Equity and the Resources of Critique Programme

MONDAY 29TH JUNE

12.15-1pm Arrival and buffet lunch (Cornwallis NW Seminar Room 8: located adjacent to the Gulbenkian café)

1-3pm Welcome and session 1 (Chair: Nick Piška, University of Kent)

- Jan-Patrick Oppermann (Independent Scholar). 'Teaching the Garden: Equity and Exscription'
- Piyel Haldar (Birkbeck College, University of London). 'The Visual Turn in Renaissance Equity'
- Robert Herian (The Open University). 'The Castrated Trustee'

3-3.15pm Coffee break

3.15-4.35pm Session 2 (Chair: Anne Bottomley, University of Kent)

- Daniela Carpi (University of Verona). 'Jodi Picoult's *My Sister's Keeper*: New Definitions of Human Dignity in Novel and Film'
- Sidia Fiorato (University of Verona). 'P.D. James's Legal Thrillers: an Equitable Perspective on Crime'

4.35-4.40 Short break

4.40-6pm Session 3 (Chair: Johanna Jacques, University of Warwick)

- Fernanda Farina (Faculty of Law, University of São Paulo). 'The Brazilian Experience in the Expansion of Judicial Power: Is Equity Adjudication in Civil Law Countries a Distortion or a Tendency?'
- Geoffrey Samuel (Kent Law School/Sciences-Po Paris). 'Does the Common Law and Equity Distinction Have an Impact upon Legal Reasoning?'

7.30pm: workshop dinner (Café de Soleil)

Equity and the Resources of Critique Programme

TUESDAY 30TH JUNE

9-11am Session 4: (Chair: Rosemary Auchmuty, University of Reading)

- Henry Jones (Durham University). 'Beating the Bounds: The Territory of Property Law'
- Matt Stone (University of Essex). 'Equity and the Ethical Subject'
- Adam Gearey (Birkbeck College, University of London). 'Assemblages of Dishonesty'

11-11.15am Coffee break

11.15-12.35 Session 5 (Chair: Adam Gearey, Birkbeck College, University of London)

- Sarah Wilson (York Law School). 'Law, Equity and Capitalism – Past Present and Future'
- Anne Bottomley (Kent Law School). '*Tempus Edax Rerum*: and, In Time, Equity...'

12.35-1.30pm Lunch

1.30-2.50pm Session 6 (Chair: Robert Herian, The Open University)

- Nick Piška (Kent Law School). 'Aristotle's Pharmacy'
- Nathan Moore (Birkbeck College, University of London). '"This is Machinery", or: After Equity'

2.50-3.50pm Session 7 Concluding thoughts and critical equity network discussion

4pm onwards: Post-workshop drinks at the Goods Shed (self-funded)

Equity and the Resources of Critique

Abstracts

SESSION 1

Teaching the Garden: Equity and Exscription

Jan-Patrick Oppermann, Independent Scholar

The **first part of the essay** means to make a modest contribution to the critical - that is to say investigative and non-traditional - study of the philosophical origin, sense, and parameters of the concept/idea of equity. It focus will at first be on Aristotle. Then I will seek to widen the Aristotelian concept of equity by a consideration of the moral and intellectual capacity of "enlarged mentality" as found in Hannah Arendt's interpretation of Kant. In doing so, I will seek to loosen the legal or judicial bonds of this concept, instead allowing it to freely enter a larger conceptual space involving the political and the psychological. In the **second part of the essay**, this larger conceptual space leads me to a wider and more speculative meditation concerning the possibility of an ontological extension of a trans-legal interpretation of equity through a consideration of some aspects of the work of French philosopher Jean-Luc Nancy, particularly his notion of "exscription." In the **third part of the essay**, I then supplement this Nancean meditation with a psychological turn focusing on Nancy's commentary on Freud's remark on the "extension of psyche." I offer these speculative moments to step beyond Aristotelian and Kantian constraints and also in order to advance possible philosophical exploration of equity and justice against overly narrow containers in "legal philosophy" including "critical legal theory."

The Castrated Trustee

Rob Herian, The Open University

Focusing on equity's concern to ensure that beneficial enjoyment remains clearly separated from the onerous task required of the trustee per the trust mechanism, this paper aims to develop and explore alternative narratives concerning the standards applicable to a trustee and to breach of trust.

In this instance, breach of trust will not be examined from the doctrinal perspective of the trustee who fails to uphold the standards applicable to her and must account as such, but rather from the perspective of the subject of psychoanalysis who strives to push beyond the pleasure principle and thus catch the jouissance of the other as thing. Consequently, and in contradistinction to the rules concerning liability for breach, the discussion's emphasis will fall not on the needs of the beneficiaries, but on the desire of the trustee.

Using as illustrative sections from Iris Murdoch's novel *The Philosopher's Pupil* and taking into account Freud's psychic regulatory apparatus, primarily the superego, as well as analogous formulations that surround it, the hope is to provide fresh insight into one of English law's most enduring relational and intersubjective doctrines.

The Visual Turn in Renaissance Equity

Piyel Haldar, Birkbeck College, University of London

The classical Ciceronian debate posits the idea of equity as exceptional to law against the idea of equity as the source of justice. The debate became key to the renaissance humanists who attempted to synthesise the Ciceronian accounts with those of the Christian fathers and medieval schoolmen. This paper attempts to recuperate a humanist understanding of equity in order to redeem its foundational status to law. By focusing on a number of jurists it would seem that a wider definition of equity emerges than those offered by the standard accounts of Christopher Saint Germain and others. This wider function of equity takes on board something hinted at by Cicero and expanded by Saint Augustine. That is equity is linked to the aesthetics of decorum and thereby to the proper function of office. It is through the decorum of office that equity properly institutes subjectivity as a question of faith (and interiority). Analysing this wider concept of equity allows us to refresh the role of the office of the trustee as a universal feature of public civic 'humans' and their role in the civic organisation of life.

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SESSION 2

Jodi Picoult's My Sister's Keeper: New Definitions of Human Dignity in Novel and Film

Daniela Carpi, University of Verona

My starting point is that bioethics and the problems connected to human rights and human dignity are the logical evolution of the principles of equity.

My paper aims at analysing Jodi Picoult's novel *My Sister's Keeper* (2005) in the light of the connections existing between *Literature* and the interdisciplinary fields of *Bioethics* and *Biolaw*. Bioethics examines the moral and ethical dimension of biological sciences, with particular reference to health-related contexts, whereas biolaw takes into account their more and more evident legal implications.

Picoult's literary production is chiefly devoted to inspect how modern technology applied to medicine has affected our lives, bringing on evident threats to the consistency of our rights and undermining our interpersonal relationships as well. Throughout this compelling novel, life, love and compassion, science and the law indissolubly merge together. The extremely complicated context of boundary medical situations the author presents, force us to open our eyes to alarming current scenarios, and to their future possible developments as well. Her
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fictional characters call for a reassessment of the concept of human dignity and for the necessity for law to defend the integrity of the body.

P.D. James's legal thrillers: an equitable perspective on crime.

Sidia Fiorato, University of Verona

P.D. James's detective fiction is characterized by an ongoing engagement with specific legal issues that intersect with the portrayed criminal cases and open up to wider intellectual investigations after their final solution. Her detective Adam Dalgliesh represents the readers' *alter ego* in his attempts to face the gap between his own idea and ideal of justice and its enactment in legal institutions. PD James's innovation of the genre consists in her shaping of it as a legal forum which addresses the individual as a legal person and puts at its centre relevant ethical and human questions. Significantly, her last novel *The Private Patient* (2008), which can be considered her literary testament, concludes with a powerful legal and ethical question: "Would you be willing to break the law if by doing so you could right a wrong […]?". The liminal encounter of the detective with the dimension of the law transfigures itself and opens up to a dimension of equity through the expression of a "gentle art of particular perception" (Nussbaum); in a law and literature perspective, literary works can help us integrate experience and open up to the particularities of the case by actively engaging our legal imagination.

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SESSION 3

The Brazilian Experience in the Expansion of Judicial Power: Is Equity Adjudication in Civil Law Countries a Distortion or a Tendency?

Fernanda Farina, Faculty of Law, University of São Paulo

The most orthodox doctrine holds that civil law jurisdictions are not the right place to debate or observe equity justice. Nonetheless, the twentieth and twenty-first centuries have shown that the distances between civil and common-law traditions are not that far apart. Furthermore, with the expansion of constitutionalism doctrine, judges of civil law countries found themselves in an ampler, unfamiliar ground, where interpretation and equity adjudications are not solely aspects of common law practice, but rather their own day-to-day reality.

This phenomenon is clearly visible in Brazil. The observation of Brazilian courts decisions, as well as the analysis of general case law, indicates that Brazilian judges are gaining more and more power in terms of shaping the law. Several hard cases illustrate how modern Brazilian magistrates have long ceased to be simply the "bouche de la loi", as the French Revolution idealists would expect. On the contrary, it is clear that equity adjudication, with the
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use of hermeneutic and of broad constitutional principles, became a vital, increasingly used instrument of Brazilian judiciary.

However, this ongoing empowerment of the Judiciary in civil law countries, such as Brazil, raises several questions, such as: are judges, with the use of interpretation and constitutional principles, shaping the statutes to achieve equity, as they please? In doing so, is the Judiciary in Brazil making/changing the law? Is this a distortion or a tendency of modern civil law? And finally, does this result in a more just or unstable system?

To respond these questions, this paper analysis a few Brazilian hard cases, specially contrasting the application of the same statute in different time periods. The aim is to show that, in various civil law jurisdictions, such as Brazil, modern judges are more than ever able to modify the law, operating equity decisions in a wide range of cases and undermining the dogma of civil law judges as mere statute appliers.

Does the common law and equity distinction have an impact upon legal reasoning?

Geoffrey Samuel, Kent Law School

To mark the passing of Bernard Rudden (who died in March 2015), this paper takes as its starting point an essay published by Professor Rudden in 1992 (Rudden, 1992). The title of this essay is 'Equity as Alibi' and in it the late author looked at how the division between law and equity can still impact upon legal reasoning.

This present paper will develop Rudden's theme. In particular it will look at how equity as a category can act as a structural foundation for several models of reasoning (cf Samuel, 2015). However it has been particularly instrumental in establishing what might be called the remedies model where the emphasis is placed on the nature of the action and its connection with factual situations (see eg Sir Nicolas Browne-Wilkinson in *Kingdom of Spain* v *Christie, Manson & Woods Ltd* [1986] 1 WLR 1120, at 1129). As Rudden pointed out, equity never denied the existence of common law rights; it simply threatened on occasions a right-holder with sanctions if the right-holder tried to vindicate his common law right in a court of law (see today *D & C Builders Ltd* v *Rees* [1966] 2 QB 617). All this might seem an incoherent mess ("chaos with an index") to those who subscribe to a different reasoning model such as the one that sees legal knowledge, and the reasoning that attaches to it, as rule based and highly systematised. Strict rights theorists who emphasise the importance of coherence are also often dismayed by the possibility of internal contradiction. Nevertheless if one sees legal reasoning as essentially dialectical in the way that it interacts with texts and with facts, the law and equity divide can arguably be defended.

In setting up dialectical oppositions at a very low level of abstraction the division can achieve the same results as systems which employ rationalised principles operating at a high-level of abstraction (abuse of rights, good faith for example). In addition the dialectic between law and equity permits a subtle interaction between common law and equitable remedies, the cases said to reflect the thesis of efficient breach of contract being good examples (see in particular *Attica Sea Carriers Corporation* v *Ferrostaal* [1976] 1 Ll Rep 250; *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] AC 1). Equitable remedies can also act as vehicles for developing legal protection by turning 'interests' into 'rights' (rights by ricochet) (see eg *Island Records (Ex p)* [1978] Ch 122); equally it can restrict the scope of common law actions by erecting an

impermeable barrier between equitable and common law duties that motivate the remedies (*Banque Keyser Ullmann* v *Skandia Insurance* [1990] 1 QB 665 (CA); [1991] AC 249 (HL)). Finally, it is not unimaginable that the Supreme Court might one day issue an injunction against the government in respect of a statutory provision that is regarded as unacceptably repugnant to the constitution.

Rudden, B (1992), Equity as Alibi, in S Goldstein (ed), *Equity and Contemporary Legal Developments* (Hebrew University of Jerusalem, 1992) 30

Samuel, G (2015), Legal Reasoning and Argumentation, in: James D. Wright (editor-in-chief), *International Encyclopedia of the Social & Behavioral Sciences* (2nd edition, Vol 13, Oxford: Elsevier) 776

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SESSION 4

Beating the Bounds: The Territory of Property Law

Henry Jones, Durham University

In Jim Crace's 2014 novel *Harvest* an imagined English village is destroyed in the tumult of the rapid change from feudal commons to enclosed modern farm land. In a key central chapter the narrator tours the boundaries of the village, a journey taken every year to ceremonially instruct the children of the village about where they live and what belongs to them. The narrator takes with him a surveyor, who transforms these felt and lived places into lines on a chart. This simple act transforms a communal place into a series of legally defined spaces.

The 1494 Treaty of Tordesillas between Spain and Portugal divided control over navigation and discovery of new lands to the East and West of a meridian drawn 370 leagues west of the Cape Verde Islands. This line, where it hit land, created the first claims over territory to be rooted in an abstract legal agreement, rather than in physical occupation or discovery. Both of this stories relied upon a combination of law's abstract authority and the scientific ability to subject space to calculation. The first story is about enclosure, the second about colonialism. Both were vital processes in establishing capitalism.

Property and territory are usually considered as separate topics. Territory has recently been subject to sustained critical attention, particularly from scholars of geography. Stuart Elden's masterful genealogy of the topic describes territory as a political technology that combines control of land and terrain with ideas about its organisation through calculative rationality. The law takes a role in constituting territory, but territory also is a container of law, organising it in particular ways. I will argue that property similarly originates as a political technology for the control of space to be abstracted away from occupation and actual possession, and turned in to rights to be exercised and enforced. Property has a territory.
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Equity and the Ethical Subject

Matt Stone, University of Essex

Does equity tell us anything about what it means to be an ethical subject? Or conversely, might an ethical model of subjectivity shed light on the workings of equity? With these questions in mind, this paper sets out to explore the relationship between equity and the idea of property, particularly the modern notion of subjectivity being structured by self-possession. Resisting any temptation to posit a theory of equity in general, and mindful that equity also has a life beyond property, it pursues a suggestion that equity can operate as a symptom of the defects in our prevailing ideology of property relations. Equity imbues property with responsibility. It offers resistance to absolutist ideas of the liberal property-owning subject. As such, it challenges the modern subject, asking us to confront the extent to which (self-)possession confers rights and privileges over duties and debts. The trust is of course an exemplar, followed by the various other mechanisms in which property relations have been bound by ethically-loaded terms such as 'conscience'. The paper seeks to link these claims to strands of contemporary property theory that have sought to resist the traditional model of subject-object relations of ownership (e.g. Margaret Radin on inalienable property, Margaret Davies on queer property, Davina Cooper on property and belonging), as well as exploring the nexus of property, subjectivity and responsibility that can be read in Derrida and Levinas. The paper thereby asks whether equity might be understood as signifying the contradictions of the possessive subject in modern political community, and the exigency of imagining more radical configurations of subjectivity, property and ethical duties. The paper concludes, however, by arguing that equity has nevertheless equally shown itself to be vulnerable to being assimilated into the very modalities of property it resists.

Assemblages of Dishonesty

Adam Gearey, Birkbeck College, University of London

Focused on the juridical construction of dishonest assistance in breach of trust, this paper addresses the way in which equitable doctrines position the market actor. Drawing on Adorno, Rose and Weil our central thesis is that we can read equity as the judicial misrecognition of ethical community in a period of mature capitalism.

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SESSION 5

Law, Equity and Capitalism – Past present and future

Sarah Wilson, York Law School

The premise of the recent Public Lecture within the LSE's Systemic Risk Centre and Law and Financial Markets Project titled 'The Law, Finance and the Abyss' (March 2015) was that although financial markets law and finance are intrinsically connected, 'When markets collapse, however, legal rules are pushed into the background and other forces take over'. This paper seeks to open up some connections between this proposition – made now several years on from the onset of the global financial crisis, and as conversations on regulatory reform appear set to continue for some time yet - and one made several years earlier in 1989 as part of a commentary on nineteenth-century developments in law and equity in the seminal *Law and Society in England 1750-1950* from W R Cornish and G de N Clark. The latter proffered that while the common law focused on sanctity of bargain and freedom of contract, that equity would build up a protective jurisdiction of conscience as a refuge for those unfitted to a world of hard bargaining, or misled during their experience of it.

There are numerous connections which it is envisaged can be opened up through focusing on the significance of equity for commerce and underpinning financial systems, for the wider economy and even for capitalism itself. In attempting to convey a sense of what is conceptually possible within this remit, the paper focuses on equity's significance as an 'other force' within discourses on the perceived challenges being associated with aligning capitalism with post-crisis recovery, clustering particularly strongly around promoting stability and resilience and yet also stimulating growth, vibrancy and innovation. It considers how this angle provides important critical discursive space for reflecting on the perceived attractions for and concerns attached to the application of equity's doctrines and principles in 'business affairs'. As the workload of the courts demonstrably and increasingly involves ruling on the 'importation into commercial law of equitable principles', conversations on forging and articulating regulatory reform occurring simultaneously at the highest levels of policy are also concerned with the proper place for equity in the 'orderly conduct of business affairs' (per Lord Browne-Wilkinson, *Westdeutsche*, 1996).

At this critical juncture, the paper suggests that an examination of nineteenth-century articulations of law and capitalism is highly revelatory, and also highly pertinent. For the former, the paper points to many illustrations of the perceived importance of equity in providing certainty and stability for Victorian contemporaries in times of extensive, rapid and unpredictable change, brought about by new transactional freedoms and breakdown in traditional transactional governance, as new participants and new practices flooded commercial environs. Grounding these perspectives in contemporary discourse on the perceived and aspirational functions of law and equity allows some very interesting social commentary observations to be made, alongside ones more directly related to law's own development and its evolving relationship with society in times of 'striking change … and pressure for change' (Black and McRaild, 2002).

For the paper's commentary on how it might be pertinent as well as interesting to examine equity's perceived value for providing stability and certainty in times of extensive and

far-reaching change, and where fitness to engage in hard bargaining could be gained and lost easily and quickly, it will firstly be noted that the present is also being characterised as a time of immense if not unprecedented extensive and far-reaching change. From this the paper examines current interest in opening up connections with the past in seeking to respond to present-day challenges arising from a 'once-in-a-lifetime crisis' (Haldane, 2012). Key statements from UK regulators pointing to this analytical trend are aligned with traditional Legal History scholarship and that from within Modern History to present a cogent and methodologically sound approach for situating past alongside present and future within the Common Law tradition, and to propose the manifest importance of undertaking this.

***Tempus edax rerum*: and, in time, equity....**

Anne Bottomley, Kent Law School

It is not particularly innovative to suggest that crucial to equity's modes, methods and materializations is the question of time, or rather questions of time. This paper then, does little more than examine the obvious in calling into account creations of, and responses to, temporal rhythms carried in and through equity, eg in projecting (into) a future, holding back (in) a past, in folding time(s) into patterns of repetition and sequences of difference, and in reaching out towards a celestial time of 'perpetuity'. And yet, in what seems obvious, perhaps there are things we have not quite recognised, questions we have never quite asked, issues we have not yet fully articulated - perhaps too seduced by equity's seeming timelessness, or rather her temporal resilience. And so maybe this is a place, a point, to begin to engage with the temporalities of equity by stuttering 'in time'.

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SESSION 6

Aristotle's Pharmacy

Nick Piška, Kent Law School

Financial crises are consistently linked to crises of trust, whether in terms of market confidence, faith in the integrity of market actors, or belief in the effectiveness of the existing regulatory frameworks. Indeed, following the Financial Conduct Authority ruling on the LIBOR rate-fixing scandal Lord Blackwell, the Chairman of Lloyd's Banking Group who were at the centre of the fraud, stated that 'trust is at the core of our business'. To the extent that trust is at the heart of financial capitalism, an effective regulatory framework would need to respond to 'distrust', so as to discourage breaches of trust and encourage and constitute 'trusting' relations. Equity provides a key juridical apparatus for responding to trust and distrust, giving effect to the trust as a crucial form for market relations and equitable remedies as part of the strategy for regulating those relations. And yet there is little critical engagement with the role of equity and trusts in relation to the financial markets.
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It is from these observations that I situate my critique of the trust form and related equitable principles and remedies. On the one hand the trust and related remedies are often seen as enforcing fiduciary obligations of loyalty and good faith, and have in this context been seen as a key strategy in the regulation of the financial markets, immunizing society from capital's pernicious effects (and thereby safeguarding capital from itself). On the other hand, the intrusion of equity into the world of commerce has drawn much criticism, as its supposed flexible and discretionary nature is said to be anathema to the certainty required for efficient and effective transactions.

In this paper I draw on the work of Roberto Esposito and Bernard Stiegler as the basis for developing a critique of equity, in particular the relationship between equity and financial capitalism, what Maurizio Lazzarato calls the 'debt economy'. In doing so I want to suggest, contrary to the views emanating from commercial lawyers, that equity was a condition of possibility for the development of financial capitalism and that far from undermining financial capitalism, equitable remedies sustain and intensify market relations. In short, I will argue that equity & trust lawyers are both the 'architects and sanitation workers of the market'. This raises questions about the suitability of equity for the critique of modern law.

"This is Machinery", or: After Equity

Nathan Moore, Birkbeck College, University of London

As Maitland pointed out, it is difficult to provide a simple answer to the question, 'what is equity?' Commonly, equity is considered as a kind of justice, in the sense of an over-arching justice both requiring, and legitimating, departure from the law in specific, and usually unforeseen, situations. The relationship between law and equity is frequently presented as one of contestation as a result. In this paper, I will consider the law-equity relation to be a less a question of contestation, and more one of potential. In particular, I will consider the possibility that equity can be considered as being on the side of impotential, as this latter is discussed by Agamben in reference to Aristotle. Rather than a straightforwardly theoretical account, this analysis will be made through the recent case of *Southern Pacific Mortgages v Scott* [2014] UKSC 52.