jurisdictions of equity / programme

university of kent / 14-15 june 2012

Thursday 14th June 2012	
1.00-2.15	Arrival and lunch
2.15-2.30	Welcome and introduction
2.30-5.00	*Session I: Conceptions of equity* Chair: Simone Wong **DEFACED PATHS OF JUSTICE: THE DANGEROUS LIAISON OF EQUITY AND COMMON LAW** MARIA DRAKOPOULOU (UNIVERSITY OF KENT) **"WHERE THE SHOE PINCHES": TRUE EQUITY IN TROLLOPE'S *THE WARDEN*** GARY WATT (UNIVERSITY OF WARWICK) **A MARXIST APPROACH TO THE ENGLISH EQUITY JURISDICTION** MIKE MACNAIR (ST HUGHS, UNIVERSITY OF OXFORD)
5.00-6.30	Drinks reception (Eliot Senior Common Room)
7.15-	Workshop dinner (JoJos, Whitstable)
Friday 15th June 2012	
9.30-11.00	*Session II: Equity's potentiality* Chair: Gary Watt **"THE WOMEN AND CHILDREN MUST INVARIABLY BE SPARED": MARTIAL LAW, UNCONSCIONABILITY AND THE REALIZATION OF SOVEREIGNTY IN SETTLER STATES** JULIE EVANS (UNIVERSITY OF MELBOURNE) **"WE ARE ALL IN DANGER": EQUITY AND THE PRODUCTION OF ENVIRONMENTAL SUBJECTIVITY** ANDREAS KOTSAKIS (LSE/SOAS)
11.00-11.30	Refreshments
11.30-1.00	*Session III: Equity and subjectivity* Chair: Andreas Kotsakis **EQUITY'S SUBJECTS** MATTHEW STONE (UNIVERSITY OF ESSEX) **THE GOVERNMENTALIZATION OF INJUNCTIVE RELIEF** NICK PIŠKA (UNIVERSITY OF KENT)
1.00-2.00	Lunch
2.00-3.00	Roundtable discussion and close

"THE WOMEN AND CHILDREN MUST INVARIABLY BE SPARED": MARTIAL LAW, UNCONSCIONABILITY AND THE REALIZATION OF SOVEREIGNTY IN SETTLER STATES

JULIE EVANS (UNIVERSITY OF MELBOURNE)

At first glance, it seems odd to consider equity and martial law within the one conceptual field. Yet, through their indeterminate commitment to arbitrary and discretionary practices, both notions unsettle law's capacity to fix jurisdictional boundaries and to be seen to uphold the rule of law. Further, despite their contrasting purposes, equity and martial law raise similar questions about the nature and limits of law's normal operations, while questions of justice persistently resist circumscription.

This paper represents some preliminary explorations of the analytical possibilities of this conceptual pairing, and offers some early thoughts on how equity and martial law might be productively discussed as expressions of law's extremities. The general context of inquiry is newfound settler colonies where Britain's discursive claims to sovereignty were being realised through outright violence on the ground, where the force and boundaries of (Europe's) law were still in the process of constitution, and where the narrative of law's authority as arising in time immemorial was accordingly difficult to sustain.

In directing attention to the 'history of everyday life'* – to the exceptional, individualised and embodied experiences of law – the paper discusses the lived expression and reception of martial law in 1820s Van Diemen's Land when Governor Arthur finally understood that Aboriginal people would not willingly consent to their own dispossession. The concept of unconscionability emerges as a useful way to understand how relatively detached concerns about the legal and political legitimacy of the fledgling state were also matched by profoundly personalized anxieties about the limits of the rule of law and the irrepressible claims of justice.

* Peter Goodrich, *Languages of Law*, p.5

"WE ARE ALL IN DANGER": EQUITY AND THE PRODUCTION OF ENVIRONMENTAL SUBJECTIVITY

ANDREAS KOTSAKIS (LSE/SOAS)

A multifaceted inquiry into environmental justice has become the most recent contribution of the environmental legal field to the unravelling apparatus of environmentalism. In the present era of escalating ecological, economic and social disaster, this inquiry has often assumed the character of a search for theoretical alternatives to the dominance of sustainable development as a guide for environmental action at all levels. Within this inquiry, the more specific discussion of equity becomes important due to its potential to articulate a comprehensive challenge to the jurisdictional limits of environmental law, to the very understanding of what constitutes an environmental issue in need of regulation.

As an additional line of thought breaking through the environmental apparatus, equity may finally introduce the missing third ecology of Guattari's ecosophical schema; the ecology of subjectivity that will complement the ecologies of nature and of society. This ecology of subjectivity stresses the link between environmental degradation, social dissolution, and the erosion of collective subjectivities across many regions and locales. By focusing on the processes and apparatuses for the production of

environmental subjectivity, one can articulate a critique of the foundation of environmental law in the compartmentalisation of each environmental issue along with its regulatory response.

Seeking to reverse this creation of an elaborate tableau of isolated grave dangers - perceived solely through an institutionalist and structuralist lens underpinned by the primacy of scientific knowledge and the instrumentalism of the law - the paper will assess instances of the connection between equity and environmental legal thought that highlight processes of environmental subjectivity formation. In turn, this analytical step leads to the questioning of environmental law's fusion of Western scientific and legal rationality that has produced the single environmental subject; rational, autonomous, calculating, scientific, ostensibly liberal and ethically/aesthetically conservative. In this way, equity can constitute the engine used to initiate environmental law's movement away from under the thrall of globalisation and the homogenising promotion of a single model by which environmental problems are to be 'solved'. The growing discord both between and within the North and the South simply indicates that it is not the environment, but our collective subjectivity that is in danger today.

A MARXIST APPROACH TO THE ENGLISH EQUITY JURISDICTION

MIKE MACNAIR (ST HUGHS, UNIVERSITY OF OXFORD)

This paper offers, as its title indicates, an attempt to use a historical materialist theoretical framework to understand the peculiarly 'common law tradition' forms of the concept of equity expressed in the existence of a distinct equity jurisdiction (whether this jurisdiction is that of real courts, or exists only in a 'virtual' form, as in England since 1875).

The 'historical materialist theoretical framework' I offer is in the tradition Engels-Kautsky- Lenin/ Martov/ Bauer as opposed to the tradition [Sorel]-Luxemburg-Lukács/ Korsch-'Western Marxism'/ 'New Left' (all these are 'cartoon' identifiers), but I also engage with some of the arguments of Chris Cutrone and Spencer Leonard of the Platypus Affiliated Society, whose theoretical framework is drawn from the Frankfurt school. Outside these frameworks, 'institutionalist' economic historians have added to our knowledge of pre-capitalist social orders and the transition to capitalism, and any 21st century Marxism has to (not uncritically) integrate aspects of this work.

I take it that there exists a 'broad' concept of equity - Aristotelian; James VI and I; and quite a lot of modern 'critical' uses of the idea. There has in the past existed a 'narrow' conception of equity in terms of "fraud, and accident, and confidence" which is related to the idea of contractual good faith. There also exists an 'ultra-narrow' or 'Chancery bar' conception of equity as 'what was done in Chancery as of 1875' (Maitland) or its US analogue 'what was done in the English Chancery as of 1793' (Justice Scalia).

I argue that the 'broad' concept of equity is intimately linked to the medieval conception of social order as involving personal power and affective relations of personal submission and personal trust in one's superiors. The transition to capitalism involves a transition from this personal trust and authority to 'impersonal trust' and making this transition therefore involves abandonment of the broad conception. What replaces it, however, is not at first the 'ultra-narrow' conception (which could hardly exist in the 18th century) but the 'narrow' conception linked to contractual good faith. The 'ultra-narrow' conception emerges more recently: with the rise to dominance in Britain in the late 19th century of financial capital.

Platypus authors argue, I think correctly, against a conception of socialism (or more generally of any alternative to the present order) as a return to personal trust; and this has implications for any idea of a critical reappropriation of 'broad equity'. This, I argue, tends merely to support a judicial political Bonapartism of the sort attempted by Lord Denning.

EQUITY'S JURISDICTION: AN INTENSIVE ASSEMBLAGE DOING LAW DIFFERENTLY

JAMIE MURRAY (LIVERPOOL JOHN MOORES UNIVERSITY)
[Unable to attend workshop]

One of the distinctive features of Equity is that it does law differently, that it has something to do with justice being the heart of Equity, that what defines Equity is the creation of new rights in property where considerations of fairness require it. In Law Schools Equity academics have a passionate attachment to Equity, and are very protective of its reach of jurisdiction and of its special difference ('Don't bully Equity – it/we are special').

With the task of theorising law in terms of an abstraction of sovereignty-legislation I go straight to the molar fold (Deleuze), the logos as opposed to the nomos (Deleuze & Guattari), the State social machine (Deleuze & Guattari), and the Name of the Father (Lacan). This produces a jurisprudence of transcendence, molar abstract machines, a plane of organisation, reterritorialisation and overcoding, subjectification and desire as lack.

However, with Equity this line of theorisation does just not run. Rather Equity is an assemblage of legality, although soaked in a culture of transcendent law, that is at some distance to State law. It is an assemblage of legality with its own assemblage of enunciation, its own arrangement of bodies and people, its own territories, and its own lines of flight. It is an assemblage of legality marked by quite considerable relative deterritorialisations and lines of flight, where existing law is dispensed with and new rights created on the basis of consideration of equity and justice. This doing law differently involves Equity moving off an extensive plane of molar organisation and entering an intensive field of the case, where there is law but there are also sensations, intensities, affecting and being affected, becomings. The rights created by Equity get overcoded as law, but in their creation they are the establishment of blocks of sensation-intensity-affect-event consistencies, and the practise of creating solutions without precedent to intensive problems of justice and desire (Thorner v Major: an almost wordless intensive field of sensations and affects where Equity intervenes to machine a consistency of sensations, intensities and affects in creating the new right).

The Equitable jurisdiction, of course, sometimes moves closer to overcoded law and the plane of organisation, sometimes wanders more wildly into the intensive field of the case and the creation of new right consistencies, but the mere fact that it does operate in the intensive social field makes Equity a jurisdiction of doing law (a little) differently.

THE GOVERNMENTALIZATION OF INJUNCTIVE RELIEF

NICK PIŠKA (UNIVERSITY OF KENT)

The injunction is usually taken to be a banal private law remedy protecting legal or equitable rights, although it continues to be inscribed within the discourse of equity as the 'quintessential equitable remedy' and 'possibly the most famous and effective child of equity'. In the course of the last century or so injunctive relief has undergone something of a transformation, shifting from a private law remedy tied to a discourse of equity to a 'tool of government', which drawing on governmentality studies I will call the governmentalization of injunctive relief. In this paper I will sketch the transformations in the 'jurisdictions' of injunctive relief that made possible the emergence of the injunction as a tool of government, and will ask how the governmentalization of injunctive relief is tied to particular rationalities and techniques of governance. I will end with some comments on governmentality and equitable relief more generally.

EQUITY'S SUBJECTS

MATTHEW STONE (UNIVERSITY OF ESSEX)

This paper examines the articulation and production of multiple subjectivities through the discourses and institutions of equity. Whilst resisting any claim of a continuous genealogy, it presents a fragmented look at the various and changing ways in which a subject of equity has been constructed. Ecclesiastical knowledge, relational structures of ethics, and governmental norms of commerce and family life have all, in divergent contexts, fed into the discursive jurisdiction of equity in informing a sense of individual identity and duty. Implicit in the argument of this paper is a scepticism over the existence of an ahistorical and singular voice behind equitable norms.

"WHERE THE SHOE PINCHES": TRUE EQUITY IN TROLLOPE'S *THE WARDEN*

GARY WATT (UNIVERSITY OF WARWICK)

The name of equity is captured for many causes and each warden will claim to have jurisdiction over its captive. The court of the divine will say that equity is God's preordained order for human society. The Court of Chancery will say that it is an improvement on the Common Law. Equity in the social sense will look to the fair. Equity in the financial sense will look to the share. Then there is equity in the Aristotelian sense of *epieikeia*, which is a personal ethic that is slow to judge at all, unless it is to judge the self. Anthony's Trollope's *The Warden* provides a rich and complex case study in all these candidate equity jurisdictions, and more besides. My aim is to explain why the title character, the warden of Hiram's hospital, believes that there is, in the midst of all the arguments, a "true" equity to be discovered. And I aim to explain why I agree with him.