A JUDGE'S GUIDE TO LEGAL CHANGE IN PROPERTY: MERE EQUITIES CRITICALLY EXAMINED

BY JUDE WALLACE* AND YURI GRBICH**

This article examines the development of equities as proprietary interests and their place in the law of priorities. After reviewing the two major decisions, it suggests new ways of rationalising the body of case law. The processes of judicial creation are criticised and a new model of policy based decision-making is supported.

I INTRODUCTION

1. *The Problem*

This article critically analyses a particular judicial tool used for giving birth to a new property remedy: the "mere equity". Property law has a long, involved history which tends to imbue it with an aura of certainty and stability, an image that is not entirely justified. In recent years there has been much ambitious innovation. Among other devices, equitable remedies have been resurrected as a vehicle for renewal; however, they have not been used in a systematic and constructive way. Equitable intervention in recent decisions has not been supported by analysis of the conflicting demands of stability and change in property law, nor has it produced any concerted attempt to articulate and develop a cohesive model to guide judicial response to demands for new remedies. If anything, the techniques of legal renewal have systematically concealed innovation and *a fortiori*, the reasons for it. Judicial decision-making has favoured case-by-case manipulation of legal rules and categories. It has relied on fictions and still more categories, avoiding open articulation of policies and values supporting change. There has been no systematic weighing of alternative options for change. Consequently, there has been more confusion and anguish over change than is necessary. Such formalistic legal renewal is not confined to property law but the aura of certainty in this area of law has exacerbated the problem. The mere equity device is symptomatic of the flawed manner in which innovation in the common law is brought about.

2. *The Argument*

The argument distinguishes two types of recurrent judicial questions: questions that require application of established rules and questions which are on the frontier of these rules. These are not dichotomous models. In theory they are at opposite ends of the spectrum. For

* LL.B. (Melb.), LL.M. (Va.); Lecturer in Law, Monash University.
** LL.M. (Well.), Ph.D. (Lond.); Senior Lecturer in Law, Monash University.

simplicity the middle ground in the range will largely be ignored. Questions which invoke established rules are the subject of the classic or formal analysis of dispute resolution. The characteristics of this analysis include deterrence of specific behaviour by a more or less efficient application of a rule attaching a sanction at the behest of an offended party through an accessible and prescribed legal authority. Even if this instrumental or positivist view of law was the most frequent social experience of the impact of law (and it probably is not), equities and similar cases raise a host of questions that cannot be characterised by this formal analysis. Typical equities cases present parties who have set little value on a continuing relationship. They involve a proportionately high material gain to the successful litigant, especially if we take the level of personal resources available to the litigant into account. More significantly, there are no certain rules or clearly specified patterns of illegal behaviour. Even if facts in equities cases can be proven, possible interpretations range over an enormous spectrum of moral, social, economic and political implications which a property lawyer is not adequately trained to consider.

In our view the techniques which are useful to structure judicial discretion in questions involving established rules and the frontier questions cannot be the same. Failure to distinguish appropriate techniques creates the problem. The limitation of innovation that formalism encourages is especially inappropriate in the area of frontier questions. Innovation by the invention of categories, like equities, can inhibit changes; furthermore, it may cause judges to concentrate on the wrong questions when they do decide to bring about change. Lawyers who take the process of legal renewal seriously do not require more categories; they require less. Labels like "trusts", "constructive trusts", "estoppel" and even "mere equities" tend to develop a fixed connotation which inhibits a secure, wide-based, thoughtfully directed development of the law. The artificiality and overlap of the categories makes legal argument depend too much on verbal manipulation and too little on substantive analysis of objectives and competing priorities. A rush to new categories to justify new remedies encourages new verbal games. Judges need to develop a coherent framework of principles which justify legal innovation. They need to distinguish clearly those frontier issues which do not lend themselves to the application of established rules.

The traditional model of judicial innovation[1] is based on a cautious step-by-step extension of existing rules.[2] It inhibits assessment of under-

[1] See the model of judicial reasoning based on logic or history and precedent in B. Cardozo, *The Nature of the Judicial Process* (1921) 9. Contrast the method or tradition of justice according to the morals, welfare and mores of the day with the method of sociology and "the judge as legislator", *id.*, 30-31.

[2] See C. Lindblom, "The Science of Muddling Through" (1959) 19 *Public Administration Review* 79.

lying policies and it is not appropriate where new rules are being established or where old rules have become thoroughly confused. In frontier areas clear rules are not available and fundamental policy choices are not settled. Precedent is not of major assistance in solving new problems and reference back to existing rules can operate to conceal avenues for innovation. To borrow a homely analogy of De Bono, you cannot dig a hole in the right place by digging a bigger, better and altogether more impressive hole in the wrong place.[3] If new remedies are to be justified, that justification ought specifically to articulate the standards and policies invoked. Far from creating obstructive subjectivity and uncertainty, this will facilitate principled and orderly innovation in frontier areas. In short, we are advocating the type of policy-orientated judicial decision-making that Clark and Trubek describe.[4] This requires us to side-step the debate as to whether judges should adopt the Clark and Trubek model or the conservative model of judicial practice; while we are aware of the literature of judicial conservatism,[5] the equity cases show judges are clearly creating law according to subjectively selected criteria. Thus, whether they should or should not do this is a moot issue. The real issue is improving their techniques of creativity and legal renewal. The frontier area of equities merits a broader analytical perspective than is apparent in existing literature and judgments. It is time our courts and commentators adopted alternative strategies.

3. *Scheme of the Article*

The article is in two parts. Part one consists of a critical analysis of the existing authorities; it demonstrates that the mere equity is not a useful device for solving problems and that authority is against its use. Part two explains why mere equities have not worked; it draws some wider inferences about the most efficacious means of legal renewal in property. Happily, the existing law on equities has already been the subject of a number of descriptive articles.[6] There is little point in going over the same ground in this analysis. This allows us to "pick

---

[3] E. De Bono, *The Use of Lateral Thinking* (1971) 22.

[4] C. Clark and D. Trubek, "Creative Role of the Judge: Restraint and Freedom in the Common Law Tradition" (1961) 71 *Yale L.J.* 255.

[5] Possibly the strongest argument is in R. Dworkin, "Hard Cases" (1975) 88 *Harv. L. Rev.* 1057. Also relevant is the argument for judicial restraint by Mr Justice Frankfurter and the search for neutral principles begun by H. Wechsler, "Toward Neutral Principles of Constitutional Law" (1959) 73 *Harv. L. Rev.* 1, both of which are directed to public law issues.

[6] H. Wade, "Licences and Third Parties" (1952) 68 *L.Q. Rev.* 337; A. Hargreaves, "Licensed Possessors" (1953) 69 *L.Q. Rev.* 466; R. Maudsley, "Licences to Remain on Land (other than a Wife's Licence)" (1956) 20 *Convey.* 281; F. Crane, "Estoppel Interests in Land" (1967) 31 *Convey.* 332; A. Everton, " 'Equitable Interests' and 'Equities'—In Search of a Pattern" (1976) 40 *Convey.* 209; G. Cheshire, "A New Equitable Interest in Land" (1953) 16 *Mod. L. Rev.* 1;

over the bones" of the cases and to concentrate on an examination of the rules in the broader perspective of future development. Thus far the core of the traditional debate about equities is between conveyancing technocrats, who argue that equities do not or ought not to exist because they are an impediment to cheap and reliable conveyancing or because they are open-ended,[7] and realists, who appraise the device as a necessary means of mitigating the rigour of the law and who see virtue in extending it even if its development is haphazard.[8] As currently conducted, this debate is largely unproductive. Little has been done to analyse equities as a tool for granting remedies. It is an illusion ask whether mere equities constitute a class of rights which give claimants substantive remedies in the borderline areas and then to ask what rights are included in the category. At most it classifies remedies after the event. Some commentators count the cases and say equities exist; others count them and say they do not. The conflict has gone beyond the point where the traditional arbiter, "authority", can settle the debate. The analyses have broken down: they cannot help us decide whether a remedy ought to be created in any new situation and cannot invoke useful generalisations of the circumstances in which courts have already created remedies.

II THE AUTHORITIES

1. *National Provincial Bank* v. *Ainsworth* and *Latec* v. *Terrigal*

The decision in *National Provincial Bank Ltd* v. *Ainsworth*[9] contains an authoritative denial by the House of Lords that a category of proprietary interests called equities is recognised by the law.

A husband was sole registered proprietor of a house. He deserted his wife and four children, left them in possession of the house and created a registered third mortgage over the property in favour of the National Provincial Bank. The Bank claimed it knew nothing of the wife. The House of Lords held that the wife had no grounds for resisting the interest of the Bank. Lords Hodson,[10] Guest[11] and Cohen[12] viewed the right of the wife as purely personal and "not in any sense running with

---

R. Poole, "Equities in the Making" (1968) 32 *Convey.* 96; R. Smith, "Licences and Constructive Trusts—'The Law is What it Ought to be' " [1973] 32 *Camb. L.J.* 123; D. Jackson, "Estoppel as a Sword" (1965) 81 *L.Q. Rev.* 84, 223; M. Neave and M. Weinberg, "The Nature and Function of Equities" (1978) 6 *Uni. of Tas. L. Rev.* 24; A. Everton, "An Equity to Remain . . ." (1976) 40 *Convey.* 209.

[7] The strongest position is taken by H. Wade, note 6 *supra*. Also relevant are R. Maudsley, note 6 *supra*; A. Everton, " 'Equitable Interests' and 'Equities'—In Search of a Pattern" note 6 *supra*; R. Meagher, W. Gummow and J. Lehane, *Equity Doctrines and Remedies* (1975) 96-98; R. Poole, note 6 *supra*, 114.

[8] D. Jackson, *Principles of Property Law* (1967) 72-77; G. Cheshire, note 6 *supra*.

[9] [1965] A.C. 1175.

[10] *Id.*, 1225-1226.

[11] Who concurred with Lord Hodson, *id.*, 1229.

[12] *Id.*, 1228.

the land".[13] Lord Wilberforce[14] considered the policy question of whether the wife should be given an equitable estate in the house. Lord Upjohn went further; he directly confronted the reasoning of Lord Denning in the Court of Appeal to the effect that the wife had a licence coupled with an equity and more significantly, that the equity was distinguishable from an equitable interest. Lord Upjohn held that mere exclusive occupation could not create a right in the land; neither could mere notice create such a right. The right in the land must have some other root: "[T]o create a right over the land of another that right must in contemplation of law be such that it creates a legal or equitable estate or interest in that land and notice of something though relating to land which falls short of an estate or interest is insufficient".[15] He immediately went on to list the common equitable interests:

> [N]o lesser interests have been held to be sufficient. A mere "equity" used in contra distinction to an "equitable interest" but as a phrase denoting a right which in some circumstances may bind successors is a word of limited application . . . . I myself cannot see how it is possible for a "mere equity" to bind a purchaser unless such an equity is ancillary to or dependent upon an equitable estate or interest in the land.[16]

He summed up by saying that "a mere 'equity' naked and alone is, in my opinion, incapable of binding successors in title even with notice; it is personal to the parties".[17] These are very strong words from an able Chancery Judge supporting the argument in this article. The decision not to give her protection suggests an ordering of objectives which put conveyancing costs, convenience of buyers and certainty of interests in land above protection of a wife's occupancy of the matrimonial home. It is of course dangerous to extrapolate from this case to disputes in other contexts, nevertheless, the import of the case for the future of the category of equities is clear enough: they are not proprietary.

However, the decision raises a number of problems. The methodology and argument is unsatisfactory. Even if Lord Upjohn's view of the authorities is correct, the question in the case is whether mere equities *should* exist as proprietary interests. A complete cataloguing of existing interests could not provide an answer to this question, it merely supports the argument that they are not currently recognised. The decision assumes a range of very conservative but unarticulated premises about the judicial function.[18] If property cases are always decided on the

---

[13] *Per* Lord Hodson, *id.*, 1225-1226.
[14] *Id.*, 1250.
[15] *Id.*, 1237.
[16] *Id.*, 1238.
[17] *Ibid.*
[18] It is not unusual to see these premises articulated. Lord Reid in *Pettitt* v. *Pettitt* [1970] A.C. 777, 795 offered a conservative view of judicial function by deferring to parliament in "matters which directly affect the lives and interests of large sections of the community".

basis of existing law and conservative politics, parliament would be the only innovator. This is patently not the case. In the short term, the decision resulted in legislative modifications of the protection available to deserted families. Thus, in retrospect, the ordering of judicial objectives proved unacceptable. When the United Kingdom did use other devices to protect matrimonial occupation, purchasers did not seem unduly embarrassed despite fears of "doorstep investigations" as described by Lord Wilberforce in *Ainsworth*.[19]

In *Latec Investments Ltd* v. *Hotel Terrigal Pty Ltd*[20] the difficulty arose because a majority of judges assumed that the mere characterisation of an interest as equitable would automatically determine the order of priority according to a rigid hierarchy of proprietary interests. Since this would produce the undesirable result of postponing the later acquired interest, the judges thought they needed to use a device which reversed the *prima facie* priority order. Only Menzies J., aided by historical research, saw the diversity of options given to him within the equitable interest category. The other judges attempted to call the interest anything but an equitable interest and in the process introduced uncertainty about the continued judicial protection of well-established equities.[21]

Hotel Terrigal was the registered proprietor of a hotel; the company created a registered second mortgage over the land under the Real Property Act 1900 (N.S.W.) in favour of Latec Investments. Latec fraudulently exercised the power of sale of the mortgagee and sold the property to its subsidiary, Southern Hotels who, in turn, created a floating charge over its assets in favour of M.L.C. Nominees. Hotel Terrigal did nothing for five years and the liquidator took no action to warn third parties of the fraud that had occurred. The High Court of Australia held that M.L.C. Nominees had priority over Hotel Terrigal, a result which was undoubtedly correct.

Taylor J. reasoned that it did not matter much whether the interest of Hotel Terrigal was a mere equity inferior to the equitable interests of M.L.C. Nominees or whether Hotel Terrigal lost priority because the Court refused to help them remove an extra impediment to the assertion of an equitable title (the equity of redemption).[22] His reasoning would, therefore, lend support to the view that the question of the existence of an independent proprietary interest called a mere equity was not required for the decision. This argument went to the priority issue and that, in turn, merely required a balance of the strength of the interests of the two parties.

---

[19] Note 9 *supra*, 1250.

[20] (1965) 113 C.L.R. 265.

[21] *Latec Investments Ltd* v. *Hotel Terrigal Pty Ltd, ibid.*, is assumed by R. Maudsley and H. Hanbury, *Modern Equity* (10th ed. 1976) 675-676 to establish a distinction between equities and equitable interests.

[22] Note 20 *supra*, 286.

Kitto J. settled the question on *Rice* v. *Rice*[23] criteria, postponing Hotel Terrigal because of the long period of delay in seeking rectification of the Register, though he acknowledged this was caused by a shortage of funds available to the liquidator.[24] He suggested in the alternative, though it was possibly obiter dictum, that it was against the preliminary equity and not the equitable interest of Hotel Terrigal that the defence of purchaser for value without notice succeeded. Arguably, that gave recognition to a place for mere equities in the scheme of priorities, as a conglomeration of rights which would always be inferior to the interests of a *bona fide* purchaser for value who bought the equitable estate without actual notice (or perhaps constructive notice) of those rights. These remarks give precarious support to the claim for an independent proprietary right called a mere equity. However, they must be read in the context of the problem being considered: the fraudulent exercise of a power of sale by a mortgagee. As rights arising through this fraud were traditionally not assertable against the *bona fide* purchaser for value without notice (whether of a legal or equitable interest), these remarks re-asserted a particularly well-established principle limiting the assertion of claims arising through fraud. A defrauded mortgagor has always been required by equity courts to protect his interest before intervention of the purchaser, even if that purchaser acquired an equitable estate. *Phillips* v. *Phillips*[25] made no difference to this. At the same time, equity regarded the right to rectify for fraud as an equitable estate when the question arose between the original parties and their privies: *Stump* v. *Gaby*.[26] The remarks of Kitto J. are consistent with the idea that there are equitable interests with a prescribed area of operation. This idea has since been developed by Ann Everton[27] who distinguishes between "latent" equitable interests which depend on favourable exercise of judicial discretion such as an estate contract and "patent" equitable interests such as trusts which do not depend on the availability of discretionary proprietary remedies like specific performance. This seems attractive until we see that it perpetuates an analytical dichotomy of cases where judicial discretion exists and cases where it does not. This dichotomy is highly misleading and theoretically unsustainable. The idea of equitable interests with limited survival is only attractive if its theoretical foundation acknowledges the universality of judicial discretion and its avenues for operation in even those cases which invoke established rules.

Menzies J., in the most satisfactory judgment, noted that the term mere equity had a clear legal pedigree when used narrowly to refer to

---

[23] (1853) 2 Drew. 73; 61 E.R. 646.
[24] Note 20 *supra*, 276-279.
[25] (1861) 4 De G.F. & J. 208, 218; 45 E.R. 1164, 1167.
[26] (1852) 2 De G.M. & G. 623; 42 E.R. 1015.
[27] See " 'Equitable Interests' and 'Equities'—In Search of a Pattern" note 6 *supra*.

an equity of rectification and an equity to set aside a transaction for fraud. However, he saw that each type of equity involved distinct questions. Incidents of ownership exerciseable by a holder of a right to rectify and a right to set aside a transaction for fraud are not necessarily the same, though they are both properly called equities. Menzies J. diversified the proprietary nature of equities into separate questions: should a court enforce it against third parties and can it be assigned or devised? Other questions are, of course, relevant. This theoretically sound and practical approach has the attraction of inducing a judicial awareness of the different contexts in which the interest is likely to appear and is sensitive to the fact that different policy considerations operate in each context. To call both a right to rectify and a right to set aside for fraud mere equities should not lead us automatically to conclude that they are both assignable to third parties, even if we are certain that they can be enforced *against* third parties in limited circumstances. A right to rectify might be assigned with the supporting interests. It is essentially a procedural right in the sense that it has no value to any person who in addition does not own the beneficial right in the property. It cannot be assigned independently because it is a bare right to litigate.[28] However, there does not seem to be any reason to allow a stranger to a fraud to set the transaction aside merely because he now owns the property that was involved.[29] These differences in the source of the right, in the contexts in which problems will potentially arise and in the legal solutions they attract, highlight the danger of over-simplification by categorisation of interests in land. This is a danger which the technique of Menzies J. easily avoids.

Latec and *Ainsworth* indicate a general reticence by courts to allow prior rights, whose existence and scope is difficult for a purchaser to assertain, to be asserted against third parties who do exactly what the existing rules require in the nature of searches and whose conveyancing standards are otherwise impeccable. However, settlement of hard equities cases by resort to conveyancing practices alone begs a fundamental question. Conveyancing practices are designed to reveal only existing interests. The existence of an interest in these litigated cases is in doubt, either because it is unusual and without precedent or because of a failure by the party asserting it to carry out the requisite formalities. In cases involving third parties, courts are wary of creating or recognising interests not already covered by the familiar lists and place a premium on the presence of formalities. With some minor exceptions, anyone who asserts they have uncertain or unfamiliar rights in land would be advised to litigate the issue before the third party intervenes.

---

[28] *Compania Colombiana De Sequros* v. *Pacific Steam Navigation Co.* [1965] 1 Q.B. 101.

[29] Further discussion of assignability is in R. Meagher, W. Gummow and J. Lehane, note 7 *supra*, 99 in the context of *Gross* v. *Lewis Hillman Ltd* [1970] Ch. 445.

2. *Equities and the Priority Rules*

The conclusion to be drawn is obvious but frequently forgotten. Equitable jurisdiction has two distinct limbs. One is to do justice between the claimant and the "owner or occupier" whose action gave rise to the claim. The second is to decide whether to grant rights to the claimant against third parties. These questions involve quite separate issues. For those who argue there is no conceptual harm if the term mere equity is refined and limited to the priority context, where clearly established proprietary rights are asserted against third parties, we would point to four unfortunate problems. First, the confusion caused by the decision in *Latec* and hence, the uncertainty surrounding the law. Secondly, inflexibility; the use of the concept potentially creates inflexibility on occasions where there is a particular reason to postpone the holder of the equitable estate in favour of the equity—for example, in the case of gross negligence leading to the creation of the equity or where the merits of the parties are precariously balanced.[30] Thirdly, the category overlaps with related categories, particularly the constructive trust. Fourthly, the conceptualisation destroys the only attraction of equities. They enable a judge to create new remedies; this, currently, is their sole *raison d'etre*. While we would argue that better methods for creative expansion of property norms are available in the light of changed social expectations, we would not be content with a static version of equities until other devices for change are established.

In the priorities context the judgment of Lord Upjohn in *National Provincial Bank Ltd* v. *Ainsworth*[31] all but removed the authoritative basis for the existence of a mere equity as a category of proprietary right. *Latec Investments Ltd* v. *Hotel Terrigal Pty Ltd*[32] gave no support to the existence of an equity as a distinct proprietary right. These two cases can be used to support the proposition that a category of proprietary interests denoted mere equities does not exist. Moreover, the category lacks the essential merit of any useful generalisation: it does not clarify. Yet textbooks continue to cling to it.[33] Why? Perhaps the answer lies in the mistaken assumption that the priority rules are

---

[30] As, for example, occurred in *Horrocks* v. *Forray* [1976] 1 W.L.R. 230; [1976] 1 All E.R. 737. *Tanner* v. *Tanner* [1975] 1 W.L.R. 1346; [1975] 3 All S.R. 776 was cited before the Court and was distinguished on the basis that there the Court had found a "contract", consideration for which was the relinquishing by the woman of a rent-controlled flat to take up residence in the plaintiff's house. Megaw L.J. in *Horrocks* v. *Forray* held that the occupation of the mistress and illegitimate child should be determined in favour of the widow and legitimate child.

[31] Note 9 *supra*, 1229.

[32] Note 20 *supra*.

[33] D. Jackson, note 8 *supra*, 72-77. R. Megarry and P. Baker, *Snell's Principles of Equity* (27th ed. 1973) 25; see also their discussion of proprietary estoppel, 565-568.

settled.[34] By imagining that the courts rigidly give priority to every equitable interest in their order of creation, one cannot create any rights good against third parties without defeating all later created equitable interests. Therefore, the temptation to create a separate and weaker interest, the mere equity, is strong. In fact, the priority rules are much more complex and give the judges room for the restrained exercise of discretion in the ordering of priorities.

The discretionary nature of priority rules is clearly revealed by the decision in *Rice* v. *Rice*[35] which established the most flexible priority principle. The court in *Rice* took pains to emphasise that time should be the last criterion resorted to and that a careful weighing of the merits of the claims of the parties is the primary criterion for allocating priorities. The principle has the attraction of never requiring the updating of its formulation. It is timeless in its language but maleable in its application.

The subsequent history of the case suggests that good principles never die; they are merely taken out of context. When the principle is used in priority disputes concerning land under the Torrens System, it tends to encourage use of general law conveyancing arguments. (However, the principle is analytically neutral—it refers to whatever conveyancing standards are appropriate to a particular case.) A good example of this is the judgment of Lord Wright in *Abigail* v. *Lapin*[36] where he adopted the formalist view of *Rice* v. *Rice* postulated by Lord Cairns "that, in order to take away any pre-existing admitted equitable title, that which is relied upon for such purpose . . . must amount to something . . . which can have the grave and strong effect to accomplish the purpose".[37] This speech can be explained partly as a refinement of the original principle but taken literally it is in conflict with the whole thrust of the decision and out of step with the trend of the later authorities. Lord Cairns took a very rigid view of equitable jurisdiction when he spoke of the measures needed to "take away any pre-existing admitted equitable title".[38] This was not the right question to put; it was not a question of "taking away" a title. Rather, it was a question of deciding priority between two innocent victims of the actions of another person, a

---

[34] A summary of priority rules is in R. Smith, note 6 *supra*, 124 and in A. Everton, " 'Equitable Interests' and 'Equities'—In Search of a Pattern" note 6 *supra*, 210-211.

[35] Note 23 *supra*.

[36] [1934] A.C. 491.

[37] *The Directors of the Shropshire Union Railways and Canal Co.* v. *R.* (1875) L.R. 7 H.L. 496, 507. F. Crane, "The Deserted Wife's Licence" (1955) 19 *Convey.* 343, 346 supports the view: "[A]s between equitable interests . . . first in time prevails, unless the holder of the prior equity (i.e. equitable interest) in point of time has been guilty of some conduct whereby he should be postponed". He cites *Rice* v. *Rice*, note 23 *supra*; *Phillips* v. *Phillips*, note 25 *supra* and *Cave* v. *Cave* (1880) 15 Ch.D. 639.

[38] *The Directors of the Shropshire Union Railways and Canal Co.* v. *R.*, note 37 *supra*, 507.

question that is not clarified if too much prominence is given to the "equitable title" instead of the policies which give rise to remedial action.

Priority issues will only arise if a proprietary interest is conceded to exist. It is the concentration on the idea of a separate category covering all newly invented interests that makes judicial treatment of equities and third parties so unsatisfactory. The use of a single category to do two jobs tends to confuse questions about creating an interest and its priority in a competition with other interests. This under-emphasises the fact that the reasons for *granting a remedy* will be very different in each of the distinct contexts litigated. The issue in third party cases is not usually about the existence of the interest but whether the claim ought to take precedence over the rights of a particular third party. Even if the claim is ordinarily enforceable against a third party, its treatment in the hands of a court remains problematical because of the inherent ambiguity in the priority rules and the existence of a choice of rules. Leeways of choice are built into the priority rules by the language of notice, *bona fides*, priority in time, consideration or value, equal equitable interests and the definitions of the interests themselves. Larger scope for discretion arises from the multitude of precedents and the inevitable conflict this provokes. Even if the policies behind the rules are clear, their application in the property system oscillates between reinforcing existing conveyancing standards and revising those standards as business and social needs change. Ambiguity in the rules is both inescapable and essential. The categories and rules alone can never explain why third parties feel the sting of equitable remedies.

A fresh appraisal of equities cases and their close relatives suggests there are at least five different criteria for enforcement in third party situations. First, except in rare circumstances courts will not protect voluntary takers.[39] They have said they will protect commercial takers without notice of a prior claim[40] but as yet this is unsettled. Secondly, despite problems of privity of contract, courts will not protect a non-meritorious commercial purchaser who negotiates a lower price for the "encumbered" property and then seeks to resile from the "encumbrance".[41] Thirdly, courts will not allow a successor who derives a continuing benefit from an original agreement to resile at whim from

---

[39] *Errington* v. *Errington and Woods* [1952] 1 K.B. 290; *Inwards* v. *Baker* [1965] 2 Q.B. 29; Griffiths v. Williams (unreported, Court of Appeal, 6 December 1977).

[40] Denning L.J. in *Errington* v. *Errington and Woods*, note 39 *supra*, 299 said "[n]either the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice". In *Inwards* v. *Baker*, note 39 *supra*, 37 Lord Denning M.R. said, "I think that any purchaser who took with notice would be clearly bound by the equity".

[41] *Timber Top Realty Pty Ltd* v. *Mullens* [1974] V.R. 312; *Binions* v. *Evans* [1972] Ch. 359; *Tulk* v. *Moxhay* (1848) 2 Phil. 774; 41 E.R. 1143; *Bannister* v. *Bannister* [1948] 2 All E.R. 133; [1948] W.N. 261; see also *Neale* v. *Willis* (1968) 19 P. & C.R. 836 where a husband was forced to put a house in the joint names of

its burdens, despite problems of using estoppel as a sword.[42] Fourthly, courts will not enforce a sham transaction.[43] Finally, query whether we can usefully add a category of cases involving a user of land revealed by physical investigation. Such a user has its source in an agreement or representation and detriment and is not yet protected by running of time.[44] It is of course misguided to ask purchasers to investigate "agreements" or "representations" made between landowners long since gone, but it is consistent with conveyancing practice to put them on notice of the possibility that people other than the owner properly so-called might be legally entitled to continue their overt and public use of the land after completion of the transaction. The purchaser then has the option of investigating the interest more closely or of shifting the risk of its continuance to the vendor by suitable covenants of title.

These situations can be adequately explained without resort to a new proprietary category. They turn largely on the balancing of a limited number of policy objectives including facilitating marketability of land, guaranteeing security of title and implementing standards of fairness. When these competing policies operate in a changing world, new situations continually arise which force the courts to readjust their balance. However, it is obvious to the most casual observer that the courts would do better in finding a balance if the arguments about policies were overt.

Returning to our argument that there are two types of recurrent judicial questions, we can now clarify the models. Those questions which require the application of established rules do not obviate choice. Rather, choice is guided and informed by the rules and by well understood supporting policies, even if the policies are only occasionally articulated. Questions on the frontier of the body of rules will not present policy issues in the same clear way but, since the rules are unclear, policy can be the only guide to rational decision-making in this context. Thus, on the frontier, reference to policies supporting decisions is much more critical than it is in other situations.

---

himself and his wife after he took part of the purchase price from her father. *Cf. King* v. *David Allen and Sons Billposting Ltd* [1916] 2 A.C. 54 and *Clore* v. *Theatrical Properties Ltd and Westby and Co. Ltd* [1936] 3 All E.R. 483, which in the opinion of Lord Denning M.R. in *Binions* v. *Evans* [1972] Ch. 359, 368 are distinguishable because in those cases "there was no trace of a stipulation, express or implied, that the purchaser should take property subject to the right of the contractual licensee".

[42] *Halsall* v. *Brizell* [1957] 1 Ch. 169; *E.R. Ives Investment Ltd* v. *High* [1967] 2 Q.B. 379. Using the estoppel principle in cases of mutual benefit and mutual burden is likely to produce arbitrary results depending on who litigates first, unless estoppel can be used as a sword as well as a shield. See D. Jackson, note 6 *supra*.

[43] *Ferris* v. *Weaver* [1952] 2 All E.R. 233.

[44] See *Hopgood* v. *Brown* [1955] 1 W.L.R. 213; *Ward* v. *Kirkland* [1967] 1 Ch. 194.

3. *The Equity of Acquiescence*[45]

There is greater judicial willingness to recognise an interest or entitlement to continued possession when the right is asserted against the original party or his privies. A number of devices are available to achieve this including what the textbooks call a mere equity.

One authoritative basis for the existence of a mere equity as a separate category of property is *Inwards* v. *Baker*.[46] A son built a house on his father's land on the assurance that "[i]t was to be his home for his life or, at all events, his home so long as he wishes it to remain his home".[47] The English Court of Appeal held that the son could remain in possession and that this right bound the father's personal representatives. The Court frequently referred to the right which they were creating in the son as an equity. The remedy was not based on an agreement but on the actions of the father in allowing his son to act to his detriment in the belief that there was an agreement. Lord Denning M.R., relying on *Dillwyn* v. *Llewellyn*[48] and *Plimmer* v. *Mayor of Wellington*,[49] treated the question as a natural extension of equitable estoppel:

> It is quite plain from those authorities that if the owner requests another, or indeed allows another, to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity.[50]

A line of reasoning that invokes estoppel has much to recommend it since it draws strength from acceptable bases for equitable intervention. It was followed by Gresson J. in *Thomas* v. *Thomas*[51] where an equity was brought into being because the husband stood by and allowed his wife, who was a joint tenant, to spend money on their home in the belief that she was full owner. Gresson J. treated *Dillwyn* v. *Llewellyn* as a "case of equitable estoppel by acquiescence"[52] but one in which the doctrine was used as a sword. He cited and applied *Central London Property Trust Ltd* v. *Hightrees House Ltd*.[53]

The decision in *Inwards* involved two distinct steps. First, the

---

[45] The basic case law includes *Hopgood* v. *Brown*, note 44 *supra*; *Inwards* v. *Baker*, note 39 *supra*; *Ward* v. *Kirkland*, note 44 *supra*; *E.R. Ives Investment Ltd* v. *High*, note 42 *supra*.

[46] Note 39 *supra*.

[47] *Id.*, 37.

[48] (1862) 4 De G.F. & J. 517; 45 E.R. 1285.

[49] (1884) 9 App. Cas. 699.

[50] Note 39 *supra*, 36-37.

[51] [1956] N.Z.L.R. 785.

[52] *Id.*, 793.

[53] [1947] K.B. 130. This treatment of the equity cases is common in the literature: D. Allan, "An Equity to Perfect a Gift" (1963) 79 *L.Q. Rev.* 238; F. Crane, note 6 *supra*, 339; D. Jackson, note 6 *supra*.

creation of a new, carefully defined right in the son which yielded him protected possession. Secondly, Lord Denning thought it followed as a matter of course that any purchaser who took with actual notice of this right would be bound by it, even if they paid a market value consideration, implying that a *bona fide* purchaser of the father's estate for value and without notice could take free of the son's right. This second branch of the reasoning is contradicted by *Ainsworth* and the doubts surrounding the doctrine of notice. If the occupation of the son puts a buyer on notice, the possibility of a third party without it is moot.[54] However, it is likely that occupation will not be notice for the reasons put forward in *Smith* v. *Jones*[55] and *Caunce* v. *Caunce*.[56] We are then faced with the prospect of a somewhat arbitrary distinction between claimants who are related to the land owner and claimants who are not. In *Smith* v. *Jones* the defendant bought a farm with notice of the plaintiff's tenancy agreement which placed liability for structural repairs on the plaintiff. Upjohn J. limited the application of the doctrine of notice by holding that the defendant was not concerned with whether the document correctly represented the rights of the plaintiff and could rely on its terms without enquiring whether there was an equity of rectification. In *Caunce* v. *Caunce* the doctrine of notice was held not to apply to interests of persons whose possession of land was consistent with the title offered. Thus, a wife lost her equitable interest arising under a constructive trust constituted by her contribution to the purchase price, in favour of creditors entitled on the bankruptcy of her husband to his assets, one of which was the matrimonial home in issue. Whatever the outcome in *Inwards* v. *Baker* had there been a *bona fide* purchaser without notice, the case in no way supports the proposition that the interest of the son was a form of weak property right called a mere equity which would automatically lose priority, even if the concept of notice is clarified and refined.

The leading authority of *Dillwyn* v. *Llewellyn*[57] was decided on facts very similar to those in *Inwards* v. *Baker*.[58] Only the nature of the representation was different. The Court held the testator to his intention to vest the absolute fee simple ownership in his son. The son was given

---

[54] *Barnhart* v. *Greenshields* (1853) 9 Moo. P.C. 18; 14 E.R. 204 and *Hunt* v. *Luck* [1902] 1 Ch. 428 establish notice of interests of persons in possession. However, see *Hodgson* v. *Marks* [1971] Ch. 892, 931-932 on the interpretation of "actual occupation" in Land Registration Act 1925 (Eng.) s. 70(1)(g) where Lord Russell indicated that in multiple occupancy cases possession depends on "the circumstances, and a wise purchaser or lender will take no risks". The problem of possessory rights is complex and it seems incorrect to suggest that "the purchaser would not be put on notice of the equity merely by the fact of the lessee's possession or inspection of the document concerned" as do R. Meagher, W. Gummow and J. Lehane, note 7 *supra*, 98.

[55] [1954] 1 W.L.R. 1089; [1954] 2 All E.R. 823.

[56] [1969] 1 W.L.R. 286; [1969] 1 All E.R. 722.

[57] Note 48 *supra*.

[58] Note 39 *supra*.

the fullest equitable estate—an equitable fee simple. In *Inwards* the son was given a more limited estate. Both sons spent money on improving their father's land.

Errington v. *Errington and Woods*[59] also suggested that equity jurisdiction requires a movement of funds from the claimant to support a demand for continued possession. Even the extension of remedies to non-working women is being justified on the basis of their economic contribution to the home environment by their physical labour.[60] At the same time, trust remedies are being tailored to fit only those situations where money has actually been paid.[61] Thus, it is clear that the conscience of the Chancellor is much moved by money, but we should note that there are quite distinct kinds of expenditure in these cases: payment of debts secured in the land and payment for improvements which, traditionally, were given different legal treatment.

Where there is no contract and the parties are strangers, English law generally puts the price of building on another's land on the builder. It usually reverses the decision and puts the price of building on the owner where he has requested, encouraged or even stood by and watched the expenditure of capital.[62] The inducement negates any suggestion that the shift of funds was a gift. Application of these norms will not be straightforward where the parties are related, though evidence of the inducement is still likely to negate the suggestion of a gift. The picture becomes less clear when the parties are a married couple because conflicting policy objectives and close economic ties between the parties raise new issues. It is here, particularly, that the possibility of opening the gates to a flood of litigation and fears that the marketability of land will be inhibited severely, create enormous pressure. With respect to de facto relationships it is difficult to find a clear pattern in the increasing list of decided authorities. According to Bridge L.J. in *Dyson Holdings Ltd* v. *Fox*[63] the cases represent judicial recognition of a "complete revolution in society's attitude to unmarried partnerships".[64] While this far from equalises the property rights of married and unmarried women, there are perceptible changes.[65] It is going too far

---

[59] Note 39 *supra.*

[60] In *Eves* v. *Eves* [1975] 1 W.L.R. 1338; [1975] 3 All E.R. 768 and *Cooke* v. *Head* [1972] 1 W.L.R. 518; [1972] 2 All E.R. 38, judges including Lord Denning M.R., allocated property to deserving mistresses.

[61] In *Chandler* v. *Kerley* [1978] 1 W.L.R. 693 the Court of Appeal attached significance to the fact that the plaintiff who claimed possession paid a considerable sum to the defendant for the house and reduced the defendant's entitlement to continued occupation.

[62] *Brand* v. *Chris Building Co. Pty Ltd* [1957] V.R. 625; *Hamilton* v. *Geraghty* (1901) 1 S.R. (N.S.W.) Eq. 81; *Ramsden* v. *Dyson* (1866) L.R. 1 H.L. 129, 140.

[63] [1976] Q.B. 503.

[64] *Id.*, 512.

[65] See for instance *Cooke* v. *Head*, note 60 *supra*; *Tanner* v. *Tanner* note 30 *supra*; *Eves* v. *Eves*, note 60 *supra*. *Cf. Horrocks* v. *Forray*, note 30 *supra* and *Allen* v. *Snyder* [1977] 2 N.S.W.L.R. 685.

to suggest, as has one commentator,[66] that marriage is on the way out. While the courts notably are more flexible in recent cases, they are far from developing clear principles to effectuate an intrusion on the sanctity of marriage.[67] As a result of the inherent uncertainty in the law, many of the cases involving a non-owner improving another's land are handled under the equities rubric. On looking at these cases as a group, it can be seen that where the parties are related judges have usually denied themselves the simple solution of forcing the landowner to refund the price of the building,[68] though the remedy has an obvious attraction between strangers. Instead, they have granted occupancy rights and sometimes title (with some reasonable exceptions)[69] because the relationship between the parties makes the failure to formalise the arrangement excusable. In support of their decision to grant a remedy the courts have frequently enunciated a wide principle of estoppel by representation, acted upon to the detriment of the claimant.[70] Thus, the pattern of judicial reasoning suggests that the building cases should be treated in a similar way to cases where the request[71] is for a temporary occupant to discharge, in whole or in part, a debt secured on the land. The discharge of such a debt is traditionally handled by trust concepts. This allows the courts to grant rights of occupancy in debt cases instead of ordering repayment of cash subscribed. Since this kind of reasoning has vast implications for conveyancing, it initiates a process of narrowing which undermines the strength of the favourable decisions.[72] The result is a high level of unpredictability in judicial decision-making that is further exacerbated by the rich variety of situations involved in litigation.

The equity of acquiescence involves an attempt to contain complex and unrelated issues in a single concept. A cursory examination of the specific remedies actually granted by the courts suggests that the apparent simplicity of this approach is illusory. Meanwhile, important subsidiary issues are left untouched. The nature of the occupancy as a matter of law has been considered in the artificial context of whether

---

[66] M. Richards, "The Mistress and the Family Home" (1976) 40 *Convey.* 351.

[67] Illustrated by D. Hambly, "Property Rights and De Facto Spouses" (unpublished)—a paper delivered to the Canberra Law Workshop, 27 May 1977.

[68] However, see *Raffaele* v. *Raffaele* [1962] W.A.R. 29.

[69] Such as *Hussey* v. *Palmer* [1972] 1 W.L.R. 1286; [1972] 3 All E.R. 744 where joint occupation was impossible because of antagonism between the parties. In *Ivory* v. *Palmer* [1975] I.C.R. 340, 352 cessation of the employment was held to be sufficient reason for discontinuing any entitlement to possession. In that case the plaintiff had repudiated his contract of employment and the Court thought as a matter of principle the contracts of employment and housing should run together.

[70] Note 51 *supra.*

[71] In contradistinction to an agreement or contract.

[72] As occurred in *National Provincial Bank Ltd* v. *Ainsworth,* note 9 *supra.* The subsequent narrowing of a widely phrased equitable "principle" is a familiar and recurrent process. The best example remains the saga of *Tulk* v. *Moxhay,* note 41 *supra.*

or not it is legal possession, a concept relevant to the distinction between leases and licences.[73] The cases do not make it clear if occupancy rights are personal. Sometimes the period of occupation is left to the determination of the successful claimant;[74] occupation may be his alone or the claimant may share.[75] This seems to depend on the relationship between the parties rather than formal property concepts. Apparently an equity cannot entitle its owner to sell, mortgage or lease. But why not? If Mrs Errington Jnr had let the house and used the rents to finance the mortgage payments, would she have lost? Other significant questions await answer. Who has possession of the property for purposes of an action in trespass? Is the occupancy of such a nature as to constitute adverse possession? Who is liable for the rates? If a stranger takes possession of the land adversely, who can eject him and whose title is eventually barred? Does settled-land legislation apply? If so, how much of it operates and where is the settlement?[76]

Once all these questions are added to the general norms governing the use of land without the formal consent of the owner, the difficulty of resorting to proprietary categories and rules can be appreciated. Synthesising the area with a rigid structure of property characterisations is not helpful in predicting what the courts ought to do or what in fact they will do.

4. *Equities in Australia*

Australian courts have generally not relied on the equity category in decided cases, though constructive trusts have occasionally been utilised to give remedies in new situations.[77] The use of contractual licences is relatively insignificant in Australia compared with England. The major

---

[73] The problem of exclusive possession and licences was recognised by Denning L.J., in *Errington* v. *Errington and Woods*, note 39 *supra*, 297-298 and as Mrs Errington Jnr clearly had exclusive possession, he discovered this device to distinguish leases from licensees. See also *Cobb* v. *Lane* [1952] W.N. 196, 197; [1952] 1 All E.R. 1199, 1202 where Denning L.J. held a man in possession was a mere licensee and not a tenant at will to escape Limitation Act 1939 (Eng.) s. 9(1). Compare *Radaich* v. *Smith* (1959) 101 C.L.R. 209 with *Isaacs* v. *Hotel de Paris Ltd* [1960] 1 All E.R. 348. The intention test is hardly much better at revealing the real ground for decision, though it does transparently invoke judicial choice.

[74] In *Inwards* v. *Baker*, note 39 *supra*, Jack Baker could stay as long as he liked.

[75] *Kingswood Estates Co. Ltd* v. *Anderson* [1963] 2 Q.B. 169.

[76] In *Binions* v. *Evans*, note 41 *supra*, 366 Lord Denning M.R. argued that the settled-land legislation should not apply. Some commentators doubt the legitimacy of this conclusion. See *Dodsworth* v. *Dodsworth* (1973) 228 E.G. 1115 and Griffiths v. Williams, note 39 *supra*.

[77] *Ogilvie* v. *Ryan* [1976] 2 N.S.W.L.R. 504 and *Doohan* v. *Nelson* [1973] 2 N.S.W.L.R. 320. However, see *Robinson* v. *Robinson* [1961] W.A.R. 56; McRae v. Whooley (unreported, W.A., 1975); *Fraser* v. *Gough* [1975] 1 N.Z.L.R. 138; *Murdoch* v. *Murdoch* (1947) 41 D.L.R. (3d) 367. These cases are in a similar vein to *Hazell* v. *Hazell* [1972] 1 W.L.R. 301; [1972] 1 All E.R. 923 where Lord Denning held an interest was created by constructive trust. *Cf. Gissing* v. *Gissing* [1971] A.C. 886. Short notes on these cases are in (1974) 48 *A.L.J.* 494 and (1976) 50 *A.L.J.* 37.

case on licences, *Cowell* v. *The Rosehill Racecourse Co. Ltd*,[78] illustrates the practical dangers of reform by creating new categories. In a conservative judgment, Latham C.J. rejected a device utilised in *Hurst* v. *Picture Theatres Ltd*[79] by which a licence was given "proprietariness" by coupling it with a grant in order to prevent its revocation at the will of the licensor. Latham C.J. reasoned that this "aspect of the case should be considered in relation to established principles of equity and not in relation to the arguments *ab inconvenienti* which are so prominent in the majority judgments in *Hurst's Case*".[80] Contrast this with what Evatt J. said in dissent: "I think the fallacy in the criticism of *Hurst's Case* lies in the continuous insistence upon discovering a proprietary right as a condition of equitable intervention".[81] The same spirit pervades the incisive reasoning of Lord Radcliffe in *Commissioner of Stamp Duties (Qld)* v. *Livingston*.[82] When a court adjudicates a claim for a remedy and there is no settled law with respect to that claim, does it help to have a category in which to put that claim? An attempted categorisation will tend to constrict and exclude; its very creation concedes the conservative view of Latham C.J. that equity can settle questions only by reference to establish remedies. While Australian judges have sporadically supported a flexible version of equitable jurisdiction, innovation has been slower here than England.

Recently in England, the widening of judicial discretion to allocate matrimonial property between the spouses has given impetus to the development of equities. The developments and innovations encouraged by the matrimonial causes legislation were easily extrapolated by English judges to de facto relationships[83] and thence generally to property law. In Australia the Family Law Act 1975 (Cth)[84] has placed jurisdiction over matrimonial property in the hands of a separate court, the Family Court of Australia.[85] Therefore, there is less pressure for the invocation of equitable, as distinct from specifically statutory, remedies in the divorce and de facto marriage context. Any special concept of family assets will remain the creation of the Family Court and will have less influence on courts which handle non-matrimonial work and which are staffed by different judges. Given the Australian statutory law, practical expression of a social conscience towards wives and de facto wives need no longer rely on devices such

---

[78] (1937) 56 C.L.R. 605.
[79] [1915] 1 K.B. 1.
[80] Note 78 *supra*, 621.
[81] *Id.*, 652.
[82] [1965] A.C. 694.
[83] *Eves* v. *Eves*, note 60 *supra*; *Tanner* v. *Tanner*, note 30 *supra*. *Cf. Horrocks* v. *Forray*, note 30 *supra*. One commentator finds trends are "consistent with the general preoccupation of the courts with the interests of the family rather than with property rights strictly so-called". M. Richards, note 66 *supra*.
[84] Family Law Act 1975 (Cth) ss. 78, 79, 79A.
[85] Western Australia has a separate state family court.

as the mere equity. The general arguments supporting judicial creativity in this article can be applied in family law without the historical "hangovers".

The popularity of licences and equities in England is part of a reaction against what was thought by judges to be excessive protection offered to people classified as tenants (at will, or otherwise) by the Rent Acts and Limitation of Actions legislation. A desire to limit the ambit of this legislation encouraged a widening of the concept of a licence even when the licensee clearly had exclusive possession.[86] While Australia saw heavy rent controls during and after both world wars, the phenomenon was more temporary and provided less of a threat to the free play of market forces in the rental sector, which is favoured by contemporary lawyers. This is so even in New South Wales. Courts did not perceive a need to restrain the application of these schemes and at the same time the schemes permitted devices for determined landlords to escape rent control. The pressure on the courts to convert lessees into licensees consequently was reduced.[87] In England a detectable disenchantment with the Limitation Acts occurred after the period of adverse possession was reduced to twelve years.[88] One manifestation of this disenchantment is the narrow application of the concept of "possession", a concept that property law does not automatically bestow on licensees.[89] In Australia, judicial antagonism towards possessory titles is not so apparent. In any event, judicial opinion is usually relevant only in cases concerning general law land. In the case of Torrens System land where adverse possession is allowed,[90] the question is generally dealt with by administrators and not by judges.

The place of equities in the Torrens System is the subject of conjecture.[91] The exception to indefeasibility which protects tenants has been read widely[92] especially in some states, thus, creating a body of authority for extending the concept of the lease at the expense of proprietary licences. There is no Australian equivalent to the decision of Lord Denning M.R. in *E.R. Ives Investment Ltd* v. *High*[93] with

---

[86] As in *Errington* v. *Errington and Woods*, note 39 *supra*.

[87] *Cf. Radaich* v. *Smith*, note 73 *supra*, where the High Court disallowed a transparent attempt to rewrite a standard lease by referring to the parties as licensee and licensor.

[88] Real Property Limitation Act 1874 (U.K.). This is not to suggest that the reduction was a causal factor. See *Williams Brothers Direct Supply Ltd* v. *Raftery* [1958] 1 Q.B. 159 following *Leigh* v. *Jack* (1879) 5 Ex. D. 264.

[89] *Radaich* v. *Smith*, note 73 *supra*.

[90] Transfer of Land Act 1958 (Vic.) ss. 60-62. Transfer of Land Act 1893-1972 (W.A.) ss. 222-225.

[91] *Raffaele* v. *Raffaele*, note 68 *supra*, accepted the equities argument in the Torrens context but allowed a very limited remedy.

[92] *Downie* v. *Lockwood* [1965] V.R. 257 and *Sandhurst Mutual Permanent Investment Building Society* v. *Gissing* (1889) 15 V.L.R. 329.

[93] Note 42 *supra*. The Land Charges Act 1925 (U.K.) specifically required registration of encumbrances as a pre-requisite to their enforceability. Lord

regard to statutory registration requirements. If read strictly the Torrens legislation will protect third parties who register even if they have notice of a stranger in possession.[94] The possibility of lodging a caveat to protect a licence or an equity is not settled. Without an extension of the caveat provisions there is little hope for the development of equitable jurisdiction via equities in Torrens land against third parties.[95] This is not to suggest that Australian courts should fail to develop their equitable jurisdictions. Rather, it suggests that local development will utilise different devices, such as constructive and resulting trusts.

III EQUITIES AND LEGAL RENEWAL

1. *Equities and the Logic of Decision*

Traditional legal reasoning resolves demands for innovation primarily by reference to the existing framework of legal rules. The relationship between the innovation and the established rules is expressed by the tenet that judges ought to constrain discretion by reference to the established rules. This constraint is justified by the important objectives that a legal system should be certain, predictable in its application and internally consistent. Provided these objectives are balanced against others, they should be supported. However, it will be argued that traditional legal reasoning is wrong in its assumption that certainty is introduced into discretionary remedies by reference to established rules. While traditional theory postulates rules as the primary source of certainty, it cannot deal with cases that are on the frontier. Such frontier cases inevitably involve the interweaving of facts and values and they are not dealt with satisfactorily by simply applying rules. An acceptable degree of certainty is possible in frontier cases as well but it is advanced by quite different techniques than those appropriate in cases applying established rules.

Consistency, certainty, predictability or even persuasive reasons for innovation cannot be created by appealing to broad generalisations such as "conscience" or "justice" since these are known to differ from individual to individual. Ideals like consistency, certainty and predicta-

---

Denning M.R., however, enforced an unregistered charge against a successor in title. There are instances of courts manoeuvering out of restrictive statutory provisions to recognise property interests. *Cf. Pearce* v. *Pearce* [1977] 1 N.S.W.L.R. 170; *Horton* v. *Public Trustee* [1977] 1 N.S.W.L.R. 182 and *Olsen* v. *Olsen* [1977] 1 N.S.W.L.R. 189 noted at (1978) 52 *A.L.J.* 99.

[94] Unless of course the land is in Victoria or Western Australia and the registered owner is statute barred from reclaiming possession by the limitations legislation, or the possessor falls within the "tenant in possession" category which all Torrens Systems protect to some extent.

[95] The equity holder is not noted for his use of available formalities. Even if a Torrens caveat could be lodged to protect an equity, the reasonable or excusable failure to take advantage of formal protection opportunities would remain a central difficulty in equities claims.

bility cannot be achieved by interposing the legal concept of an equity between the facts in the case and the broad generalisations. Nor can certainty come from logic even if we attempt to define the central concept of an equity with meticulous precision.

In the words of Julius Stone the category will remain a "legal category of indeterminate reference". Its logic will still require

> that the courts shall evaluate the concrete situation rather than apply a formula mechanically . . . [J]udgment cannot turn on logical formulations and deductions, but must include a decision as to what justice requires in the context of the instant case. This is recognized, indeed, as to many equitable standards, and also as to such notorious common law standards as "reasonableness". They are predicated on fact-value complexes, not on mere facts.[96]

Whether the equity concept is defined or not, it is invoked to support remedies in novel legal situations and appeals to values outside the law, not to rules of law, in order to explain its application. These values are not mysterious. However, they cannot be derived from myopic concentration on construction of existing rules and formulae. Thus, the central problem is identifying the values invoked when the concept is used. Without analysis of the substantive objectives that do or ought to motivate decision-makers, rational explanation of what happens is impossible. Predictability in the frontier jurisdiction depends on knowing the relevant verbalisations, on being familiar with what are currently unarticulated values contained in the formal legal reference and on anticipating the level of judicial sympathy for these standards in the context of the case in question. The exercise in prediction would be facilitated if the wider and more general principles, policies and values governing rule creation were articulated. This is particularly important when decisions are based on values. As lawyers, we form our sense of justice and conscience by observing the continuing interaction of the law and social values. These values are various, not necessarily related, frequently inconsistent and unequally distributed. Thus, judicial creativity which relies on the implementation of values can only be predictable, certain and consistent if the traditional judicial reasoning in support of decisions is widened to include overt and conscious analysis of the specific values actually invoked.

The central process in invoking equitable jurisdiction in frontier cases is the allocation of legal remedies on the basis of extra-legal justifications. If a real, rather than an illusory order is to be found, it will not be found at the primary level of verbalisations of rules. Rather, the real order is to be found at the second level definition of a broad consensus about values and in a methodology for recognising, evaluating and implementing those values. In order to establish this second level consensus and methodology it is necessary for lawyers to make a

---

[96] J. Stone, *Legal System and Lawyers' Reasonings* (1964) 263-264.

sustained effort to consider the social consequences of nuclear families, the growing economic independence of women,[97] the availability of legal aid to the economically disadvantaged, the growth in the demand for authoritative detached adjudication of private household arrangements and a host of other changing social values that are emerging in post-industrial society. Changes can be predicted in the pattern of litigation if groups, such as deserted women, who are traditionally outside the ambit of legal protection are able to bring their particular problems to the attention of the courts. The breakdown of patriarchal authority hierarchies will have a more subtle impact. This breakdown will affect structures of dispute settlement in families. Thus, it is inevitable that family litigation will increase, even though some would hope not.[98] Widening of the horizon to include an appraisal of social changes would immediately highlight the present lack of articulated policy in equities cases. Also, given the heterogeneous nature of the issues which these cases must solve, the impossibility of settling any coherent policy basis for the whole body of existing decisions must also be highlighted. Such a widening would reveal a process of renewal in the law that is little more than an ad hoc judicial reaction to situations on a case-by-case basis.

2. *Mere Equities as a Functional Concept*

The utility of the mere equity is best evaluated by examining what function this conceptual tool is being required to do. The underlying problem is to invent a device that enables the legal system to systematically ameliorate the impact of its established rules on the trusting, the foolish, the aged and the infatuated without destroying the framework of those rules and the expectations they support. The pattern of litigation in equities reveals that the judges are prepared to treat as exceptional some situations in which prescribed formalities for bringing into existence a particular property "right" have been omitted. The difficulty is to give selected persons remedies without undermining the generality of the rules prescribing conveyancing formalities from which they have deviated and without offending the expectations of those who take pains to conform. Thus, judges tend to look favourably on the "household" situations as people living in close proximity are not expected to formalise their understanding. The household offers a ready distinction between interests that a court might protect and claims that

---

[97] One area that has seen unequivocal acknowledgment of the growing economic independence of women is in cases dealing with the presumption of advancement where it has supported the discarding of one of the few protections of women available in the common law. *Cf.* Lord Reid in *Pettitt* v. *Pettitt*, note 18 *supra*, 793: "[T]he strength of the presumption must have been much diminished". See also *Doohan* v. *Nelson*, note 77 *supra*.

[98] In *Jones* v. *Jones* [1977] 1 W.L.R. 438, 443; [1977] 2 All E.R. 231, 236 Roskill L.J. said "[i]t is very unfortunate that this family litigation cannot be made to stop".

a court can avoid recognising without formalities in order to preserve the usual standards. A suspension of formal requirements in a household conflict does not sanction lower conveyancing standards in other contexts.[99] While formalities are crucial to the decision process, the courts have not articulated reasons which support conveyancing and registration formalities, though these are far from self-evident. Even less have they advanced policy arguments for the suspension of formalities. The problem of formalities occurs throughout the law but it is particularly in the property field that the solution becomes complicated by misleading and unarticulated assumptions that the rules are precise and internally consistent, and that restructure is the task of the legislature rather than the judiciary. Thus, it is not surprising that development of mitigating devices in property is a tortuous process, largely the work of a single judge, Lord Denning M.R.

The vision of property law as a system of rigid rules has already been attacked here and it has been shown that a high degree of judicial discretion exists. We have observed that our language habits of referring to terms of ambiguous connotation like "conscience" or "justice" to support decisions cannot contribute to predictability, and that as a matter of logic, the equity category invokes values, standards and policies outside the rules of law. Finally, we have shown that the equity category is not a useful tool for ameliorating requirements regarding formalities. There is still more to add in criticism. The mere equity device has been used to protect a miscellany that includes rights to use a pier[100] or a private canal;[101] occupancy of a house for life[102] or so long as mortgage payments are made[103] or for a period of 30 years;[104] rights to call for titles at some determinable stage;[105] statutory tenancies;[106] road cost sharing schemes;[107] easements of way;[108] shares of proceeds of sale;[109] joint ownership claims.[110] In addition, there are the traditional

---

[99] The household need not present parties that are related; see *Hussey* v. *Palmer*, note 69 *supra*.

[100] *Plimmer* v. *Mayor of Wellington*, note 49 *supra*.

[101] *Hopgood* v. *Brown*, note 44 *supra*.

[102] *Inwards* v. *Baker*, note 39 *supra*; *Binions* v. *Evans*, note 41 *supra*. The equities argument is explicit in the judgment of Lord Denning M.R. The majority relied on a resulting trust.

[103] *Errington* v. *Errington and Woods*, note 39 *supra*.

[104] Griffiths v. Williams, note 39 *supra*, appears to support this.

[105] *Errington* v. *Errington and Woods*, note 39 *supra*; *Dillwyn* v. *Llewellyn*, note 48 *supra*.

[106] *Kingswood Estates Co. Ltd* v. *Anderson*, note 75 *supra*.

[107] *Halsall* v. *Brizell*, note 42 *supra*; *Frater* v. *Finlay* (1968) 91 W.N. (N.S.W.) 730 noted (1971) 45 *A.L.J.* 105.

[108] *E.R. Ives Investment Ltd* v. *High*, note 42 *supra*; *Ward* v. *Kirkland*, note 44 *supra*; *Crabb* v. *Arun District Council* [1976] Ch. 179.

[109] *Hussey* v. *Palmer*, note 69 *supra*, where the argument explicitly referred to a resulting trust; *Eves* v. *Eves*, note 60 *supra*; *Jones* v. *Jones*, note 98 *supra*.

[110] See *Thomas* v. *Thomas*, note 51 *supra*, for a variation of this theme.

equities of a right to set aside a fraud[111] and an equity to rectify a document.[112] The spectrum includes claims widely disparate in sources, nature and extent. A claim for future possession of land is not always present.[113]

Someone familiar with the history of priorities might dispute the demand for a policy common to all kinds of interests litigated in the equities cases to justify the use of the category. With all the resources of aftersight it is not possible to reveal any policy common to equitable interests. This is, of course, conceded. Equities of redemption, vendor liens, restrictive covenants, equitable future interests, estate contracts and equitable easements have nothing more in common than at some time in the past Chancery judges thought the situations demanded remedies. What commonality there is had its rationale in jurisdictional conflicts between courts of law and equity rather than conveyancing, land utilisation and marketing considerations. However, our point is that the modern process of incremental law-making and judicial awareness are substantially different. A new category of interests is proposed and no-one has produced a broad-based argument in favour of it or against it for that matter. We are not faced with a repetition of the historical experiences that created equitable interests. Equities involve a distinct, modern attempt to move the law forward while at the same time controlling the forward motion by a framework that looks sufficiently familiar to make the process acceptable. Assuming we have agreement on why the law needs changing, a broad-based argument must include a technique for bringing about change that is most appropriate to the problem. Equity cases are unrelated in any way except by post-judgment use of common language that suggests security of possession for de facto wives and enforcement of unregistered access easements involve similar legal and social considerations. At the same time the development of equities and related concepts misleadingly suggests that cases involving similar facts are based on different principles of law. Equities, perfection of imperfect gifts,[114] constructive trusts, implied contracts, mutual benefit and mutual burden cases, equitable estoppel, and "agreements" overlap alarmingly. Cases such as *Ramsden* v. *Dyson*[115] and *Central London Property Trust Ltd* v. *High Trees House*

---

[111] *Phillips* v. *Phillips*, note 25 *supra*; *Latec Investments Ltd* v. *Hotel Terrigal Pty Ltd*, note 20 *supra*.

[112] *Cf. Downie* v. *Lockwood*, note 92 *supra*.

[113] Analysis of the cases distinguishing a claim for possession and "an equity to remain" has been attempted; see A. Everton, "An Equity to Remain . . .", note 6 *supra*, 423. *Cf. Dodsworth* v. *Dodsworth*, note 76 *supra*, where the equity raised was thought to be capable of satisfaction by repayment of the monetary outlay involved and there was no claim to protect occupation.

[114] D. Allan, note 53 *supra*.

[115] Note 62 *supra*. As a matter of history *Ramsden* v. *Dyson* originally belonged to the *Dillwyn* v. *Llewellyn* and *Plimmer* v. *Mayor of Wellington* line of authority though it has since been relegated to contract law. See Lord Denning M.R. in *Inwards* v. *Baker*, note 39 *supra*, 36.

Ltd[116] are obvious partners to the equity cases, even if they traditionally appear in contract texts. Constructive trusts and equities are acknowledged to be interchangeable.[117] Indeed, more of these situations would be labelled trusts if it were not for the excessive concern for marketability of land[118] and the antipathy towards rules which virtually guarantee survival of the interest against third parties.

The courts retain a continuing equitable jurisdiction through which to create new rights and remedies, though some writers still seem able to deny that this jurisdiction exists in property.[119] Is reform expedited by the concession that the categories of equitable interests are closed or that the situations where they should be extended were satisfactorily defined prior to the Judicature Act 1873 (Eng.)?[120] While labelling is an arbitrary outcome of pleading, the tendency to under-utilise the flexibility of established equitable interests such as the constructive trust is unfortunate, especially since it can obviate major difficulties arising under land registration schemes.[121] The constructive trust gives courts scope to protect interests which have no formality to support them and hence which do not appear on the register. If there is a persistence in developing new categories, it should be remembered that as they currently operate, land registration schemes do not make room for such categories. Though this might advance marketability it seldom gives sufficient weight to competing values.

3. *Moving Away From Categories and Developing Reasons*

The traditional debate is concerned with the judicial support for creating a new category of proprietary interests labelled equities. However, the roots of the argument touch upon more fundamental questions, questions which are seldom explicitly considered. A major unarticulated premise is since the parties in every future case, who are faced with arguing that a new interest should be recognised, cannot be expected to plough through the full ramifications of the conceptual issues, it assists analysis to create a new category called a mere equity which has the trappings of authority to which lawyers can refer when

---

[116] [1947] K.B. 130.

[117] *Tanner* v. *Tanner*, note 30 *supra*; *Eves* v. *Eves*, note 60 *supra*. See also *Binions* v. *Evans*, note 41 *supra*, where resulting trusts and equities are relied on.

[118] M. Neave and M. Weinberg, note 6 *supra*, 30 have another reservation about the usefulness of trusts in this area: trust remedies are less flexible than the equity concept which "enables the court to tailor the relief given to the plaintiff to fit the facts of the particular case".

[119] H. Wade, note 6 *supra*, 347: "[R]ights which can bind third parties ought to be of a limited and familiar kind; for otherwise purchasers might have to investigate an infinite variety of incumbrances". This view is soundly criticised by G. Cheshire, note 6 *supra*, 9-13.

[120] This is particularly hard to justify when courts are noticeably extending trusts. See *Binions* v. *Evans*, note 41 *supra*. *Cf.* R. Smith, note 6 *supra*, 141-144.

[121] Failure to register is not a disaster since trust interests cannot appear on the register in Torrens schemes.

contemplating a remedy in a new situation. Yet, is not that solution too simplistic for the problem or more accurately, for so many different problems? Is it not dangerously facile to reduce legal complexity to "rule of thumb" categories for solutions? Precision should be sought in each class of case only in so far as the nature of the problem admits. A category that does not constructively bring together relevant factors for decision tends to obscure the real basis of judicial intervention. Where judges are not protecting existing rights, the reasons they choose to exercise discretion cannot be explained by categories. This being so, the category does not assist in predicting what judges will do.

It will become increasingly common in a rapidly changing society for a court to be confronted with situations in which social policy and conscience demand a remedy for a plaintiff who finds himself outside the existing armoury of remedies. If forces are strong enough the courts will be able to escape the constraint of existing doctrine. This is no less true of our encrusted hierarchy of proprietary interests. The compelling need which commentators have felt for a new category of proprietary interests called mere equities is symptomatic of an excessive awe at the words property and equitable estate which is only now breaking down. It is no longer heretical for a court to admit it is creating a new personal right. Is there any essential difference when a court enforces a right against a third party for the first time? When third party rights arise distinct policy factors such as marketability of land are obviously present and the court must be more circumspect in action. However, the Chancery courts did create such rights, for example, in extending the right of the beneficiary to follow trust property and by enforcing restrictive convenants to facilitate private planning. The suggestion that this inherent flexibility of equity was abrogated by the Judicature Act 1873 (Eng.) and its colonial equivalents is out of key with the increasing pace of change and the historical function of equity jurisdiction. The great gulf between proprietary and personal rights is in retreat;[122] as a conceptual framework in which to decide between litigants it is too restrictive. The remaining question is how best to drive forward. The answer, it is suggested, lies in promoting a more creative approach to existing equitable remedies as social conditions demand. The process of categorisation might be appropriate to later stages of development after

[122] Scarman L.J. in *Crabb* v. *Arun District Council*, note 108 *supra*, 193 said, "I do not find helpful the distinction between promissory and proprietary estoppel. This distinction may indeed be valuable to those who have to teach or expound the law; but I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance". This distinction between proprietary and personal rights is part of the traditional literature; for instance F. Crane, note 6 *supra* and A. Everton, "An Equity to Remain . . .", note 6 *supra*, 422. The pragmatic approach of Lord Scarman in searching for the "minimum equity to do justice to the plaintiff" (note 108 *supra*, 198) and his reliance on the specific facts of the conduct of the defendant to define the injustice is to be applauded.

new remedies have received the *imprimatur* of habitual use. Used too early it creates rigidity.

Equities raise central issues about the judicial function. In a regressive view the judicial task can be described as keeping current decision, dogmas and human expectations in line with past decisions, authority and rules so that change is orderly and excessive disruption is avoided. More popular and progressive rhetoric argues that judges keep legal rules in tune (more or less successfully) with social values and changes in the existing social fabric.[123] Whichever emphasis is correct, the denial of subjective decision and the perception of law as a whole system of rules are traditional intellectual tools that subdue judicial consciousness. They also inhibit clear theory about social processes. This in turn inhibits a rational and ordered body of experience to guide future action. The corollary is that the subjectivity involved in decision-making is systematically understated in theoretical analysis of substantive legal reasoning, despite an enormous body of explorative and general literature which demonstrates its importance.[124]

Formal legal theory has over-stressed order and has failed to accommodate demand for change by systematically developing devices for renewal. To the formalist, adaptation and change appear to involve judicial non-conformity. Judges are asked to constrain their discretion by a vision of the past, meticulously catalogued and selectively filtered according to supposedly objective and extremely narrow criteria of relevance. A version of judicial decision-making as automatic, traditional or formal is an over-simplification. In fact, judicial decision-making involves in any one instance a number of stages at which judges must commit themselves to a choice.[125] Even in the simple case, a judge must elect among interpretations of the facts,[126] determine criteria of relevant facts, distinguish relevant from irrelevant facts, determine the criteria for selecting relevant law, interpret the relevant law, apply the law to the facts by a personally acceptable process of reasoning and articulate his judgment according to a professionally acceptable reasoning process in public argument. In frontier cases where fairly straight forward

---

[123] J. Stone, note 96 *supra*, 235-241.

[124] K. Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960). His criticism of formal style judging and praise of grand style judging is rich in its perceptions. Note the criticisms of W. Twining, *Karl Llewellyn and the Realist Movement* (1973) 266-269. The writings of Cardozo provide a non-formalistic model of judicial decision-making and a reflective analysis of the creative role of the Judge: *The Nature of the Judicial Process* (1921); *The Growth of the Law* (1924); *The Paradoxes of Legal Science* (1928). A general discussion of the methods of Cardozo is available in E. Patterson, "Cardozo's Philosophy of Law" (1939) 88 *U. Pa. L. Rev.* 71, 156, 160-165 and C. Clark and D. Trubek, note 4 *supra*.

[125] For a diagrammatic representation of "choice points" see L. Allan and M. Caldwell, "Modern Logic and Judicial Decision Making: A Sketch of One View" (1963) 28 *Law and Contemp. Prob.* 213, 227.

[126] C. Perelman, "Judicial Reasoning" (1966) 1 *Israel L. Rev.* 373, 376-377.

application of an admitted rule to the case at hand is clearly inappropriate, a more complex and significant choice must be made. Far from being the extraordinary situation, cases which require such significant choice (including those which demand invention of new rules) are standard in many first instance cases and in most appeal cases. While this point of choice is the recognised place for injecting judicial creativity, it is obvious that not all decisions made at this stage can be called creative. In actuality many of these decisions do not survive in the system. This is a central problem in controlled innovation. Formal theory has no clear rules or guidelines to determine when or why a purported innovation will become an established legal norm. Such guidelines as exist are rules about a hierarchical order of authoritative statements rather than substantive and systematic devices which make creative judicial decision-making an objectively rational process. The precedent doctrine works to minimise ad hoc decision-making and balances certainty and change in ways that have long been misunderstood but, as a result of the American Realist movement, the subjectivity invited by the juxtaposition of opposing aims of certainty and change and the multiple points of choice involved in legal decision-making are now clearly recognised. We can no longer afford to place a disproportionate theoretical emphasis on certainty.

The denial of the existence of the creative scope of judges has plagued theoretical rationalisation of processes of the common law since Blackstone. Whilst it is now unfashionable to suggest that judges find law rather than make it, the legacy of superficial judicial decision-making remains.[127] Whatever the reasons for this, it is not because an alternative analysis is unavailable. The possibility of structured creativity in frontier areas has evolved dramatically in response to the model of rational decision-making developed by Harold Lasswell and Myers McDougal.[128] Their efforts have generated a new term, "policy science".[129] This development was a response to the inability of traditional models of formal legal reasoning to generate answers acceptable to more highly educated critics. These critics were not impressed by theological claims of *a priori* legal principles that were central to the legal experience of the nineteenth century.[130] While policy science borrows heavily from

---

[127] C. Clark and D. Trubek, note 4 *supra*. An historical survey is in R. Gordon, "Introduction: J. Willard Hurst and the Common Law tradition in American Legal Historiography" (1975) 10 *Law and Soc. Rev.* 9.

[128] H. Lasswell and M. McDougal, "Legal Education and Public Policy: Professional Training in the Public Interest" (1943) 52 *Yale L.J.* 203.

[129] A critical analysis of the ideological, epistemological and philosophical implications of policy science and its particular versions of the nature of reality, knowledge and language is in L. Tribe, "Policy Science: Analysis or Ideology" (1972) 2 *Phil. and Public Affairs* 66.

[130] See M. Horwitz, *The Transformation of American Law, 1780-1860* (1977) for an account of the growth of *a priori* principles in the United States. No historical account is available in the United Kingdom or Australia.

political science and has been applied primarily to large questions of public and world order[131] it is designed to systematise and rationalise treatment of complex legal issues. It is available for application to any of the questions involving interaction of facts and values which continuously confront decision-makers.[132] It establishes a more satisfying decision-making model by reducing the complex factors into ordered stages in a fully articulated decision process. Mayo and Jones have developed the following stages:

1. Identification of (or provisional statement of) the problem
2. Specification of goal-objectives
3. Recognition of controlling contextual factors including:
   a. Demands and expectations of participants
   b. Resources available to claimants or to decision makers
   c. Relevant institutional framework including legal processes
   d. Customary practices involved
   e. Major movements and trends affecting the problem context
4. Invention and designation of alternative courses of action
5. Projection of the more probable outcomes for each alternative course of action
6. Description of specific consequences for each projected outcome
7. Evaluation of such consequences in terms of the specified goals (value-preference scale)[133]

The usual description of the judicial decision is far removed from this structure but our plan is not to describe the actuality. Rather, it is to suggest an ideal type of reasoned judicial decision as a guide to its improvement. The disparity between the description and the current reality does not diminish the utility of an ordered type of decision-making in the frontier area which borrows heavily from policy science. This adaptation would immediately and significantly improve renewal techniques in property law.[134]

---

131 M. McDougal and H. Lasswell, *The Interpretation of Agreements and World Public Order; Principles of Content and Procedure* (1967); M. McDougal, H. Lasswell and I. Vlasic, *Law and Public Order in Space* (1963); M. McDougal and W. Burke, *The Public Order of the Oceans: A Contemporary International Law of the Sea* (1962); M. McDougal and F. Feliciano, *Law and Minimum World Public Order: The Legal Regulation of International Coercion* (1961).

132 Introductory analyses include: J. Moore, "A Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell" (1968) 54 *Va. L. Rev.* 662 and S. Tipson, "The Lasswell—McDougal Enterprise: Toward a World Public Order of Human Dignity" (1974) 14 *Va. J. Int'l L.* 535.

133 L. Mayo and E. Jones, "Legal-Policy Decision Process: Alternative Thinking and the Predictive Function" (1964) 33 *Geo. Wash. L. Rev.* 318, 349-350. The article is one of the best detailed expositions of a basic decisional model available in the literature.

134 See M. McDougal and D. Haber, *Property, Wealth Land: Allocation Planning and Development. Selected Cases and Other Materials in the Law of Real Property: An Introduction* (1948).

IV CONCLUSION

Lessons from the past indicate that efforts to balance grand concepts of pure reason with the structural limitations of the court system and the intellectual limitations of the human mind will not have universal appeal. This does not mean we should not strive to assert rationality as a useful objective in decision-making. Certainty is not developed by slavish application of traditional legal rules or even by scrutiny of their effect in the real world. It is not advanced by playing sterile word games. The only certainty we can hope for is a structural mechanism which balances stability against other values and allows for more sensitive innovation and adaptation of the system in response to feedback. The choice does not lie between atrophied rules, habitually applied after empty debate about the meanings of words in previous judgments and the unstructured and unprincipled manipulation of remedies according to the individual sense of justice and morality of particular judges—an equity depending on the length of the secularised conscience of a judge. Between these two extremes lies a wide range of choices. The choice favoured here admits that the law is an open system, that judges, certainly appeal judges, control its boundaries to an important degree, that control is maintained by an initiation of judges into shared perceptions which socialise them into a common approach to innovation and that all decisions, even policy decisions, can be supported by structured and articulated principles. Innovation by judges must be freed from its almost exclusive reliance on existing rules. This is the most serious difficulty with traditional models of judicial creativity. Describing what the rules were can never, of itself, justify what they are now nor what they should be tomorrow.