

# Chapter 1

## Introduction

That conscience played an essential role in the development of English equity is a commonplace. C.K. Allen observes that ‘a philosophical and theological conception of *conscience*’ was the ‘one general principle which more than any other influenced equity’.<sup>1</sup> A.W.B. Simpson similarly says that ‘the primary principle of decision’ in the ‘fifteenth- and early-sixteenth-century court of Chancery was *Conscience*’,<sup>2</sup> and W. Barbour refers to conscience as a ‘juristic principle’ proper to at least the early Chancery.<sup>3</sup> Helmut Coing points out that the ‘prominence of conscience is peculiar to English equity,’ and finds ‘no parallel ... in Aristotle’s doctrine of equity or in the civil law’.<sup>4</sup> Jurists of the early period clearly declared that conscience was central. Christopher St. German (c. 1460–1540/41), whose work ‘set the tone’ for ‘almost all’ English legal reflection on equity in the sixteenth century, ‘preserved the teaching of the canon law of the medieval church and its philosophical ideas of conscience’;<sup>5</sup> Edward Hake (c. 1545–c. 1604) distinguished Chancery equity from

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<sup>1</sup> Carleton Kemp Allen, *Law in the Making* (6<sup>th</sup> edn, Oxford, 1958), p. 389.

<sup>2</sup> A.W.B. Simpson, *A History of the Common Law of Contract: The Rise of the Action of Assumpsit* (Oxford, 1975), p. 397.

<sup>3</sup> Willard Barbour, ‘Some Aspects of Fifteenth-Century Chancery’, *Harvard Law Review*, 31/6 (1918): 834–59, p. 838. D.E.C. Yale uses this same expression in the ‘Introduction’ to his edition of *Lord Nottingham’s Chancery Cases* (2 vols, London, 1957), vol. 1, p. xxxvii.

<sup>4</sup> Helmut Coing, ‘English Equity and the *Denunciatio Evangelica* of the Canon Law’, *Law Quarterly Review*, 71(1955): 223–41, p. 224. This observation requires qualification. Joseph Story, for example, speaks of the ‘settled distinction’ in the civil law ‘between natural obligations, upon which no action lay, but they were merely binding in conscience, and civil obligations, which gave origin to actions’ (*Commentaries on Equity Jurisprudence* (Boston, 1836), vol. 1, p. 3). Elsewhere, quoting Cicero, he suggests that the Roman Prætor judged ‘according to equity and conscience’ (*ibid.*, p. 7n.). Similarly, Lord Nottingham (1621–82) tells us that civilians divided rights into ‘*jus precarium*, for which no remedy, *jus fiduciarium*, for which a remedy but in conscience, and *jus legitimum*’ (*Lord Nottingham’s Manual of Chancery Practice* and ‘*Prolegomena of Chancery and Equity*’, ed. D.E.C. Yale (Cambridge, 1965; reprinted Holmes Beach, 1986), p. 239). Francis Bacon makes essentially the same observation in his *Reading on the Statute of Uses*, in *The Works of Francis Bacon*, eds J. Spedding, R.L. Ellis and D.D. Heath (14 vols, London, 1857–74), vol. 7, p. 401. This does not, of course, indicate that any general jurisdiction based on conscience existed in the civil law, but it does suggest that the concept was not alien to it.

<sup>5</sup> ‘Introduction’ to Edward Hake, *Epieikeia: A Dialogue on Equity in Three Parts*, ed. D.E.C. Yale (New Haven, 1953), p. xiii.

the equity of the law generally on the basis that the former ‘is drawne owte and deryved allonly from the conscience of the Lord Chauncellor or the Lord Keeper ...’;<sup>6</sup> and conscience remained an important concept for Lord Nottingham, late in the seventeenth century.<sup>7</sup> Indeed, observations such as Norman Underhill’s that ‘the “conscience” theory of the chancellor’s jurisdiction’ may have petered out after the seventeenth century<sup>8</sup> or J.J. Park’s that ‘tribunals *quae statuunt ex arbitrio boni viri, et secundum discretionum sanam*’ ‘can only be concurrent with an infant state of the science of jurisprudence’<sup>9</sup> notwithstanding, the discourse of conscience in equity has displayed remarkable staying power.<sup>10</sup>

An enduring difficulty with conscience as a juristic principle, one that may be self-evident to us moderns, is that conscience *appears* to be ‘a privatized or subjective notion’,<sup>11</sup> that is, ‘the subjective sense of right and wrong possessed by a particular individual’.<sup>12</sup> Legal judgment, we think, should be objective, should not be a matter of personal moral sensibility. So, for example, Peter Birks points out that ‘conscience of the [modern] intuitive kind is ... antithetical to the rule of law’.<sup>13</sup> Although this may seem obvious to us today, it has long been a locus of concern in the law. Early in the sixteenth century the author of *The Replication of a Serjeant at the Laws of England* cautioned about the uncertainty implicit in making the criterion of judgment the ‘conscience of oon man’, for ‘divers men, divers conscience’,<sup>14</sup> and every common lawyer is familiar with the jibe of John Selden (1584–1654), in the seventeenth century, that the dimensions of the Chancellor’s conscience might be as variable as the length of his foot.<sup>15</sup> During

<sup>6</sup> Hake, p. 122.

<sup>7</sup> See D.R. Klinck, ‘Lord Nottingham and the Conscience of Equity’, *Journal of the History of Ideas*, 67/1 (2006): 123–47 and Chapter 8 of the present study.

<sup>8</sup> Norman Underhill, *The Lord Chancellor* (Suffolk, 1978), p. 92.

<sup>9</sup> John James Park, *What Are Courts of Equity?* (London, 1832), p. 20.

<sup>10</sup> See, for example, Margaret Halliwell, *Equity and Good Conscience in a Contemporary Context* (London, 1997), D.R. Klinck, ‘The Unexamined “Conscience” of Contemporary Canadian Equity’, *McGill Law Journal*, 46/3 (2001): 571–614, and D.R. Klinck, ‘The Nebulous Equitable Duty of Conscience’, *Queen’s Law Journal*, 31/1 (2005): 206–58.

<sup>11</sup> Sharon K. Dobbins, ‘Equity: The Court of Conscience or the King’s Command, the Dialogues of St. German and Hobbes Compared’, *Journal of Law and Religion*, 9/1 (1991–92): 113–49, p. 127.

<sup>12</sup> ‘Introduction’ to Christopher St. German, *Doctor and Student*, eds T.F.T. Plucknett and J.L. Barton (London, 1974), p. xxvi.

<sup>13</sup> Peter Birks, ‘Annual Meigunyah Lecture: Equity, Conscience and Unjust Enrichment’, *Melbourne University Law Review*, 23/1 (1999): 1–29, p. 22.

<sup>14</sup> *Christopher St. German on Chancery and Statute*, ed. J.A. Guy (London, 1985), p. 101.

<sup>15</sup> *Table Talk of John Selden*, compiled by Richard Milward, ed. Frederick Pollock (London, 1927), p. 43.

the same epoch, Sir Bulstrode Whitelocke (1605–75), one of the Commissioners of the Great Seal during the Commonwealth period, initially expressed reluctance to accept the office because, while ‘[t]he Judges of the Common Law have certain rules to guide them; a Keeper of the Seals hath nothing but his own conscience to direct him . . . . The proceedings in Chancery are *secundum arbitrium boni viri*, and this *arbitrium* differeth as much in several men, as their Countenances differ’.<sup>16</sup> So, what has been identified as the guiding principle of decision in the Court of Chancery, at least historically, has also been attacked as inimical to the very idea of law as comprised of determinate rules.

That conscience might be a variable or mutable standard is not the only—or arguably the most sinister—implication of this concern. As Story for example explains, it potentially also reduces the judicial function to a ‘formidable instrument of arbitrary power’: ‘[i]t would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting . . . *arbitrio boni judicis*, and it may be, *ex aequo et bono*, according to his own notions and conscience; but still acting with a despotic . . . authority’.<sup>17</sup> This implication, too, was a matter of bitter complaint, at least by the mid-seventeenth century.<sup>18</sup>

There are several possible responses to this apparent incommensurability of conscience with what might be regarded as essential features of law. At this point, I want to highlight two of the main ones, which will become recurrent issues in this study.

The first of these I have already adumbrated. Notwithstanding W.H. Bryson’s somewhat surprising claim that ‘[t]he concept of conscience is the same today as it was in the sixteenth century, a sense of absolute right versus wrong’,<sup>19</sup> the consensus of commentators seems to be that the concept of conscience, at least during the late medieval period, was quite different from what it is today. While I do not wish at this stage to explore the nuances, it is clear that at least pre-Reformation accounts of conscience included a significant objective dimension.<sup>20</sup> A quick way of summarizing this point is to adopt Potts’s observation that, to the medieval mind, conscience was not a matter of belief or opinion, however genuine

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<sup>16</sup> Bulstrode Whitelocke, *Memorials of the English Affairs* (London, 1682), p. 373; EEBO image 49724:187.

<sup>17</sup> Story, p. 21. And see J.H. Baker, *The Oxford History of the Laws of England, Volume VI 1483–1558* (Oxford, 2003), p. 43, referring to ‘the support which the enforcement of one man’s view of conscience lent to the despotic tendency of the Chancery’.

<sup>18</sup> See, for example, D.R. Klinck, ‘Imaging Equity in Early Modern England’, *Canadian Bar Review*, 84/2 (2005): 217–47, pp. 238–44.

<sup>19</sup> ‘Introduction’, *Cases Concerning Equity and the Courts of Equity 1550–1660*, ed. W.H. Bryson (2 vols, London, 2000), vol. 1, p. xlii.

<sup>20</sup> See, for example, T.C. Potts, *Conscience in Medieval Philosophy* (Cambridge, 1980) and Michael G. Baylor, *Action and Person: Conscience in Late Scholasticism and the Young Luther* (Leiden, 1977).

or sincere, but in some sense a matter of *knowledge*.<sup>21</sup> An objective account of conscience, although perhaps paradoxical to us, would ostensibly be easier to reconcile with its status as a juristic principle, a measure of law.

So, one possible answer to the apparent rift between the subjectivity of conscience and the necessary objectivity of law is that, at the time when conscience was the informing principle of equity, it was itself an objective notion and therefore not incongruous with law. Apart from the obvious objection that, while this might justify the prominence of conscience in early equity it cannot justify its continuing invocation today—a point which is only by implication part of my study—this explanation raises other difficulties. Notably, as we have seen, there were complaints about the perceived subjectivity of conscience at least as long ago as the sixteenth century. At a time when the ‘science of jurisprudence’ was ostensibly still in an ‘infant state’ and when conscience was still seen as intimately a part of equity, it was viewed by some as problematic.

Any rationalization of conscience as a juristic principle that depends upon the argument that the concept has changed, perhaps radically, over time cannot rely on the crude dichotomy of ‘medieval’ *versus* ‘modern’. Rather, even accepting the idea of conscience as objective in, say, the late fifteenth century, we must address how that concept might have evolved in the period which is the main focus of this study—essentially the sixteenth and seventeenth centuries. Indeed, it is largely because this period is transitional—heir to medieval ideas, womb of modern ones—that it is both challenging and potentially illuminating.

At this stage, I wish merely to flag two of the ways in which this transition, particularly relating to conscience, has been described. The first is the ostensible change in emphasis from ‘conscience’ to ‘equity’ as the focus of Chancery’s judicial activity. Typical are Sir John Baker’s account of the ‘shift from “conscience” to “equity”’<sup>22</sup> and J.L. Barton’s opinion that we are largely indebted to Christopher St. German for the fact that ‘we have courts of equity rather than of conscience at this day’.<sup>23</sup> Such observations might suggest is a supersession of ‘conscience’ by ‘equity’—a proposition that must be carefully scrutinized.

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<sup>21</sup> Potts, pp. 20, 41.

<sup>22</sup> J.H. Baker, *An Introduction to English Legal History* (4<sup>th</sup> edn, London, 2003), pp. 106–8. Timothy S. Haskett, ‘The Medieval English Court of Chancery’, *Law and History Review*, 14/2 (1996): 245–313, p. 268, referring to an earlier edition of Baker’s book, writes: ‘Baker sees conscience as the hallmark of the medieval chancellors in their court and equity in the Court of Chancery as something significantly different, a product of developments in the Tudor age’. W.J. Jones, *The Elizabethan Court of Chancery* (Oxford, 1967) appears to draw the line at a somewhat different point, ‘conscience’ being the appropriate descriptor ‘before the seventeenth century’ and ‘equity’ for ‘that modern and distinct kind of case law of which Nottingham was the greatest exponent’ (p. 419n.).

<sup>23</sup> J.L. Barton, ‘Equity in the Medieval Common Law’ in R.A. Newman (ed.), *Equity in the World’s Legal Systems* (Brussels, 1973), pp. 139–55, p. 154.

Another way in which the change has been described, one not unrelated to the first, is suggested by D.E.C. Yale who, while observing that the earlier concept of conscience had a continuing influence on the development of Chancery equity, says that ‘canonist conscience’ was superseded ‘by what may be called, for want of a better phrase, the Protestant conscience’.<sup>24</sup> That is, the Reformation effected changes in the conception of conscience and the locus of its authority which almost certainly impacted its position as a juristic principle. My object at this point is not to give an elaborated account, but merely to suggest the broad contours of the change the Reformation wrought. Meg Lota Brown, fairly typically, identifies the main difference as between ‘authoritarian’ Catholic casuistry, ‘based on precedent and canon law’, and the Protestant emphasis on individual conscience and direct engagement with scripture.<sup>25</sup> One can imagine how a developed casuistry based on Latin authority and administered by professionals according to established rules would be more congruent with law than is the isolated individual conscience, left to its own resources, or to those resources animated by faith. Baylor suggests that while in medieval scholasticism the ‘object of the action of the conscience is restricted to particular moral actions’ for Luther at least conscience definitively concerned itself ‘with the individual or person as a whole’.<sup>26</sup> Conscience as concerned with specific actions, rather than with one’s overall moral condition, appears more relevant to the legal sphere, focused as it is on instances of conduct.

One must, of course, be extremely wary of such generalizations. This may be no more starkly illustrated than by considering Benjamin Nelson’s assertion that, by contrast with the Catholic ‘pattern’, ‘[t]he Court of Conscience and the Court Christian disappeared in the Protestant lands, and with them the historical notions of a law of conscience, human judges of conscience, a casuistry’.<sup>27</sup> In England, indubitably a ‘Protestant land’, the court of conscience emphatically did not disappear, nor did the notion of a branch of law somehow informed by conscience.<sup>28</sup> The seventeenth century in England has, not inappropriately, been

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<sup>24</sup> ‘Introduction’ to Hake, p. xiv.

<sup>25</sup> *Donne and the Politics of Conscience in Early Modern England* (Leiden, 1995), pp. 25, 30, 36. See also Camille Wells Slight, *The Casuistical Tradition in Shakespeare, Donne, Herbert and Milton* (Princeton, 1981), p. 35. Alexandra Walsham makes the somewhat different but related point that the more frequent post-Reformation occasions for people to assert conscientious objections to religious conformity of whatever stripe contributed to ‘relativising and internalising the concept of conscience’ (‘Ordeals of Conscience: Casuistry, Conformity and Confessional Identity in Post-Reformation England’ in H.E. Braun and E. Vallance (eds), *Contexts of Conscience in Early Modern Europe 1500–1700* (Basingstoke, 2004), pp. 32–48, p. 33.

<sup>26</sup> Baylor, pp. 201–2.

<sup>27</sup> Benjamin Nelson, ‘Conscience and the Making of Early Modern Cultures: the Protestant Ethic Beyond Max Weber’, *Social Research*, 36/1 (1969): 5–21, p. 16.

<sup>28</sup> John Witte Jr., *Law and Protestantism: The Legal Teachings of the Lutheran Reformation* (Cambridge, 2002), pp. 160–61, outlines the importance of conscience in

called ‘the Age of Conscience’;<sup>29</sup> there developed a distinctive and influential Protestant casuistry. And, albeit that casuistry emphasized the engagement of the individual conscience, it was far from endorsing the idea that what was concordant with conscience was simply a matter of personal moral preference.

One strategy, therefore, for addressing the ‘subjective conscience *versus* objective law’ conundrum is to say that, ‘historically’, conscience as understood *was* objective, or more objective. But for the sixteenth and seventeenth centuries this does not resolve the difficulty. It identifies the difficulty. An important issue is the persistence of conscience, or talk about conscience, in relation to equity in the face of its ostensible subjectivization or even relativization after the Reformation.

A second conventional response to the conundrum is to narrow the claims of conscience as a juristic principle by subdividing it broadly into the non-justiciable and the justiciable. That is, the distinction is not simply between ‘strict law’ and conscience comprehensively; rather, within the concept of conscience itself there is a distinction between those matters which are susceptible to regulation by a court of equity and those which in any case must be left to the person himself. As Story points out, ‘[t]here are many cases against natural justice, which are left wholly to the conscience of the party, and are without any redress, equitable or legal’.<sup>30</sup> The ways in which the demarcation is described vary, but they do illustrate a theme, a theme which implicitly recognizes the tenuousness of invoking conscience comprehensively as a principle of legal judgment.

The distinction pre-dates the period which is my main focus here. As Simpson for example notes, canon law distinguished between the internal forum, which related to ‘the individual’s spiritual health, and the avoidance of sin’, and the external forum, the ecclesiastical courts, where the ‘concern was with the welfare of the Church and its members generally’.<sup>31</sup> He points to at least one case in which this distinction was a matter of contention in Chancery and in which, indeed, the Chancellor, Archbishop John Morton (1420–1500), apparently regarded himself as being *in foro conscientiae* just by virtue of his being in his own court.<sup>32</sup> This might indicate some blurring of the distinction at that, pre-Reformation, time. By contrast, Baker cites a dictum attributed to Fitzjames C.J. (d. 1539)—‘Two maine principles that guide Humane nature are conscience and law; by the one we are

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the legal theory of the influential German Lutheran jurist Johann Oldendorp (1486–1567), albeit that theory did not involve a separate jurisdiction.

<sup>29</sup> K. Thomas, ‘Cases of Conscience in Seventeenth-Century England’ in J. Morrill, P. Slack and D. Woolf (eds), *Public Duty and Private Conscience* (Oxford, 1993), pp. 29–56, p. 29. Compare Max. Radin, ‘The Conscience of the Court’, *Law Quarterly Review*, 48 (1932): 506–20, p. 508.

<sup>30</sup> Story, p. 16. See also p. 203, where he remarks that many things that ‘may be reproved in sound morals ... are left without any remedy, except by an appeal *in foro conscientiae* to the party himself’.

<sup>31</sup> Simpson, p. 381.

<sup>32</sup> *Ibid.*, p. 399.

obliged in reference to another world, the later in relation to this’—which he, Baker, sees as implying that conscience might be ‘exclude[d] ... from human law entirely’.<sup>33</sup> Perhaps another early variation on the theme is the *denunciatio evangelica* as described by Coing: at first a ‘purely penitentiary’ procedure, it later appeared in a severable version which aimed at ‘redress of a material wrong as well as at penitence’, becoming a *denunciatio judicialis privata*.<sup>34</sup>

Concern to make the distinction persisted, and perhaps became more urgent, during the sixteenth and seventeenth centuries. Of St. German’s time, Baker says that the ‘essence of the debate over equity and law ... lay in the difficulty of deciding which questions of conscience should be left entirely to the party’s conscience’.<sup>35</sup> In his *Reading on the Statute of Uses*, Francis Bacon quotes Sir Edward Fenner J.’s (d. 1611/12) observation that uses are ‘ordered and guided by conscience, either by the private conscience of the feoffee, or the general conscience of the realm, which is Chancery’.<sup>36</sup> In this instance, the operation of the two kinds of conscience may be concurrent, but Fenner J. does differentiate private from public conscience. Perhaps most famously, Lord Nottingham, who wrote ‘God forbid, a man should use no better conscience than the Chancery can compel him, however the rule must always hold, that ‘tis not fit for a court of equity to do everything that is fit to be done’,<sup>37</sup> in more than one place distinguishes between *conscientia politica et civilis*—the proper focus of equity—and *conscientia naturalis et interna*<sup>38</sup>—the latter comprehending matters ‘which cannot be reformed by the regular and political administration of equity’.<sup>39</sup>

Just as one might attempt to resolve the ostensible incongruity between conscience and law by dividing the concept of conscience temporally and saying that at a particular time conscience was understood objectively and therefore could be coherently assimilated to law, so one might divide the concept atemporally and say, in effect, ‘we are not talking about conscience *tout court*, but about one segment of it, which is “public” and therefore (in some way) subject to agreed criteria’. But just as the temporal distinction, at least for the early modern period, is problematic, so is this attempt to divide the substance of conscience. Saying that there is an objective, public conscience, distinguishable from private or personal conscience, and that the former alone is the proper sphere of equity,

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<sup>33</sup> ‘Introduction’ to *The Reports of Sir John Spelman*, ed. J.H. Baker (2 vols, London, 1978), vol. 1, p. 40n., citing Brit. Lib., MS Sloane 1523, f. 31.

<sup>34</sup> Coing, pp. 225, 227.

<sup>35</sup> ‘Introduction’, *Reports of Sir John Spelman*, p. 40n.

<sup>36</sup> Fenner J. cited in Bacon, *Reading on the Statute of Uses*, p. 401. The editor’s note states that Bacon is the only source for these observations by Fenner J.

<sup>37</sup> *Prolegomena*, p. 194.

<sup>38</sup> *Cook v. Fountain* (1676) in *Lord Nottingham’s Chancery Cases*, ed. D.E.C. Yale (2 vols, London, 1957), vol. 1, p. 371.

<sup>39</sup> *Prolegomena*, p. 194.

is one thing. Identifying the criteria for making the distinction is quite another, perhaps especially for the period in question, which was probably less prone than we are to drawing distinctions between law and morality, between the secular and the sacred, and so on. As John Donne said in a sermon in 1621, although our activities may ‘seeme but *Morall*, or *Civill*, or *domestique*, yet they have a deeper tincture, a heavenly nature, a relation to *God*, in them’.<sup>40</sup> Just as the temporal development of the concept of conscience will be a central focus of my inquiry, so will be the exploration of the distinction between those matters of conscience which are properly cognizable by judicial equity and those which are not.

Donne’s observation should remind us not only that separating the ‘civil’ from the ‘heavenly’ may be an intractable enterprise, but that from a certain perspective it may not ultimately be crucial. Probably most of the commentators, religious or legal, I shall be considering would have believed that there was a sanction beyond the temporal for violations of the imperatives of conscience. In the end, it is not one’s conscience that judges, but God, whose judgment is perfect and infallible, however awkwardly calibrated the assessments of human institutions may be. Thus, for example, James Forsyth, far from fortuitously, entitles his sermon about God’s final judgment *The Great Day of Chancery*, explaining that, at that time, ‘the iust Iudge of all the world, will according to the euidence of euery mans conscience, distribute righteous Iudgement’.<sup>41</sup> What this means is that it may not be critical for the temporal Court of Chancery to define precisely the distinction between conscience that is properly justiciable and conscience that is not, since a higher ‘court’ will ultimately put everything right.

A number of other dimensions of my subject warrant mention at this stage, in anticipation of their arising later.

One of these is the obvious, but sometimes overlooked, point that considerations of conscience were not exclusive to equity. This aggravates the difficulty of discerning the sphere of conscience as something separate from law. Norman Doe, for example, makes at some length the point that, certainly during the medieval period, ‘conscience was ... extensively employed as a moral authority fundamental to the common law’.<sup>42</sup> Indeed, much of St. German’s project involved showing how the common law was conformable to conscience. This is not to suggest that every

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<sup>40</sup> *The Sermons of John Donne*, eds George R. Potter and Evelyn M. Simpson (10 vols, Berkeley and Los Angeles, 1953–59), vol. 3, p. 366.

<sup>41</sup> ‘Epistle Dedicatorie’ to *The Great Day of Chancery* (London, 1619), sig. A5r; EEBO image 5944:3.

<sup>42</sup> Norman Doe, *Fundamental Authority in Late Medieval English Law* (Cambridge, 1990; reprinted Holmes Beach, 2000), p. 132. See generally chapter 6, ‘Conscience in the Common Law’, in Doe. See also L.A. Knafla, ‘Conscience in the English Common Law Tradition’, *University of Toronto Law Journal*, 26/1 (1976): 1–16 and L.O. Pike, ‘Common Law and Conscience in the Ancient Court of Chancery’ in *Select Essays in Anglo-American Legal History*, ed. Association of American Law Schools (3 vols, Boston, 1908), vol. 2, 722–36.

rule of the common law was motivated by considerations of conscience, but many were. Even though law and juridical conscience are regularly set in opposition to each other, we should not think of them as mutually exclusive categories. Rather, we should probably think of much of law as embodying conscience and the ‘conscience’ of equity as being a kind of residue which the law has failed to embody—apart, of course, from that part of conscience which is in any case merely a matter for the confessional. If the line between conscience justiciable in equity and purely private conscience is blurred, so is the line between the former and law *per se*. One implication of this is that there is no radical discontinuity between law and equity, the latter being a more complete fulfilment of what is already implicit in the former. Another is that observations about conscience as it inheres in the law may be transferable to conscience in equity.

A second further dimension relates to what might be our tendency to think of conscience in equity as just yielding substantive principles or rules. Doubtless it does. But an important aspect of Chancery conscience involves procedural and evidentiary issues. Zofia Rueger observes that much of the early chancellors’ task involved ‘establish[ing] the truth of [a] complaint in accordance with conscience—*secundum conscientiam* ...’.<sup>43</sup> As late as the nineteenth century, Story could write that ‘Courts of Equity ... address themselves to the conscience of the defendant, and require him to answer upon his oath the matters of fact stated in the bill’, so that ‘every bill in Equity may be said to be, in some sense, a bill of discovery ...’.<sup>44</sup> This suggests that the chancellor, in deciding a cause, was not so much looking for or enunciating a new principle as he was considering more facts, or facts in a more searching way, including, typically, examining litigants under oath, which bound them in conscience to speak the truth. Thus, Barbour cites a case from about 1470<sup>45</sup> in which the chancellor says that his decision proceeds ‘*secundum conscientiam et non secundum allegata*’ and comments that this means ‘that the truth is to be discovered by any means within his power’.<sup>46</sup> Baker emphasizes that the conscience of equity relieved against the common law’s ‘inflexible system of pleading and proof’,<sup>47</sup> and that ‘[c]onscience was more within the realm of fact than law ...’.<sup>48</sup>

Recently, Mike Macnair has argued forcefully that the ‘technical’ meaning of conscience in equity should be understood primarily or even exclusively in these procedural or evidentiary terms.<sup>49</sup> Thus, ‘conscience’ would refer to means

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<sup>43</sup> Zofia Rueger, ‘Gerson’s Concept of Equity and Christopher St. German’, *History of Political Thought*, 3 (1982): 1–30, p. 26.

<sup>44</sup> Story, pp. 29–30.

<sup>45</sup> Y.B. 9 Edw. IV, 14.9.

<sup>46</sup> Barbour, ‘Some Aspects of Fifteenth Century Chancery’, p. 854.

<sup>47</sup> ‘Introduction’, *Reports of Sir John Spelman*, p. 39. See also Baker, *Oxford History*, p. 47.

<sup>48</sup> *Ibid.*, p. 43.

<sup>49</sup> ‘Equity and Conscience’, *Oxford Journal of Legal Studies*, 27/4 (2007): 659–81.

of accessing facts other than those authorized by strict legal rules of proof. These would include matters within the judge's private knowledge as well as information that could be extracted from parties by way of confession under oath. On this view, the distinction between justiciable and non-justiciable conscience would be marked by the availability of such evidence. As Baker observes, those facts that could not be known, even by these extraordinary means, would remain within the 'court of conscience' of 'the party's own soul'.<sup>50</sup> *Conscientia civilis et politica* would comprehend those matters which the Chancery could access; *conscientia naturalis et interna* would be those matters that remained concealed in the litigants' breasts.

Unquestionably, this procedural dimension was an important aspect of conscience in equity, and I shall refer to it throughout this study. At the same time, however, conscience in this context had a substantive dimension. It was commonly portrayed, at least in non-legal discourse, as having a tripartite function: it was *law[giver]*, *witness*, and *judge*. 'Whosoever ... understands ... these three Latine words, *Lex*, *Index* and *Judex*, or these three English words, a *Law*, a *Witnesse*, a *Judge*', writes one commentator, 'is in a good way ... to understand the nature and essence of Conscience'.<sup>51</sup> Another observes that the book of conscience consists of two volumes, the first "a Law-booke, wherein are set downe the grounds and principles of truth, and equity", and the second 'a *Chronicle*, or a *Register*, wherein all our workes are written'; when conscience gives judgment, 'it first reades ouer the Law booke ... then it turneth over the records ...'.<sup>52</sup> Conscience tells one what the rule should be, discloses relevant facts, and then judges by applying the rule dictated to the facts revealed. Macnair disputes that this general, or 'non-technical' meaning of conscience was the meaning in the context of *legal* equity. But, as we shall see, legal writers, when they define or describe the conscience of equity often refer to authors who adopt this view, and judges regularly seem to think in terms of the norms that conscience sets. When, for example, Lord Nottingham says that private conscience dictates what is *fit to be done*, beyond what Chancery will enforce, he is, I believe, speaking normatively. This study will address both the evidentiary and the normative aspects of the conscience of equity.

One further dimension that should be mentioned now might be called 'rhetorical'. Put simply, the word 'conscience' might have continued a part of the discourse of equity as a result of, or partly as a result of, rhetorical inertia or its rhetorical force. By rhetorical inertia, I mean the tendency for language to retain words after their original significance is attenuated—perhaps something like what is suggested by Bertrand Russell's observation that 'ordinary language

<sup>50</sup> 'Introduction', *Reports of Sir John Spelman*, p. 40.

<sup>51</sup> John Jackson, *The Booke of Conscience Opened and Read* (London, 1642), p. 13; EEBO image 103990:12.

<sup>52</sup> John Hughes, *St. Pavls Exercise, or, a Sermon of Conscience* (London, 1622), pp. 7–8; EEBO images 4483:7–8. Compare, for example, Anthony Cade, *Conscience, its Nature and Corruption* (London, 1661), pp. 2–3; EEBO image 54332:6.

is shot through with the fading hues of past philosophic theories'.<sup>53</sup> In the fifteenth century, 'conscience' as a juristic principle might have had a coherence, albeit a coherence based ultimately on untenable premises; long after this *raison d'être* had become obsolete, people continued, as a matter of habit, to speak of the 'court of conscience'. While such an argument may contain some truth, it seems to me to be too facile as an explanation. For one thing, there was too much deliberate attention paid to conscience in the judicial context for it merely to have been perpetuated subliminally: St. German, for example, wrestled with the concept and, a century and a half later, it was still a matter to which Lord Nottingham was addressing his mind.

By rhetorical force I mean the positive power that particular formulations might have to elicit certain responses. Arguably, 'conscience' is an evocative word of this kind that was more or less deliberately preserved for the role it could play in social ordering. Lowell Gallagher has explored this aspect of 'conscience' in relation to a number of discursive contexts—from the conflict between Queen Elizabeth and Mary Queen of Scots to Spenser's *Faerie Queene*—in the sixteenth century.<sup>54</sup> Broadly—and I am mindful of the pitfalls of paraphrase here—he maintains that 'official' discourses of conscience, such as casuistry and some legal discourse, were part of a 'stabilizing, normative' process by which 'marginal [presumably, subjective] psychological and moral states' could be absorbed into socially 'sanctioned or legitimized modes of thought and behavior'.<sup>55</sup> I take this to mean that human experience evinces idiosyncrasy of 'psychological and moral states', tending to militate against a stable, or at least uniform, social order. Practices like casuistry, which address particularities in institutional terms, are efforts (conscious or otherwise) to normalize or regularize such states. Like casuistry, equity—being the official discourse of conscience in the legal sphere—attempts to accommodate the particular, the aberrant, within a system, and thus to assimilate it to the system. This process is 'rhetorical' in at least two senses. First, 'conscience' has a heavy cultural resonance. To take just one example from the period, Henry VIII repeatedly invokes conscience in his questioning the legitimacy of his marriage to Katherine of Aragon: '[t]he special cause that moved me in this matter, is a certain scruple that pricked my Conscience ...'.<sup>56</sup> How disingenuous this appeal might be I do not know, but it is significant that he appeals to conscience as a kind of ultimate authority. Second, the exploitation of this resonance permits the managing of behaviour by the construction of whole discourses involving it. On this view, equity's attempt to portray conscience within a structure of ruledness involves taming it. Gallagher argues, however, that this discursive practice contains the

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<sup>53</sup> Bertrand Russell, *Wisdom of the West* (London, 1959), p. 309.

<sup>54</sup> Lowell Gallagher, *Medusa's Gaze: Casuistry and Conscience in the Renaissance* (Stanford, 1991).

<sup>55</sup> *Ibid.*, pp. 2, 6.

<sup>56</sup> George Cavendish, *The Life and Death of Thomas Woolsey, Cardinal* (London, 1667), p. 89; EEBO image 64261:53.

seeds of its own subversion: since the discourse of conscience keeps coming back to the particular, or even the subjective, it has a destabilizing effect. While, say, the institutional power of the Church in medieval times might have been sufficient to keep the destabilizing tendencies of conscience in check, the fragmentations associated with the Reformation, including the questioning of church-as-authority-or-mediator, compromised such power. On this view, expressions of concern about ‘legal uncertainty’ attendant upon retaining conscience as a juristic principle themselves might mask the more radical possibility that the release of conscience threatens uniform social order itself, a possibility complicated by, or manifested in, the growing pressure for allowance to be made for diversity of conscience, associated particularly with the religious and political dislocations of the seventeenth century.

While a thesis such as Gallagher’s is intriguing, I am not simply reiterating it as my own. But it is an aspect of the issue which should be borne in mind. It is always possible that the elusiveness of the juridical meaning of ‘conscience’ arises from the fact that what it entails is little more than ‘words, words, words’. Perhaps inevitably, conscience is a concept that pulls in opposite directions and whose rhetorical weight can be invoked to buttress either of its divergent tendencies.

Recently, Mark Fortier has developed the thesis that early modern England was, among other things, importantly ‘a culture of equity’.<sup>57</sup> He argues that this equity was not confined to the realm of the law, but encompassed as well ‘the world of letters’ and ‘private morality and religion’.<sup>58</sup> My project, though related, is narrower. My primary focus is on equity as a concept in law, and my concern is with essentially just one feature of that equity, namely, conscience. As I have already intimated, I shall be exploring how conscience was, or could have been, understood as an informing principle of legal equity. Inevitably, however, in pursuing that inquiry, I shall regularly have to refer to contexts such as ‘morality’ and ‘religion’—and perhaps at least implicitly to ‘the world of letters’ of which each of these discursive spheres is a dimension. In other words, I shall be situating the juristic principle of conscience within a more general culture of conscience.

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<sup>57</sup> Mark Fortier, *The Culture of Equity in Early Modern England* (Aldershot: 2005) at 11.

<sup>58</sup> *Ibid.*