, relieving a defendant of their own ethical burden and doing so ‘out of tenderness for his conscience’ (Browne 1933, p. 39). An underlying justification of equity’s jurisdiction appears to be found in the court’s capacity to intervene in the defendant’s own conscience and spare them their inner turmoil.

Ashburner is just one of many jurists who have grappled with this enigmatic yet persistent concept of private law. His formulation, made with striking brevity, is symptomatic of what this article calls the contradictions of conscience. Whilst residing at the heart of equity, defining its spirit and its overarching objectives, equity frames conscience in multiple, conflicting and often manifestly confusing ways. In one instance it lies within the Chancellor (latterly, the judge) as a criterion of their judgment; in another it belongs to the defendant as an expression of their ethical integrity. It seeks to set an objective threshold of liability, whilst relying heavily on the internal reflection of the individual. And whilst in some lights it appears to demand respect for state law, in others it is a personally-felt ethical force.

In recent years, there has been a growing academic debate on how to interpret the significance of conscience for modern equity (e.g. Halliwell 1997; Hopkins 2006; Macnair 2007; Samet 2012; Hudson 2016; Pawlowski 2018; Agnew 2018). I suggest there are two poles between which the conceptual looseness of conscience can be framed. On the one hand, we can regard it as what Margaret Halliwell described as a ‘fundamental *rhetoric* of equity’ (1997, p. 8). Indeed, it has no unified analytical definition, but still permeates the language of equity and steers case law as if it has a self-evident or intuitive weight to it. On the other hand, one can point out that, despite lacking an overarching definition, conscience has enjoyed abundant instantiation within case law without needing the support of a grand theory. There are, therefore, voluminous generic scenarios in which we know, simply

via the logic of precedent, that certain behaviour must be in good conscience or bad. Upon this view, no rumination on deeper principles is required.

It is a central premise of this article that conscience cannot be fully understood via the latter perspective alone. As we will see, conscience is different to almost all other legal concepts. It is not originally a legal idea at all, instead emerging from the theological function of the ecclesiastical courts. At the same time, it resonates throughout a much richer history of Western thought. One finds overlapping accounts of conscience in the Ancient Greeks, Medieval theology, Enlightenment philosophy, psychoanalysis, poststructuralist ethics, and so on. Far from lacking meaning, conscience has a presence throughout the history of ideas, which the political theorist Mika Ojakangas has argued quite compellingly is characterised not by its disparity but by its delineable continuity in our ‘ethico-political tradition’ (2013, p. 2). Furthermore, it expresses a unique symbolic structure of obligation, in which the authority of law is conflated with the ethical autonomy and rationality of the individual. In short, equity says ‘you are obligated by this court, because your conscience says so.’¹ As will be argued, we should therefore not be content with a view resigned to conscience merely being whatever the Court of Chancery says it is.

I want to ask why equity has failed to resolve the contradictions of conscience, and how it has persevered nevertheless. The primary aim is not to find out what conscience is in some metaphysical sense, but instead to ask what conscience *does*. What is happening when a juridical obligation is posed as one of conscience, as opposed to any other form of duty? The hypothesis is that a concept

¹ Alternatively: ‘the language of conscience conveys the message that the defendant is being compelled to do [what] she “*really* ought to do”, and not simply what she “ought to do according to the law”’ (Agnew: 2018, p. 504).

that is so manifestly contradictory—not to mention fluid, intangible, and often controversial (see Birks 1999)—can only have managed to persist so successfully if it does something that other legal concepts do not. Indeed, the article claims that it is precisely these contradictions that allow conscience to have a persistent and distinctive animating influence. Nevertheless, this is not an attempt to valorise or romanticise the history of equity. As will be argued, the normativity of conscience expresses our relation with law via a relation with ourselves, constructing an ideal image of us as ethical beings. Ultimately, the article argues that conscience can be understood as an expression of power in which the subject is constructed as the source of its own authority. As such, the juridical authority of the state is granted a distinctly ideological façade.

This argument will be put forward in four stages. First, the doctrinal origin of conscience will be explored, showing how it has played a central role in equitable jurisprudence for several hundreds of years and how it remains crucial to modern doctrine. It will also pre-emptively respond to those who have reservations about the theorising of conscience in English law, and who feel it could be easily replaced by a set of conventional legal concepts. The following section fleshes out the claim that despite its crucial role, conscience is an intractably contradictory concept. Thirdly, I ask why such a contradictory idea has managed to hold such normative weight. Answering this will involve looking at a wider history of conscience in philosophy and psychoanalysis that help us understand its rhetorical power. It is no coincidence that equity's conception of conscience was shaped alongside wider social and political changes of modernity. Via Kant, Freud and eventually Foucault, the article tracks the ascent and then critique of conscience in modern thinking. It is principally via Foucault that the final section of the argument is put forward. Theorising

conscience requires us to consider the particular structure of power being expressed, one that obligates the subject by leading them to perceive themselves, rather than the vertical command of law, as the fundamental source of their obligation.

2. The Doctrinal Position

‘Equity operates on the conscience of the owner of the legal interest,’ stated Lord Browne-Wilkinson unequivocally in *Westdeutsche-Landesbank v Islington LBC* [1996] AC 669 (p. 705). How little seems to have changed since the 17th century, when the famous judgment in the *Earl of Oxford’s Case* (1615) 1 Ch Rep 485 declared grandly that equity’s role is to ‘correct Men’s Consciences’ (p. 486). Conscience not only defines this spirit of equity, but it also directly shapes the development of entire branches of doctrine that restrain unconscionable behaviour. As put in Holdsworth’s *History of English Law* (1966, p. 433), the ‘root principle of equitable ownership’ itself, from the beginning of the 16th century, was tied to ‘the chancellor’s power to proceed against the person whose conscience was affected by the notice of the use [the ‘use’ being the progenitor to the modern trust].’ Therefore, the peculiar status of equitable property relations, lying somewhere between *in rem* and *in personam*, is attributable to their conscientious status, moderated by an ethical test. As we will shortly see, for the most part, holding property in bad conscience indicates some awareness of circumstances that make holding the property wrong, notwithstanding one’s common law title.

Despite its conceptual breadth, equity has produced a detailed jurisprudence on the subject, such that tests for conscience follow a predictable pattern of scenarios.

The following is an unexhaustive summary of key circumstances in which liability rests upon a failure of good conscience:²

- (a) *Outright theft*. Unsurprisingly, trustees and accomplices³ who misappropriate trust property will find their title subject to a constructive trust for the existing beneficiary. Similarly, in theft generally, the thief gains a merely possessory title as a trustee in favour of their victim.

- (b) *Taking conscious advantage of impropriety*. Exploiting the procedural requirements of a purported transaction, so as to make a personal gain, is against conscience.⁴ When an otherwise innocent party receives property gratuitously, it is unconscionable to take the benefit if they are aware of certain facts, including: someone else has a conflicting beneficial interest;⁵ or the transaction was intended as something other than a gift;⁶ or it was an error.⁷

- (c) *Reneging on shared expectations*. Allowing someone to believe they have an interest in your property makes it unconscionable to renege once they rely on the expectation.⁸ Similarly, a shared understanding of beneficial rights in the family home can be enforceable by a trust once the relevant parties have relied upon the common belief.⁹

² Alternatively, see Sinead Agnew's (2018) analysis of the explanatory base that conscience provides to modern doctrine. Additionally, see Pawlowski (2018).

³ Specifically, 'dishonest' accomplices: *Royal Brunei Airlines v Tan* [1995] 2 AC 378.

⁴ Youdan (1984); Hopkins (2006); *Rochefoucauld v Boustead* [1897] 1 Ch 196.

⁵ The doctrine of notice continues to govern the enforceability of equitable interests in many cases, despite being usurped by land registration.

⁶ Per Lord Browne-Wilkinson, *Westdeutsche* (pp. 705-6). Cf Chambers, *Resulting Trusts* (1997, pp. 207-9).

⁷ See *Westdeutsche*.

⁸ See: *Taylor's Fashions v Liverpool Victoria Trustees* [1982] 1 QB 133; *Gillett v Holt* [2001] Ch 210.

⁹ *De Bruyne v De Bruyne* [2010] EWCA Civ 519, [49] per Patten LJ.

- (d) *Gaining an advantage via one's fiduciary role.* Fiduciary roles, in which one represents another person's interests, entail that unauthorised personal gains made in the role are against conscience.¹⁰
- (e) *Abuse of bargaining power.* Contracts may be set aside due to unconscionability where one party has knowingly taken advantage of the other's ignorance or vulnerability.¹¹

Clearly then, as a threshold of liability, conscience does not refer to an individual's personal moral outlook on the world. But it is not a purely objective standard either—the examples all demonstrate that it still concerns the defendant's state of mind.¹² In reality, probing the conscience of the defendant is likely to amount to an evidential question of how much they knew about some existing facts: whether of some impropriety, mistake, privileged information, informal agreement or assurance. What unites such categories above is precisely this subjective awareness of pertinent facts¹³ and, and as the piece will argue, the personal capacity to understand their moral status.

How did this doctrinal situation originate? Between the 14th and 16th centuries, the Court of Chancery resembled a Canonist court in which the Chancellor dispensed ecclesiastical wisdom. Conscience was understood as the practical interpretation of a transcendent, divine law (Potts 1982; Drakapoulou 2000; Klinck 2010, pp. 31-36; Kries 2002). In the pre-modern period conscience was therefore thought of as a principally objective moral standard, albeit one that requires a

¹⁰ On conscience and fiduciary relationships, see: *Hospital Products v US Surgical Corp* (1984) 55 ALR 417, p. 430; *Indata Equipment Supplies Ltd v ACL Ltd* [1998] FSR 248, pp. 255-56. On the scope of the rule, see *Boardman v Phipps* [1966] 2 AC 46.

¹¹ *Hart v O'Connor* [1985] AC 1000; *Credit Lyonnais Bank v Burch* [1997] 1 All ER 144.

¹² See Watt (2009), p. 111. On the tension between subjective and objective standards in conscience generally, see Samet (2012).

¹³ See also, Macnair (2007).

prudent interpreter, such as the Chancellor, to be heard. But despite this supposed underlying objectivity, the Court of Chancery was still concerned more with providing discretionary relief than solid principles (Klinck 2010, p. 17), functioning ‘at the cost of dispensing (if necessary) with the law of the state’ (Holdsworth 1915, p. 295).

Only in the early modern period that followed do we see the emergence of equity as a body of rules and principles, comparable to the equity we know today (Baker 2007, p. 106; Pollock 1913, pp. 286-96). Credited for mediating this shift, Christopher St. German’s 1528 text, *Doctor and Student*, promoted the secular credibility of equity, embodying coherent workable doctrines that can function effectively alongside the common law. St German argued that equity is not relief from law, but a component or aspect of law itself. Rationalising equity as part of the general juridical order of the state complemented the wider sociological changes at the time of modernity’s arrival. Equity’s conscience moved away from exceptional discretionary jurisdiction, and instead became the animating force and unifying rhetoric in the development of principles. And as cases such as *Westdeutsche* illustrate, conscience happily endures, always returning to the essential language of modern Chancery and holding together equity’s jurisdiction within an intuitive, albeit elusive, idea.

Not everyone finds the durability of conscience a sign of its conceptual worthiness. Peter Birks argues, for example, that conscience today does little more than offer a juristic shorthand for those scenarios in which we already have precedent for equity to intervene (Birks 1996, 22). When Lord Browne-Wilkinson claimed that ‘equity acts upon the conscience of the owner of the legal interest’, Birks’ reaction (1996, p. 20) is that this simply represents an astute judge ‘adapting

his technical learning to the broad language in which equity has always traded.’ There is, admittedly, some obvious merit in such an outlook. The flowery rhetoric of conscience is difficult to reconcile with the hard-nosed realm of commerce in which it is increasingly deployed, and there is no small amount of artifice in the image of commercial organisations experiencing the colloquial pangs of guilt. But one cannot help wondering why a modern Law Lord would hide their analytical brilliance behind amorphous terminology if it signals nothing distinctive. Indeed, some would say we ought to draw the precise opposite type of conclusion, that conscience endures *because* its elusive nature delivers something that common law doctrine cannot. Agnew (2018) argues, for example, that conscience helps to consolidate equitable obligations upon a unifying moral base. Keren (2016, p. 398) goes further, seeing conscience as crucial in allowing equity to help maintain ‘the very fabric of our social contract.’ Similarly, Rotman (2016, p. 501) states that equity’s doctrinal ‘fogginess’ is crucial in bringing positive law ‘closer to the human condition.’ Meanwhile, Drakapoulou (2000, p. 375) claims that the ‘dogged persistence of conscience’ represents an irrepressible ‘need...for an ethics in law and legal judgement’ which the common law cannot satisfy. Nevertheless, to an important extent, the Birks-style criticism *confirms* the contradiction of conscience, in that it draws upon an appealing rhetoric of inner moral wisdom whilst simultaneously claiming the objective rationality of a legal concept. Understanding how conscience is maintained in such a contradiction serves as a response to those who minimise its significance.

3. The Contradictions of Conscience

How exactly does conscience produce obligations? Any answer to this is beset by irreducible contradictions, which, far from weakening its normative authority, are

instead essential to its prevailing influence. It is time to flesh out this contradictory structure by focusing on two essential lines of conflict.

A. Between Objective and Subjective Standards

The early ideas of conscience insinuated a form of objectively true divine reason, known as *synderesis* (Potts 1982; Klinck 2010, pp. 31-36; Kries 2002). In the transition into modernity, the idea of immutable Godly rationality waned in favour of a newly *personal* form of faith (Drakapoulou 1999, p. 355). Instead of operating as a channel for celestial wisdom, the modern formulation of conscience was refocused inwards upon the individual's own relation with moral ideas. Klinck's history of equity (2010, p. 112) therefore makes a persuasive distinction between the pre-Reformation 'canonist conscience' and the new, modern 'protestant conscience'. No longer representing humans' effort to decipher transcendent signs, conscience had become

the faculty which allows us to know ourselves. That knowledge is objective in so far as it is either right or wrong, but it is 'subjective' in containing elements ultimately unfathomable by others. (ibid, p. 23)

The point was not to somehow assimilate the defendant's conscience into that of the Chancellor or the court. This would be at odds with the post-Reformation ideology of a personal, individual relationship of faith. Chancery does not transmit a particular conscience into the individual's soul. But it does invoke conscience as a source of both juridical knowledge and personally-addressed obligation. As Ashburner went on to claim in *Principles of Equity*, equity functions as a mechanism for the 'purification' of one's conscience, as an end in itself (Browne, p. 38). Paradoxically, it must provide a general normative standard by which the defendant can be judged, yet as a source

of authority it also resonates within the defendant. Consider the approach taken with the improper receipt of property. By testing liability in relation to the recipient's awareness of whatever impropriety has occurred, equity makes clear that it is *their* conscience at stake. Equity would not intervene merely on the basis of the objectively wrong transaction. In effect, equity says 'you are liable because *you* know you ought not to do that' (instead of simply 'you are liable because you have acted in a way that breaks a rule').

Some might disagree with the claim that conscience invokes directly conflicting subjective and objective standards. One alternative is to assume that conscience is a firmly objective standard, albeit one that feels subjective by virtue of its apparently obvious, intuitive nature (see Samet: 2012; Hudson: 2016; Agnew: 2018, p. 504). Such values have the power to *feel* subjective because of the way they should emerge in every person's mind. Such a premise is plausible, but one would need to rebut two criticisms, which will be explored further in the next section. Firstly, this type of outlook invites, somewhat inevitably, a reductive moral essentialism. Even a conservative jurist, albeit of the liberal variety, may be sceptical of such firm ethical consensus. Secondly, cases that establish the threshold of conscience are often contentious.¹⁴ If conscience represents a kind of general ethical common sense to which all reasonable people subscribe, how can it so easily throw the legal profession's sharpest minds into disagreement? And if its standards are subject to disagreement, as is obvious from case law, the subjectively-felt aspect of conscience must be *doing* something. It cannot simply be a phenomenological idiosyncrasy of our common ethical agreement.

¹⁴ E.g. *Pennington v Waine* [2002] EWCA Civ 227, and see Halliwell's (2003) commentary.

B. Between Judge and Defendant

Equity equivocates quite overtly on exactly whose conscience we are talking about, whether that of the chancellor, judge or court, or indeed the defendant's. From the beginning of modern equitable jurisprudence, the rhetorical deployment of conscience in impersonal abstract terms has been commonplace (e.g. it is 'against conscience',¹⁵ or it is in 'good conscience',¹⁶ or perhaps even referring to the 'rules of conscience'¹⁷). References to conscience as a faculty of the judge or the court itself can be seen from the 17th century.¹⁸ Then, in the 18th century, alongside these existing syntactical trends, references to conscience as a general source of *personal* obligation began to emerge (e.g. one is 'obliged in conscience'¹⁹), as well as a growing use of phrasing that indicates quite clearly that it is, in fact, the party's own individual conscience that obligates: their conscience is described as 'affected'²⁰ or 'bound'.²¹ Elsewhere we find the court beginning to cite the 'ill conscience' of the person,²² or proceeding to 'reform the conscience of the party'.²³ Trusts are 'a burden upon the honour and conscience of the person intrusted'.²⁴ The idea of an individual's conscience being affected, and moreover this being the basis of some form of legal compulsion, is retained precisely right through to Lord Browne-Wilkinson's contemporary formulation. It is this sense of a personal ethical demand—being obligated in equity via one's personal obligation in conscience—that underwrites the paradigmatic concepts of modern equity: the trust, the doctrine of notice, estoppel.

¹⁵ *Courtney v Glanvil* (1614) 79 ER 294, p. 294; *Edmunds v Povey* (1683) 1 Vern 187, p. 187.

¹⁶ *Carpenter v Tucker* (1635) 1 Rep Ch 78, p. 79; *Hunt v Matthews* (1686) 1 Vern 408, p. 408.

¹⁷ *Salsbury v Bagott* (1677) 2 Swans 603, p. 606.

¹⁸ *Crisp v Bluck* (1674) 2 Rep Ch 88, p. 91; *Nourse and others v Yarworth* (1674) Rep t Finch 155, p. 160.

¹⁹ *Luke v Bridges and Christy* (1700) Prec Ch 146, pp. 148-49; *Sheffield v Lord Castleton* (1700) 2 Vern 393, p. 393; *Keen v Stuckely* (1718) Gilb Ch 155, p. 156; *Countess of Coventry v Earl of Coventry* (1721) Gilb Ch 160, pp. 165-66.

²⁰ *Hopkins alias Dare v Hopkins* (1738) 1 Atk 581, p. 591; *Le Neve v Le Neve* (1747) 1 Ves Sen 64, p. 69; *Garth v Sir John Hind Cotton* (1750) 1 Ves Sen 546, p. 555.

²¹ *Attorney-General v Day* (1749) 1 Ves Sen 218, p. 221.

²² *Barnesly v Povel* (1749) 1 Ves Sen 284, p. 289.

²³ *The Earl of Kildare v Sir Morrice Eustace* (1686) 1 Vern 405, p. 405.

²⁴ *Ayliffe v Murray* (1740) 2 Atk 58, p. 60.

We can also understand Ashburner's conflicted formulation presented at the start of the article. Conscience must be a mode of judgment, therefore belonging (or least accessible) to the judge, yet also something personal to the defendant, at least discoverable within the self if not immediately consciously apparent.

There is, then, a manifest tension here between judicial authority and individual ethical autonomy: why would we need law to give effect to a normative imperative that is meant to be inherent within oneself? Does conscience support the general and vertical authority of law, or does it offer a space in which moral ideas can be determined on a personal or interpersonal basis? It would be easy to assume that, insofar as conscience is deployed in a juridical form, it must always invoke vertical authority. Whilst equity famously purports to soften the rigidity of the common law, in some lights it should be read as mechanism for consolidating the authority of state law. For example, a statutory technicality cannot be relied upon where it would unconscionably exempt some form of fraud.²⁵ The *authority* of law, in spirit rather than letter, is reinforced by conscience in such cases. Yet at the same time, the judgment holds that the source of this norm is not the accordance of one's behaviour within a prescribed general framework, but the capacity for internal reflection on the ethics of one's actions. It is still very much the individual's conscience that is being adjudicated as well.

4. The Rhetorical Force of Conscience

I now turn to the material question of this article, of why conscience is so enduring in equity despite this apparent muddle. A crucial starting premise, in agreement with

²⁵ *Rochefoucauld v Boustead* [1897] 1 Ch 196.

Halliwell (1997), is to understand conscience as a tool of legal *rhetoric*, the ‘broad language’ that Birks describes in the history of Chancery judgments. As we will see, the rhetoric of conscience places the subject in confrontation with an ideal, ethically abiding version of itself. For scholars concerned with the textual nature of law, one cannot underplay the significance of rhetoric to legal reasoning. Law *is* a branch of rhetoric, of the resources and performances of argument that define an ethical community. White (1985, p. 690) emphasises that legal language is never simply a technical mapping of rules and principles, and always operates in some way to constitute the community it assumes: “Every time one speaks as a lawyer, one establishes for the moment a character—an ethical identity, or what the Greeks called an *ethos*—for oneself, for one’s audience, and for those one talks about, and in addition one proposes a relation among the characters one defines.”

There are two key insights to draw from this position, but which might equally be drawn from any number of modern studies in law, language and ontology (E.g. Perelman (1980); Dworkin, (1982); Goodrich (1987); Fish (1989); Sarat and Kearns (1996); Constable (2014)). Firstly, one cannot isolate the technical, legalistic meaning of ideas such as conscience from the weight they hold within the history of ideas as a whole. Secondly, language—including the speech of law—is not a passive window onto reality, but the very material that allows us to shape our shared reality around us. Therefore, if the court of Chancery repeatedly equivocates on matters such as whether it is the conscience of the judge or the defendant it is necessary to ask what rhetorical function such equivocation serves. Why does it carry such power to marshal the rights and wrongs of the sorts of problems equity must address? If it is correct to say that conscience is the defining modality of modern Western ethical thinking (Ojakangas 2013), then it would be myopic to assume we can understand

what it is doing in equity without engaging with its intuitive significance which has been amply analysed in broader fields of thought.

A pervasive characteristic of conscience within the history of ideas is that it presumes the *splitting* of subjectivity. This is expressed exemplarily by Hannah Arendt, perhaps the most profound thinker of the failures of conscience in late modernity. For her, conscience demands an experience of self in which one takes both positions of addressee and addressor, ‘to know with and by myself’ (Arendt 1971, p. 418). As a form of knowledge, it requires thought, and specifically a mode of thinking that places one in an accusative dialogue with oneself, grappling with whether we can endure the internal disharmony inflicted by wrongness (see also May 1983). This structure, Arendt points out (1971, p. 443), can be traced back at least as far as Socrates, who likened this process of drawing inwards to coming home to find oneself already there. One is alone, and as such in the company of oneself, who accuses and interrogates oneself. It is, of course, an outlook that replicates the familiar colloquial experiences of conscience, as an inner voice, a version of our better selves to which we ought to listen.

We readily see this dynamic of addressee/addressor in equity, where the court invokes knowledge of the defendant’s conscience as the basis for its authority (one’s own conscience is ‘affected’ or ‘bound’). Conscience is capable of informing us of right and wrong, but its voice is implied to originate *within* the person, even if it takes the Court of Chancery to hear it. Adriaan Peperzak (2004, p. 187) illuminates this untypical form of obligation by claiming that ‘even if it is the voice of the Father, the State, a friend, humanity, or God, my conscience must recognize its pronouncements as its own before it can hear them as authentically obligatory.’ Without this sense of personal voice, conscience loses its especial authority and

becomes a mere external command. But likewise, whilst it is constructed as an inner voice, the prescriptive content of conscience must come from somewhere external, and must impress some sort of imperative upon the subject; it cannot merely be the unconstrained and immanent whim of the individual.

The rhetorical power of a court claiming to understand each individual's inner moral voice is naturally formidable. But this rhetoric would soon unravel if it did not also maintain consistent and objectively intelligible norms. So how is this possible? To answer this, we can consider two of the most influential modern attempts to theorise the experience of conscience, Kant in the domain of moral philosophy and Freud for his conception of the human psyche. The Kantian position derives principally from his famous 'categorical imperative', the structure of moral law which holds that one ought only to act in a manner that a rational person could will to be a universal maxim (Kant 2005, p. 74). Kant understood the moral law not as a form of externally imposed authority that restrains the freedom of the thinking subject but, on the contrary, as the subject's own emancipatory self-legislation through reason. Morality is therefore not simply imposed via social institutions (e.g. religion), nor can it be explained through the emotional dynamics of phenomena such as guilt. Conscience, for Kant, describes our built-in motivation to apply the categorical imperative to our own actions out of respect for ourselves as rational beings. Counterintuitively, conscience is therefore an expression of one's very own autonomy and freedom as a rational being.²⁶

For Kant, then, conscience describes the manner in which we are drawn to such reason within ourselves, and why we achieve satisfaction and a sense of personal integrity, and avoid shame and guilt, when following its prescription. In this

²⁶ For a critique of the association of conscience with freedom, see [removed for purposes of anonymous review]

sense he illuminates the internal nature of the tension between one's immediate desire and one's capacity to 'know better'. Conscience is an exercise of reason that is neither exclusively the preference of the individual nor a purely external rationality, and is experienced as an internal fracture within the self:

Every human being has a conscience and finds himself observed, threatened, and, in general, kept in awe by an internal judge; and this authority watching over the law in him is not something that he himself makes, but something incorporated into his being. (Kant 1991, p. 233)

Kant's framework concerns both the introspective dimension of self-knowledge, as well as the objective normative grounds of moral knowledge (Skorupski 2010, p. 555). It is precisely *because* objective moral conclusions can be drawn by the individual's own rational faculties that the Kantian conscience has a power to motivate ethical behaviour (Wood 2008, p. 183). It is *felt* as a distinctly personal experience of reason and self-knowledge, and indeed this is precisely its normative power, yet it retains objectivity and intelligibility. An accusation of acting against conscience therefore does significantly more than imply a moral wrongdoing; it calls into question the very coherence and integrity of the accused. The sense of inner conflict presupposes a more fundamental tribunal of rightness and wrongness (reason itself), one which transcends positive law.

With this in mind, Irit Samet (2012) understandably turns to Kant's framework to understand conscience in equity. Despite the complexity of the Kantian method, it offers a satisfying neat conclusion: ultimately, conscience in the courts of Chancery invokes 'the relevant moral value to which *all* thinking people, including the defendant, must subscribe' (Samet 2012, 30). In other words, equity's conscience is a label for the obviousness of certain, supposedly incontestable moral

standards, and the way that this obviousness always manifests in the diligent exercise of thought.²⁷ Kant, via his interpreters, therefore provides a hypothetical solution to the problem this article addresses. Conscience merely *appears* contradictory because it concerns norms that are sufficiently obvious that they will present themselves as valid to any thinking person. Upon this view, it would be both understandable and inconsequential that equity seems inconsistent about who the conscience belongs to, and whether it is a matter of applied norms or personal judgement.

However, I have two principal objections to thinking this completely solves the enigma of contradiction. Firstly and most simplistically, I do not think that equity's settled norms of conscience are always so obvious that any rational mind would have to agree. Tempting as it is to illustrate this with a highly contentious piece of caselaw, let us instead look at a truly paradigmatic example of bad conscience in modern equity. Imagine a person finds that, purely by virtue of their bank's negligence, a modest but entirely undue windfall of £50 has been deposited into their current account. Granted, most people in such a situation would likely say it is against good conscience to keep the money—but surely there is at least scope for debate? After all, it was the bank's mistake, it is unfair to burden the innocent recipient with the job of returning it, and banks would arguably tighten up their act if they knew they were to be liable for such errors. It is beyond the scope of this article to rehearse the wider debate on the extent of an essential core morality to law, so I will simply register my firm scepticism that equity's norms of conscience are always sufficiently simple and obvious to be beyond reasonable argument.

²⁷ I should also add, for the benefit of clarity, that the breach of such incontestable standards is not *on its own* sufficient to invoke liability. The unconscientious behaviour must also be of a recognised type deserving a remedy (e.g. wilful lying is an example of bad conscience, but is not itself an equitable wrong). Conversely, there are cases where equity imposes liability despite ostensibly good conscience, such as *Boardman v Phipps*.

Secondly, if we leave aside the last issue, and assume for the sake of argument that conscience does accurately describe a stable core of necessary moral consensus, we still need to understand how an objective moral norm can reach a level of incontestability that it seems to be spoken by the intimate internal voice of reason itself. Whilst Kantian conscience helps us understand the scene of internal conflict, the battle between the subject's immediate desire and her rational capacity to know better, the conscience alone does not tell us how those norms arise in the first place. That is the job of the categorical imperative.

Some norms are simple enough that they are validated by the imperative in abstract terms alone. The prohibitions of lying and committing suicide are oft-cited examples of maxims that derive automatically from the exercise of reason. However, most ethical questions concern more complex types of human dilemma, and can only be properly understood when seen in their social and historical context. David Velleman's (1999) reading of Kant emphasises that moral laws do not arrive simply via some form of *pre-given* logical necessity; they are personally-felt thoughts that are subsequently universalised by an understanding of what others would also think in the given situation. Conscience forces us to reflect on what *we* think *others* would think, and vice versa, in a kind of recursive feedback loop. The thinking subject contemplates an action, as well as contemplating what other people would think of that action, and what they would think of us contemplating their thought on that same action, *ad infinitum* (Velleman 1999, p. 62). The Kantian moral system therefore represents the persistence of ethical tradition. Our motivation to obey our conscience is not typically a dispassionate application of abstract logic, but rather 'our response to something that we have internalized from real people in the course of our moral development' (Velleman 1999, p. 76).

If we accept that the core morality invoked by conscience must have an evolving human history (and I suggest this must be accepted this if Kant is to have anything useful to say about positive law), how then does it become internalised to the point that it feels irrational to repudiate? Velleman (1999) answers this by roughly equating the categorical imperative with the Freudian super-ego—an equivalence indicated occasionally by Freud himself (1995, p. 281; 2010, p. 66). Both Kant and Freud saw conscience as means by which objective norms manifest in subjective feeling, but where Kant saw conscience as a type of respect for reason, Freud (2010) regarded it as a form of self-limitation. The conscience/super-ego represents the interditory faculty of the mind that produces internal feelings of guilt and draws the subject towards an ideal image of itself, an ego-ideal. For Freud, this structure originates in the Oedipal dynamic of the family, whereby the (male) child represses its competition with the father for its mother's erotic attention by 'identifying' with the father's prohibitive role. The authoritative father becomes a source of aspiration, embodying the ego-ideal, allowing this prohibitive force to be internalised within the subject. Once adopted in this manner, this structure of identification is transposed into the broader social field. Morality, religion and other sources of social practice operate through this process in which normative codes are internalised. It is once the ego-ideal becomes an expression of ethical norms (as opposed to parental will) that Freud (2010, p. 44) calls it conscience.

This is by no means an uncritical outlook. Like Nietzsche before him,²⁸ Freud saw conscience as a functional solution to a type of human weakness. It provides a vital restriction on our primal aggressive instincts, necessary for a working society. The threat of punishment is not enough to stop someone breaking the law

²⁸ Nietzsche's outlook, however, is predictably more cynical than Freud's. *The Genealogy of Morals* (2003) depicts conscience as a way of dignifying our powerlessness behind a façade of pious ethics. And by telling ourselves that all other people are bound by the same rules, we feel able to judge others.

(because punishments only apply if you are caught) and so the super-ego presents ‘an internal authority to watch over him, like a garrison in a conquered town’ (Freud 2002, p. 61). And whilst it serves the social order, conscience is a source of tension within the psyche, potentially an experience of guilt to the extent of neurosis. It is therefore important not to conflate this experience with moral phenomena as traditionally conceived (Jones 1966).

Freud and Kant therefore both roughly agree on the existence of a particular type of norm that, despite their objective intelligibility, manifest in as if they originated in the individual. Both theories claim that this subjective aspect of conscience is necessary to motivate us to heed conscience’s call. Conscience provokes us to apprehend an ideal image of our ethical selves, an unimpeachable ego-ideal to which the subject aspires. Where they differ is on the source of those norms and our motivation to obey them—whether arising from the operation of reason itself, or from the internalisation of authority that originates in the family dynamic (Longuenesse 2012). And it would be fair, at this point, to ask why this question matters. Only the staunchest nihilist would deny the necessity of *some* basic common morality to human society, so does it even matter where these norms have come from?

One purpose of comparing these two thinkers is to show that the Kantian insight can be acknowledged, whilst being augmented by analyses of power and ideology. Freud allows us to consider that the obviousness of norms that appear via one’s conscience is not, simply, a sign of their rational validity, but instead derives from forces and tensions imprinted upon the unconscious. In its starkest light, the Freudian conscience simply describes ‘internalised threats and fears which are now self-administered’ (Jones 1966 p. 56). It is arguable that the apprehension of moral

phenomena that seem rationally unimpeachable can only ever be derivative of this concealed ontological mooring. Adopting this view would therefore suggest that the Kantian outlook is one historical interpretation of how conscience manifests in conscious thoughts, and is inextricably embedded within its Enlightenment context (Longuenesse 2012, pp. 33-34). Naturally, this article cannot resolve this debate. But I suggest that the proclivity of conscience to make moral norms seem natural and obvious entails a duty to question whether this is an ideological structure, veiling structures of power behind the scenes. The unique rhetorical power of conscience, as this section argues, lies in its claim to confront the individual with their ego-ideal, the intimate impression of an ethical version of themselves. The final section of my argument therefore critiques the way that such an idealised image of the self becomes constructed, such that its voice resonates in harmony with everyone else's.

5. Norms, Power and Moral Rationality

It should perhaps be unsurprising that Foucault has been described as a prominent legatee of the Freudian outlook on conscience (Ojakangas 2013, p. 203). Despite their differences, both adopt a post-humanist premise that our impression of the world is shaped by structural power relations that operate outside of conscious thoughts and perceptions. Both also regarded conscience as an aspect of this ideological apparatus. I want to examine, with Foucault's help, how and why norms can become naturalised to the extent that they resemble an incontestable moral rationality (a moral rationality that can be enforced by the super-ego, to put it in Freudian terms). In particular, I am interested in Foucault's idea of the conscience being 'directed', and specifically how it is 'directed' by the power dynamics of what Foucault identifies as confession. Further, that such practices of confession may by

recognised in the process and reasoning of equity's jurisprudence. The wager of this section is that the subjective dimension of conscience does not derive simply from each individual's in-built proclivity for common moral reasoning. Rather, the appeal to the individual's own moral faculties is more fundamental, helping *produce* moral consensus as an operation of power, via the normalisation of potentially contestable ethical ideas.

Let us first recall that the distinguishing feature of conscience in *modern* equity is its shift from an expression of divine will to being rooted in the individual and their capacity for self-knowledge (Drakapoulou 2000, p. 354). Reformation theology placed a greater emphasis on faith and one's personal submission to God's will than it did on the notion of celestial reason. The problem this posed, both for the Church and indeed for Chancery, however, was ensuring that institutional authority can be maintained in the face of this burgeoning individualism. Foucault (1998, p. 59) explains how this problem is addressed insofar that people became conditioned by techniques of confession as one of the dominant modes of power within modernity. Rather than exerting an interdictory top-down power, confession allows power to be internalised and practiced by the very individual it addresses. Confession feels like a liberation, relieving ourselves from a secret presupposed to burden us; we tell the truth. But it works to reinforce a particular normativity inseparable from such claims to truth. Power is given effect, but rather than being imposed from the outside it emerges through subjectivity itself (Foucault 1998, p. 60). There is therefore no neutral subject upon which power is practiced; via confession power produces the subject. To take an example outside of law, the doctor-patient relationship draws people to take a confessional stance on various forms of behaviour deemed to be vices (e.g. poor diet, lack of exercise, sexual practices). By confessing, the subject

internalises and then practices a normative understanding of the healthy human body. The point here, of course, is not to be unduly cynical about concerns for people's health, but to understand the way in which power works in this dynamic. Crucially, this power does not prohibit; rather, it teaches the subject what it ought to desire in itself (Foucault 1980, p. 59). For example, the confessional technique teaches us to desire a certain body type, rather than banning us from unhealthy behaviour. In its paradigmatic form, confession therefore describes a tripartite structure between the subject, the expert, and the norm. The role of the expert, or authority figure, is to teach the subject the truth about themselves, a truth that itself arises from the norm (Foucault 1980, p. 218).

By now it should not be surprising that Foucault (1980, p. 216) regarded this confessional practice as the steering of the conscience. Specifically, that confession expresses a power that

cannot be exercised without knowing the inside of people's minds, without exploring their souls, without making them reveal their innermost secrets. It implies a knowledge of the conscience and an ability to direct it. (Foucault 2002, p. 333)

Foucault agrees with Kant and Freud by regarding the conscience as an aspect of subjectivity in general, as a way in which we understand ourselves, and we can see how confession feeds the structure outlined so far in which the subject is drawn to apprehend an idealised (or 'normalised') image of itself; it delivers objectively intelligible moral ideas which nevertheless manifest through a personal journey of self-understanding. Judith Butler (1997) has gone as far as to argue that conscience, despite its modest appearance in Foucault's writings, is vital to his and indeed any other theory of how the effects of power become internalised in the construction of

subjectivity.²⁹ The subject is ‘directed’, but by coming to terms with itself rather than receiving a command.

Here it is important to draw the necessary link with the distinctly confessional form of equity’s own jurisdiction. Due to the porosity between theological and juridical forms at the time, this may be taken literally: medieval Chancellors played, to borrow Klinck’s description (2010, p. 24), an ‘ostensibly confessional role’. This porosity was not simply because of the proximity of the early equity to Canon law and the invariably ecclesiastical backgrounds of the early Chancellors, but also due to the nature of equitable procedure. Equity is exceptional for its history of using inquisitorial rather than adversarial methods of hearing evidence (Kessler 2005). Whilst the adversarial model promotes procedural justice by giving control of proceedings to the respective parties, equity was principally concerned with the narrower objective of finding a singular truth. As such, witnesses were examined in private by court officials, and were not subject to the tactical playground of the courtroom cross-examination. Testimony was kept secret from the parties whilst the case was in process. Secret testimony was slower and allowed for more reflection, aimed at reaching a true account of facts rather than catching the witness out, or debating their reliability. As Macnair (2007) has argued, the conscience of the defendant depended upon their knowledge of facts that, for any procedural reason, were not available for consideration by a common law court.

Whilst by the end of the 19th century equity’s methods of taking evidence had become assimilated into the adversarial common law approach,³⁰ today we still see the remnants of this confessional history. The distinctiveness of liability in equity

²⁹ See also, Ojakangas (2013, pp. 203-4).

³⁰ By the time of the Judicature Acts, taking evidence was no longer held in secret and could be taken by the parties themselves following the Chancery Practice Amendment Act 1852. See Kessler (2005, p. 1236 n. 297).

depends less on actions, and largely upon finding out what the defendant knows about facts that affect the moral status of her actions. This may be verified through the categorisation of unconscionable scenarios set out at the beginning of this article. Knowing that property has arrived out of another's impropriety or mistake, suspecting that one is assisting another's impropriety, making unwritten agreements or promises (with respect to both trusts and estoppel), using knowledge gained in a fiduciary capacity, all turn lawful behaviour in the common law into actionable cases at equity. The distinguishing variable represents what, or how much, the defendant knows.

To illustrate the legacy of this confessional mode in a modern context, what better example can be found than the courts' interpretation of the intentions of parties to an implied trust of a family home. Any constructive trust depends upon knowledge of some facts, such as shared intentions, that make it unconscionable to align beneficial ownership in accordance with the legal title. As Lord Walker and Lady Hale stated in their joint judgment in *Jones v Kernott* [2011] UKSC 53, the logic of implied trusts contains 'an elision between what the judge can find as a fact (usually by inference) on consideration of the admissible evidence, and what the law may supply (to fill the evidential gap) by way of a presumption' (para [29]). In other words, when testimony has failed to establish directly what the party was really thinking, the court constructs an image of what a normal person *should* think and treats them as if this was their actual intention. Such presumptions may require the judge to assign an intention based on a 'broad generalisation about human motivation' (ibid). The evidence adduced therefore constructs the subject's ideal type within a normative framework, justified by a claim to knowledge (i.e. the presumption) about how human beings think and act. Where this veers from the

Kantian interpretation is the claim to know how humans think and act is not an operation of transcendent rationality, but the construction of rationality, specifically the rationality of the equitable subject, within the nexus of power and knowledge.

For instance, in cases of joint legal title to land the court now presumes strongly that partners have equal and undivided beneficial interests, despite their balance of contributions to the purchase. This normative presumption is based explicitly on the court's association of intimate relationships with a joint "emotional and economic commitment" (ibid, [19]). Even if this presumption is to be rebutted, the court has the onus of 'divining the parties' true intentions' as to how they were to share their house by inference.³¹ Such a conclusion must be drawn from all the evidence available, including the reasons for the purchase, their marital status, and whether they have children (*Stack v Dowden* [2007] 2 AC 432, p. 459). Faithful to its confessional history, equity presumes to use the evidence presented to show the party what they, or more accurately their idealised image, must have really thought.

And this is not an apolitical manoeuvre. As Lord Diplock once commented, the way in which equity constructs intentions is not static and must adapt to the changing social climate.³² The previous orthodoxy in this field highlights how the normalised figure of the equitable subject has changed. The old rules on resulting trusts reflected a very different understanding of familial economics, presuming that one would only contribute to purchase if one intended to gain a directly proportional share of the beneficial interest. Another good example is the now-defunct presumption of advancement, which stated that husbands and fathers are presumed to relinquish their beneficial interest in property transferred to their wives or

³¹ This article consciously avoids debating the distinction between 'inference' and 'imputation'. It suffices to say both rest on the same legal fiction. Asserting an intention that the court believes the party *should* hold (imputation) is equivalent to saying they *did* hold it (inference) if both judgements derive from normalised ideas of familial behaviour.

³² Per Lord Diplock, *Pettitt v Pettitt* [1970] AC 777, p. 824.

children. The father/husband (and it was entirely gender-specific) acting as the honourable family provider is the explicit image being invoked here. Crucially, in all these examples equity purported to give effect to the ‘correct’ intention that the court itself has revealed and constructed upon the party. This is quite a different logic to other structures of obligation, for example in criminal law, in which parties may be sanctioned, instead, for having a wrongful intention. Equity is not an *exemplary* site of confessional power—the nature of judicial process ensures that a losing party is unlikely to acquiesce happily to an offer of moral therapy. But this is a confessional practice because it aims at teaching the subject what they *really* think, rather than setting out to punish deviant behaviour.

Why should we accept this Foucauldian notion that conscience works as a form of power, one in which a normative framework is insinuated into the moral rationality of the subject? It has already been noted by others that bringing conscience into the juridical structures of state power, i.e. into the Court of Chancery, was in part a way of consolidating control of a morally fragmenting population (Gallagher 1991, p. 6). This may be understood within the broader context of how power shifted its mode of operation in modernity. The pre-modern exercise of monolithic power over people, most notably by the Catholic Church, was replaced by a new structure centred around the individual. Allowing the subject to understand its own normalised behaviour as an expression of its own reason and autonomy is therefore a vital ideological state mechanism. The normative force thus grounds itself in the rhetoric of merely giving institutional recognition to the individual’s own conscientious disposition.

6. Conclusion

A concluding point to be made here is that the place of conscience within equity is not limited to the ecclesiastic history of chancery, or to the basic trope about how equity pursues justice within the interstices of an unyielding common law. More than this, we can see that conscience delivers a very specific structure of obligation, one which expresses our relation with law via a relation with ourselves. I have argued that the structure of conscience draws us to apprehend and become accountable to an idealised image of us that thinks and acts in accordance with the ethical norms developed by Chancery precedent. Doing this requires equity to make an implicit claim to knowledge of what is in good conscience and, moreover, of the individual's capacity to know themselves and to be capable of assuming this ethical disposition. Far from being a dusty remnant of English legal history, conscience allows for a changing normative terrain to appear as if it were first nature. This may encourage those who advocate a distinctive, flexible and contemporary jurisdiction of equity. But it should concern those who worry—rightly, I suggest—about law's ability to disguise ideology behinds concepts that appear simplistic or intuitive at first glance.

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