

## CRITIQUE AND COMMENT

### THE PROBLEM OF CLASSIFICATION IN PRIVATE LAW

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*[The critics of Peter Birks' insistence that we should be able to draw a map of the law fail to appreciate fully what this mapping is meant to achieve. Mapping the law, properly understood, does not seek to deny that the law is a dynamic phenomenon. While our understanding of the law never stands completely still, reliance upon relatively stable categories of response-generating events ought to remain a key feature of our community's commitment to the rule of law. This is as true of equity as it is of the common law. Mapping the boundaries between these categories is a means of managing complexity and enabling the dissemination of the key features of legally relevant events. The possibility of difficult disputes being resolved according to law (as opposed to the personal authority of an adjudicator) is enhanced where the major contours of the law are, in this way, rendered communicable and intelligible to all.]*

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#### I INTRODUCTION

The late Professor Peter Birks insisted that we should be able to draw a 'map of the law'.<sup>1</sup> Birks invoked the mapping analogy in opposition to those who advocated the abolition of categories in the study of law. Birks thought that the problem of lawyers 'getting stuck in single categories' was the result of a *lack* of attention to categorisation.<sup>2</sup> Young lawyers were not being taught how the categories of the law fit together into a single coherent body of principle and were, accordingly, impaired in their dealing with difficult cases — those not

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<sup>1</sup> Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 *University of Western Australia Law Review* 1, 7.

<sup>2</sup> *Ibid.*

obviously contract cases or negligence cases and so on.<sup>3</sup> For Birks, the crucial matter was identifying the boundaries between categories.<sup>4</sup>

Birks' approach insists upon mutual exclusivity of categories. The law proceeds on the assumption that there is only one correct answer to any legal problem. It is the lawyer's obligation to find it. One criticism of the mapping metaphor and other aspects of Birks' approach to classification has been that mutual exclusivity has not been, historically, an essential characteristic of English private law. Stephen Waddams, for example, has noted that 'the concepts of contract, wrongdoing and unjust enrichment have ... often worked concurrently and cumulatively'.<sup>5</sup> He argued that an insistence that every legal intervention can be assigned to a single legal concept 'is apt to distort an understanding of the past, and consequently also of the present'.<sup>6</sup> Waddams also suggested that the making of a legal map (and every subsequent use of that map) determines the shape of the terrain that is being mapped. The analogy between law and cartography in Birks' metaphor is, therefore, an inexact one.<sup>7</sup>

Waddams made an important point. In English private law and those legal systems derived from it, the practice of the law is logically prior to its description and systematisation, but the description and systematisation has an effect upon future practice. Systematisation and categorisation carry a risk that we might overlook subtleties and complexities in the prior legal practice.<sup>8</sup> It is important to acknowledge the existence of this risk, but it should also be recognised that a community which places a high value upon like cases being decided alike and the existence of a principled basis for those decisions needs an efficient means for disseminating the grounds for legal decisions. This need generates, in turn, a need for the reasons for decisions to be expressed in relatively abstract terms — that is, in terms of the case's belonging to a category of like cases rather than in terms of the particular facts of the case.

The central thesis of this article is that a strong commitment to a relatively stable system of legal categories is an essential element of our community's commitment to the rule of the law. The values of consistency of adjudication and the intelligibility of adjudicative processes are more likely to be fulfilled where there are rules which dictate outcomes for cases and which are easily communicable from one adjudicator to another. This is as true of the body of law called 'equity' as it is of the common law. Nevertheless, the nature of the things being classified has a profound effect upon the way in which the classification process must proceed. It will be argued that while Birks' insistence upon mutual exclu-

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Stephen Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (2003) 225.

<sup>6</sup> Ibid 226. See also Joachim Dietrich, 'The "Other" Category in the Classification of Obligations' in Andrew Robertson (ed), *The Law of Obligations: Connections and Boundaries* (2004) 111, 112.

<sup>7</sup> Waddams, above n 5, 226.

<sup>8</sup> See also Geoffrey Samuel, 'Classification of Obligations and the Impact of Constructivist Epistemologies' (1997) 17 *Legal Studies* 448, 472, where it is stated that 'although the reduction of knowledge to symbolic form facilitates its communication, conservation and handling (for example by a computer), there is a significant loss of information in such a reduction.'

sivity of categories was sound, his particular conception of the causative event underestimated the importance of human attitudes in identifying the significance of factual events. It will be proposed that legally relevant events should be classified by reference to the basis upon which they are seen to *justify*, in terms of the relevant community's conception of just conduct, a response of a particular type.

## II THE RULE OF LAW AND LEGAL CATEGORIES

Keith Mason has defined the rule of law as the idea that '[o]ur society is controlled by legal rules, and those who exercise power within it (including the judges) are themselves bound by law.'<sup>9</sup> At least three implications can be drawn from this definition:

- 1 The conduct of people in our society exhibits certain regularities, not because people are always naturally inclined to behave in those ways, but because they are observing rules which they believe they ought to obey. These regularities enable people to form reasonable expectations about the conduct of others and, accordingly, interact with one another in an orderly fashion.
- 2 The response of state coercion to any departure from these regularities of conduct is fairly predictable because the state follows certain rules when applying that coercion.
- 3 When we say that judges *make* law, we use the word 'make' in a very weak sense. There is, in every legal dispute, presumed to be a single correct answer which follows from the application of the pre-existing law to the particular facts of the dispute and the judge is obliged to find that answer.<sup>10</sup>

The third of these propositions is particularly important for the purposes of the present discussion. The judicial arm of government is charged with applying the law in order to resolve particular legal disputes. This is not always a simple mechanical exercise. The law needs to be interpreted in order to discover how it should be applied to novel situations. This task ought to be entrusted only to the most learned and experienced members of the legal profession, and they should expect to have to exercise a large measure of critical judgement in the course of arriving at an answer. Nevertheless, it is inconsistent with the idea of the rule of law to assert that judges might, even occasionally, have any real choice<sup>11</sup> as to how they analyse a particular case. This assertion would be inconsistent with the notion that the parties to a dispute have entitlements which are defined by law, so

<sup>9</sup> Keith Mason, 'The Rule of Law' in P D Finn (ed), *Essays on Law and Government: Principles and Values* (1995) vol 1, 114, 114.

<sup>10</sup> The same implication is present in the following statement by F A Hayek, *The Constitution of Liberty* (1960) 153:

It is because the lawgiver does not know the particular cases to which his rules will apply, and it is because the judge who applies them has no choice in drawing the conclusions that follow from the existing body of rules and the particular facts of the case, that it can be said that laws and not men rule.

<sup>11</sup> The word 'choice' is used here to describe a situation where two or more alternative analyses are regarded as being equally correct for the purposes of the case at hand.

that one of them has (prior to and independently of the judge's determination) a right to win. The exception which proves the rule is the situation where Parliament expressly confers a discretionary power upon judges to make determinations about what the parties' entitlements shall be.<sup>12</sup> However, this power exists only because Parliament has expressly conferred it in that particular form.

The proposition that disputes between citizens ought to be resolved according to law lies at the core of the insistence upon mutual exclusivity of categories. If it is not assumed that there is a correct answer to the dispute and that it is the judge's obligation to find *that* answer (rather than merely *an* answer), it is being conceded that a litigant's 'rights' in relation to that dispute might turn upon the idiosyncrasies of a particular judge. Waddams might argue that we are still some distance from establishing the proposition that legal categories *must* be mutually exclusive. The 'correct' answer in a particular case may, according to Waddams, be found in the concurrent and cumulative operation of two or more legal concepts.<sup>13</sup> Waddams explained the famous decision in *Lumley v Gye*,<sup>14</sup> which recognised a tort of interference in contractual relations, in the following terms:

The question whether Gye was unjustly enriched and the question whether he was a wrongdoer were not resolved independently: it was the very fact that Gye's enrichment from the transaction was perceived to be unjust that led the court to the conclusion that his conduct was wrongful, and vice versa, just as the same considerations taken together tended to support the conclusions that Lumley had something analogous to a proprietary interest, that it should be protected by injunction ... and that the result conformed to public policy, considered from the point of view both of restraint of trade and observance of contracts.<sup>15</sup>

Waddams denied that *Lumley v Gye* stood for the proposition that inducement of breaches of contract is always wrongful and instead suggested that

inducing breach of contract is wrongful where it infringes something analogous to a proprietary interest, where it causes an unjust enrichment, and where the public policy favouring freedom of action is outweighed by strong countervailing considerations.<sup>16</sup>

Even if we accept that Waddams' analysis of *Lumley v Gye* is an accurate reflection of the reasoning of the majority of the Court in that case, we are left with the question of whether the decision is the product of legal reasoning within a rule of law framework or an aberration. The dissenting judge, Coleridge J, approached the case in quite a different way. Coleridge J acknowledged the existence of a large body of case law concerning the 'seduction of servants', which had its basis in a statute enacted during the reign of King Edward III, but could not find any foundation within this body of case law for a broader proposi-

<sup>12</sup> Consider, for example, the power of judges of the Family Court of Australia under the *Family Law Act 1975* (Cth) s 79 to redistribute (in effect) the property of the parties to a marriage upon the breakdown of the marriage. This broad discretionary power is made tolerable by the requirement that judges refer to certain criteria which are set out in the legislation.

<sup>13</sup> Waddams, above n 5, 226–7, 230.

<sup>14</sup> (1853) 2 El & Bl 216; 118 ER 749.

<sup>15</sup> Waddams, above n 5, 33–4.

<sup>16</sup> *Ibid* 36.

tion that the law responds to the procurement of a breach of contract.<sup>17</sup> His Honour went on to say:

I mention this case now as shewing how far courts of justice may be led if they allow themselves, in the pursuit of perfectly complete remedies for all wrongful acts, to transgress the bounds which our law, in a wise consciousness as I conceive of its limited powers, has imposed on itself, of redressing only the proximate and direct consequences of wrongful acts.<sup>18</sup>

This passage is an emphatic rejection of the ‘concurrent and cumulative operation’ approach. Commitment to the rule of law (as opposed to the rule of judges) requires that judges are restrained in the exercise of their powers by the need to identify the case before them as falling within an abstract category of cases in which the law dictates a response.

The precise bounds of the factual territory covered by a category will not be known in advance, but to acknowledge this is not to deny the existence of a category of cases which is susceptible to abstract definition. To recognise that the outer limits of the factual reach of the tort of negligence are not known does not prevent us from stating an abstract definition for the category of cases which fall within those bounds. An appropriate definition would refer to B’s suffering of foreseeable harm as a result of A’s failure to exercise the standard of care that A ought to have exercised in the circumstances of the relationship between A and B. Definitions like this provide a framework for consistent adjudication among cases because they enable judges to identify facts (as they arise) that fall, prima facie, within the scope of a relevant liability category. Cases that appear, at first sight, to fall within a particular category may exhibit features which, when considered in the light of other notions of just conduct to which the law gives effect, justify treating them as falling outside the category that attracts liability. Moreover, defences to claims are often framed in terms of a weakness or deficiency in the very thing that justifies the claim. A plausible rationalisation of both the mitigating factor of contributory negligence and the defence of *volenti non fit injuria* is that there is conduct, on the plaintiff’s part, which tends to undermine a conclusion that the defendant’s lack of care is responsible for the plaintiff’s injury.

There is always a possibility that boundaries of categories may be expanded outwards. It may be the case that the ‘seduction of servants’ cases referred to by Coleridge J were really to be understood as cases about procuring breaches of contract; that is, the category of ‘seduction of servants’ was a proxy for the category of ‘procuring a breach of contract’, which had become defined in the narrower way because this had been the sole factual context in which the relevant notion of just conduct had been offended. Acknowledging that this is a possible interpretation of the ‘seduction of servants’ cases does nothing to support Waddams’ analysis of *Lumley v Gye* because, in broadening the category of cases in which a legal response is justified to other events which are analogous to the seduction of a servant, we must thereby commit ourselves to the view

<sup>17</sup> *Lumley v Gye* (1853) 2 El & Bl 216; 118 ER 749.

<sup>18</sup> *Ibid* 252; 732.

that the response is justified in *all* instances of the same type. Over time there may be considerable development of the features that a case must possess in order to be classified as the relevant type. Part of this development may involve relatively narrow definitions of legally relevant events becoming subsumed within broader definitions. Those broad definitions may, in the face of successive cases, be abandoned in favour of definitions that refer to other common features of the cases.<sup>19</sup> Nevertheless, a commitment to the rule of law involves an aspiration towards doctrinal coherence. This requires that all resolutions of disputes can be understood in terms of a single, internally consistent body of principle. Old categories are abandoned in favour of new categories precisely because those new categories are seen to have a better fit within the overall structure of the law.

The fundamental problem with the ‘cumulative and concurrent operation’ approach is that it provides a correct answer for that case and for that case only. If Waddams’ analysis of the majority reasoning in *Lumley v Gye* is correct, that reasoning would allow judges plenty of scope for impressionistic judgement in relation to whether the property analogy, the principle of unjust enrichment and public policy issues coalesce in the same way and carry the same cumulative weight in future cases. It would fail to provide litigants with a reliable basis for predicting the outcome in those future cases.

Justice Antonin Scalia (writing extra-judicially) has suggested that allowing broad discretionary space to future courts can undermine the community’s confidence in the idea that everyone is equal before the law: ‘When a case is accorded different treatment to an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*.’<sup>20</sup> Justice Scalia insisted that judges can only ‘hedge themselves in’ to the extent that they announce rules.<sup>21</sup> The ability of judges to state rules that dictate an outcome in the present case and bind them in relation to future cases depends upon their ability to identify clearly defined categories of situations, which can be seen to demand the same type of treatment. Treating a case in the same way as previous cases is justified by reference to an idea of just conduct, which is offended, or at risk of being offended, in each particular case. A judge cannot pluck this notion of just conduct out of thin air. It must be an idea of just conduct to which the judges have committed themselves in their previous decisions, even if they have done so implicitly. Unless a judge can say ‘I am bound to decide the case this way because it is a case that falls within category *x*’, it is difficult (if not impossible) for any other person to be confident that the

<sup>19</sup> See, eg. Edward H Levi, *An Introduction to Legal Reasoning* (1949) 7–19, in which Levi traces how a single instance of a gun owner’s liability for injury caused to the plaintiff’s son by a person other than the owner became the basis for the development of a rule about ‘dangerous things’. This category was, in time, abandoned in favour of a rule about negligence. Of course, the concept of ‘negligence’ is itself subject to continual refinement by reference to the cases which are said to fall within it. A more recent example of this type of development is, of course, the emergence of a law of ‘unjust enrichment’ from the categories of ‘quasi-contract’ and certain other categories which are associated with relief in a restitutionary measure.

<sup>20</sup> Justice Antonin Scalia, ‘The Rule of Law as a Law of Rules’ (1989) 56 *University of Chicago Law Review* 1175, 1178 (emphasis in original).

<sup>21</sup> *Ibid* 1180.

present decision is, in fact, consistent with previous decisions or that future decisions will be consistent with the present decision.

### III THE CHARACTERISTICS OF LEGAL CATEGORIES

Two observations may be made about classification in general. First, many objects may be classified in more than one way. To the extent that this is so in particular cases, classification systems are a product of human choice. In English private law, there is, as Waddams has noted, a two-way relationship between the science of legal classification and legal practice.<sup>22</sup> Legal categories evolve on the basis of an accumulation of choices made by judges in successive cases. The judges' exercise of choice is constrained by the obligation of the judiciary (implicit in the rule of law) to decide cases according to a single, internally coherent body of principle which endures over time and which permits only one correct answer in each case. Secondly, it is possible to have hierarchies of classification in the sense that a number of more specific categories may fall wholly within the bounds of a more general category. Very different maps of the law can be produced depending upon one's choice as to the *basic* level of abstraction around which categories at higher and lower levels are proposed.

#### *A Choice of Basis of Classification*

Legal categories have a prescriptive function. The categories guide members of a politico-legal community as to how they *ought* to behave and, in particular, how the officials of that community *ought* to resolve disputes between members of the community. They perform descriptive and predictive functions as well. They perform a descriptive function insofar as they enable everyone to recognise the types of dispute that ought to be resolved in any particular way. They perform a predictive function insofar as they provide individuals with a basis for forming expectations about how disputes they are having with their neighbours will be resolved in the event that they bring legal proceedings, or whether and how the state will respond to any acts that they might be tempted to perform upon their neighbours' persons or property. Nevertheless, the prescriptive function is of primary significance for classification. To describe my relationship with another person as 'contractual' or (more generally) 'consensual' conveys the idea that it is *right* for me to perform particular actions which I have undertaken to perform or to bring about a particular result which I have undertaken to bring about. The description of the relationship as 'contractual' or 'consensual' carries with it a prescription that the undertaking ought to be performed. The physical characteristics of promising or consenting do not, of themselves, create an obligation to perform. The physical characteristics of the event of promising or consenting are combined with a widely-diffused attitude within the relevant politico-legal community that it is good to keep one's promises or to uphold one's consent once it has been given. The underlying attitude need not be

<sup>22</sup> See Waddams, above n 5, 15.

universal.<sup>23</sup> It need only be the prevailing common sense within the relevant politico-legal community.

The foregoing example highlights two attributes of legal categories. First, legal categories are *artificial*, in the sense that they classify physical events according to human attitudes and interpretation of facts, rather than purely by reference to the physical properties of the events. Secondly, the categories used by the law of a free society (as opposed to a society organised according to the particular ends of the ruler) must refer to notions of just conduct that are grounded in the shared attitudes of members of the community.<sup>24</sup> These attitudes consist of assumptions that certain types of conduct generate corresponding entitlements on the part of individual human beings. It follows that the use of coercion is *justified* for the sake of securing those entitlements.

### 1 *Artificiality*

Birks attempted to ground legal events in raw facts. A person could be said to have a right to a legal response because a particular type of factual event occurred.<sup>25</sup> This view of events has been disputed by R B Grantham and C E F Rickett. They have argued that the law does not respond to ‘raw and unreconstructed happenings in the physical world’ but to ‘an interpretation of those physical happenings within the intellectual framework of the law.’<sup>26</sup> The law’s recognition of a performance obligation depends upon ‘an interpretation of the physical occurrence of statements as amounting to an agreement as that latter concept is understood by the law’.<sup>27</sup> It is not the bare fact that those statements were made, so much as it is the community’s interpretation of that event as belonging to an abstract category of events in which a performance response is *justified*, which gives rise to the legal obligation to perform. It is difficult to see how Birks’ insistence that physical events *cause* rights to come into existence can be sustained without the mediation of an attitude that the event *justifies* the response. Labelling events as ‘negligent damage’ or ‘unjust enrichment’<sup>28</sup> suggests, in itself, that the physical events of infliction of harm and receipt of a payment are not, respectively, adequate conditions for the existence of the obligations to pay reparation and to make restitution of the amount received. The additional factor is the community’s interpretation of the physical events as offending its notions of just conduct.

The grounding of legal categories in notions of just conduct distinguishes legal categories from the zoological categories with which Birks frequently drew

<sup>23</sup> Note Lawrence Rosen’s observation that Tongans have not traditionally regarded promising as creating any form of obligation: Lawrence Rosen, *Law as Culture: An Invitation* (2006) 113.

<sup>24</sup> As to ‘just conduct’: see Friedrich A Hayek, *Law, Legislation and Liberty: Rules and Order* (1973) vol 1, 86–7. In short, the word ‘just’ refers to the justice of the conduct itself rather than the justice of either the effects of the conduct or the ends being pursued by the actor.

<sup>25</sup> Peter Birks, ‘Unjust Enrichment and Wrongful Enrichment’ (2001) 79 *Texas Law Review* 1767, 1778.

<sup>26</sup> R B Grantham and C E F Rickett, ‘Property Rights as a Legally Significant Event’ (2003) 62 *Cambridge Law Journal* 717, 723.

<sup>27</sup> *Ibid* 724.

<sup>28</sup> Birks, ‘Unjust Enrichment and Wrongful Enrichment’, above n 25, 1778.



analogies.<sup>29</sup> As Geoffrey Samuel has noted, legal science is unlike zoology insofar as it is not ultimately referable to a natural phenomenon which exists independently of and externally to the science.<sup>30</sup> While the subject matter of zoological science is not perfectly analogous to the subject matter of law, it cannot be said that this observation is fatal to Birks' central idea that legal responses ought to be classified according to the alignment of types of response with types of event. It does not follow from the proposition that the categories of the law reflect human attitudes rather than natural phenomena that those categories are arbitrary. The attitudes of the community (and of the judiciary in particular) to certain types of physical event are the reality that legal science attempts to describe. Of course, this is not a reality which can be verified in a laboratory in the way that the realities studied by biology, chemistry and physics can be. It is, to a large extent, self-perpetuating. A judge's pronouncement that event *a* justifies response *x* tends to reinforce the general belief that event *a* justifies response *x*. Nevertheless, the demand for internal coherence within the network of rules enforced in any particular community exposes the proposition that event *a* justifies response *x* to an external check. When it is discovered that event *a* has sometimes led to response *y*, the proposition will be called into question. Either one proposition must drive out the other or we must consider whether what we have hitherto conceptualised as event *a* is better understood as two distinct types of event. The validity of any particular rule is a matter of coherence with the rest of the network, rather than a matter of our ability to deduce the content of the rule from proven propositions about the physical world or universally valid moral norms.<sup>31</sup>

Reliance upon a coherence test for the validity of propositions is not peculiar to legal science. The economist and intellectual historian, Friedrich Hayek, described the categories of the social sciences as 'selections of certain elements of a complex picture on the basis of a theory about their coherence.'<sup>32</sup> While these categories do not stand for concrete things, they are saved from being arbitrary constructions or impositions to the extent that they are premised upon a valid theory about the relationships between the individual events or phenomena that are grouped together.<sup>33</sup> The law's categories are the product of theorising about the basis upon which the rules of the community might be understood as an internally coherent expression of the community's sense of just conduct.

The relationship between law and physical events, being mediated through the attitudes of a community, is similar to that between language and physical events. Every time we speak or write a sentence, we refer to a complex system of labels and taxonomies. The substantive vocabulary of a language consists of labels for categories of things or ideas. No two cats are exactly identical. The label 'cat' refers to a class of things that are related to one another in a way

<sup>29</sup> See, eg, *ibid*; Birks, 'Equity in the Modern Law', above n 1, 6.

<sup>30</sup> Geoffrey Samuel, 'English Private Law: Old and New Thinking in the Taxonomy Debate' (2004) 24 *Oxford Journal of Legal Studies* 335, 340.

<sup>31</sup> Samuel acknowledged that Birks' approach to the testing of the validity of any particular explanation of legal practice was 'a matter of coherence rather than correspondence': *ibid* 342.

<sup>32</sup> Friedrich Hayek, *The Counter-Revolution of Science: Studies on the Abuse of Reason* (1952) 55.

<sup>33</sup> *Ibid* 56.

which human beings perceive to be important. Rules of grammar also rely upon categorisation of the concepts we wish to express. Before one chooses to say ‘a cat’, ‘the cat’, ‘cats’ or ‘the cats’ one needs to reflect — not necessarily at length — about whether one is talking about a single cat or a group of cats and whether the identity of the particular cat or cats is an important aspect of the meaning to be conveyed. Which rules come into operation depends upon one’s categorisation of the meaning to be conveyed. Each linguistic community will also be committed to rules concerning the representation of the sounds of a language in written form — that is, the orthography of the language. A small degree of variation of spelling and pronunciation within a linguistic community is tolerable — for example, ‘recognise’ and ‘recognize’ and the difference between the British/Australian and American pronunciations of ‘tomato’ — but these minor differences represent hard choices made within a larger framework that is the subject of general acceptance throughout the entire community. The choice is between two credible claimants for the status of ‘the rule’. The pluralism of spelling and pronunciation is, in both of the cases mentioned, the result of different sub-communities exercising that choice differently.

The critical point is that linguistic forms carry meaning by social convention rather than by way of intrinsic correlation between sounds and concepts.<sup>34</sup> The categories adopted by one linguistic community do not always align with the categories adopted by its neighbours. The French use the word *mouton* to describe both the animal and its meat, while the English use the word *sheep* to refer to the animal and the word *mutton* (which has an apparent etymological relationship with *mouton*) to describe the meat.<sup>35</sup> The uses of the Swedish prepositions *på*, *vid* and *i* do not align perfectly with the uses of their English equivalents *on*, *at* and *in*. Furthermore, the precise coverage of a word, grammatical form or orthographical symbol may change over time, although this process is nearly always a gradual one whereby people who have learnt to speak according to an older convention diminish in number by way of natural attrition over an extended period of time. Nevertheless, for the time being, the recognised categories provide both a framework within which people may learn the language — so, for example, people who are learning to speak a language have to have the same understanding of when they should use a hard consonant and when they should use a soft consonant as prevails among the existing speakers of that language<sup>36</sup> — and a framework within which means of communicating new ideas may be developed.<sup>37</sup> Development occurs by way of small changes within the framework of a system that is otherwise stable.

<sup>34</sup> Philippe Wolff, *Western Languages: AD 100–1500* (Frances Partridge trans, 1971 ed) 10.

<sup>35</sup> *Ibid.*

<sup>36</sup> In English, the letter ‘c’ represents a soft consonant before ‘e’ and ‘i’ (for example, receive, cigar) and a hard consonant before other vowels (for example, cat, cake, cot, cut). The letter ‘k’ is always hard, except when followed by ‘n’, in which event the ‘k’ is silent. In Swedish, ‘c’ is always soft, while ‘k’ is hard before ‘a’, ‘o’, ‘u’ and ‘ä’ (for example, *kaka*, cookie/biscuit) but soft (that is, sounds like the English ‘sh’) before ‘e’, ‘i’, ‘y’, ‘ä’ and ‘ö’ (for example, *kyrka*, church). Swedes, in common with speakers of other Germanic languages, pronounce both the ‘k’ and the ‘n’ in ‘kn’.

<sup>37</sup> The development of compound words, which are common in Germanic languages, is a good example of this. Consider the Danish words *samarbejde* (‘together work’, that is, cooperate),

The success of legal systems, like that of linguistic systems, depends upon the existence of fairly stable rules, which presuppose the existence of categories of things. The categories and their attendant rules provide a basis upon which people may hold reasonable expectations about the conduct of others (including the application of coercion by the officials of the community) and these expectations become the foundation for orderly interaction between members of a community.

## 2 *Notions of Just Conduct*

It has already been noted that legal propositions have a particular type of content, which is that A has an *entitlement* that B behaves in a particular manner towards A. A is consequently entitled to enlist the coercive powers of the state to ensure that B behaves in that manner. The validity of legal rules does not depend upon those rules being grounded upon proven facts about the physical world or upon universally valid moral truths. The position taken here is something like that which Stephen A Smith has described as the ‘moderate approach’.<sup>38</sup> We can observe the practice of a legal community and see that coercion is seen to be justified in certain types of situation. Any argument which is advanced in order to justify coercion in any particular case must be an argument of the same type as the arguments that have justified coercion in the prior practice of that legal community.<sup>39</sup> Arguments which proceed on the basis of categories which are ‘foreign to the concepts and lexicon of the law’ will not be accepted.<sup>40</sup> To accept these arguments would be to undermine the law’s character as an internally coherent system of justified coercion.

It is possible to isolate several key characteristics which arguments must exhibit in order to be acceptable as proper legal argument within English private law (and those systems derived from it). First, arguments must proceed on the basis that, if B is to be coerced to act in a particular way, then any other person whose circumstances are identical (in terms of the argument) to those of B must be liable to be coerced to act in the same way. Neil MacCormick emphasised this aspect of legal reasoning when he said that reasons for decisions must be universalisable — that is, treating like cases alike ‘implies that I must decide today’s case on grounds which I am willing to adopt for the decision of future similar cases, just as much as it implies that I must today have regard to my earlier decisions in past similar cases.’<sup>41</sup> The requirement of universalisability

*samtale* (‘together speak’, that is, conversation), *samtidigt* (‘together timely’, that is, simultaneous) and *samfund* (‘together find’, that is, society).

<sup>38</sup> Stephen A Smith, ‘Taking Law Seriously’ (2000) 50 *University of Toronto Law Journal* 241, 254–5.

<sup>39</sup> *Ibid* 254.

<sup>40</sup> *Ibid* 255.

<sup>41</sup> Neil MacCormick, *Legal Reasoning and Legal Theory* (1994) 75. It should not be thought that universalisability depends upon the existence of an antecedent moral principle. R M Hare, *Freedom and Reason* (1963) 38 pointed out that even Jean-Paul Sartre held to the idea of universalisability and explained the idea in this way:

We have to consider the particular case and make up our minds what are its morally relevant features, and what, taking these features into account, ought to be done in such a case. Nevertheless, when we do make up our minds, it is about a matter of principle which has a bearing outside the particular case.

flows naturally from the notion that human interaction is governed by law and not by any person's preferences as to the outcome in the particular case. The argument that B, having negligently caused injury to A, should pay damages to A implies that everyone who negligently causes injury to another must pay damages to that other person. The categories of negligence, causation and injury may need to be refined over a large number of cases, but the argument proceeds on the basis that A has an entitlement and B has a duty because their circumstances fit into a category of circumstances to which the law attaches consequences. Arguments applicable to the circumstances of A and B but not potentially applicable to unknown future plaintiffs and defendants are not admissible.

Secondly, arguments must proceed on the assumption that the network of rules used to resolve disputes is internally coherent. No rule can be inconsistent with any other rule that belongs to the same system. In deference to Ronald Dworkin, one might call this requirement the requirement of integrity.<sup>42</sup> Every first-year law student knows that the law is not completely free of inconsistencies. It would be remarkable if a system which is the product of the operation of many minds over several centuries were to be free of inconsistencies. The key point is that legal argument must proceed on the basis of an *assumption* of internal coherence 'so that each person's situation is fair and just according to the same standards.'<sup>43</sup> It is a worthy aspiration that the law should deal with every person according to an identical standard, even if human frailties prevent the perfect fulfilment of that aspiration.

Where, on the basis of the previously articulated law, there are two or more different rules which would appear to apply to a case, so that the parties' dispute may be resolved in two or more different ways, the adjudicator must look for a reason for deciding the case in one or another of those ways. The adjudicator may have to abandon or revise a previously accepted theory about the law's coherence. This means that there will always be some degree of dynamism and instability within the law's categories. This dynamism and instability does not undermine the law's integrity. The types of case that come before the courts may change over time — on account of, for example, changing technology or social conditions<sup>44</sup> — and those novel cases may serve to reveal the incoherences in existing categories. This dynamism and instability is part of the quest for integrity.

A third possible requirement is that the argument proceed on the basis that it is *right*, as between A and B, that B should behave in a particular way towards A. The argument must be articulated in terms of B having a duty towards A and A having a right as against B. This requirement is best summed up in the proposition that English private law is a system of corrective justice rather than a system concerned directly with the overall distribution of benefits and burdens within a community. Ernest J Weinrib, in what is perhaps the best known recent corrective justice account of private law, linked the corrective justice idea with

<sup>42</sup> See generally Ronald Dworkin, *Law's Empire* (1986) ch 7.

<sup>43</sup> *Ibid* 243.

<sup>44</sup> Levi, above n 19, 103.

Immanuel Kant's idea of right<sup>45</sup> — that is, right is 'the sum of conditions under which the choice of one can be united with the choice of another in accordance with a universal law of freedom.'<sup>46</sup> If A and B are in a contractual relationship, both parties would desire that the other party perform its contractual undertaking. If B were to say that A must perform its undertaking while denying that it is obliged to perform its own undertaking, B denies A's status as a free and equal individual. The law of contract recognises that each party has possession of the other party's choice within the scope of that party's undertaking.<sup>47</sup>

Whether private law conforms perfectly to the corrective justice model advanced by Weinrib has been a matter of intense debate.<sup>48</sup> It will suffice, for the moment, to make two observations. First, at an empirical level, it may be observed that English private law has developed in the context of particular bipolar disputes. Its precepts are universalisations of the reasons why particular defendants were found to owe duties to particular plaintiffs. These precepts may, over time, have proved themselves to be conducive to the general welfare of the community, but they are first and foremost directed towards justice between individuals. Secondly, at a philosophical level, it may be observed that the requirements of universalisability, integrity and corrective justice combine to underpin a system of principle which regards people as free and equal agents. The system treats people as free and equal because a rule which applies in the case of a dispute between A and B applies equally to all disputes of the same type, novel disputes are to be resolved according to a rule which is consistent with the known rules of the system and B is coerced only to the point necessary to secure an identical degree of freedom of action on the part of both A and B. Consequently, A and B will have considerable freedom to plan their lives within a framework of reasonable expectations about the conduct of others. A system of dispute resolution which emphasises the effect of the outcome upon the distribution of benefits and burdens at the community level, by contrast, leaves the individual with no reasonable expectations that could be asserted in opposition to the adjudicator's perceptions as to the welfare of the community as a whole.

Notions of just conduct, understood as principles which define what is proper conduct as between individuals and which are universalisable and consistent with all other principles to which the relevant community adheres, are the subject matter of legal classification. Concepts such as contract, trespass and negligence are appropriate classifications of legal events because they link particular types of factual scenario with an internally coherent system of universalisable justifications for coercing individuals to behave towards other individuals in a particular way.

<sup>45</sup> Ernest J Weinrib, *The Idea of Private Law* (1995) 95.

<sup>46</sup> Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, 2<sup>nd</sup> revised ed, 1996) 56 [trans of: *Die Metaphysik der Sitten*].

<sup>47</sup> *Ibid* 90–1.

<sup>48</sup> For discussion of weaknesses in the corrective justice explanation of certain aspects of private law: see Dennis Klimchuk, 'Unjust Enrichment and Corrective Justice' in Jason W Neyers, Mitchell McInnes and Stephen G A Pitel (eds), *Understanding Unjust Enrichment* (2004) 111.

### B Hierarchies of Categories

There can be categories within categories. ‘Mansion’ and ‘bungalow’ are more specific than ‘house’, while ‘dwelling’ is more general than ‘house’. The term ‘house’ is the one that we use most frequently in daily conversation and constitutes the *basic level* of categorisation for this series of concepts. The more specific categories of ‘mansion’ and ‘bungalow’ emphasise the physical features which distinguish one thing from the other. The more general category of ‘dwelling’ embraces many things which are very different in their physical features, such as ‘igloo’, ‘tepee’, ‘gunyah’, ‘house’ and ‘apartment’. What binds these things together and defines the category is the purpose for which human beings use them. James Penner has called this ‘interest-related knowledge’.<sup>49</sup> It reflects an attitude formed towards a thing on the basis of ‘the way we characteristically interact with the thing in question to serve our various interests.’<sup>50</sup> Interest-related characteristics are obviously of considerable importance in legal classifications because they provide a foundation for supposing that human beings have legitimate claims that others ought to behave in particular ways. To put it another way, the existence of common human interests in being able to do certain types of things provides a basis for supposing what are *reasonable* expectations about the conduct of other people and, hence, a foundation for justifying coercion.

Penner suggested that the basic level of categorisation will usually be that level where the knowledge of physical characteristics and interest-related knowledge converge.<sup>51</sup> Penner used the concept of ‘chair’ to illustrate the point.<sup>52</sup> Chairs are things that we sit upon. That interest places limits upon the physical form that a chair may take, from which we can recognise that the thing is a chair.<sup>53</sup> Penner observed that the law has a basic level category called ‘assaults’ which encompasses a number of diverse events, all of which involve an actual or threatened application of force by one person to another (physical characteristic) and provoke ‘perceptions like pain or near-universal emotional reactions like anger or sadness or fear’ (interest).<sup>54</sup> More recently, Penner (drawing on the work of the philosopher Bernard Williams) has described concepts such as ‘assault’ and ‘murder’, in which fact and value judgement are united, as ‘thick evaluative concepts’.<sup>55</sup> Penner suggested that reliance upon these thick evaluative concepts is typical of English private law. The law exists in the cases insofar as particular cases trigger our knowledge about values (which are represented by thick evaluative concepts) and provide us with ‘new knowledge’ about those values.<sup>56</sup>

<sup>49</sup> James Penner, ‘Basic Obligations’ in Peter Birks (ed), *The Classification of Obligations* (1997) 81, 94.

<sup>50</sup> *Ibid.*

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid.*

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

<sup>55</sup> J E Penner, ‘Legal Reasoning and the Authority of Law’ in Lukas H Meyer, Stanley L Paulson and Thomas W Pogge (eds), *Rights, Culture, and the Law: Themes from the Legal and Political Philosophy of Joseph Raz* (2003) 71, 83.

<sup>56</sup> *Ibid.* 94.

This new knowledge is used ‘to refine and explain only a relatively small portion of [our] body of knowledge, and at a suitably low level of abstraction.’<sup>57</sup>

The critical insight to be gained from Penner’s work is that legal classification is neither solely a matter of empirical observation of physical properties nor solely an exercise in abstract moral reasoning. Legal classification ought to begin at a level of abstraction somewhat lower than the series of consent, wrongs, unjust enrichment and other events employed by Birks. ‘Contract’ is a likely candidate for status as a basic level category because it involves a factual event, namely A undertaking to do something on the basis that B does something or undertakes to do something, and an evaluation of that event as generating entitlements on the part of each of A and B that the other party will do what it has undertaken to do. ‘Nuisance’ is another likely candidate because it involves an act or omission, the consequences of which are unpleasant to human senses (such as noise or foul odours) and an evaluation that people who occupy land in the vicinity ought to be able to enjoy their land free from those types of interference. The category ‘express trust’ would also qualify as a basic level category because there is an act of reposing trust in another (‘trustee’) to manage property for the benefit of the donor, a third party or a charitable purpose, and an evaluation that it would be unjust for trustees to deal with property in any way which is contrary to the basis upon which the property was given to them.

To identify this level of abstraction as the basic level of classification is not a denial of the usefulness of more abstract categories. If we conceptualise both contracts and express trusts as consensual undertakings of obligations, that conceptualisation may not be entirely irrelevant to legal reasoning insofar as it draws our attention to a common theme as to the types of human interest which the law protects. The presence of this common theme suggests that the two categories ought to be treated in the same way for at least some purposes — for example, both damages for breach of contract and compensation for breach of a trustee’s duty of administration ought to be concerned with placing the plaintiff in the position in which they would have been had the duty been performed<sup>58</sup> — but they might be treated differently for other purposes. The critical point is that while abstract superordinate categories arise from common characteristics in the basic level categories, higher level categorisation may feed back into our understanding of the scope of the basic level categories insofar as it carries important information about the legal community’s understanding of the basic level categories.

The search for superordinate categories enables us to see, for example, that any supposition that the law of trusts represents a basic level category in Anglo-Australian law is false. ‘Express trusts’ is a possible basic level category because all of the events which belong to that category seem to draw a response from the law on the same normative basis. They are all situations in which someone has undertaken to administer property, of which they are the legal owner, for the benefit of another person. We know that some trusts do not arise

<sup>57</sup> Ibid.

<sup>58</sup> *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64; *Re Dawson*; *Union Fidelity Trustee Co Ltd v Perpetual Trustee Co Ltd* [1966] 2 NSW 211.

on the basis of a consensual undertaking. Therefore, ‘trusts’ cannot belong to a superordinate category which consists of consensual undertakings. That said, ‘consensual undertakings’ *does* explain several legal categories, including ‘contracts’ and ‘express trusts’, and is the very type of explanation which is typical of legal categories; that is, it is a universalisable proposition which explains the coherence of a number of more specific rules within the system and it secures an identical freedom of action for both parties to a bipartite relationship. As such, the category of ‘trusts’ needs to be dissected. ‘Express trusts’ can be a basic level category which falls, together with ‘contracts’ and ‘gifts’, within a superordinate category of ‘consensual undertakings’. We need to investigate the normative bases for the other so-called trusts in order to ascertain whether there is a common normative basis, so that they can form a single basic level category, or whether we are dealing with a range of quite distinct legal events. By this process, we can see that categories such as ‘constructive trust’ — arguably one of the most unhelpful labels in English private law — do nothing to enhance the law’s intelligibility and may be counterproductive.

#### IV WHAT ABOUT EQUITY?

It might be thought that equity, being concerned with overriding or placing conditions on the operation of common law rules, poses a particularly forceful challenge to the model of legal reasoning set out in the preceding Parts. It will now be argued that, whatever may have been the situation in the late Middle Ages, modern equity is committed to the values of universalisability, integrity and corrective justice in the same way as the common law. If there is need for caution in classifying and defining the events to which equity responds, it is merely that the history of equity as an ameliorative jurisdiction continues to inform the scope of the operation of the equitable rules and, this being the case, we should not be too eager to assimilate *every* equitable rule with its apparent common law analogy.

##### *A Equity and Rules*

Graham Virgo has suggested that equity is best understood today as ‘the technical system of Equity as administered by the Court of Chancery’.<sup>59</sup> Virgo has noted that there are two other notions of equity which are ‘still at play’<sup>60</sup> — the notion of equity as ‘overriding or correcting the effect of rules’ and the notion of equity as ‘good conscience and natural justice’.<sup>61</sup> Something of these notions of equity was present in the following statement by Sir Anthony Mason:

<sup>59</sup> Graham Virgo, ‘Restitution through the Looking Glass’ in Joshua Getzler (ed), *Rationalizing Property, Equity and Trusts: Essays in Honour of Edward Burn* (2003) 83, 85.

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.*



the ecclesiastical natural law foundations of equity, its concern with standards of conscience, fairness, equality and its protection of relationships of trust and confidence, as well as its discretionary approach to the grant of relief, stand in marked contrast to the more rigid formulae applied by the common law and equip it better to meet the needs of the type of liberal democratic society which has evolved in the twentieth century.<sup>62</sup>

Sir Anthony conceded that the concept of good conscience is 'not susceptible of sharp definition'.<sup>63</sup> Sir Anthony suggested that uncertainties 'will be dissipated by an increase in the number of decisions on a wide range of fact situations'.<sup>64</sup>

Birks had a very different attitude towards equity. Birks disliked equity's persistent reliance upon broad, ill-defined concepts such as 'unconscionable behaviour' and 'equitable fraud', which he thought concealed a 'private and intuitive evaluation'.<sup>65</sup> Birks insisted that judges should not be makers of social policy, as that task belongs to elected officials.<sup>66</sup> In societies in which competition between different sets of values is real, judges have to be seen to be working within a relatively stable legal order — in Birks' words, 'an analysis anchored in authority'<sup>67</sup> — rather than imposing their own value judgements under the cloak of relatively undefined concepts such as unconscionability. It is the judge's obligation to decide cases consistently with the established rules, which link types of case with types of response, thereby preserving the legitimacy of the law's coercion in the public eye.<sup>68</sup> The approach to equity espoused by Sir Anthony Mason, on the other hand, reposes considerable trust in a supposed ability of adjudicators to analogise directly from case to case with little or no mediation by way of stable rules.

If uncertainty really is to be dissipated in the long run and confidence in the rule of law maintained, it will be because adjudicators and litigants can recognise that certain *types* of case ought to be treated in certain ways. MacCormick has insisted that both common law and equity consist of universalisable propositions:

Equity cannot be understood, I would suggest, as something particular by contrast to the universalizability of justice. The contrast can rather and rightly be set as between law and equity, and only then in the sense that formal rules of positive law may work injustice in their application, which may justify the creation of exceptions to the law for classes of situations to which for good reason the previously declared or enacted law ought not to be applied. But as that in itself says, equity is as much a matter of what is universalizable as is justice.<sup>69</sup>

MacCormick, in this passage, emphasised that equity, far from being a departure from the notion of justice according to rules, merely overrides or corrects the

<sup>62</sup> Sir Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110 *Law Quarterly Review* 238, 239.

<sup>63</sup> *Ibid* 258.

<sup>64</sup> *Ibid*.

<sup>65</sup> Birks, 'Equity in the Modern Law', above n 1, 16–17.

<sup>66</sup> *Ibid* 17. See also Peter Birks, 'Three Kinds of Objection to Discretionary Remedialism' (2000) 29 *University of Western Australia Law Review* 1, 15.

<sup>67</sup> Birks, 'Equity in the Modern Law', above n 1, 22.

<sup>68</sup> Birks, 'Three Kinds of Objection to Discretionary Remedialism', above n 66, 15.

<sup>69</sup> MacCormick, above n 41, 98–9.

effects of those particular common law rules. He referred to *classes* of situations in which the previously declared law should be applied. That the rules of the common law may have an unjust or unconscionable operation in some cases presupposes that we are able to devise generic descriptions of those types of case.

Any suggestion that this view of equity is ahistorical should not detain us for too long. Sarah Worthington has pointed out that while equity's origins lie in the exercise of the King's 'bounty' to save litigants from injustices arising from the rigid application of rules, political conditions in England conspired to ensure that it evolved into a system of rule-based justice. The writs, the jury system and political tensions between the common law judges and the Royal Court had the effect that the common law judges were unwilling or unable to refine the law using methods that modern common lawyers would regard as commonplace. Accordingly, the 'evolutionary pressure' to incorporate the King's bounty into the law of England 'sought another outlet.'<sup>70</sup> This outlet was the jurisdiction of the Chancellor and, later, the Court of Chancery. The development of equity from the exercise of the King's bounty to a system of rule-based justice administered by technical lawyers was reinforced by the ascendancy of parliamentary democracy over royal power from the middle of the 17<sup>th</sup> century. In these conditions, the idea that justice was the gift of the King was no longer politically acceptable.<sup>71</sup>

The related question of whether equity adheres to a doctrine of precedent must also be taken to be resolved in the affirmative. W H D Winder collated evidence extending back to the early 17<sup>th</sup> century showing that Chancellors relied upon previous decisions.<sup>72</sup> The historical differences between the common law and the Chancery attitude to precedent could be summed up in terms of the greater width of equitable principles and the Chancery emphasis upon the authority of the 'course of the decisions' rather than upon the authority of the single decision.<sup>73</sup> It might be said that, insofar as differences did exist in the past, they were differences of degree rather than kind.

Virgo was correct to suggest that equity is best understood as 'the technical system of Equity as administered by the Court of Chancery'.<sup>74</sup> The labels 'common law' and 'equity' refer to the historical origin of the relevant rules, rather than to a rule-based system, in the first case, and a non-rule-based system, in the second.

### B *Equity as an Ameliorative Jurisdiction*

The observation that equity consists of rules and is barely distinguishable from the common law in methodological terms raises the question of whether the two bodies of rules can be integrated into one, internally coherent whole. This course

<sup>70</sup> Sarah Worthington, *Equity* (2006) 10.

<sup>71</sup> *Ibid* 9–11.

<sup>72</sup> W H D Winder, 'Precedent in Equity' (1941) 57 *Law Quarterly Review* 245, 246–51.

<sup>73</sup> *Ibid* 247.

<sup>74</sup> Virgo, above n 59, 85.

has been advocated by Worthington,<sup>75</sup> with the apparent approval of Birks.<sup>76</sup> While a commitment to the coherence of the law as a whole must ultimately push the law in that direction, there is a reason for exercising caution. As Virgo noted, the notion that equity overrides or corrects the effects of common law rules is still at play,<sup>77</sup> and it may be surmised that the ameliorative function of the equitable rules has informed the scope of their application.

Equity was, for much of its history, conceived as a body of principle that was concerned with supplementing, rather than competing with, the common law. F W Maitland gave particular attention to this aspect of equity's character, describing it as 'a collection of appendixes'.<sup>78</sup> The principles of equity, in their classical form, presupposed the prior application (or applicability, at least) of common law rules and operated to prevent or correct certain recognised abuses of the common law. While this aspect of the nature of equity was perhaps obscured by the advent of the *Judicature Acts*,<sup>79</sup> P D Finn detected a re-emergence of this theme in the equity jurisprudence of the High Court of Australia during the 1980s.<sup>80</sup> Finn said that equity 'seeks to prevent an insistence upon strict legal rights where unconscionable conduct has attended their acquisition or would inhere in their proposed exercise'.<sup>81</sup> The concept of unconscionable conduct is obviously too broad and open-textured to be capable of direct application to particular cases. Nevertheless, Finn's observation is valuable insofar as it points to a layering of the notions of just conduct which underpin the law. Common law rights, the recognition of which is underpinned by certain attitudes about the justice of actions, may be used in a way which offends certain other attitudes about the justice of actions. The common law's unwillingness or inability to incorporate those attitudes into its rules left space for another set of adjudicators to respond to those attitudes.

If we fail to appreciate the sequential operation of common law and equity, we risk distorting the rules of equity. The troublesome issue of the juridical basis of equitable estoppel is a case in point. In many cases, equitable estoppel operates so as to require a person who makes a promise or representation to make good the promise or representation even though that person would not have been obliged to do so at common law, owing, for example, to the absence of consideration or observance of the proper formalities.<sup>82</sup> It is tempting to say that equity has added to the list of situations in which the law requires a person to make good a promise or representation. If this was the best possible interpretation of equitable estoppel, there would be no point in talking about the 'equitable' aspect

<sup>75</sup> Worthington, above n 70, 306–7.

<sup>76</sup> Peter Birks, 'Publication Review: Meagher, Gummow and Lehane's *Equity Doctrines and Remedies*' (2004) 120 *Law Quarterly Review* 344.

<sup>77</sup> Virgo, above n 59, 85.

<sup>78</sup> F W Maitland, *Equity, Also the Forms of Action at Common Law: Two Courses of Lectures* (1920) 19.

<sup>79</sup> *Supreme Court of Judicature Act 1873* (Imp) 36 & 37 Vict, c 66; *Supreme Court of Judicature Act 1875* (Imp) 38 & 39 Vict, c 77.

<sup>80</sup> P D Finn, 'Equitable Estoppel' in P D Finn (ed), *Essays in Equity* (1985) 59, 60.

<sup>81</sup> *Ibid.*

<sup>82</sup> Consider, for example, the outcomes in: *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387 ('*Waltons Stores*'); *Giumelli v Giumelli* (1999) 196 CLR 101.

of the principle. We could state, as Birks did, that the law enforces promises where there is a deed, consideration or estoppel.<sup>83</sup> Indeed, one might go further and state that since everything which falls within the category 'consideration' would also fall within the category 'induced detrimental reliance', there would be no point in talking about the doctrine of consideration. Closer investigation reveals that, in Australia at least, equitable estoppel does not do exactly the same work as consideration or a deed.<sup>84</sup> Induced detrimental reliance merely generates an entitlement on the part of the relying party not to be left *worse off* as a result of its reliance. The inducing party must, on account of the fact that it encouraged the reliance, ensure that the relying party is no worse off than it would have been had it not been induced to rely.<sup>85</sup> Mere induced detrimental reliance, as opposed to a promise made under seal or with consideration, does not justify imposing an obligation upon the inducing party to place the relying party in the position in which it would have been had the promise been performed or the representation been true. This interpretation of the juridical basis of equitable estoppel keeps the law of contract, as developed at common law, intact. Equity does not second-guess the common law of contract about the circumstances in which a person may assert an entitlement to the making good of a promise or representation. It provides a different type of entitlement to a person who cannot assert a contractual entitlement. The practical effect may be identical in many cases, but the entitlement to which equity gives effect is one of a different type.

Other contributions of equity — notably the law of trusts — cannot be understood other than in terms of the sequential operation of common law and equitable rules. The trustee is the legal owner of the trust property and is empowered to deal with the property as the owner. Equity merely restrains the trustee's use of the rights of ownership in certain situations where such use would be inconsistent with the trustee's undertaking to use the property for the benefit of the objects of the trust. The proprietary rights of the objects are not of the same character as legal ownership. They give way in the face of the claim of a third party who has acquired its interest in good faith, for valuable consideration and without notice of the trustee's breach of duty. Once again, equity does not second-guess the common law about ownership of property. It merely recognises that a particular class of owners have particular duties to a particular class of people and those people have corresponding entitlements against those owners.

<sup>83</sup> Birks, 'Equity in the Modern Law', above n 1, 63.

<sup>84</sup> *Waltons Stores* (1988) 164 CLR 387, 404–5 (Mason CJ and Wilson J), 423–4 (Brennan J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 413 (Mason CJ), 428–9 (Brennan J), 454 (Dawson J), 475–6 (Toohey J); Andrew Robertson, 'Satisfying the Minimum Equity: Equitable Estoppel Remedies after *Verwayen*' (1996) 20 *Melbourne University Law Review* 805; Andrew Robertson, 'Situating Equitable Estoppel within the Law of Obligations' (1997) 19 *Sydney Law Review* 32; Michael Spence, *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (1999).

<sup>85</sup> Compare the position of Waddams, who says that '[t]he effect of estoppel is to protect the plaintiff from harm': Waddams, above n 5, 58. He insists, however, that equitable estoppel represents the cumulative operation of several legal concepts, including contract, wrongdoing and unjust enrichment, to justify the award of relief which has that effect: at 61–2. No one concept would be enough in itself to justify the relief but, according to Waddams, their cumulative effect does.

None of the foregoing comments should be interpreted as opposition to the assimilation of common law and equitable rules where equity is doing the same work as the common law. The maintenance of different rules which could potentially apply to the same sets of circumstances offends the idea of integrity. Andrew Burrows has identified quite a number of areas in which common law and equity 'do not co-exist coherently'.<sup>86</sup> If it is important to us that the law provide an internally coherent system of justification, this situation cannot be tolerated. Naturally, these incoherencies need to be resolved one at a time, which is what Burrows appears to advocate.<sup>87</sup> This process appears to be occurring, in England and New Zealand at least, in relation to compensation for trustees' breaches of their duties. In these jurisdictions, the fact that the duty is a *trustee's* duty is not of itself relevant to the measure of compensation. What matters is whether, on the one hand, the trustee's breach relates to its obligation to administer the trust property according to the terms of the trust or whether, on the other hand, the trustee has been negligent in carrying out an authorised transaction. There is no *legal* reason to treat the latter any differently from any other situation in which the law requires a negligent defendant to pay compensation.<sup>88</sup>

Attempting to incorporate all common law and equitable rules into a single map of the law does not mean aggregating common law and equitable categories on the basis of *any* point of similarity between them. We must distinguish between two ways in which equity supplements the common law.

The first of the ways in which equity supplements the common law is by adding to the specific circumstances in which a particular type of legal response is seen to be justified. A good example is equity's expansion (under the nomenclature of actual undue influence) of the circumstances in which a transaction may be set aside on the ground that the will of one of the parties was overborne by the other. The equitable doctrine of actual undue influence and the common law doctrine of duress fulfil the same notion of just conduct. If one of the parties' consent to the transaction was produced by coercion, that party may avoid the transaction.<sup>89</sup> That party's refusal to perform does not deny the other party's status as a free and equal person. The party who did the coercing cannot insist upon performance of the transaction because the very element that justifies restraining the other party from choosing not to perform — namely, consent freely given — is absent. Not only may the categories of duress and actual undue influence be aggregated into a single category, but we can say, without hesitation, that the aggregated category forms a category of cases within both the law of contract and the law of gifts, which are, in turn, basic level categories within

<sup>86</sup> The areas that Burrows identifies are set-off, tracing, illegal contracts, compound interest, common law strict restitutionary liability subject to change of position compared with equitable 'knowing receipt' liability, and laches compared with the general law on limitation of actions: Andrew Burrows, 'We Do This at Common Law but that in Equity' (2002) 22 *Oxford Journal of Legal Studies* 1, 6–7.

<sup>87</sup> *Ibid* 16. See also Andrew Burrows, 'Remedial Coherence and Punitive Damages in Equity' in Simone Degeling and James Edelman, *Equity in Commercial Law* (2005) 381, 383.

<sup>88</sup> *Bristol & West Building Society v Mothew* [1998] Ch 1; *Bank of New Zealand v New Zealand Guardian Trust Co Ltd* [1999] 1 NZLR 664.

<sup>89</sup> *Universe Tankships Inc of Monrovia v International Transport Workers Federation* [1983] 1 AC 366, 384 (Lord Diplock), 400 (Lord Scarman).

the superordinate category of consents. Duress and actual undue influence reverse neatly the element of consent which is the law's justification for applying coercion in cases of contracts and gifts. As Burrows has suggested, there is no reason to retain both labels.<sup>90</sup>

The second of the ways in which equity supplements the common law does not involve such a neat reversal of the justification for applying coercion at common law. Equitable estoppel, as conceived by the High Court in *Waltons Stores*,<sup>91</sup> is, as already noted, an example of this. There is no legal justification for restraining the representor from failing to make good its representation. The law of contract and the law of gifts have no application. Nonetheless, the coercion of the representor to ensure that the representee is not left worse off as a result of relying upon the representation is legally justified. The harm suffered by the representee was not self-inflicted but was suffered because the representor's conduct encouraged the representee to act in the way that it did. This justifies requiring the representor to place the representee as close as possible to the position that it would have been in *had it not relied* — bearing in mind that the only way of doing this in a particular case may be to require the representor to make good the representation<sup>92</sup> — but it does not, of itself, justify coercing the representor to make good the representation. Equitable estoppel cannot be subsumed within either the law of contract or the law of gifts. A map of the law *as it is* must acknowledge this while simultaneously recognising the sequential relationship that equitable estoppel may have with these two bodies of law.

## V CONCLUSION

Those who object to maps of the law on the basis that they distort our view of legal practice fail to appreciate fully what it is that mapping of the law sets out to achieve. The famous, multicoloured map of the London underground railway system does not set out to be a representation of London in all its glorious variety and detail. It is a simplified and stylised representation of the London underground railway system which enables one to work out that, if one wants to travel from King's Cross to Knightsbridge, one needs to catch a southbound train on the Piccadilly Line. Attention to the detail of the Gothic arches of Westminster Abbey, the baroque splendour of St Paul's Cathedral, the Georgian facades of Gower Street and Belgrave Road and the open spaces of Hyde Park (along with perhaps the depressing greyness of some of the council housing estates) may be important if one wants to appreciate what London is really like, but this information does not assist one in getting from place to place within London. Its inclusion in the London underground railway system map would be an unnecessary (and possibly counter-productive) complication.

Any map of English or Australian private law is, of course, more complex and varied than that of the London underground railway system. It also differs from

<sup>90</sup> Burrows, 'We Do This at Common Law but That in Equity', above n 87, 6.

<sup>91</sup> (1988) 164 CLR 387.

<sup>92</sup> Consider, for example, how the plaintiff in *Giumelli v Giumelli* (1999) 196 CLR 101 might have been placed in the position that he would have occupied had he not relied upon his parents' representations, and sought a home and pursued a career away from the family property.

the London underground railway system insofar as the process of description and systematisation has a dynamic effect upon the thing being described. The point of mapping the law is not to deny the law's complexity and dynamism. Mapping creates an abstraction. It is a means of managing complexity and enabling the dissemination of the key features of the thing which is being mapped. Maps of the law serve the purpose of enabling those who have to use and rely upon the law to identify its principal components and how those components fit together into a single internally coherent system grounded in the community's conception of justice. When we have an overall view of private law, we are in a better position to identify and iron out incoherencies and to resolve hard cases in a way that enhances the system's coherence. Detailed study of the case law in particular areas is, of course, necessary in order to identify the law's principal components. To acknowledge this is not to deny the value of mapping. The very idea of law (as opposed to arbitrary personal rule) involves an assumption that the law is an internally coherent system of justification for state coercion. Its major contours must be communicable and intelligible to all. Legal scholarship does itself a great disservice when it denies the value of mapping the law.