

THE RHETORIC OF REALTY

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1. Introduction

Although Holmes famously maintained that the law ‘cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics’,¹ it is in the law of land that the perfection of pure reason appears most nearly attainable.² English land law³ -- more obviously than any other area of the law -- seems to be characterised by the rational application of axiomatic principles to a limited number of highly artificial jural constructs.⁴ The propositional dogmas of land law control relationships amongst a set of estates and interests whose taxonomy was meticulously enshrined in codified form in the property legislation of 1925 and is left virtually untouched by the Land Registration Act 2002.⁵ It is arguable therefore that land law can be seen as comprising a modern *ratio scripta* whose conceptual purity and internal coherence are unrivalled across the field of contemporary law.⁶ Indeed land law displays many of the features of a closed system of logic or an

¹ Oliver Wendell Holmes, *The Common Law* (Little, Brown & Co, Boston, 1881), p 1. See also Jerome Frank, *Mr Justice Holmes and Non-Euclidean Legal Thinking*, 17 Cornell LQ 568 at 571 (1931-32).

² Some three centuries before Holmes, Coke had described law as ‘the perfection of reason’, adding that reason was ‘the life of the law, nay the common law itself is nothing else but reason’ (*Co Litt*, 97b (sect 138)).

³ The use of this phrase necessitates, of course, the ritual apology that ‘English’ law connotes, for the purpose of this essay, the law of England and Wales.

⁴ See F H Lawson, *The Rational Strength of the English Law* (Stevens, London 1951), p 79 (describing the English law of property as ‘more logical and more abstract than anything that to my knowledge can be found in any other law in the world’).

⁵ Effective 13 October 2003.

⁶ The Real Property Commissioners of the 19th century clearly envisaged that the result of the reforms proposed by them -- and largely realised in the property legislation of 1925 -- would ‘come almost as near perfection as can be expected in any human institution’ (see A W B Simpson, *A History of the Land Law* (2nd edn, Clarendon 1986), p 275).

autopoietic order, prompting immediate analogies with mathematics⁷ and, more particularly, with the discipline of Euclidean geometry.⁸ Land law resembles, in this sense, a specialised game,⁹ played by a rarified caste of amiable eccentrics, in which the outcome of every strategic move is dictated by an arbitrarily predetermined set of foundational principles.¹⁰ Accordingly, it could be posited that the discourse of land law is governed by its own internal grammar; that the outcome of all land law operations is preordained by the unchallengeable starting points which lie back of, or beyond, the law; and that property in land 'behaves' in a manner just as predictable and verifiable as any other branch of rational science.

It is the purpose of this paper to argue that, although the law of real property contains many emanations of a strict logic or deep rationality which orders the intellectual processes of the land lawyer, there remains much that is not resolved by the mechanical application of formal or mathematical reasoning.¹¹ Instead the logic of land law is heavily infiltrated by a variant mode of reasoning -- a 'rhetoric' or persuasive logic based on conventional understandings reached by the 'interpretive community' of land lawyers.¹² In some important way, 'property talk' within this community settles the parameters of legal doctrine. This alternative mode of rational discourse has ancient roots. It draws its vitality as an 'appeal for the adherence of an audience, which can be thought of, after the manner of Kant's categorical imperative, as encompassing all reasonable and

⁷ This is not to deny that the science of mathematics is also characterised by an aesthetic or nonanalytic component which transcends the purely logical experience (see Philip J Davis and Reuben Hersh, *The Mathematical Experience* (Harvester Press, Brighton 1981), pp 298-316). Indeed, for many mathematicians 'the distinguishing feature of the mathematical mind is not logical but aesthetic' (Seymour A Papert, 'The Mathematical Unconscious', in Judith Wechsler (ed), *On Aesthetics in Science* (MIT Press, Cambridge Mass 1978), p 105). But then again the intense beauty of highly ordered schemes is also one of the primary attractions of the law of realty.

⁸ See Walter W Cook, *Scientific Method and the Law*, 13 ABAJ 303 at 304 (1927).

⁹ All common law-derived systems of property consist of systematic abstractions which 'seem to move among themselves according to the rules of a game which exists for its own purposes' (F H Lawson, *op cit*, p 79).

¹⁰ Ironically, the rational strength of English land law may also explain some of the distaste felt, in certain quarters, for the discipline of real property. All too often there is a perception that land law is mechanical, bereft of cerebral vitality, its highest claim to intellectual merit being that it remains encrusted with the relics of an arid medieval scholasticism. One extremely distinguished jurist has alleged that '[m]any legal decisions, for example those in the law of real property, are very largely devoid of any moral or social ideals; they rest entirely upon the application of legal rules' (A G Guest, 'Logic in the Law', in Guest (ed), *Oxford Essays in Jurisprudence* (Oxford UP 1961), p 187). Even Blackstone ended his account of realty in a state of evident disenchantment, recording his fear that 'it has afforded the student less amusement and pleasure in the pursuit, than the matters discussed in the preceding volume' (*BI Comm*, Vol II, p 382).

¹¹ Here we adopt Laurence Tribe's definition of 'mathematical methods' as encompassing 'the entire family of formal techniques of analysis that build on explicit axiomatic foundations, employ rigorous principles of deduction to construct chains of argument, and rely on symbolic modes of expression calculated to reduce ambiguity to a minimum' (see Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv L Rev 1329 at 1330 (1970-71)).

¹² Here the term 'rhetoric' reverts to its true or original meaning, not as a pejorative description of verbal posturing, but rather as a form of discourse 'concerned with creating opinion and inspiring action' (see Allen D Boyer, *Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition*, 10 Intl J for the Semiotics of Law 3 at 4, 10-11 (1997)).

competent men.’¹³ The epistemological function of this ‘rhetoric’ is no less compelling than that of the Euclidean theorem and, when let loose in land law, reveals itself as a powerful motivating force behind the directions taken by the modern law. The ‘rhetoric’ of realty, in fixing the co-ordinates, orientations and movements of land law concepts, is actually much more a matter of geography than of geometry.¹⁴ Land law has always had its reasons, of which reason -- in the purest sense -- knows very little. And the more generalised image of the law which emerges from this analysis reflects a richer and more subtle understanding of the normative structure of legal phenomena as a product not only of collaborative human endeavour, but also of a creative tension between formal and informal sources of law.

Over the last 20 or 30 years the process of ‘rhetorical’ or nonformal argumentation has exerted at least three recognisable kinds of impact upon the development of English land law. First, the modern rhetoric of land has induced a heightened norm of *rationality* in respect of those one-off transactions in which we deal with each other as *strangers*. The effect, felt principally in the context of sale and mortgage, is dramatically to tighten up and stabilise matters pertaining both to land titles and to the priority of claims which would derogate from the absoluteness of titles. The overriding concern here is with the maximisation of systemic order. Second, a new norm of *reasonableness* has been injected into those areas in which, in some broad sense, we deal with each other as *neighbours*. The impact of this imperative, measured in terms of the tolerances and accommodations increasingly required of those who choose to co-exist in mutual proximity, is both extensive and surprisingly unremarked. Here the dominant focus is upon the maximisation of social co-operation. Third, the contemporary rhetoric of realty has started to reinforce a significant norm of *reciprocity* in those wider contexts in which we deal with each other as *fellow citizens*. This trend is evident in the way in which an intensified element of community-oriented responsibility is being quietly engrafted on to the phenomenon of land ownership in the Britain of the 21st century. The governing preoccupation here is with the maximisation of civic equity. The implications of today’s new ‘rhetoric’ are, of course, interactive: the three spheres of interface -- as strangers, neighbours and fellow citizens -- are never wholly distinct or discrete. Yet all three of the normative drifts (or ‘meta-principles’) which we identify in this paper can be seen to mirror more profound social, cultural and economic developments. In combination they demonstrate that it is the *rhetorical* power wielded by land law’s interpretive community which controls the logic of modern realty and preserves it as a more or less orderly structure of rules which is responsive, albeit slowly, to the processes of societal change.

In some yet deeper sense, the three normative movements referred to above can also be said to coalesce in - indeed to be emblematic of -- a contemporary concern with the maximisation of material welfare. Together these three trends give expression to a widely perceived need to set in place durable conditions for the self-actualising experience of relative affluence.¹⁵ Alike they seek to underpin the expectations created by lifetime

¹³ Chaim Perelman, ‘The New Rhetoric: A Theory of Practical Reasoning’, in Perelman, *The New Rhetoric and the Humanities* (Reidel 1979), pp 13-14.

¹⁴ ‘The law can never succeed in becoming a completely logical system ... [b]ut logic acts as a kind of geography, explaining the directive force of propositions and their relationship one with the other’ (A G Guest, ‘Logic in the Law’, in Guest (ed), loc cit, p 197). For an earlier reference to the ‘logical geography of legal concepts’, see Samuel J Stoljar, *The Logical Status of a Legal Principle*, 20 U Chi L Rev 181 (1952-53).

¹⁵ A telling index of increasing affluence is recorded in the statistic that in Great Britain owner-occupation rose from 29 per cent of all households in 1951 to 50 per cent in 1971 and, finally, to 70 per cent in 2001 (*Social Trends 32* (2002 edn London), pp 166-167 (Table 10.7)).

investments of labour, skill and careful economic management. It almost seems as if a century traumatised by the memory of global warfare generated in its closing decades a forceful, if subliminal, yearning for peace, simplicity and security in the enjoyment of gathering economic prosperity. Consistently with the guiding spirit of an increasingly secular and materialistic age, a dominant social imperative now accentuates the importance of hassle-free access to the intangible 'quality of life' benefits associated with economic advantage. The significance of this imperative is revealingly, if perhaps unconsciously, reflected in the very language of the post-war European Convention on Human Rights, which guarantees the entitlement of every natural or legal person to the 'peaceful enjoyment of his possessions.'¹⁶

The rhetoric of modern land law accordingly articulates a generalised impatience with any threat to the realisation of individualist visions of the good life.¹⁷ 'Griefers' -- to adopt the current patois for players whose strategy is essentially negative or obstructionist -- are hugely unwelcome in today's deadly serious game of privatised accumulation and consumption. The pre-eminent object of popular desire is the quiet enjoyment of utility -- the maintenance of a certain 'feel good' factor in the undisturbed exploitation of economic benefit. In a world of complex interdependence property owners can no longer afford the constant attrition of unnecessary conflict over title, adverse rights, neighbourhood controversies or the selfish pre-emption of environmental goods. A correspondingly heavy emphasis is therefore attached to the stabilisation of material advantage, to the virtues of social co-operation and compromise, and to the optimal co-ordination of the preconditions for sustainable enjoyment of the world around us. *These* are the crucial semiotic propositions, emanating from within a powerful interpretive community of lawyers and others, which nowadays inform and supplement the traditional logic of realty. They are also, undoubtedly, the motivations which reflect the fundamental, if somewhat limited, aspirations of an overwhelmingly post-religious and highly acquisitive society. An earlier generation's concern with the prescriptions of distributive justice has been transmuted into a more general *Angst* in relation to the preservation or retention of the material, emotional and experiential goods of modern life.¹⁸ A concomitant effect has been to reinforce existing configurations of wealth and to intensify the widening social and political gulf between those who enjoy economic success and those who remain marginalised, disempowered and, above all, excluded from the property game.¹⁹

¹⁶ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (see Cmd 8969 (1953)), Protocol No 1, Art 1.

¹⁷ A more general reflection of the modern *Zeitgeist* can be seen in the importance increasingly attached to the jurisdiction, exercised pursuant to the Crime and Disorder Act 1998, to impose 'anti-social behaviour orders' in restraint of even 'relatively trivial' instances of destructive and offensive conduct (see *R (McCann) v Manchester Crown Court* [2002] 3 WLR 1313 at 1322F-1323A [16] per Lord Steyn, 1330G-1331A [42] per Lord Hope of Craighead, 1344A-D [85-86] per Lord Hutton).

¹⁸ It should be obvious that the operation of a legal 'rhetoric' in no way guarantees that its goals are particularly noble or its social effects especially benign. Brendan Edgeworth observed some time ago that the mere existence of certain 'critical reflective attitudes' within the legal community (even if such can be identified) may simply connote the entrenchment of unattractive patterns of privilege or power (see Edgeworth, *Legal positivism and the philosophy of language: a critique of H L A Hart's 'Descriptive Sociology'*, (1986) 6 *Legal Studies* 115 at 132-139). See also Edgeworth, 'Reading Dworkin Empirically: Principles, Policies and Property', in Alan Hunt (ed), *Reading Dworkin Critically* (Berg, New York and Oxford 1992), pp 187-208.

¹⁹ See K J Gray, *Equitable Property*, (1994) 47(2) CLP 157 at 214. As Justice McHugh pointed out more recently in *Western Australia v Ward* (2002) 191 ALR 1 at 149 [529], 'you do not have to be a Marxist to

But first let us examine the role of logic in the organisation of our law of real property.

2. The logic of land law

There is much to be said for the view that land law comprises an axiomatic system of rules in which legal outcomes emerge as the sweet distillation of an invincible logical process. As Lord Devlin once pointed out, 'no system of law can be workable if it has not got logic at the root of it.'²⁰ Logic, with all its frailty, is still the essential operating system of the human condition -- our ultimate operational resource. Logic is commonly seen as providing a universal standard by which it can be judged whether a particular conclusion has been correctly derived from its supposed premises.²¹ Indeed, the very universality of the logical process goes far towards ensuring both our freedom from the exercise of arbitrary will and a measure of equality in the enforcement of the law²² -- in short, towards guaranteeing that we have a government of laws and not of men. It has also been suggested that logical systems confer 'an enormous mnemonic convenience' in facilitating the recollection and communication of causally linked propositions within a complex structure of rules.²³ Logical systems tend, furthermore, to satisfy that component of the 'moral emotion of justice' which causes humans to desire that 'the proposition by which conduct is evaluated be taken as the consequence of some larger, more general, proposition.'²⁴

(1) The axiomatic structure of land law

The essence of an axiomatic structure is, of course, that 'axioms' (or 'fixed postulates') enjoy a fundamental and autonomous status within the scheme. An axiomatic proposition is a raw *datum* whose validity is assumed, never proved. One can no more seek to go *behind* an axiom than one may question why, in a game of chess, the knight or the bishop moves in the peculiar ways these pieces do. It is irrelevant that the axiom in

recognise that at least on occasions the dominant class in a society will use its power to disregard the rights of a class or classes with less power.'

²⁰ *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 at 516. See also *Scott v Davis* (2000) 175 ALR 217 at 245 per McHugh J.

²¹ In a very strict sense, of course, 'the conclusion does not follow from premises; conclusions and premises are two ways of stating the same thing' (John Dewey, *Logical Method and the Law*, 10 Cornell LQ 17 at 23 (1924-25)).

²² See Morris R Cohen, *The Place of Logic in the Law*, 29 Harv L Rev 622 at 624 (1916).

²³ Max Radin, *The Chancellor's Foot*, 49 Harv L Rev 44 at 53 (1935-36). See also Geoffrey Samuel, *The Foundations of Legal Reasoning* (MAKLU, Antwerp 1994), pp 120-121.

²⁴ In this respect Radin merely reflected the views of other writers who maintained that the tendency to universalise propositions of law served the principle of equality before the law and was 'on the whole, beneficial to the legal ordering of society' (see Nathan Isaacs, *How Lawyers Think*, 23 Col L Rev 555 at 561 (1923)).

question is morally neutral or indifferent and that no evil of any kind would ensue from a denial of its validity. Axioms are simply immune from rational challenge.²⁵ To knock at an axiom is to want to play a different game; and to alter an axiom is already to have begun a different game.²⁶

English land law is no stranger to axiomatic propositions.²⁷ Blackstone spoke, for example, of the 'fixed and undeniable axiom' that all land is held 'mediately or immediately of the king.'²⁸ Thus, even today, the citizen is confined to non-allodial forms of land ownership, ie to ownership of a mere abstract 'estate' or 'interest' in the land.²⁹ Each interposed abstraction -- each 'estate' or 'interest' -- is carefully calibrated with reference to its temporal duration and other incidents, with the consequence that the actuality of land ownership is ultimately expressed as a coherent grid of logically defined, interlocking conceptual rights. All 'estates' or 'interests' are then assigned either *legal* or *equitable* quality in accordance with other axioms which lie grounded in statute,³⁰ different rules classically governing the enforcement of these legal and equitable entitlements against strangers. Other axioms of English land law follow thick and fast -- much as might be expected in a structure so heavily regulated by a legislative code. No minor may hold a legal estate.³¹ A legal estate may not be owned by tenants in common.³² The maximum number of co-owners of a legal estate is four.³³ The 'four unities' of possession, interest, title and time must be present before a joint tenancy can be said to exist³⁴; and

²⁵ See *Co Litt*, 11a (sect 3) ('so sure and uncontrollable as that they ought not to be questioned').

²⁶ Thus when in 1823 William Webb Ellis, with a 'fine disregard' for the prohibition against handling in soccer, allegedly lifted the ball and ran with it, the result was the birth of the game of rugby football.

²⁷ A 'maxime in law' is 'a proposition, to be of all men confessed and granted without prooffe, argument, or discourse', wrote Coke, adding '*Contra negantem principia non est disputandum*' (*Co Litt*, 67a (sect 90), 343a (sect 648)). Commenting in the immediate context of Littleton's account of the law of realty ('the most perfect and absolute work that was ever written in any humane science'), Coke clearly thought it 'too much curiositie to make nice distinctions' between a 'maxime', a 'principle', and a '*rule, a common ground, postulatum, or an axiome*' (*Co Litt*, 11a (sect 3)). See also John U Lewis, *Sir Edward Coke (1552-1633): His Theory of 'Artificial Reason' as a Context for Modern Basic Legal Theory*, (1968) 84 LQR 330 at 334-339.

²⁸ *Bl Comm*, Vol II, p 106 (a 'received, and now undeniable, principle' (ibid, p 105)). See *Lowe v J W Ashmore Ltd* [1971] Ch 545 at 554F per Megarry J.

²⁹ See *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 277 per Latham CJ; *Stokes v Costain Property Investments Ltd* [1983] 1 WLR 907 at 909F per Harman J.

³⁰ Law of Property Act 1925, ss 1(1)-(3), 52(1)-(2), 54(2). Furthermore, the legal status of rights in registered land often depends on the completion of their transfer by registration (see Land Registration Act 2002, ss 7(1), 27(1)-(3)).

³¹ Law of Property Act 1925, ss 1(6), 205(1)(v). See also Trusts of Land and Appointment of Trustees Act 1996, Sch 1, para 1(1)(a).

³² Law of Property Act 1925, ss 1(6), 36(2).

³³ Trustee Act 1925, s 34(2); Law of Property Act 1925, s 34(2)-(3). The limitation to four trustees does not apply to land vested in trustees for charitable, ecclesiastical or public purposes (Trustee Act 1925, s 34(3)).

³⁴ *Bl Comm*, Vol II, pp 180-182; *AG Securities v Vaughan* [1990] 1 AC 417 at 431H per Fox LJ.

where all 'four unities' are present in a multiple holding of land there is joint tenancy.³⁵ There can be no lease of land unless the grantee enjoys exclusive possession.³⁶ Future interests are automatically void at common law unless they are bound to vest, if they vest at all, within 21 years after the expiry of some life in being at the date of their creation.³⁷ Examples could proliferate.

Of course, none of this need have been so: the axioms of English realty could have been fashioned quite differently. But this is merely to make the point that the axioms of land law, being generally value-neutral, serve an arbitrary purpose within the logical scheme to which they belong. They mark out irreducible and irrefutable points of reference for the systematic resolution of disputes, effectively setting up 'a legal order in the place of private war.'³⁸ Axiomatic propositions underpin the effective functioning of a legal order and, as is so often said in relation to the law of property, justice is never quite as important as *order*.³⁹

(2) The closed nature of the axiomatic system

With its careful gradation of conceptual 'estates' and 'interests' in land, English law ensured that proprietary entitlement became a matter of virtually mathematical abstraction. But the rational coherence of any axiom-oriented system depends, in large degree, on the maintenance of strict boundaries around the system and its key conceptual constructs. This concern has triggered two closely related historic features of our law of real property, although there is today some question whether these features are quite as immutable as they may once have appeared.

(a) *The numerus clausus*

In common with many other regimes of property, English law has traditionally placed stringent limits on the kinds of entitlement which are considered 'proprietary' and therefore within the scope of the axiomatic rules of land law. The catalogue of proprietary entitlement in land comprises a closed list -- a *numerus clausus* -- of

³⁵ *Corin v Patton* (1990) 169 CLR 540 at 572 per Deane J. It has been said that the law of joint ownership bears to this day 'many traces of the scholasticism of the times in which its principles were developed' (*Wright v Gibbons* (1949) 78 CLR 313 at 330 per Dixon J).

³⁶ *Radaich v Smith* (1959) 101 CLR 209 at 214 per McTiernan J, 222-223 per Windeyer J; *AG Securities v Vaughan* [1990] 1 AC 417 at 454A-B per Lord Bridge of Harwich; *Antoniades v Villiers* [1990] 1 AC 417 at 459D-H per Lord Templeman.

³⁷ The common law rule against perpetuities, now heavily amended by statute, annulled excessively remote contingent interests (see John Chipman Gray, *The Rule against Perpetuities* (4th edn, Boston 1942), s 201).

³⁸ Roscoe Pound, *Law and Morals* (Univ of North Carolina Press, Chapel Hill, NC 1924), p 77.

³⁹ See *Burnet v Coronado Oil & Gas Co*, 285 US 393 at 406, 76 L Ed 815 at 823 (1932) per Justice Brandeis ('in most matters it is more important that the applicable rule of law be settled than that it be settled right'). See also *Cowcher v Cowcher* [1972] 1 WLR 425 at 430A-C per Bagnall J; *Western Australia v Ward* (2002) 191 ALR 1 at 137 [479] per McHugh J.

recognised estates and interests. In fact, these permissible forms of conceptual entitlement probably total fewer than a dozen,⁴⁰ and, unlike the position in contract, land law allows the citizen no freedom to customise new species of right.⁴¹ Those who play the property game are restricted to the pieces contained in the box, in just the same way that the chess player has no discretion to introduce a miniature cannon or flame-thrower in order to reinforce his supply of knights and soldier-pawns. Alien forms may not intrude into the world of land law. The inhabitants of this world -- the world of our land law game -- are required to construct their proprietary relationships using only the conventional building blocks constituted by the known 'estates' and 'interests'.⁴² As Lord Brougham LC classically observed in *Keppell v Bailey*,⁴³ 'it must not ... be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner.'⁴⁴ Brougham's protective concern for law as a rational rule system was richly evidenced in the next sentence of his judgment: 'It is clearly inconvenient both to the science of the law and to the public weal that such a latitude should be given.'⁴⁵

Similar concerns for the schematic order of land law underlie most attempts to explain the *numerus clausus* principle. The restriction on the proliferation of proprietary rights in land allegedly serves both to reinforce certainty in matters of ownership and obligation⁴⁶ and also to prevent the cluttering of land with long-term burdens of an idiosyncratic or anti-social nature.⁴⁷ The *numerus clausus* has recently been described as a 'deep design principle of the law that is rarely articulated explicitly', the limited menu of estates and interests in land helping to ensure that property comes 'in standardized packages that the layperson can understand at

⁴⁰ See Bernard Rudden, 'Economic Theory v Property Law: The *Numerus Clausus* Problem', in J Eekelaar and J S Bell (ed), *Oxford Essays in Jurisprudence (Third Series)* (Clarendon 1987), pp 241-242. Rudden points to the estate in fee, the life interest, the leasehold estate, easements, profits à prendre, restrictive covenants, mortgages and allied forms of security interest in land.

⁴¹ 'A new species of incorporeal hereditament cannot be created at the will and pleasure of an individual owner of an estate; he must be content to take the estate and the right to dispose of it subject to the law settled by decisions, or controlled by act of parliament' (*Hill v Tupper* (1863) 2 H & C 121 at 127-128, 159 ER 51 at 53 per Pollock CB). Similar assertions are collected by Rudden, loc cit, p 244.

⁴² See eg Law of Property Act 1925, s 4(1), proviso, which declares that, save for instances of express enactment, an equitable interest in land 'shall only be capable of being validly created in any case in which an equivalent equitable interest in property real or personal could have been validly created' before 1 January 1926.

⁴³ (1834) 2 My & K 517 at 535, 39 ER 1042 at 1049.

⁴⁴ See also *Ackroyd v Smith* (1850) 10 CB 164 at 188, 138 ER 68 at 77-78 per Cresswell J.

⁴⁵ '[G]reat detriment would arise and much confusion of rights if parties were allowed to invent new modes of holding and enjoying real property' ((1834) 2 My & K 517 at 536, 39 ER 1042 at 1049).

⁴⁶ '[I]t would hardly be possible to know what rights the acquisition of any parcel conferred, or what obligations it imposed' (*Keppell v Bailey* (1834) 2 My & K 517 at 536, 39 ER 1042 at 1049 per Lord Brougham LC).

⁴⁷ Unrestricted freedom for estate owners to invent proprietary rights would 'impress upon their lands and tenements a peculiar character, which should follow them into all hands, however remote' (*Keppell v Bailey* (1834) 2 My & K 517 at 536, 39 ER 1042 at 1049 per Lord Brougham LC). See also *Ackroyd v Smith* (1850) 10 CB 164 at 188, 138 ER 68 at 77-78 per Cresswell J.

low cost.⁴⁸ Thus, it is claimed, the maintenance of the *numerus clausus* facilitates commerce in realty by reducing the transaction costs otherwise incurred in the process of trading with unfamiliar, non-uniform or unorthodox packages of entitlement.⁴⁹ Accordingly, although never adverted to expressly, the *numerus clausus* has silently moved English courts to deny that proprietary status can ever be attained by such protean phenomena as the contractual licence⁵⁰ or the *ius spatiandi* (ie the right to wander at large over another's land).⁵¹ The canon of proprietary rights does not embrace any claim to protection from environmental degradation.⁵² Nor, as some Victorian home owners were keen to establish, is there any such 'right of property' as an entitlement to exclusive use of a name attached to a house or other land.⁵³ Again, in much more modern times, it is significant that the long awaited form of stratified ownership known as 'commonhold' is to be given effect, not through the medium of some novel estate in the land known as a 'commonhold' (as distinct from a freehold or leasehold), but rather as a sub-species of fee simple ownership itself (ie as ownership of a 'freehold estate in commonhold land').⁵⁴

(b) Conceptual vigilance

The axiomatic base of English land law requires that not only its overall structure but also each of its key concepts should be kept within firm definitional limits.⁵⁵ Even inside the field of recognised proprietary rights there is no place for vague or loosely defined entitlement.⁵⁶ Each discrete block of entitlement -- each estate

⁴⁸ Thomas W Merrill and Henry E Smith, *What Happened to Property in Law and Economics?*, 111 Yale LJ 357 at 359 (2001).

⁴⁹ See Thomas W Merrill and Henry E Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale LJ 1 at 24-38 (2000).

⁵⁰ See *Ashburn Anstalt v Arnold* [1989] Ch 1 at 24D per Fox LJ ('a contractual licence does not create a property interest'). See likewise *Camden LBC v Shortlife Community Housing Ltd* (1992) 90 LGR 358 at 373 per Millett J; *Canadian Imperial Bank of Commerce v Bello* (1992) 64 P & CR 48 at 51 per Dillon LJ; *IDC Group Ltd v Clark* (1992) 65 P & CR 179 at 181 per Nourse LJ; *Nationwide Anglia Building Society v Ahmed* (1995) 70 P & CR 381 at 387, 389 per Aldous LJ; *Habermann v Koehler* (1996) 73 P & CR 515 at 520 per Evans LJ, 523 per Peter Gibson LJ; *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 EGLR 108 at 110H-J; *Lloyd v Dugdale* [2002] 2 P & CR 13 at [52(4)] per Sir Christopher Slade.

⁵¹ *International Tea Stores Co v Hobbs* [1903] 2 Ch 165 at 172; *Attorney-General v Antrobus* [1905] 2 Ch 188 at 198-200. See also *Re Ellenborough Park* [1956] Ch 131 at 176 per Evershed MR (an 'indefinite and unregulated privilege'). The proprietary exclusion of the *ius spatiandi* is echoed elsewhere (see eg *Randwick Corp v Rutledge* (1959) 102 CLR 54 at 74 per Windeyer J; *Smeltzer v Fingal CC* [1998] 1 IR 279 at 286; *Kanak v Minister for Land and Water Conservation (NSW)* (2000) 180 ALR 489 at 497).

⁵² *Phipps v Pears* [1965] 1 QB 76 at 84D-E per Lord Denning MR (no right to protection from the weather). See also *Hunter v Canary Wharf Ltd* [1997] AC 655 at 726F-H per Lord Hope of Craighead.

⁵³ *Day v Brownrigg* (1878) 10 Ch D 294 at 302 per Jessel MR.

⁵⁴ Commonhold and Leasehold Reform Act 2002, ss 1(1)(a), 2(1).

⁵⁵ See K J Gray and S F Gray, 'The Idea of Property in Land', in S Bright and J K Dewar (ed), *Land Law: Themes and Perspectives* (Oxford UP 1998), pp 31-32.

⁵⁶ The classic, though controversial, expression of this preoccupation with definitional rigour is found in Lord Wilberforce's statement in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175 at 1247G-1248A

or interest in land -- must have cleanly hewn, crystalline edges, since mathematical precision is perceived to be essential to the rational organisation and operation of the law. Definitional brightlines give each entitlement a hard-edged integrity which makes possible the Euclidean geometry of land law, whilst also ensuring easy commerce with the rights in question.⁵⁷ Thus, for instance, the intellectual orderliness of the scheme is underpinned by the rule which invalidates open-ended terms of years for the very reason that they postulate a *term* without an ascertainable *terminus*, thereby inviting confusion with the fee simple estate.⁵⁸ The conceptual parameters of asset entitlement must be definable with certainty *ab initio*. Likewise the law of easements categorically excludes claims to rights which are 'too vague and too indefinite'.⁵⁹ There can be no easement in respect of a good view or prospect.⁶⁰ An easement cannot, in English law, comprise a right to the uninterrupted access of light or air except through defined apertures in a building.⁶¹ Nor can any easement protect an unimpeded and general flow of air across one's neighbour's land to one's windmill⁶² or safeguard one's land from the noxious smoke emitted by a neighbour's chimneys⁶³ or guarantee the reception of a television signal.⁶⁴ All such claims are defeated by the vigilant insistence of English courts that proprietary rights in land must come in neat, discrete, pre-packaged conceptual compartments which facilitate the functional integrity of a logical order. Indeed, so tightly drawn are the parameters of recognised proprietary rights that it is not impossible to conceive of the entire field of land law concepts as expressible in the rigorous form of a symbolic or calculised logic.⁶⁵

that before a right or interest can be admitted into the 'category of property, or of a right affecting property', it must be 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'

⁵⁷ See Carol M Rose, *Canons of Property Talk, or, Blackstone's Anxiety*, 108 Yale LJ 601 at 626 (1998).

⁵⁸ *Prudential Assurance Co Ltd v London Residuary Body* [1992] 2 AC 386 at 394E-H, confirming *Lace v Chantler* [1944] KB 368. See *Western Australia v Ward* (2002) 191 ALR 1 at 124 [432] per Gleeson CJ, Gaudron, Gummow and Hayne JJ (referring to a 'dimming in the brightness of the line which otherwise divides a fee simple and the understanding of a lease as "a time in the land"').

⁵⁹ *Harris v De Pinna* (1886) 33 Ch D 238 at 250 per Chitty J. See also *Copeland v Greenhalf* [1952] Ch 488 at 498 per Upjohn J.

⁶⁰ *William Aldred's Case* (1610) 9 Co Rep 57b at 58b, 77 ER 816 at 821. See also *Harris v De Pinna* (1886) 33 Ch D 238 at 262 per Bowen LJ; *Campbell v Paddington Corp'n* [1911] 1 KB 869 at 875-876; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 699C-E per Lord Lloyd of Berwick, 709B per Lord Hoffmann, 727A-B per Lord Hope of Craighead.

⁶¹ See *Harris v De Pinna* (1886) 33 Ch D 238 at 250-251, 262; *Levet v Gas Light & Coke Co* [1919] 1 Ch 24 at 27.

⁶² *Webb v Bird* (1861) 10 CB (NS) 268 at 283-286, 142 ER 455 at 460-462, (1863) 13 CB (NS) 841 at 843, 143 ER 332 at 333. See also *Harris v De Pinna* (1886) 33 Ch D 238 at 249-250.

⁶³ *Bryant v Lefever* (1879) 4 CPD 172 at 178, 180.

⁶⁴ *Hunter v Canary Wharf Ltd* [1997] AC 655 at 709H per Lord Hoffmann, 719F-H per Lord Cooke of Thorndon, 727C-D per Lord Hope of Craighead.

⁶⁵ For a brief, but brave, attempt see Bernard Rudden, *Notes Towards A Grammar of Property*, [1980] Conv 325. As Dennis Lloyd once said, logic in the formal sense is 'concerned with what has been termed the "grammar" or deductive implications of propositions of complete generality or abstractness' (*Reason and Logic in the Common Law*, (1948) 64 LQR 468 at 473). See also Ilmar Tammelo, *Sketch for a Symbolic*

(3) Modes of land law logic

Perceptions of land law as a self-contained scheme of rational order are reinforced by the way in which certain operations of strict or formal logic have characterised much of the discourse of the land lawyer. Indeed it is in the area of land law that abstract reason has tended to find some of its least compromising applications, prompting the occasional lament that ‘the ineluctable logic of received property law strains in one direction while common humanity and sound public policy strain in the other.’⁶⁶

Certain features of land law exhibit a logic which is nothing other than the elaboration of the self-evident, the logic of the truism, the language of irreducible meaning. Thus, for example, the notion of proprietary entitlement necessarily connotes some form of immunity from summary cancellation or extinguishment.⁶⁷ Another irreducible component of proprietary right is a general or presumptive entitlement to exclude others from enjoyment of, or from interfering with one’s own enjoyment of, a designated resource.⁶⁸ The concept of property also implies, on behalf of the proprietor, a vital discretion over the priority to be accorded to the various forms of value inherent in a particular asset.⁶⁹

Other forms of land law reasoning comprise a logic of self-reference, that is, an elaboration of the implications which flow directly from the stipulative definitions attached to key legal concepts.⁷⁰ Thus if the term

Juristic Logic, 8 J Leg Ed 277 (1955-56); Layman E Allen, *Symbolic Logic: A Razor-Edged Tool for Drafting and Interpreting Legal Documents*, 66 Yale LJ 833 (1956-57).

⁶⁶ See *Harris v Crowder*, 322 SE2d 854 at 855 (W Va 1984) per Neely J. One has only to recall the mechanical austerity of the common law rule against perpetuities which, in the teeth of all realistic probabilities, routinely struck down certain property interests as void *ab initio* (see eg *Jee v Audley* (1787) 1 Cox Eq Cas 324, 29 ER 1186).

⁶⁷ See eg *R v Toohey; Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327 at 353 per Wilson J (‘[i]rrevocability is an important feature of an estate or interest in land’); *Saeed v Plustrade Ltd* [2001] RTR 452 at 457-458 [17]-[18]. This element of immunity from arbitrary and uncompensated confiscation is recognised, most prominently, in European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (see Cmd 8969 (1953)), Protocol No 1, Art 1.

⁶⁸ On the ‘logical primacy of the right to exclude’, see Thomas W Merrill, *Property and the Right to Exclude*, 77 Neb L Rev 730 at 740-745 (1998). See also David L Callies and J David Breemer, *The Right to Exclude Others From Private Property: A Fundamental Constitutional Right*, 3 Wash J of Law and Policy 39 (2000). For affirmation of property as consisting primarily of control over access, see *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 at 38 [13] per Gleeson CJ, Gaudron, Gummow and Hayne JJ, 127-128 [286] per Kirby J.

⁶⁹ See K J Gray, *Equitable Property*, (1994) 47(2) CLP 157 at 193, 199.

⁷⁰ As Sam Stoljar used to say, such logic is simply part of the ‘laws of thought’ which require that legal propositions ‘cannot at the same time assert both “A” and “non-A”’ (Stoljar, *The Logical Status of a Legal Principle*, 20 U Chi L Rev 181 at 193 (1952-53)).

'possession' is defined as requiring a 'single and exclusive' occupancy of land,⁷¹ it follows that no claim of 'possession' can be made on behalf of an occupier who enjoys a physical presence on land *concurrently with*, but *adversely to*, another person who is already in possession.⁷² Possession is intrinsically indivisible.⁷³ Likewise if, as the common law holds, rights to exclusive possession of land for a term constitute the conclusive 'identifying characteristics' of a lease or tenancy,⁷⁴ it is 'self-contradictory and meaningless' to assert that a person legally entitled to exclusive possession for a term is a mere licensee.⁷⁵ Nor, necessarily, can any one person 'at the same time be both landlord and tenant of the same premises.'⁷⁶

Perhaps more so than any other branch of jurisprudence, land law is also firmly founded upon a logic of magnitude, ie the assumed truth that a whole is always larger than any of its parts. It is this *a priori* which underlies lawyers' understandings of the relationships between various interests in land and of the axiomatic superiority of the greater over the lesser. The relativity of magnitude accounts for a substantial portion of the manoeuvres of the law governing realty. The structure of proprietary rights in English land (and the process of their perdurable creation and transfer) are premised on the idea that *lesser* entitlements may be -- indeed can only be -- carved out of *larger*.⁷⁷ Moreover, the derivative structure of real rights carries two important implications which are deeply grounded in the logic of the common law. First, no one can convey or alienate, with ultimately conclusive effect, a greater estate or interest in land than that which he already owns.⁷⁸ The stark, but elementary, principle of *nemo dat quod non habet*⁷⁹ stands sentinel over the transactional history of English land law.⁸⁰ Second, it also follows that 'every subordinate interest must perish with the superior

⁷¹ For authority drawn from the law of adverse possession, see *Buckinghamshire CC v Moran* [1990] Ch 623 at 641A per Slade LJ; *J A Pye (Oxford) Ltd v Graham* [2000] Ch 676 at 689D-F per Neuberger J, [2002] 3 WLR 221 at 233C [38] per Lord Browne-Wilkinson. See also *Simpson v Fergus* (2000) 79 P & CR 398 at 401.

⁷² See eg *Powell v McFarlane* (1977) 38 P & CR 452 at 470; *J A Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221 at 233C [38] per Lord Browne-Wilkinson, 243H-244A [70] per Lord Hope of Craighead.

⁷³ See *Western Australia v Ward* (2002) 191 ALR 1 at 142 [502]-[503] per McHugh J.

⁷⁴ *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 at 413E-F per Lord Hoffmann. See also *Radaich v Smith* (1959) 101 CLR 209 at 223 per Windeyer J; *Street v Mountford* [1985] AC 809 at 818C, 827B per Lord Templeman.

⁷⁵ *Radaich v Smith* (1959) 101 CLR 209 at 222-223 per Windeyer J. See *Street v Mountford* [1985] AC 809 at 827E, where Lord Templeman gratefully adopted 'the logic and the language of Windeyer J.' See also *Western Australia v Ward* (2002) 191 ALR 1 at 143 [506], 145 [513] per McHugh J.

⁷⁶ *Barrett v Morgan* [2000] 2 AC 264 at 271A per Lord Millett. See also *Rye v Rye* [1962] AC 496 at 505 per Viscount Simonds, 514 per Lord Denning; *Ingram v IRC* [2000] 1 AC 293 at 300G per Lord Hoffmann.

⁷⁷ See eg *Willies-Williams v National Trust* (1993) 65 P & CR 359 at 361 per Hoffmann LJ (easement); *Ingram v IRC* [2000] 1 AC 293 at 303G per Lord Hoffmann, 310C-D per Lord Hutton (leasehold estate).

⁷⁸ *Western Fertilizer & Cordage Co v BRG, Inc*, 424 NW2d 588 at 593 (Neb 1988); *Western Fertilizer & Cordage Co v City of Alliance*, 504 NW2d 808 at 813 (Neb 1993).

⁷⁹ See *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510 at 537 per Lord Radcliffe (a 'general and probably unimpeachable proposition').

⁸⁰ See eg *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 at 415B per Lord Hoffmann.

interest on which it is dependent.⁸¹ Thus, for example, a subtenancy is always destroyed at common law when the relevant superior tenancy is terminated by any means other than the superior tenant's surrender.⁸² Likewise any mortgage charge taken over a leasehold estate is potentially devastated by a forfeiture of that estate.⁸³

But if one single feature of formal logic dominates the mental processes of the land lawyer, it is, of course, the Aristotelian syllogism ('*All A is B; x is an instance of A; therefore x is an instance of B*').⁸⁴ Without the device of the syllogism many of the propositional dogmas of real property would have remained inexpressible; the reasoned manipulation of the land lawyer's key concepts would have been impossible; and the rational outworking of axiomatic truths concerning real property would have appeared quite unattainable. Syllogistic reasoning characterises -- indeed is vital to -- the operation of the priority rules of land law. A few illustrations (of both common law and statutory origin) may perhaps suffice.

Major premise: All legal rights in unregistered land bind the world.

Minor premise: Susan holds a legal easement over Redacre, a parcel of unregistered land.

Conclusion: Susan's easement over Redacre is enforceable against the world.

Major premise: A leasehold estate in registered land granted for a term not exceeding seven years is an interest which overrides any registered disposition of that land.⁸⁵

Minor premise: Susan holds a five-year term of years in Greenacre, granted prior to Kevin's disposition to Edward of the registered freehold title in Greenacre.

Conclusion: Susan's term of years overrides the registered disposition of Greenacre to Edward.⁸⁶

⁸¹ *Bendall v McWhirter* [1952] 2 QB 466 at 487 per Romer LJ.

⁸² See eg *Barrett v Morgan* [2000] 2 AC 264 at 268F, 269B, 271D-272A, 272C-D per Lord Millett.

⁸³ *Croydon (Unique) Ltd v Wright* [2001] Ch 318 at 325B.

⁸⁴ On the Aristotelian syllogism, see A G Guest, 'Logic in the Law', in Guest (ed), *Oxford Essays in Jurisprudence* (Oxford UP 1961), p 181. See also *F A & A B Ltd v Lupton* [1972] AC 634 at 658G-659A per Lord Simon of Glaisdale.

⁸⁵ Land Registration Act 2002, Sch 3, para 1.

⁸⁶ Land Registration Act 2002, s 29(1), (2)(a)(ii).

Major premise: All estate contracts relating to unregistered land and created on or after 1 January 1926 are, for want of appropriate registration in the Register of Land Charges, 'void as against a purchaser for money or money's worth ... of a legal estate in the land.'⁸⁷

Minor premise: Kevin holds a post-1925 estate contract (eg an option to purchase) relating to the unregistered title to Blueacre, which he has failed to register prior to Edward's conveyance of the fee simple estate in Blueacre to Susan, a purchaser who paid £100,000.

Conclusion: Kevin's estate contract is void and unenforceable against Susan.

Here, in the legal syllogism, is found the structural purity of English land law in one of its severest guises. The power of the syllogistic device short-circuits any need to weigh the detailed facts of particular cases in an attempt to secure individualised 'justice'. The syllogism suppresses the myriad complexity of the factual matrix. It filters out all information other than that strictly necessary for the formulation of the minor premise and thereby prepares the way for a mechanical and morally neutral operation of logical deduction. Indeed, in our final example above, the austere outworking of the syllogism leads to its inescapable conclusion even though Susan may have had full prior knowledge of Kevin's unprotected entitlement in Blueacre.⁸⁸ The syllogistic form, in its effectuation of the naked force of reason, is concerned only with the inner order of the scheme of land law and not with the 'fairness' of its outcomes. The propositional logic of realty is both dispassionate and inexorable.

(4) Limits of land law logic

Logic, in its many forms, has therefore characterised much of the essential modus operandi of the land lawyer. But the relentless lesson of legal history is that logic, on its own, is not enough. We did not actually need Holmes to tell us that '[t]he life of the law has not been logic; it has been experience.'⁸⁹ Chief Justice Coke, some three centuries earlier, had already declined King James's personal offer to render legal

⁸⁷ Land Charges Act 1972, s 4(6).

⁸⁸ *Midland Bank Trust Co Ltd v Green* [1981] AC 513. See also *Markfaith Investment Ltd v Chiap Hua Flashlights Ltd* [1991] 2 AC 43 at 60D per Lord Templeman.

⁸⁹ *The Common Law* (Little, Brown & Co, Boston, 1881), p 1 ('The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed'). The Holmesian adage continues to be cited frequently in the highest courts of the common law world (see eg *Read v J Lyons & Co Ltd* [1947] AC 156 at 175 per Lord Macmillan; *Secretary, Department of Health and Community Services v JWB* (1992) 106 ALR 385 at 459 per McHugh J (High Court of Australia); *Symes v The Queen* (1993) 110 DLR (4th) 470 at 496 per L'Heureux-Dubé J (Supreme Court of Canada)). Ironically, it appears almost certain that Holmes found the source of his apothegm in Rudolph von Jhering's great work of 1852, *Der Geist des römischen Rechts* (see Peter Stein, *Logic and Experience in Roman and Common Law*, 59 Boston U L Rev 433 at 437 (1979)).

judgments based on logic,⁹⁰ observing that ‘causes which concern ... inheritance, or goods, or fortunes ... are not to be decided by natural reason but by the artificial reason and judgment of law, which law is an art which requires long study and experience, before that a man can attain to the cognizance of it.’⁹¹ In truth, the common law may not be quite so much a body of rules or principles as ‘a traditional mode of dealing with situations’⁹² -- perhaps even, as Brian Simpson has put it, ‘much more like a muddle than a system.’⁹³ The common law -- no less in areas of property than in others -- reverberates with an almost anti-intellectual distrust of logical reasoning.⁹⁴ Judges, jurists and philosophers have alike condemned the ‘absolutistic logic of rigid syllogistic forms’,⁹⁵ the ‘fallacy ... that the only force at work in the development of the law is logic.’⁹⁶ Even

⁹⁰ *Prohibitions del Roy* (1612) 12 Co Rep 63 at 65, 77 ER 1342 at 1343 (see similarly *Co Litt*, 97b (sect 138)). The confrontation between Coke and the King (and Coke’s self-serving account thereof) are critically examined in Roland G Usher, *James I and Sir Edward Coke*, 18 Eng Hist Rev 644 (1903). See also Neil MacCormick, *The Artificial Reason and Judgement of Law*, *Rechtstheorie*, Beiheft 2 (1981), 105.

⁹¹ Coke regarded King James as having proffered judgments based on ‘natural reason’, but it is clear that, in 17th century discourse, natural reason ‘referred to logic’ (see Thomas Y Davies, *Recovering the Original Fourth Amendment*, 98 Mich L Rev 547 at 688 (1999)). Indeed, Coke himself (*Co Litt*, 97b (sect 138)) consistently contrasted ‘natural reason’ (ie ‘the reasoning that is engaged in by just anyone’) with the ‘artificial perfection of reason’ (ie the experiential and prudential consensus which comprises the common law (see John U Lewis, *Sir Edward Coke (1552-1633): His Theory of ‘Artificial Reason’ as a Context for Modern Basic Legal Theory*, (1968) 84 LQR 330 at 337)). For general acceptance of this understanding of ‘natural reason’ as ‘naked reason’ or logic, see also Charles Gray, ‘Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke’, in Perez Zagorin (ed), *Culture and Politics From Puritanism to the Enlightenment* (Univ of Calif Press, 1980), pp 31-32, 39-40, 55; Mary Ann Glendon, *A Nation Under Lawyers* (Harvard UP 1994), p 181.

⁹² Nathan Isaacs, *How Lawyers Think*, 23 Col L Rev 555 at 556 (1923).

⁹³ A W B Simpson, ‘The Common Law and Legal Theory’, in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (Clarendon 1973), p 99. See also S F C Milsom, ‘Reason in the Development of the Common Law’, in Milsom, *Studies in the History of the Common Law* (Hambledon Press 1985), pp 150-151 (‘[t]here has been no plan in the development of the common law’). It was likewise Blackstone’s mournful assessment of the law of property that the courts’ ‘infinite determinations ... which have been heaped one upon another for a course of seven centuries, without any order or method ... have made the study of this branch of our national jurisprudence a little perplexed and intricate’ (*Bl Comm*, Vol II, pp 382-383).

⁹⁴ A typical comment was that of Porter J in *Philadelphia National Bank v Price* [1937] 3 All ER 391 at 397 that ‘[t]he decision is a matter of outlook and impression rather than one for logical argument.’ Likewise Justice Fullagar of the High Court of Australia, one of the larger figures of 20th century common law jurisprudence, inveighed frequently against ‘the temptation, which is so apt to assail us, to import a meretricious symmetry into the law’ (*Attorney-General (NSW) v Perpetual Trustee Co Ltd* (1952) 85 CLR 237 at 285). For Fullagar the common law was ‘a system which has never regarded strict logic as its sole inspiration’ (*Tatham v Huxtable* (1950) 81 CLR 639 at 649). See also E M Konstam, *Note*, (1944) 60 LQR 232; Dennis Lloyd, *Reason and Logic in the Common Law*, (1948) 64 LQR 468 at 469-470.

⁹⁵ John Dewey, *Logical Method and the Law*, 10 Cornell LQ 17 at 27 (1924-25). In Holmes’s view, the law was administered by ‘able and experienced men, who know too much to sacrifice good sense to a syllogism’ (*The Common Law* (Little, Brown & Co, Boston, 1881), p 36). See also John Bell, ‘The Acceptability of Legal Arguments’, in N MacCormick and P Birks (ed), *The Legal Mind: Essays for Tony Honoré* (Clarendon 1986), p 47 (‘the logic of legal reasoning cannot be adequately explained in terms of deduction from settled premisses’).

⁹⁶ O W Holmes, *The Path of the Law*, 10 Harv L Rev 457 at 465 (1897). See also *Quinn v Leatham* [1901] AC 495 at 506 per Earl of Halsbury LC (‘the law is not always logical at all’). As Max Radin once remarked, ‘[n]o one in his senses really supposes that a complete Euclidean system of legal propositions can be constructed’ (Radin, *The Chancellor’s Foot*, 49 Harv L Rev 44 at 63-64 (1935-36)). The same recognition

the law governing estates in land 'is not a matter of logic in vacuo; it is a matter of history that has not forgotten Lord Coke.'⁹⁷ For the common lawyer, logic is ultimately 'a handmaid of the law, not her mistress.'⁹⁸ The logical method and form merely 'flatter that longing for certainty and repose which is in every human mind', although, as Holmes himself pointed out, 'certainty is generally an illusion, and repose is not the destiny of man.'⁹⁹

Thus, although the propositional dogmas of land law superficially resemble a system of fixed postulates and logical deductions, the reality is rather less orderly. The shortcomings of strict logic as a self-sufficient source of land law reasoning can be traced to several factors which greatly intensify the complexity of the lawyer's task.¹⁰⁰

(a) *Indeterminacy of legal rules*

First, there exists no comprehensive canon of legal rules which reliably supplies the definitive terms of each required major premise.¹⁰¹ It is often the case that the more fundamental the 'rule', the more indeterminate is its provenance, content and scope.¹⁰² In some instances there may even be a complete hiatus of applicable

emerges even from the more highly systematised traditions of continental law (see eg Jerzy Wróblewski, *Axiomatization of legal theory*, 49 *Rivista internazionale di filosofia del diritto* 380 (1972)).

⁹⁷ *Gardiner v William S Butler & Company, Inc*, 245 US 603 at 605, 62 L Ed 505 at 506 (1918) per Justice Holmes. To Holmes, again, we owe the observation that 'a page of history is worth a volume of logic' (*New York Trust Co v Eisner*, 256 US 345 at 349, 65 L Ed 963 at 983 (1921)). See also *720 Spadina Ltd v Regional Assessment Commr, Region No 9* (2001) 199 DLR (4th) 754 at 761 [10] per Carnwath J (an "ounce of history" may be worth a "pound of logic").

⁹⁸ *Rugby Joint Water Board v Footitt* [1973] AC 202 at 228C per Lord Simon of Glaisdale. The expressive figure of juristic logic as 'an *ancilla* of reasoning rather than its master' seems to stem from Ilmar Tammelo, 12 J Leg Ed 307 at 311 (1959). See also *Blewman v Wilkinson* [1979] 2 NZLR 208 at 216 per Somers J.

⁹⁹ 10 Harv L Rev 457 at 466 (1897).

¹⁰⁰ See, more generally, Wilson Huhn, *The Use and Limits of Syllogistic Reasoning in Briefing Cases*, 42 Santa Clara L Rev 813 (2002).

¹⁰¹ Moreover, an entire essay could be written on the way in which systems of logic are incapable of accommodating the phenomenon of *discretionary* judgment as a component of legal regulation (see eg the discretionary apportionment of spousal assets pursuant to Part II of the Matrimonial Causes Act 1973). Still less can schemes of strict logic cope with such pivotal statutory formulae as those which define a 'house' as a building or structure 'reasonably so called' (see Leasehold Reform Act 1967, s 2(1); Housing Act 1985, ss 183(2), 575(2)) or which direct that the bankruptcy court may make 'such order as it thinks just and reasonable' in applications for sale of a bankrupt's land (Insolvency Act 1986, s 335A(2)).

¹⁰² Thus, for instance, it is widely accepted that a squatter's assumption of possession immediately generates, on behalf of the squatter, a presumptive common law freehold in the land (*Peaceable d Uncle v Watson* (1811) 4 Taunt 16 at 17, 128 ER 232; *Leach v Jay* (1878) 9 Ch D 42 at 45 per James LJ; *Buckinghamshire CC v Moran* [1990] Ch 623 at 644D per Nourse LJ; *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 209 per Toohey J; *Yanner v Eaton* (1999) 201 CLR 351 at 388 [85] per Gummow J). Under the Land Registration Act 1925, however, it was never clear whether a squatter in whose favour time had run was entitled to be registered as the new proprietor of the displaced owner's title or as owner of the independent possessory title generated by his or her initial entry into possession (compare *Spectrum Investment Co v*

principle, precisely because the problem in hand is novel or wholly unforeseen. Such difficulties are particularly evident in those areas of land law not closely governed by statutory provision. Here the inductive tradition of the common law, by contrast with the more clearly deductive techniques of civilian jurisprudence, has done little to promote the success of the legal syllogism. Any attempt to universalise a proposition of law from a wilderness of individuated instances of application becomes a 'wild goose chase starting from a logical confusion.'¹⁰³ Moreover, anyone who has ever attended a hearing before the Appellate Committee of the House of Lords cannot have failed to observe that the process is an exercise aimed, more often than not, at the identification *de novo* of a previously elusive principle or the drastic refinement of an existing norm now deemed untenable or imprecise. The judicial task thus involves a desperate search for the rule itself rather than any mechanical deduction of consequences from an already fixed or agreed postulate. In the result, most 'doctrinally based' decisions carry an in-built ambivalence and could easily go either way.¹⁰⁴

(b) Imprecision of key concepts

Strictly logical manipulations of land law principle are further jeopardised by the very imprecision which surrounds the key terms of many a major premise. Despite the clear historic concern to maintain crystalline parameters around real property entitlements, it remains one of the (largely unremarked) ironies of land law that some of its most central concepts have escaped authoritative and definitive analysis. What, for instance, comprise the irreducible characteristics of a lease?¹⁰⁵ Where is the borderline between the lease (supposedly a possessory interest), the easement (supposedly a non-possessory interest), and the contractual licence (recently declared a *potentially* possessory interest)?¹⁰⁶ Take the notions of 'estate', 'right', 'title', 'interest' and even 'land' itself. Are these terms -- of paramount importance for land lawyers' perceptions of ownership or proprietorship -- actually synonymous? Or are there significant differences of meaning, so that, strictly speaking, one has 'title' to an 'estate' (or perhaps 'title' to 'land') or can even own an 'estate' or 'interest' in

Holmes [1981] 1 WLR 221 at 230E-H per Browne-Wilkinson J; *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] 4 All ER 948 at 955a-c per Sedley J; *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510 at 543 per Lord Radcliffe).

¹⁰³ Felix S Cohen, *The Problems of a Functional Jurisprudence*, (1937) 1 MLR 15 at 9-11, 20. See also Pierre Legrand, 'Alterity: About Rules, For Example', in Peter Birks and Arianna Pretto (ed), *Themes in Comparative Law In Honour of Bernard Rudden* (Oxford UP 2002), pp 29-30.

¹⁰⁴ See eg *Hunter v Canary Wharf Ltd* [1997] AC 655 at 711C per Lord Cooke of Thorndon ('the choice is in the end a policy one between competing principles').

¹⁰⁵ It remains unclear whether a 'lease' or 'tenancy' strictly requires payment of a 'rent' or other consideration (compare *Street v Mountford* [1985] AC 809 at 818C, 821B-C, 826E per Lord Templeman, with *Radaich v Smith* (1959) 101 CLR 209 at 222 per Windeyer J; *Ashburn Anstalt v Arnold* [1989] Ch 1 at 9F-10C, 12G-13B; *Western Australia v Ward* (2002) 191 ALR 1 at 137 [482] per McHugh J; *Fatac Ltd v Commissioner of Inland Revenue* [2002] 3 NZLR 648 at 661 [41] (New Zealand Court of Appeal)).

¹⁰⁶ See eg *Harley Queen v Forsythe Kerman* [1983] CLY 2077; *Batchelor v Marlow* (2001) 82 P & CR 459 at 462 [19]. Even the most widely accepted definition of the concept of easement arrived relatively late (see *Re Ellenborough Park* [1956] Ch 131 at 140 per Danckwerts J).

'land' without necessarily having any 'title'?¹⁰⁷ Consider, for instance, the Limitation Act 1980, which extinguishes the paper owner's 'title' to 'land' at the expiration of the statutorily prescribed period for bringing an action to recover that land from an adverse possessor.¹⁰⁸ Does this extinguishment of 'title' simultaneously destroy the paper owner's 'estate' in the land?¹⁰⁹ Or does his 'estate' remain with him, even though he no longer has any 'title' (ie entitlement) to assert it against the intruder?¹¹⁰ Or is the 'estate' left perhaps, 'like Peter Pan's shadow, unattached to anyone',¹¹¹ so that there exists somewhere a universe of lost estates, wandering *in vacuo* and destined never to be reunited with their owners? Is such a fate the ultimate curse of a medieval doctrine which, having conjured up the artificial concept of the 'estate', discovers that its creation lingers for ever as an indestructible ghost in the machine?

There even remains a more fundamental uncertainty as to whether common law perceptions of 'property' in land are ultimately constituted by the empirical reality of *de facto* enjoyment¹¹² or by jural abstractions of artificially defined entitlement.¹¹³ The pragmatic view of property -- of title as derived ultimately from the earthy reality of factual possession -- is increasingly incompatible with a more tightly conceptual view of property as originating in a logically ordered hierarchy of abstract estates in land. In its rather messy way, English land law has long managed to live with this schizophrenic dilemma, although, as we shall soon see, there are now signs that this state of ambivalence may be moving towards some sort of resolution.

¹⁰⁷ The Land Registration Act 1925 spoke, apparently interchangeably, of registration of 'land' (Part II), registration of 'title' to 'land' (s 1(1)), registration of 'title' to an 'estate in land' (s 4), and of registration of a 'proprietor' in respect of an 'interest in land' which is capable of subsisting as a 'legal estate' (s 2(1)). The Land Registration Act 2002 now defines 'registered land' as 'a registered estate or registered charge' (s 132(1)).

¹⁰⁸ Limitation Act 1980, s 17.

¹⁰⁹ It is canonical -- at least in unregistered land -- that the Limitation Act effects no 'parliamentary conveyance' of the paper owner's estate to the adverse possessor (see *Tichborne v Weir* (1892) 67 LT 735 at 736-737). See also *St Marylebone Property Co Ltd v Fairweather* [1963] AC 510 at 535 per Lord Radcliffe, 544 per Lord Denning; *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] 4 All ER 948 at 951c-d per Sedley J; *Perry v Woodfarm Homes Ltd* [1975] IR 104 at 122-123.

¹¹⁰ On this point there is little authority, although in *Central London Commercial Estates Ltd v Kato Kagaku Co Ltd* [1998] 4 All ER 948 at 958h, Sedley J seemed to assume that '[i]n the bipartite situation of freeholder and disseisor ... to bar the title is to bar the estate.'

¹¹¹ See the argument advanced in *St Marylebone Property Co Ltd v Fairweather* [1962] 1 QB 498 at 515, although the idea of 'an abstract estate which belongs to no one' found little favour with Holroyd Pearce LJ.

¹¹² It is significant, for instance, that perceptions of 'property' in land as resting on 'socially constituted fact' have recently played a vital role in Australia in securing the recognition of native land claims as a form of proprietary entitlement (see eg *Yanner v Eaton* (1999) 201 CLR 351 at 373 [38] per Gleeson CJ, Gaudron, Kirby and Hayne JJ, 389 [86] per Gummow J; *Western Australia v Ward* (2000) 170 ALR 159 at 187-190 [99]-[111] per Beaumont and von Doussa JJ, 354-356 [786]-[792] per North J, (2002) 191 ALR 1 at 162 [580] per Kirby J; *Rubibi Community v Western Australia* (2001) 6 AILR 42 at 43 [31]-[32]; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2001) 180 ALR 655 at 667 [39] per Black CJ; *Commonwealth of Australia v Yarmirr* (2001) 208 CLR 1 at 135 [304] per Kirby J).

¹¹³ See K J Gray and S F Gray, 'The Idea of Property in Land', in S Bright and J K Dewar (ed), *Land Law: Themes and Perspectives* (Oxford UP 1998), p 18.

Much confusion also surrounds the idea of 'possession' itself,¹¹⁴ notwithstanding that 'possession' has served for centuries as the operative basal concept of English land law.¹¹⁵ The common misnomer of 'exclusive possession'¹¹⁶ has generated difficulties in at least two different directions. First, the phrase rather insinuates that those in 'possession' are automatically invested with a totalitarian privilege to exclude all comers.¹¹⁷ Second, the interpolation of the unnecessary qualifier 'exclusive' has induced a blurring of the fundamental distinction between 'possession' and mere 'occupation' of land,¹¹⁸ with the result that the more intense forms of non-proprietary occupancy of land have come to be accorded legal consequences which properly attach only to 'possession'. Thus, for instance, English law has begun to recognise the concept of the 'licensee with exclusive possession',¹¹⁹ together with the possibility that such a licensee may sue in trespass¹²⁰ and nuisance,¹²¹ even though other jurisdictions acknowledge, with somewhat greater insight, that 'a licence that gives exclusive possession is a contradiction in terms.'¹²² Kindred mutants or monstrosities have emerged to complicate or frustrate important pieces of syllogistic reasoning. The legal landscape is now increasingly cluttered with previously unknown persons such as the 'bare trespasser',¹²³ the 'mere trespasser',¹²⁴ the

¹¹⁴ See, for example, the penetrating critique of 'possession' provided by Justice McHugh in *Western Australia v Ward* (2002) 191 ALR 1 at 136 [477]-[478], 142 [502]-[503]. English law, said Earl Jowitt many years ago, 'has never worked out a completely logical and exhaustive definition of "possession"' (*United States of America and Republic of France v Dollfus Mieg et Cie SA and Bank of England* [1952] AC 582 at 605).

¹¹⁵ 'Exclusive possession de jure or de facto, now or in the future, is the bedrock of English land law' (*Hunter v Canary Wharf Ltd* [1997] AC 655 at 703F per Lord Hoffmann). See also *Bell v General Accident, Fire & Life Assurance Corpn Ltd* [1998] 1 EGLR 69 at 71D-E per Hutchison LJ.

¹¹⁶ '[I]t is a pity that the term "exclusive possession" was ever used ... The adjective "exclusive" adds nothing to the concept of possession' (*Western Australia v Ward* (2002) 191 ALR 1 at 142 [502]-[503] per McHugh J).

¹¹⁷ See K J Gray and S F Gray, 'Private Property and Public Propriety', in Janet McLean (ed), *Property and the Constitution* (Hart Publishing 1999), pp 13-15. It is nevertheless a simple reality of the modern world that 'exclusive possession in absolute terms has long since ceased to exist' (*Wilson v Anderson* (2002) 190 ALR 313 at 364 [194] per Callinan J). See also *Western Australia v Ward* (2002) 191 ALR 1 at 176-177 [624], 201 [694] per Callinan J.

¹¹⁸ See *Western Australia v Ward* (2002) 191 ALR 1 at 136 [478], 146-147 [518]-[519] per McHugh J.

¹¹⁹ *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch 233 at 257D-E per Megarry J; *Street v Mountford* [1985] AC 809 at 823D per Lord Templeman; *Hunter v Canary Wharf Ltd* [1997] AC 655 at 688E, 692C per Lord Goff of Chieveley, 702H-703E per Lord Hoffmann, 724C-F per Lord Hope of Craighead.

¹²⁰ See eg *Mehta v Royal Bank of Scotland* [1999] 3 EGLR 153 at 160E-F. There is even a possibility that a contractual licensee who is in 'effective control' or 'de facto occupation' of a site may invoke the 'fast possession' procedure under CPR Sch 1, R 113 in order to evict trespassers (see *Manchester Airport Plc v Dutton* [2000] QB 133 at 147C-G per Laws LJ).

¹²¹ See eg *Pemberton v Southwark LBC* [2000] 1 WLR 1672 at 1682G-H per Roch LJ, 1684A-B per Clarke LJ, 1685H-1686A per Sir Christopher Slade.

¹²² *Western Australia v Ward* (2002) 191 ALR 1 at 145 [513] per McHugh J.

¹²³ See *Manchester Airport Plc v Dutton* [2000] QB 133 at 150C per Laws LJ.

¹²⁴ See *Hunter v Canary Wharf Ltd* [1997] AC 655 at 703F per Lord Hoffmann.

'persistent trespasser',¹²⁵ the 'tolerated trespasser'¹²⁶ and the 'introductory tenant',¹²⁷ each separated by curious gradations of supposed merit and each serving to blur the boundaries of entitlement in respect of land.

None the less such novelties play only relatively minor roles in the conceptual freak show of modern land law. Larger uncertainties and ambiguities abound. For example, the distinction between legal and equitable rights - for centuries the fundamental basis of all land law logic -- appears nowadays to be receding into insignificance in an era of increasingly comprehensive registration of land entitlements. Likewise the definition of proprietary character -- if it was ever meaningful at all¹²⁸ -- has become much less distinct in English jurisprudence.¹²⁹ The *numerus clausus* of realty suddenly looks rather more shaky than before. The contractual licence has long made periodic bids for inclusion amongst the canon of proprietary rights¹³⁰ and must surely one day succeed.¹³¹ Ironically, the House of Lords has chosen just the present time to cast massive doubt upon whether the *lease* itself is genuinely a proprietary phenomenon.¹³² Meanwhile other forms of entitlement now jostle for proprietary recognition. The inchoate equity founded on estoppel -- sometimes known as the 'equitable licence' (a hybrid term if ever there was one) -- already seems set to claim

¹²⁵ See *Powell v McFarlane* (1977) 38 P & CR 452 at 480 per Slade J.

¹²⁶ See *Colchester BC v Smith* [1991] Ch 448 at 485C-D; *Burrows v Brent LBC* [1996] 1 WLR 1448 at 1455C; *Greenwich LBC v Regan* (1996) 72 P & CR 507 at 516-518, 520-521. See also *Pemberton v Southwark LBC* [2000] 1 WLR 1672 at 1683A per Clarke LJ ('the tolerated trespasser is a recent, somewhat bizarre, addition to the *dramatis personae* of the law').

¹²⁷ Housing Act 1996, ss 124(1), 125(1).

¹²⁸ One of the more disturbing demonstrations of the intellectual crudity of our real property appears in the axiomatic formula that only *proprietary* (as distinct from *personal*) rights can bind third parties. Yet the definition of proprietary entitlement in English law is riddled with a circularity which, were it not lamentable, would be perfectly ludicrous (see K J Gray, *Property in Thin Air*, [1991] CLJ 252 at 293; *Yanner v Eaton* (1999) 201 CLR 351 at 366 [17] per Gleeson CJ, Gaudron, Kirby and Hayne JJ). The question whether an interest is 'proprietary' (and therefore enforceable against third parties) cannot, of course, be sensibly addressed in terms of a definition which uses enforcement against third parties as a criterion of 'propertiness'.

¹²⁹ See eg *Manchester Airport Plc v Dutton* [2000] QB 133 at 150C-D per Laws LJ ('In this whole debate, as regards the law of remedies in the end I see no significance as a matter of principle in any distinction drawn between a plaintiff whose right to occupy the land in question arises from title and one whose right arises only from contract').

¹³⁰ See eg *Errington v Errington and Woods* [1952] 1 KB 290 at 298-299; *National Provincial Bank Ltd v Hastings Car Mart Ltd* [1964] Ch 665 at 688-689; *Binions v Evans* [1972] Ch 359 at 368D-369C.

¹³¹ See the increasing tendency in modern statutes and European Directives to treat the contractual licence as the equivalent of a lease (Housing Act 1985, s 79(3); Agricultural Holdings Act 1986, s 2(2)(b); EC Sixth VAT Directive, Title X, art 13B). The lease and the licence also seem likely to become indistinguishably merged in the 'housing agreement' which forms the basic conceptual device underpinning current proposals for reform of the residential rented sector (see Law Commission, *Renting Homes 1: Status and Security* (Law Com Consultation Paper No 162, 28 March 2002), paras 9.21-9.42).

¹³² See *Bruton v London & Quadrant Housing Trust* [2000] 1 AC 406 at 415A-B per Lord Hoffmann. It is likely that, viewed from a wider perspective, *Bruton* evidences the gradual eclipse of the leasehold relationship as involving the conferment of a proprietary estate, thus foreshadowing, at least in the short-term residential sector, the decline of this (nowadays) politically incorrect device into something much more closely resembling the civilian concept of a contract of hire of land (see *Commonhold and Leasehold Reform: Draft Bill and Consultation Paper* (Lord Chancellor's Department, Cm 4843, August 2000), Part I, para 2.3.1 (p 85), Part II, para 1.1 (p 107), Annex A, para 7 (p 101)).

its place amongst the field of acknowledged proprietary entitlements.¹³³ Current debate even extends to the possible proprietary status of the 'carbon sequestration rights' which will underpin future regimes of domestic and international trading in greenhouse gas emission credits.¹³⁴ Conceptual uncertainties and embarrassments proliferate.

(c) Indeterminacy of fact

It is notorious that the process of deduction from axiomatic principle is rendered all the more fragile by the sheer indeterminacy of the facts which are filtered into the minor premises of syllogistic argument. The judicial selection of the salient 'facts' of a contested case is inevitably subjective.¹³⁵ As Geoffrey Samuel has so aptly said,¹³⁶ how facts are to be classified 'lies at the heart of legal method and the law reports are full of examples of factual situations which, if categorised differently, might well have attracted a quite different principle and result.' Indeed, for syllogistic purposes, the distinction between law and fact may turn out to be highly artificial, in that the formulation of the legal proposition from which deductions are to follow may itself incorporate important elements drawn from the factual context in which the proposition is supposed to operate. For the common lawyer, the major premise may well comprise the ratio decidendi of an earlier decision and this ratio is, in classical terms, isolatable or identifiable only by reference to the material facts of that case.¹³⁷

(d) The longstop of conscience

A further factor inhibits the capacity of land law to function as a strictly logical or scientific body of axiomatic principles. Logical systems permit the orderly manipulation of *ideas*, but cannot easily accommodate the

¹³³ See eg *E R Ives Investment Ltd v High* [1967] 2 QB 379 at 394G; *Sledmore v Dalby* (1996) 72 P & CR 196 at 201; *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 at 642; *Habermann v Koehler (No 2)* (2000) Times, 20 November; *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256 at 262-263 [24]-[31]. See now Land Registration Act 2002, s 116.

¹³⁴ See Lynden Griggs, *Legal Options for Protecting the Carbon Sequestration Right* (www.greenhouse.gov.au/emissionstrading/dp3_submissions/griggs_utas.pdf). See also Carol M Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 Minn L Rev 129 at 164 (1998-99).

¹³⁵ See Jerome Frank, *Mr Justice Holmes and Non-Euclidean Legal Thinking*, 17 Cornell LQ 568 at 589 (1931-32). See also Frank, *What Courts Do In Fact*, 26 Ill L Rev 645 at 665 (1931-32).

¹³⁶ Samuel, *The challenge of artificial intelligence: can Roman law help us discover whether law is a system of rules?*, (1991) 11 Legal Studies 24 at 28.

¹³⁷ See Geoffrey Samuel, *The Foundations of Legal Reasoning* (MAKLU, Antwerp 1994), pp 121-122, 143-144; Pierre Legrand, 'Alterity: About Rules, For Example', in Peter Birks and Arianna Pretto (ed), *Themes in Comparative Law In Honour of Bernard Rudden* (Oxford UP 2002), p 28. See also *F A & A B Ltd v Lupton* [1972] AC 634 at 658G per Lord Simon of Glaisdale.

recognition of *ideals*.¹³⁸ Sooner or later the conclusions derived from axiomatic deduction come into collision with perceptions of ethically admissible outcome.¹³⁹ At some point the rigorous outworking of structured rules stumbles over 'the bastard something known as morality'¹⁴⁰ in circumstances where it is agreed that the 'inextricable logic of property law' cannot be allowed to be 'entirely dispositive of the issue.'¹⁴¹ Every rule system has its own limits of tolerance; questions of value inevitably intrude upon the austere operation of syllogistic premises.¹⁴² There will be occasions when the coldly logical application of a particular rule oversteps the boundaries of the acceptable and triggers a sense of moral outrage. The residual tweak of conscience is an ultimately irrepressible feature of even the land lawyer's response to the world around him. Any set of facts can be so calibrated that the applicable rule -- clear and unambiguous though it may be -- comes eventually to be regarded as having reached its sticking or breaking point.

This is not to say that every judge travels around 'with a portable palm tree'¹⁴³ or that the litigant's claim to justice can or should be 'consigned to the formless void of individual moral opinion.'¹⁴⁴ Law is no more constituted by 'idiosyncratic notions of fairness and justice'¹⁴⁵ than it is by the 'moment-to-moment opinions of a policeman on his beat.'¹⁴⁶ But the 'slot machine' model of justice is, equally, a falsification of reality.¹⁴⁷ Land lawyers are not juristic robots, working as if in some automated car plant, assembling legal solutions by use of some predetermined formula or computerised template.¹⁴⁸ The truth is simply that, in relatively rare kinds of

¹³⁸ See Roscoe Pound, *The Ideal Element in American Judicial Decision*, 45 Harv L Rev 136 at 145 (1931-32); Laurence H Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 Harv L Rev 1329 at 1330 (1970-71).

¹³⁹ See *Re Berkeley, decd* [1968] Ch 744 at 759E per Widgery LJ for an acknowledgement that, in property law, 'a result produced by pure logic will not necessarily be the result which produces fairness between the parties.'

¹⁴⁰ Karl N Llewellyn, *On Philosophy in American Law*, 82 U Pa L Rev 205 at 208 (1934).

¹⁴¹ *Harris v Crowder*, 322 SE2d 854 at 860 (W Va 1984) per Neely J; *Vincent v Gustke*, 336 SE2d 33 at 34 (W Va 1985) per Neely CJ.

¹⁴² 'Ultimately the moral valuation will encroach to a constantly increasing extent on the logical one' (Max Radin, *The Chancellor's Foot*, 49 Harv L Rev 44 at 63 (1935-36)). See also Roscoe Pound, *Mechanical Jurisprudence*, 8 Col L Rev 605 at 606 (1908).

¹⁴³ *Taylor v Dickens* [1998] 1 FLR 806 at 820G per Deputy Judge Weeks QC. 'The courts are not omnipotent ... They ... have no general power to impose a solution which does not accord with the rights of the parties, even though that solution is practicable, accords with the needs of the parties and reflects the common sense of the case' (*Gardner v Davis* (Unreported, Court of Appeal, 15 July 1998) per Mummery LJ).

¹⁴⁴ *Carly v Farrelly* [1975] 1 NZLR 356 at 367 per Mahon J.

¹⁴⁵ *Muschinski v Dodds* (1985) 160 CLR 583 at 615 per Deane J. See also *Australian Broadcasting Corp v Lenah Game Meats Pty Ltd* (2001) 185 ALR 1 at 7-8 [20] per Gleeson CJ, 17 [59] per Gaudron J.

¹⁴⁶ *Cox v Louisiana*, 379 US 536 at 559 at 579, 13 L Ed 2d 487 at 501 (1965) per Justice Black.

¹⁴⁷ See Roscoe Pound, *The Political and Social Factor in Legal Interpretation*, 45 Mich L Rev 599 at 603 (1946-47).

¹⁴⁸ See eg *Winkworth v Edward Baron Development Co Ltd* [1986] 1 WLR 1512 at 1516C per Lord Templeman (equity 'is not a computer'). See also Chaim Perelman, *Justice, Law and Argument: Essays on*

case, certain progressions of land law logic are deemed so offensive to good conscience that the conceptual process must be -- and is -- stopped in its tracks.¹⁴⁹ The players are considered to have strayed outside the four corners of the game; foul play has occurred; the referee has blown his whistle and will shortly award a red card to the offending party.

The conscience-based limits of logic are recognised in several important areas of land law. The truncation of the logical process is activated, not by the mere perception that a rule operates harshly or unfairly or that one party has behaved unworthily, but rather by the sense that an ultimate bastion of good conscience has been placed under serious attack. Only extreme circumstances warrant a departure from the reasoned extrapolation of a basal principle. But, at some barely definable point, axiomatic rules reach the moral, if not logical, limits of their application.¹⁵⁰ Indeed, several of the *causes célèbres* of modern land law concern precisely the question whether this point has been reached.¹⁵¹ A central concern, in this context, is the identification of 'fraud'. Fraud 'unravels everything' and no court will allow a person 'to keep an advantage which he had obtained by fraud.'¹⁵² Every legal rule comes, so to speak, with an implicit 'anti-fraud' proviso: no party guilty of 'fraud' can ever plead the rule in his favour and hope thereby to win his case.¹⁵³ And 'fraud', however elusive a concept, involves some core sense of cheating¹⁵⁴ -- of dishonest deprivation of that which

Moral and Legal Reasoning (Reidel 1980), p 129 ('the judge is not a calculator entirely programmed by a third party, but a social being charged with confronting values belonging to the spirit of the system').

¹⁴⁹ This realisation mirrors the nowadays well known contention that absolute and hard-edged rules of law must ultimately give way to more open-textured 'standards' or 'principles' which express certain basic moral relativities (Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 at 1710 (1975-76); Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London 1977), pp 22-31). See also Geoffrey Samuel, *Epistemology and Legal Institutions*, 4 Intl J for the Semiotics of Law 311 at 315 (1991).

¹⁵⁰ See, for instance, the general disinclination to allow the unqualified operation of the axiomatic principle of survivorship where one joint tenant is a victim of culpable homicide committed by another joint tenant (see *Re K, decd* [1985] Ch 85 at 100G). Joint tenancy 'implies mutual rights. Its subsistence depends upon a tacit understanding or consent to accept the risks and chances of the natural expectancy of life, but the risk that one joint tenant should feloniously slay the other is a risk which is not contemplated. This act is a repudiation of the terms on which they hold' (*Re Barrowcliff* [1927] SASR 147 at 151 per Napier J).

¹⁵¹ See eg *Jones v Lipman* [1962] 1 WLR 832; *Binions v Evans* [1972] Ch 359; *Peffer v Rigg* [1977] 1 WLR 285; *Midland Bank Trust Co Ltd v Green* [1980] Ch 590, [1981] AC 513; *Lys v Prowsa Developments Ltd* [1982] 1 WLR 1044; *Lloyd v Dugdale* [2002] 2 P & CR 13. For examples drawn from other jurisdictions, see *Efstratiou, Glantschnig and Petrovic v Glantschnig* [1972] NZLR 594; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604; *Alberta (Minister of Forestry etc) v McCulloch* [1992] 1 WWR 747, [1991] 3 WWR 662.

¹⁵² *Lazarus Esates Ltd v Beasley* [1956] 1 QB 702 at 712 per Denning LJ; *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 at 625A per Lord Denning MR.

¹⁵³ For a fairly recent, and quite revealing, window on the low-visibility world of the county court, see *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 EGLR 108 at 110J. Here Judge Cowell made it clear that factors of conscience are widely regarded as more significant than the strict jural character of the rights which it is sought to enforce against the holder of a land title. In the Judge's view, 'unconscionable conduct is made of more virulent stuff, not on the conceptual difference between property rights and personal rights.'

¹⁵⁴ See *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106 per Lord Buckmaster; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 630 per Wilson and Toohey JJ.

belongs, or is due, to someone else.¹⁵⁵ Thus, for example, the clear statutory rule¹⁵⁶ that declarations of trust respecting land are unenforceable unless evidenced in signed writing finds its limit where the declarant of an oral trust acts unconscionably in setting up the statute in stark denial of a promised beneficial interest.¹⁵⁷ A statute may never be used as an instrument of fraud¹⁵⁸ and, against a background of 'change of position' by the intended beneficiary, the disclaimer of an informally bargained entitlement constitutes a 'breach of faith' by the reluctant trustee.¹⁵⁹ For precisely these reasons the constructive trust -- equity's ultimate anti-fraud device -- is rendered immune from requirements of writing or other formality.¹⁶⁰ In all such instances, concern for the structural integrity of the syllogism is displaced by a concern which ranks even higher in the scale of human values, namely an abhorrence of fraud.

Exactly the same abridgement of logical outcome interrupts the operation of those land law rules that declare a purchaser or transferee of land to be unaffected by third party rights which were protectable, but never in fact protected, by appropriate register entry.¹⁶¹ The common law world is virtually at one in agreeing that a transferee's mere knowledge of the existence of unprotected rights does not taint his title,¹⁶² but this immunity from unprotected interests cannot extend to a transferee who acts *fraudulently* or *unconscionably*.¹⁶³ Thus, contrary to the logic of the statute, unprotected rights survive transfers of title to those who engage in bad faith manipulations of the rules aimed at the destruction of such rights, whether by way of inordinately speedy

¹⁵⁵ See *Sutton v O'Kane* [1973] 2 NZLR 304 at 322 per Turner P; *R v Olan, Hudson and Hartnett* (1978) 86 DLR (3d) 212 at 217-218 per Dickson J; *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 at 625B per Lord Denning MR.

¹⁵⁶ Law of Property Act 1925, s 53(1)(b).

¹⁵⁷ See *Gissing v Gissing* [1971] AC 886 at 901D per Viscount Dilhorne, 906E-F, 908B-C per Lord Diplock; *Re Densham (A Bankrupt)* [1975] 1 WLR 1519 at 1525D-E per Goff J; *Burns v Burns* [1984] Ch 317 at 327D per Fox LJ; *Grant v Edwards* [1986] Ch 638 at 651G-652A per Mustill LJ. Likewise the requirement that land contracts be contained in signed writing (Law of Property (Miscellaneous Provisions) Act 1989, s 2(1)) gives way in the face of an unconscionable disclaimer of an oral agreement on which another party has relied to his or her detriment (see *Yaxley v Gotts* [2000] Ch 162 at 179F per Robert Walker LJ).

¹⁵⁸ Any 'reliance by the trustee on the statute requiring writing would be an equitable fraud' (*Allen v Snyder* [1977] 2 NSWLR 685 at 692E per Glass JA; *Baumgartner v Baumgartner* [1985] 2 NSWLR 406 at 435A-B). See *Rochevoucauld v Boustead* [1897] 1 Ch 196 at 206 per Lindley LJ; *Chan Yiu Tong v Wellmake Investments Ltd* (1996) 1 HKC 528 at 533C, 534E per Godfrey JA.

¹⁵⁹ *Gissing v Gissing* [1971] AC 886 at 900B-C per Viscount Dilhorne.

¹⁶⁰ Law of Property Act 1925, s 53(2).

¹⁶¹ See eg Land Registration Act 1925, ss 20(1), 23(1), 59(6); Land Charges Act 1972, s 4(2)-(8); Land Registration Act 2002, s 29(1)-(2)(a)(i).

¹⁶² See eg *De Lusignan v Johnson* (1973) 230 EG 499; *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 EGLR 108 at 109M; *Lloyd v Dugdale* [2002] 2 P & CR 13 at [52] per Sir Christopher Slade. See also *Union Bank of Canada v Boulter-Waugh Ltd* (1919) 46 DLR 41 at 48; *Waimiha Sawmilling Co Ltd v Waione Timber Co Ltd* [1926] AC 101 at 106-108; *Ruptash and Lumsden v Zawick* (1956) 2 DLR (2d) 145 at 159-160; *Holt, Renfrew & Co Ltd v Henry Singer Ltd* (1982) 135 DLR (3d) 391 at 397, 408, 421-422; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 613 per Mason CJ and Dawson J, 630-631 per Wilson and Toohey JJ, 652-653, 655 per Brennan J.

¹⁶³ Equity is not deprived of the ability to 'exercise its jurisdiction *in personam* on grounds of conscience' (*Oh Hiam v Tham Kong* (1980) 2 BPR 9451 at 9453 per Lord Russell of Killowen).

transactions at an under-value,¹⁶⁴ by dubious use of a corporate alter ego¹⁶⁵ or through the blatant disavowal of an express undertaking or 'positive stipulation'¹⁶⁶ that the transferee would honour the rights in question.¹⁶⁷ Precisely because they involve a deliberate attempt to *cheat* the unprotected incumbrancer of his rights, all such ploys result in a deflection of the otherwise inexorable logic of the basic legal rules.¹⁶⁸

(5) General philosophical deficiencies of logic

Here is not the place to discourse on the more extensive frailty of logic as a systematic scheme of human reasoning. It is clear, however, that classical logic has run into difficulties in modern times.¹⁶⁹ The perfection of Euclidean geometry had already been exploded during the 18th and 19th centuries.¹⁷⁰ Indeed it may perhaps be said that all strictly logical systems hang by a slender thread, since, if any single contradiction is assumed, all other contradictions are provable therefrom.¹⁷¹ The slow demise of formal logic has exerted an inevitable

¹⁶⁴ *Efstratiou, Glantschnig and Petrovic v Glantschnig* [1972] NZLR 594 at 598-599. See also *Midland Bank Trust Co Ltd v Green* [1980] Ch 590 at 625B per Lord Denning MR.

¹⁶⁵ *Jones v Lipman* [1962] 1 WLR 832 at 836 per Russell J. See also *Moore v Moore* (1971) 16 DLR (3d) 174 at 183.

¹⁶⁶ *Lys v Prowsa Developments Ltd* [1982] 1 WLR 1044 at 1054G-H; *Chan Yiu Tong v Wellmake Investments Ltd* (1996) 1 HKC 528 at 533C. See also *Melbury Road Properties 1995 Ltd v Kreidi* [1999] 3 EGLR 108 at 110G. There must be evidence that the transferee 'has burdened his own title' (see *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 653 per Brennan J), ie that he 'has undertaken a new obligation, not otherwise existing, to give effect to the relevant encumbrance or prior interest' (*Lloyd v Dugdale* [2002] 2 P & CR 13 at [52] per Sir Christopher Slade).

¹⁶⁷ *Binions v Evans* [1972] Ch 359 at 368C-369C per Lord Denning MR; *Ashburn Anstalt v Arnold* [1989] Ch 1 at 23D-H, 24G-25A per Fox LJ; *Chattey v Farndale Holdings Inc* (1998) 75 P & CR 298 at 316 per Morritt LJ. See also *Loke Yew v Port Swettenham Rubber Co Ltd* [1913] AC 491 at 502-504; *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 638 per Wilson and Toohey JJ; *Stiles v Tod Mountain Development Ltd* (1992) 88 DLR (4th) 735 at 750.

¹⁶⁸ The Land Registration Act 2002 contains no express provision upholding unprotected interests in the context of a fraudulent transfer (see eg Land Registration Act 2002, s 29(1)-(2)), the Law Commission and Land Registry having adopted the view that it should be irrelevant whether a disponee acts in good faith (Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century: A Conveyancing Revolution* (Law Com No 271, July 2001), para 5.16). It is inconceivable, however, that the courts will abandon their age-old concern to combat 'fraud' in its more blatant manifestations. The courts will, at the very least, retain a jurisdiction to set aside transactions for fraud or to subject a transferee to personal liability for any loss suffered by owners of unprotected interests (Law Commission and HM Land Registry, *Land Registration for the Twenty-First Century* (Law Com No 254, September 1998), para 3.49).

¹⁶⁹ See eg William and Martha Kneale, *The Development of Logic* (Clarendon 1962), pp 739-741; Anthony Kenny, *Frege* (Penguin 1995), pp 207-208.

¹⁷⁰ See Walter W Cook, *Scientific Method and the Law*, 13 ABAJ 303 at 304-305 (1927).

¹⁷¹ It is often recounted that when the mathematician, G H Hardy, made this claim, an interlocutor demanded that, assuming $2 + 2 = 5$, Hardy should demonstrate that the philosopher, McTaggart, was in fact the Pope. Hardy calmly subtracted three from either side of the assumed equation and announced that McTaggart and the Pope were two, yet also one (see eg *Establishing the Foundations: The Principles of Duality* (www.algonet.se/~paulh/foundations3.html)).

impact upon models of legal reasoning. We have moved, as Geoffrey Samuel would say, from the *mos geometricus* towards a 'post-axiomatic' stage of legal science.¹⁷² In the context of real property the more general shortcomings of formal systems of reasoning are evidenced in many ways.

At a practical level the ultimate Euclidean failure of the land lawyer is encapsulated in his almost total inability to mark out a straight or accurate line between two fixed co-ordinates on the ground, a deficiency which plainly strikes at the heart of any schematic or comprehensive analysis of ownership. The incommensurability of distance and the 'inherent physical difficulties' of landscape combine to pervert the 'logic of the law',¹⁷³ making it virtually impossible to draw an exact boundary line demarcating the physical location of adjacent estates in land. The law of boundaries is accordingly pervaded by a Heisenberg-like principle of uncertainty,¹⁷⁴ an imprecision which is explicitly acknowledged today in the so-called 'general boundaries rule' applicable to maps and plans of registered estates.¹⁷⁵ Ultimately indeterminate facts make for ultimately indeterminate law.¹⁷⁶ At a more conceptual level, even the most fundamental normative propositions of the land lawyer are apt to wind up in a tangle of logical inconsistency. For instance, the principle of unrestricted alienability of land -- regarded by some as intrinsic to ownership in fee -- is most fully realised in a transfer which imposes limits on future alienation.¹⁷⁷ The alienability principle thus contains an inherent contradiction. The ultimate exercise of the power of free alienation is, paradoxically, a negation of that power: freedom to alienate implies the power to *destroy* freedom of alienation.¹⁷⁸ Doubtless for this reason unfettered powers of alienation have

¹⁷² Samuel, *The Foundations of Legal Reasoning* (MAKLU, Antwerp 1994), p 193.

¹⁷³ *Morgan County Coal Co v Halderman*, 163 SW 828 at 840 (1914) per Faris J.

¹⁷⁴ The Heisenberg thesis, affirming that the very process of measurement inevitably disturbs or alters the object of measurement, came to depict a physical world of inherent indeterminacy (see Laurence H Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Physics*, 103 Harv L Rev 1 at 17-20 (1989-90); R George Wright, *Should the Law Reflect the World? Lessons for Legal Theory from Quantum Mechanics*, 18 Fla St U L Rev 855 (1991)).

¹⁷⁵ Under this rule the boundary of a registered estate is normally only a 'general boundary', which 'does not determine the exact line of the boundary' (Land Registration Act 2002, s 60(1)-(2)). The 'general boundaries rule', previously buried in Land Registration Rules 1925, r 278(1)-(2), is now promoted to a position of prominence in the 2002 Act itself, thereby 'reflecting its importance' (see *Land Registration Rules 2003 -- A Land Registry Consultation* (2002), para 8.1 (p 73)). Although no other legal uncertainty so fuels litigious vigour, it is widely accepted that a 'certain amount of vagueness' or 'latitude' inevitably attends the attempted definition of any boundary line (*Wibberley (Alan) Building Ltd v Insley* [1999] 1 WLR 894 at 901E-F per Lord Hope of Craighead). For a sensitive appreciation of the importance and complexity of mapping, see Alain Pottage, *The Measure of Land*, (1994) 57 MLR 361.

¹⁷⁶ Thus, for example, the notion of trespass is problematical without proof of clearly defined boundaries (*Curran v Bowen*, 753 SW2d 940 at 943 (Mo App 1988)). See also *Hackshaw v Shaw* (1984) 155 CLR 614 at 659 per Deane J.

¹⁷⁷ 'The exercise of the power to convey by any individual cannot begin to be full unless he can limit the power to convey of the individual to whom he conveys' (see Charles Donahue, 'The Future of the Concept of Property Predicted from its Past', in J R Pennock and J W Chapman (ed), *Property: Nomos XXII* (NYU Press, New York 1980), p 33).

¹⁷⁸ See K J Gray, 'Property in Common Law Systems', in G E van Maanen and A J van der Walt (ed), *Property Law on the Threshold of the 21st Century* (MAKLU, Antwerp, 1996), p 263. Thus, for Coke and Blackstone, absolute restrictions on the alienation of freehold land were repugnant to the essence of ownership in fee and therefore 'against reason' and void (*Co Litt*, 223a (sect 360); *Bl Comm*, Vol II, p 156). As another Gray has pointed out, a prohibition of further alienation is self-contradictory in that it has 'an affinity

always been heavily qualified by a number of pragmatically inspired common law rules which curtail the alienor's otherwise comprehensive creative control over future holdings in his or her property.

Formal logic may have had its day. But over and above the existing infirmities of logical method, the post-structuralist and post-modernist movements of the late 20th century inflicted a further, and devastating, crisis of communicable meaning. Together these critiques have severely limited the world of the knowable, aiming deep blows at notions of rational coherence and immanent intelligibility. One by-product has been the infusion of fundamental doubt as to the process of legal -- amongst other forms of -- decision-making. The very possibility of strictly axiomatic deduction is thrown into fatal confusion by a philosophy which proclaims that '[a] decision that didn't go through the ordeal of the undecidable would not be a free decision.'¹⁷⁹ In one sense this is absolutely true, but for some the post-modernist revolution, with its refutation of law as a phenomenon permeated by reason, betokens a dangerous 'slide to nihilism.'¹⁸⁰ Yet this was also, curiously, the charge levelled at many of the American Realists of the early 20th century, for whom every new case was 'always more or less a shot in the dark'¹⁸¹ or even the 'perfection of uncertainty.'¹⁸² But, as some of the Realists eventually perceived, there may exist alternative means for establishing a 'middle ground between matters of taste and matters capable of being settled by a previously statable algorithm.'¹⁸³ In other words, there may be yet another form of rationality inherent in the discourse of property law.

with saying "I give you a fee but I don't" (see Charles Gray, 'Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke', in Perez Zagorin (ed), *Culture and Politics From Puritanism to the Enlightenment* (Univ of Calif Press, 1980), p 66).

¹⁷⁹ Jacques Derrida, *Force of Law: The 'Mystical Foundations of Authority'*, 11 Cardozo L Rev 919 at 963 (1990). 'In short, for a decision to be just and responsible, it must ... be both regulated and without regulation ... Each case is other, each decision is different and requires an absolutely unique interpretation, which no existing, coded rule can or ought to guarantee absolutely' (ibid at 961).

¹⁸⁰ Ernest J Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 Yale LJ 949 at 1016 (1988). See also Weinrib, *The Idea of Private Law* (Harvard UP 1995), p 7; Robert S Summers, *The Formal Character of Law*, [1992] CLJ 242. Compare, however, Joseph W Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale LJ 1 (1984).

¹⁸¹ Edwin N Garland, *Legal Realism and Justice* (Columbia UP, New York, 1941), p 52.

¹⁸² Max Radin, *The Permanent Problems of the Law*, 15 Cornell LQ 1 at 15 (1929-30). See also Morris R Cohen, *The Place of Logic in the Law*, 29 Harv L Rev 622 at 638 (1916) ('The intellectualist would have the judge certain of everything before deciding, but this is impossible. Like other human efforts, the law must experiment, which always involves a leap into the dark future. But ... [t]he trained mind sees in a flash of intuition that which the untrained mind can succeed in seeing only after painfully treading many steps').

¹⁸³ See Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton UP 1979), p 336.

3. The logic of rhetoric

The intellectual order of land law may not ultimately be expressible in terms of a strict or mathematical logic; it may indeed lack comprehensive internal coherence. But, as adumbrated earlier in this paper, it is strongly arguable that the rules of real property are, instead, underpinned by an alternative, and equally powerful, mode of *non-deductive* or *persuasive* logic. According to this view, the processes of legal reasoning include a rather broader range of cognitive activity than that encompassed by formal or analytic systems of logic.¹⁸⁴ Deeply entrenched, for instance, in the philosophy of the American Realists was the perception that juristic reasoning 'is not merely thought; it is argumentation.'¹⁸⁵ Indeed a more recent school of 'rhetorical reasoning', associated mainly but not exclusively with the civilian tradition,¹⁸⁶ holds that the intellectual enterprise of law is not deductive, but dialogic; not formal, but contextual; not axiomatic, but interactive and reflective. On this analysis, rule systems incorporate, and must answer to, the collective experience of a corps of skilled observers whose deliberations vitally overshadow the operation of legal norms and impart a resultant force and direction to these very norms.¹⁸⁷

It follows that what is at work here is not a logic of axioms and deductions, but rather a 'logic of attitudes'.¹⁸⁸ The *axiomatic* has given way to the *axiological* (in the sense of a pervasive concern with the values which underpin legal phenomena).¹⁸⁹ Thus the truly formative premises of the law are often those unwritten principles which command the assent of an 'interpretive audience' of knowledgeable participants in the particular juristic enterprise concerned.¹⁹⁰ The concept of law which emerges from this analysis is one founded upon collaborative social practices of intellectual exchange or dialectic; it is born of a more authentic perception of the common law as a species of customary law.¹⁹¹ It also has strong links with an older common

¹⁸⁴ Thus, for some commentators, legal systems are only 'quasi-axiomatic' or 'partially deductive' (see Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (trans by Iain Stewart, Oxford UP 1994), p 172).

¹⁸⁵ Nathan Isaacs, *How Lawyers Think*, 23 Col L Rev 555 at 558 (1923).

¹⁸⁶ See Julius Stone, *Legal System and Lawyers' Reasonings* (Stevens, London 1964), pp 325-332.

¹⁸⁷ See John Bell, 'The Acceptability of Legal Arguments', in N MacCormick and P Birks (ed), *The Legal Mind: Essays for Tony Honoré* (Clarendon 1986), pp 49-51.

¹⁸⁸ See Samuel Stoljar, *The Logical Status of Legal Principle*, 20 U Chi L Rev 181 at 184 (1952-53).

¹⁸⁹ See Jerzy Wróblewski, *Law and Society: Basic Problems of Legal Axiology*, *Rechtstheorie, Beiheft 11* (1991), 193. See also Wróblewski, *Contemporary Models of the Legal Sciences* (Polish Academy of Sciences, Warsaw 1989), pp 71-75.

¹⁹⁰ Chaim Perelman, perhaps the foremost protagonist of the 'new rhetoric', spoke of it as embracing a 'nonformal reasoning that aims at obtaining or reinforcing the adherence of an audience' ('The New Rhetoric: A Theory of Practical Reasoning', in Perelman, *The New Rhetoric and the Humanities* (Reidel 1979), p 12). See also Perelman, 'Legal Reasoning', in Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (Reidel 1980), p 129. Robert Alexy has pointed to the intellectual affinity between Perelman's 'ideal audience' and the 'ideal speech situation' which underpins Jürgen Habermas's consensus-based theory of truth (see Alexy, *A Theory of Legal Argumentation* (trans by Ruth Adler and Neil MacCormick, Clarendon 1989), p 173).

¹⁹¹ See A W B Simpson, 'The Common Law and Legal Theory', in Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (Clarendon 1973), pp 91-94.

law tradition in which the 'common erudition', 'common learning' or *communis opinio* of the practising profession was regarded as an independent source of law.¹⁹² We are drawn back, once again, to Coke's conception of the law as 'artificial reason',¹⁹³ to an image of law as the distinctive product of an interactive community of professional experts,¹⁹⁴ of law as 'fined and refined by an infinite number of grave and learned men'.¹⁹⁵ This vision of law was itself deeply rooted in an ancient rhetorical discipline which provided, as does all rhetoric, a medium for the organisation and articulation of a shared ethical and intellectual culture.¹⁹⁶

(1) The role of meta-principles

The interactive process described above both *comprises* and *facilitates* a practical or experiential form of legal reasoning¹⁹⁷ -- a model of persuasive logic in which propositional knowledge derives, not only from the standard premises of the legal syllogism but, more importantly, from the specialised discourse of a deliberative community of jurists.¹⁹⁸ In effect, the really significant premises of legal argument are drawn from the aggregated wisdom -- the *conscience collective* -- of a body of expert observers who, whether wittingly or not, arbitrate the overriding consensus values or fundamental policy concerns which require to be reflected in

¹⁹² See J H Baker, *The Law's Two Bodies: Some Evidential Problems in English Legal History* (Oxford UP 2001), pp 64-90.

¹⁹³ This conception has been described, with justification, as 'perhaps Coke's main gift to legal theory' (see Charles Gray, 'Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke', in Perez Zagorin (ed), *Culture and Politics From Puritanism to the Enlightenment* (Univ of Calif Press, Berkeley 1980), p 30).

¹⁹⁴ Coke 'shared the belief that the truest understanding of an issue is that reached by disputation and discussion; the wisdom of the group will be fuller and more trustworthy than the opinion of any one lawyer or orator.' The individual perspective was accordingly 'constrained and bounded by professional consensus' (Allen D Boyer, '*Understanding, Authority, and Will: Sir Edward Coke and the Elizabethan Origins of Judicial Review*', 39 Boston Coll L Rev 43 at 50 (1997)).

¹⁹⁵ *Co Litt*, 97b (sect 138). Coke's exaltation of law as 'artificial reason' reflected 'a judge's faith in the communal professional wisdom of the bar -- intelligence refined by training, by artifice' (Allen D Boyer, 39 Boston Coll L Rev 43 at 48-49 (1997)).

¹⁹⁶ For a view of law as a 'rhetorical process', see James Boyd White, 'Rhetoric and the Law: The Arts of Cultural and Communal Life', in White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (Univ of Wisconsin Press, Madison 1985), pp 32-33.

¹⁹⁷ This is a logic which, in the words of Morris Cohen, is not 'too proud to learn from experience' (Cohen, *The Place of Logic in the Law*, 29 Harv L Rev 622 at 639 (1916)).

¹⁹⁸ The concept of 'interpretive community' employed in this essay deviates from the sense in which the term has been used in earlier literature. Stanley Fish, for example, explores the notion of 'interpretive community' very largely in the context of the *readership* of (and interaction with) *texts*, whereas the concern of the present paper is with the kinds of collective or corporate ethos which emerge, often quite independently of any text, in the resolution of the practical problems and recurring dilemmas of reality. Compare Stanley Fish, *Is There A Text In This Class? The Authority Of Interpretive Communities* (Harvard UP, Cambridge, Mass 1980). See also Daniel A Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 Vand L Rev 533 at 536-537 (1992); William S Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 Nw U L Rev 629 (2001).

the law.¹⁹⁹ The process is collegial; the purpose is teleological; and the product is a sort of 'reasonableness' in the development and application of legal doctrine.²⁰⁰

It is perhaps inevitable that the implicit value-orientations generated by the intellectual and professional interactions of lawyers should invade the conventional premises of the syllogistic device. It is as if each legal syllogism contained, secreted within its lines, a hidden component -- some have called it an 'excluded third premise' or 'kind of "interspace"'²⁰¹ -- which gives expression to higher order norms or 'meta-principles' emanating from the interpretive perceptions and intuitions of the juristic community.²⁰² Indeed, it is often the interpolation of such semiotic or subliminal signals in the reasoning process which enables the syllogistic indeterminacies of law and fact magically to throw up the 'right' or 'desired' result in given cases.²⁰³ It is the silent input of these additional, collectively determined policy guidelines which confers internal coherence upon a field of concepts otherwise imperfectly linked by the fragile orderings of strict logic. This is why, in so many judicial decisions, the outcome seems -- to the innocent or uninformed observer -- to be carried along by a logic which is largely unwritten, given a directional steer by some influence which is never fully articulated, and resolved by reference to a rule-book known only to the judge and senior counsel. Commentators are puzzled by the process until they realise that it is, in fact, the intervention of the overriding, but tacit, premise which alone makes sense of much judicial behaviour. Another set of norms, more general, more abstract and more diffuse in nature, has effectively cut across, catalysed or supplemented the formal logic of the law.

¹⁹⁹ See Edgar Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J Leg Ed 373 at 397 (1968-69); J-L Bergel, *Théorie générale du droit* (2nd edn Dalloz 1989), p 270.

²⁰⁰ See Edwin N Garland, *Legal Realism and Justice* (Columbia UP, New York, 1941), p 59 ('the conception of reasonableness has as a primary content a method and an attitude, which attitude is the teleological approach').

²⁰¹ See Geoffrey Samuel, *The Foundations of Legal Reasoning* (MAKLU, Antwerp 1994), p 139. Samuel, drawing on his profound experience of French legal technique, has indicated how this analysis 'quickly begins to shift legal reasoning away from formal logic and the world of dogmatic propositions (code provisions taken as axioms) towards a more complex system where the [excluded third premise], rather than the major and minor premises of the actual judgment, becomes the focal point of a reasoning system more dialectical than logical.'

²⁰² This supplementation of legal logic is, in fact, nothing new even in the world of the common law. Toby Milsom has described how, in the 14th and 15th centuries, lawyers, 'thinking as it were off the record', effectively introduced their own 'extra, unofficial law' into the resolution of claims, thereby bringing about a situation in which '[l]egal thinking has clearly outstripped legal forms' (see S F C Milsom, 'Law and Fact in Legal Development', in Milsom, *Studies in the History of the Common Law* (Hambledon Press 1985), pp 177-179).

²⁰³ '[S]yllogism has to compromise with intuition; the work of systematization borrows both from logical inferences and from axiological and teleological considerations' (Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (trans by Iain Stewart, Oxford UP 1994), p 172).

(2) A multi-factored form of reasoning

This nonformal dialectical tradition, its origins deeply embedded in Aristotle's *Tópoi*,²⁰⁴ introduces a more complex dimension into our understanding of the processes of legal reasoning.²⁰⁵ In so doing, it confirms the finely interwoven or 'multi-factored'²⁰⁶ character of legal logic. Legal reasons are seen as having a cumulatively supportive quality, 'like the legs of a chair, not the links of a chain.'²⁰⁷ As Chaim Perelman once put it, rhetorical argument consists of a 'web formed from all the arguments and all the reasons that combine to achieve the desired result.'²⁰⁸ In this way legal reasoning is quietly invigorated by a range of higher order principles agreed or arbitrated by a 'caste of lawyers'²⁰⁹ composed of judges, parliamentarians, civil servants, practitioners and others who think and write about the law.²¹⁰ The normative edifice of the law is, in effect, infiltrated by certain 'rules of experience'²¹¹ which have won consensus support from those most closely concerned with particular sectors of juristic endeavour.

²⁰⁴ See Samuel Stoljar, *System and Tópoi*, 12 *Rechtstheorie* 385 at 387 (1981), linking the concept of *tópoi* with Cicero's *loci* of debate and, thence, with the 'commonplaces' of juristic thought and belief which infuse and shape collective understandings of legal rules. This connection was to carry through into the strong rhetorical tradition of Tudor England, when law students' notebooks (or 'commonplace' books) provided 'the places whereof they shall fetch their reasons, called of orators *loci communes*' (Sir Thomas Elyot, *The Book Named the Governour* (1531), cited by Allen D Boyer, *Sir Edward Coke, Ciceronianus: Classical Rhetoric and the Common Law Tradition*, 10 *Intl J for the Semiotics of Law* 3 at 19 (1997)).

²⁰⁵ 'Formal logic is only an instrument at the service of dialectical argument' (J-L Bergel, *Théorie générale du droit* (2nd edn Dalloz 1989), pp 274-275).

²⁰⁶ Robert S Summers, *Logic in the Law*, (1963) 72 *Mind* 254 at 258.

²⁰⁷ John Wisdom, 'Gods', in A Flew (ed), *Essays on Logic and Language* (Blackwell, Oxford 1951), p 195. For Wisdom, legal argument was not 'a *chain* of demonstrative reasoning', but a 'presenting and representing of those features of the case which *severally co-operate*' in favour of the reasoner's desired conclusion.

²⁰⁸ 'The New Rhetoric: A Theory of Practical Reasoning', in Perelman, *The New Rhetoric and the Humanities* (Reidel 1979), p 18 ('The purpose of the discourse in general is to bring the audience to the conclusions offered by the orator, starting from premises that they already accept'). In another telling simile, Perelman described rhetorical reasoning as 'like a piece of cloth, the total strength of which will always be vastly superior to that of any single thread which enters into its warp and woof' (*Self-Evidence and Proof*, 33 *Philosophy* 289 at 300 (1958)).

²⁰⁹ The phrase is that of Brian Simpson (see 'The Common Law and Legal Theory', in A W B Simpson (ed), *Oxford Essays in Jurisprudence (Second Series)* (Clarendon 1973), p 94).

²¹⁰ It will be noted that no attempt is made here to be dogmatic about the precise composition of the 'dialogic community' of the law, not least because membership of this group is effectively self-defining. Those whose views and philosophies contribute to the formation of a consensus on relevant higher order principles will normally (but not necessarily) be judges and practitioners. The community extends to all informed and responsible citizens who engage in the critical development of legal policy -- a group not too far removed from the concept of the 'ideal' or 'universal' audience to which Perelman frequently made reference (see Chaim Perelman, 'The New Rhetoric: A Theory of Practical Reasoning', in Perelman, *The New Rhetoric and the Humanities* (Reidel 1979), p 14). See also Robert Alexy, *A Theory of Legal Argumentation* (trans by Ruth Adler and Neil MacCormick, Clarendon 1989), pp 160-164.

²¹¹ Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (trans by Iain Stewart, Oxford UP 1994), pp 122-123.

This constant appeal to, and reliance upon, the 'dialogic community'²¹² -- the modern equivalent of Bracton's 'common warrant of the body politic'²¹³ -- is productive of a rule structure which, although not mathematical in nature, is similarly rigorous and objective. Indeed, the infusion of higher order norms is rightly seen as the embodiment of a kind of 'reasonableness'²¹⁴ precisely because it comprises the collegial contribution of a class of reasoning men and women -- in sharp contrast to the arid and impersonal rationality of strict logic.²¹⁵ There are, here, certain obvious intellectual connections not only with the empirical and pragmatic traditions of philosophical thought, but also with Llewellyn's 'grand style' of adjudication,²¹⁶ Dworkin's super-normative 'principles',²¹⁷ the 'standards'-based analysis advocated by critical legal scholarship,²¹⁸ and the consequence-based reasoning espoused by other jurists.²¹⁹ The consensus which emerges from the deliberations of the rhetorical community carries more than an echo of Llewellyn's concept of 'horse sense'.²²⁰ It even bears a resonance of the 'law ways' so fruitfully explored by Llewellyn and his collaborator, Hoebel.²²¹

In the present context, the overall structural image which reveals itself is that of property law not as a *science*, but as a *craft* -- as a preceptual scheme mediated by constant reference to 'an "aesthetic" feel for the system'²²² and characterised by a profound professional empathy for the overriding cadences and thematic

²¹² See Alan Brudner, *The Unity of Property Law*, 4 Can J of Law and Juris 3 at 58 (1991).

²¹³ Bracton, *De Legibus et Consuetudinibus Angliae* (ed and trans by Sir Travers Twiss, Longman, London 1878), pp 3, 13. (Bracton's term is *rei publicae sponsio communis*, a phrase which bears the stamp of even earlier civilian origins.)

²¹⁴ See Dennis Lloyd, *Reason and Logic in the Common Law*, (1948) 64 LQR 468 at 475, for the view that law is 'not so much concerned with logic' as with 'reasonableness', ie 'that pattern of sentiment which inheres in a particular community or some section of it.'

²¹⁵ See Luis Recaséns-Siches, 'The Logic of the Reasonable as Differentiated from the Logic of the Rational (Human Reason in the Making and the Interpretation of the Law)', in R A Newman (ed), *Essays in Jurisprudence in Honor of Roscoe Pound* (Greenwood Press, Westport Conn, 1973), p 192.

²¹⁶ See Karl N Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co, Boston 1960), pp 36-38. Llewellyn spoke of the need to accommodate rules and decisions with the 'feel of the body of our law', so that they 'go with the grain rather than across it or against it, that they fit into the net force-field ...' (ibid, p 191).

²¹⁷ See Ronald Dworkin, *Taking Rights Seriously* (Duckworth, London 1977), pp 22-31.

²¹⁸ See eg Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685 at 1710 (1975-76).

²¹⁹ See eg Neil MacCormick, *Legal Reasoning and Legal Theory* (Clarendon 1978). See also Peter Cane, 'Consequences in Legal Reasoning', in Jeremy Horder (ed), *Oxford Essays in Jurisprudence (Fourth Series)* (Oxford UP 2000), p 41.

²²⁰ See Llewellyn, *The Common Law Tradition: Deciding Appeals* (Little, Brown & Co, Boston 1960), p 121 ('the balanced shrewdness of the expert in the art').

²²¹ See K N Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Univ of Oklahoma Press, Norman 1941).

²²² Charles Gray, 'Reason, Authority, and Imagination: The Jurisprudence of Sir Edward Coke', in Perez Zagorin (ed), *Culture and Politics From Puritanism to the Enlightenment* (Univ of Calif Press, 1980), p 61. Gray adds that '[p]erhaps long study, not of law, but of common law real property would instill in any normal person a kind of aesthetic, an aptitude for funny sensibilities -- precisely the sense that understanding the

orientations of contemporary property thinking. Even in its relation to property, the 'common law' is, in its deepest sense, exactly what it proclaims itself to be -- ie a body of intuitions common to the professional cadre most closely concerned with its direction and application. The law is not 'what the judges say it is',²²³ but rather what the juristic community declares it to be²²⁴ -- an apprehension which helps to give the lie to Bentham's disparaging observation that '[a]s a System of general rules, the Common Law is a thing merely imaginary.'²²⁵ In the perception of a pre-Benthamite era 'the essential core of the common law' was always more accurately envisaged as an aggregation of 'high-level general principles or fundamental points of the law ... woven so closely into the fabric of English life that they could never be ignored with impunity.'²²⁶

(3) The jural status of meta-principles

It is, on reflection, entirely unexceptional that prolonged or intensive engagement with the law should generate a collective professional *mentalité* -- a cluster of inner convictions, predispositions and ways of looking at problems -- which then overhangs the practical implementation of the relevant rule system. Indeed, the dialectical processes of the juristic community exemplify what some have called the phenomenon of 'internormativity' -- the capacity of the legal order 'to incorporate rules from other normative registers.'²²⁷ But even this may unduly insinuate a less authoritative status for the meta-principles of the law, as if they comprised some sort of 'infra-law' which has not quite entered the visible spectrum of the legal regime.²²⁸ In

practical purposes of the rules and the everyday moral judgments behind them is, by and large, the way to right results, and yet that there is a residue where the only explanation is the poetry of the system. For that residue, the justification for "in-tune" decisions is not so much their intrinsic virtue as a presumptive interest in not untuning the system as a whole and starting a process like cosmic decay' (ibid, p 66).

²²³ Patrick Devlin, *Samples of Lawmaking* (Oxford UP 1962), p 2.

²²⁴ Some traces of this perception are to be found in Robert Goff, *The Search for Principle*, (Maccabaeen Lecture in Jurisprudence 1983), 69 Proceedings of the British Academy 1983 (Oxford UP 1984), p 186 ('It is not unreasonable to define the law upon any particular topic as being whatever is understood to be so by the relevant professional opinion of the day').

²²⁵ Jeremy Bentham, *A Comment on the Commentaries* (1775) (revd edn by J H Burns and H L A Hart, Athlone Press, University of London 1977), p 119. For Bentham, the common law was 'sham law', a 'fictitious offspring of each man's imagination' (see Philip Schofield and Jonathan Harris (ed), *Legislator of the World: Writings on Codification, Law, and Education (The Collected Works of Jeremy Bentham)* (Clarendon 1998), pp 136-137, 271). The role played by the collectively arbitrated meta-principle in guiding the process of judicial decision rather takes the edge off Bentham's vitriolic denunciations of 'spurious', 'pretended', 'fabricated' grounds of decision, flowing from 'the sort of non-entity called common or unwritten law', which he suspected enabled the judge to give 'the name and effect of law to the work and product of his own individual will, fashioned of course according to his own conception of his own interests' (ibid, p 225).

²²⁶ J P Sommerville, *Politics and Ideology in England, 1603-1640* (Longman, London 1986), p 94. See also Roger Cotterrell, *The Politics of Jurisprudence -- A Critical Introduction to Legal Philosophy* (Butterworths 1989), p 24.

²²⁷ Michel van de Kerchove and François Ost, *Legal System Between Order and Disorder* (trans by Iain Stewart, Oxford UP 1994), p 173.

²²⁸ Continental commentators have frequently spoken, in broadly analogous terms, of the distinction between the 'juridique' and the 'infrajuridique' (see eg A-J Arnaud, *Critique de la raison juridique*, i, 'Où va la sociologie du droit?' (Librairie Générale de Droit et de Jurisprudence, Paris 1981), p 26). Similarly, Jean

reality the normative perceptions mediated by law's 'interpretive audience' form a *constituent part* of the legal order -- indeed quite often exert a predominating influence upon the day-to-day functioning of that order.²²⁹

Such realisations help to sharpen the definition of those 'rules of recognition' which identify and validate the operable principles of any particular legal system.²³⁰ The role of the meta-principle, as we have described it, confirms two fundamental features of this task of 'recognition'. First, rules of recognition are rooted essentially in behavioural or psycho-social fact. In Hart's own words, 'the rule of recognition exists only as a complex, but normally concordant, practice of the courts, officials, and private persons in identifying the law by reference to certain criteria.'²³¹ Evaluations of normative validity have, on this basis, a thoroughly 'interactional nature'.²³² Second, the rules of recognition operated by most legal systems are unquestionably 'fuzzy'.²³³ It is sometimes said that the legal norms which they validate are marked out, not by the 'vertical logic' of any centralised or exclusive source of legitimacy, but by the 'horizontal logic' or 'tangled hierarchy' which emerges from the interplay of various subsets of actors within the juristic community.²³⁴

One consequence of this collaborative process is to impart a certain ambiguity or 'latitude' to the process of rule-validation, not least in the sense that 'axiological considerations' are allowed to 'supplement' more formal criteria for determining the legitimacy of legal norms.²³⁵ The resulting picture reveals a more richly endowed taxonomy of law, where 'rules in uniform' (to use Perelman's vivid description of the norms validated by official tests of pedigree²³⁶) are seen to take their place alongside rules in mufti. And it becomes more readily apparent that the inner coherence of a legal system derives, not from the axiomatisation of principle, but from

Carbonnier referred to the 'droit vulgaire' as a counterpoint to the 'droit savant' (see Carbonnier, *Sociologie juridique* (Quadriga, Presses Universitaires de France 1994), p 371).

²²⁹ For reference to the way in which the 'unwritten conventions of the legal profession' have contributed to the 'inner logic of the law ... the inner dynamism of the law, its internal momentum for development', see Joseph Raz, *The Inner Logic of the Law*, *Rechtstheorie*, Beiheft 10 (1986), 101 at 116-117. See also Stefan Vogenauer, *Die Auslegung von Gesetzen in England und auf dem Kontinent* (Mohr Siebeck, Tübingen 2001), Vol II, pp 976, 1081-1082.

²³⁰ Some useful analogy may be found in *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) at [54] per Gleeson CJ, Gummow and Hayne JJ ('the relevant rule of recognition of a traditional law or custom is a rule of recognition found in the social structures of the relevant indigenous society').

²³¹ H L A Hart, *The Concept of Law* (Clarendon 1961), p 107.

²³² Michel van de Kerchove and François Ost, *op cit*, p 99.

²³³ See Jerzy Wróblewski, 'Fuzziness of Legal System', in Urpo Kangas (ed), *Essays in Legal Theory in Honor of Kaarle Makkonen* (XVI Oikeustiede Jurisprudentia, Vammala 1983), pp 326-329.

²³⁴ See Michel van de Kerchove and François Ost, *op cit*, pp 67-70, 172-173.

²³⁵ Michel van de Kerchove and François Ost, *op cit*, pp 49-50, 58-59, 100. Joseph Raz has likewise spoken of the existence of 'ultimate laws of discretion' which 'guide' the courts' choice in the adoption and application of legal norms (see 'The Identity of Legal Systems', in Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon 1979), pp 96-97).

²³⁶ Chaim Perelman, 'A propos de la règle de droit, réflexions de méthode', in Perelman, *La règle de droit* (Bruylant, Brussels 1971), p 316.

the interpenetration of its formal and informal sources of law.²³⁷ Indeed, the more complete -- the more sociologically accurate -- conception of a legal order is one which perceives the legal system to be 'partially disordered' and which acknowledges that systemic strength and vitality flow, not from some model of unitary or mechanistic logic, but from a constant and constructive arbitration of the tension between order and disorder.²³⁸ In this way, much as with a Jackson Pollock canvas, an invincible, irrepressible order of things begins to stare out from behind the confusion of light, colour, shape and shade.²³⁹

(4) The 'Trojan' premise in the legal syllogism

It should, accordingly, come as no surprise that the propositional structure of English land law is ultimately influenced -- even dictated -- by a number of principles of generalised or idealistic content whose origin lies outwith the formal organs of law-making and which are rarely captured in any authoritative written form.²⁴⁰ Students of English law should be well aware that large normative propositions lurk quietly -- in true Anglo-Saxon understatement -- between the inscrutable lines of statutory or judicial prose. By tradition and training, property lawyers comprise a more cohesive intellectual constituency than is usual in most other branches of the law. It is all the more natural, then, that this comparatively tight-knit community should formulate an indigenous culture of cardinal or first-order rules which infiltrate themselves, virtually unnoticed, into the jurisprudence of land law. The fruits of this process -- the 'meta-principles'²⁴¹ of land law -- are usually aspirational or organisational in scope. These meta-principles express a relatively limited range of fundamental ethical or systemic values, functioning as signposts to guide the application of real property rules.²⁴² Each meta-principle supplements the standard premises of the legal syllogism with a third -- or

²³⁷ As Llewellyn and Hoebel maintained, 'some background of ... "near-law"-and-practice is found in every culture' (K N Llewellyn and E Adamson Hoebel, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* (Univ of Oklahoma Press, Norman 1941), p 231).

²³⁸ See Michel van de Kerchove and François Ost, op cit, pp 172-173 (referring to the 'intertwining of law and infra-law' as part of the dialectic of law and society).

²³⁹ As Cardozo said of his perception of law, '[s]omewhere beneath the welter, there may be a rationalizing principle revealing system and harmony in what passes for discord and disorder' (Benjamin N Cardozo, *The Paradoxes of Legal Science* (Greenwood Press, Westport, Conn 1970 (first published 1928)), p 3).

²⁴⁰ Some ideals, declared Roscoe Pound, 'are as authoritative as the rules announced in decisions' (Pound, *The Ideal Element in American Judicial Decision*, 45 Harv L Rev 136 at 148 (fn 39) (1931-32)). See similarly F Pollock, *A First Book of Jurisprudence* (Macmillan, London 1911), p 249.

²⁴¹ For an earlier exploration of the role of 'meta-principles' in statutory construction, see K J Gray, *Normative Interpretation of Statutes* (Unpublished paper presented at the Cambridge Conference of the Society of Public Teachers of Law, 12 September 1996), pp 12-16 (copy on file, Squire Law Library, University of Cambridge).

²⁴² For reference to the importance in the rhetorical tradition of 'guidelines or pointers for the solution of controversial questions', see Edgar Bodenheimer, *A Neglected Theory of Legal Reasoning*, 21 J Leg Ed 373 at 381 (1968-69). The rhetorical tradition has always borne some distant resonance of the *regulae iuris* of classical Rome. The *regulae* formulated by second-century Roman jurists were regarded as 'signposts or guides', that is, 'generalisations which pointed the way to a defined area of the established law' (Peter Stein, *Regulae Iuris* (Edinburgh UP 1966), p 101).

'Trojan' -- premise, effectively smuggling inside the process of legal analysis an overriding normative formula which then imparts a critical twist of direction to the major premise of the syllogism. The effect can often be silently subversive of the superficially predictable outcomes of orthodox syllogistic reasoning.

The meta-principles of real property thus operate as an extra (and highly informal) source of foundational, value-laden precepts, emerging not as arbitrary fiats within some logical scheme, but as the collectively determined product of interactive rhetorical engagement within a college of expert opinion.²⁴³ Overarching propositions derived from this source can sometimes play a hugely significant role in determining the orientation -- some would say the 'geography' -- of whole areas of land law. Of course, the conventional understandings which supply such meta-principles have frequently the aspect of extra-statutory legislation; and, predictably, such a characterisation causes more *Angst* to those unfamiliar with the civilian tradition.²⁴⁴ But continental lawyers -- in contrast to their common law counterparts -- tend to be rather less embarrassed by overt reference to the role of the juristic community as agents in the interpretive processes of the law.²⁴⁵ For them it seems entirely natural to acknowledge the existence of a body of 'superior norms' or 'meta-norms', for this is exactly what helps to distinguish the '*métablangage des juristes*' from the '*langage du droit*'.²⁴⁶

(5) Meta-principles and the common law tradition of property

The common law tradition of property is certainly no stranger to the phenomenon of the meta-principle: it was, after all, Oliver Wendell Holmes who introduced us to the terminology of the 'inarticulate major premise' as an inescapable component of judicial decision-making.²⁴⁷ This paper has already adverted, for example, to the way in which a general abhorrence of fraud operates as an overriding principle governing legal transactions. Likewise, during the last three decades, a first-order imperative of gender equality has begun to infuse the

²⁴³ To borrow a well known Renaissance metaphor, 'logic is compared to the closed fist and rhetoric to the open hand' (Wilbur S Howell, *Logic and Rhetoric in England, 1500-1700* (Princeton UP 1956), p 4).

²⁴⁴ The terminology of 'meta-principles' or 'meta-rules' has recently begun to surface in English case law (see eg *Customs and Excise Comrs v Thorn Materials Supply Ltd* [1998] 1 WLR 1106 at 1118H-1119A per Lord Hoffmann) and is steadily acquiring a juristic currency in other parts of the common law world (see eg *Agritrade International Pte Ltd v Industrial and Commercial Bank of China* [1998] 3 SLR 211 at 219B [21] per G P Selvam J (Singapore High Court); *Bakhtyar v Minister for Immigration and Multicultural Affairs* (2001) 190 ALR 72 at 84 [41] per French J (Federal Court of Australia); *Bal v Minister for Immigration and Multicultural Affairs* (Federal Court of Australia, 29 August 2001) per Madgwick J). See also *Wilson v Anderson* (2002) 190 ALR 313 at 348 [139] per Kirby J ('a beam of light in the legal jungle').

²⁴⁵ See eg John Bell, *French Legal Cultures* (Butterworths 2001), pp 72-77.

²⁴⁶ P Dubouchet, *La pensée juridique avant et après le code civil* (2nd edn, L'Hermès 1991), p 227. See Geoffrey Samuel, *The Foundations of Legal Reasoning* (MAKLU, Antwerp 1994), p 275; Philippe Jestaz and Christophe Jamin, *The entity of French doctrine: some thoughts on the community of French legal writers*, (1998) 18 *Legal Studies* 415.

²⁴⁷ The phrase is drawn from Justice Holmes's dissent in *Lochner v New York*, 198 US 45 at 76, 49 L Ed 937 at 949 (1905). See also Holmes, *The Theory of Legal Interpretation*, 12 *Harv L Rev* 417 at 420 (1898-99). Holmes referred elsewhere, and in very similar terms, to the formative effect of 'obscurely felt' principles (see O W Holmes, *Codes, and the Arrangement of The Law*, 5 *Am L Rev* 1 (1870-71)).

property rulings of English courts.²⁴⁸ In *Williams & Glyn's Bank Ltd v Boland*²⁴⁹ an osmotic response to contemporary community mores caused the courts finally to concede that, in matters of priority, a wife could no longer be regarded as a mere 'shadow' of her husband in his capacity as legal owner.²⁵⁰ For the same reason the courts in *Boland* declined to press the 'legal fiction' of the conversion-oriented device of the trust for sale to 'its logical conclusion',²⁵¹ Lord Wilberforce observing that 'to describe the interests of spouses in a house jointly bought to be lived in as a matrimonial home as merely an interest in proceeds of sale, or rents and profits until sale, is just a little unreal.'²⁵²

But other, even larger, examples of the meta-principle abound. Anglo-American law's greatest contribution to global jurisprudence -- the institution of the trust -- provides the ultimate historical demonstration of a meta-principle emerging from the *conscience collective* to engraft itself upon the primary axioms of legal ownership.²⁵³ The notion of equity as a corrective of legal justice was born of the aspirational premise that conscientious obligation must take priority over strict legal right. Equitable property thus became recognised as a form of 'meta-property'²⁵⁴ -- a parallel form of entitlement -- arising in the historic pattern of equity in order to supplement and fulfil the rules of the law.²⁵⁵ In much the same way, an overarching precept of conscionable behaviour has more recently rejuvenated the law relating to proprietary estoppel.²⁵⁶ Indeed, an indicator that meta-principles have been brought into play in judicial decisions is frequently to be found in vague low-key

²⁴⁸ See eg *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 188D-E per Lord Browne-Wilkinson; *White v White* [2001] 1 AC 596 at 605F-606F per Lord Nicholls of Birkenhead; *Lambert v Lambert* [2002] All ER (D) 208 (Nov) at [26], [38]-[39], [62] per Thorpe LJ; *Parra v Parra* [2003] 1 FCR 97 at 108b [34] per Sedley LJ ('The court must have very good reasons for doing anything but go as nearly as possible down the middle').

²⁴⁹ [1981] AC 487 at 505E-G per Lord Wilberforce; [1979] Ch 312 at 332C per Lord Denning MR, 338H per Ormrod LJ, 343B per Browne LJ.

²⁵⁰ See *Bird v Syme-Thomson* [1979] 1 WLR 440 at 444A-E per Templeman J. For further evidence of the gathering consensus in favour of a social ethic of equality, see *Midland Bank plc v Cooke* [1995] 4 All ER 562 at 575d-j per Waite LJ.

²⁵¹ [1979] Ch 312 at 336G per Ormrod LJ.

²⁵² [1981] AC 487 at 507F.

²⁵³ The primal cry of the defrauded beneficiary was a counter-axiomatic assertion, ie that the purchaser from the fraudulent trustee bought that which was 'in conscience' the beneficiary's land: 'en conscience il purchase ma terre' (YB 11 Edw IV (1471), fol 8; H A L Fisher (ed), *The Collected Papers of Frederic William Maitland* (Cambridge UP 1911), Vol III, p 345). As Max Radin was to say many centuries later, the conscience of equity 'cannot be put into a Euclidean system' (*The Chancellor's Foot*, 49 Harv L Rev 44 at 67 (1935-36)).

²⁵⁴ K J Gray, *Equitable Property*, (1994) 47(2) CLP 157 at 207. 'By engrafting the *conscience of community* on to existing property relations, notions of "equitable property" can begin to reconstruct and reinforce a more fundamental *community of conscience*' (ibid at 213).

²⁵⁵ See F W Maitland, *Equity* (2nd edn revd by J Brunyate, London 1936), p 17.

²⁵⁶ See *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Note) at 147B per Oliver J, whose approach was later described as marking 'a watershed in the development of proprietary estoppel' (*Gillett v Holt* [2001] Ch 210 at 225G per Robert Walker LJ).

references to 'general equitable principles'²⁵⁷ or the invocation of a 'much wider equitable jurisdiction to interfere.'²⁵⁸

The conscience-laden premise of equitable intervention has, by now, become so extensively absorbed within the rule structure of land law that -- were it not for its indeterminate scope -- it seems almost to be incorporated as a primary axiom itself. But, for three centuries, the law of property has also been overshadowed by more ethereal or elastic 'maxims of equity', which operate as background formulae of powerful thematic content, exerting a formative -- if sometimes subliminal -- influence on the reasoning processes of generations of lawyers. As Chief Justice Mason and Justice McHugh once said in the High Court of Australia,²⁵⁹ each equitable maxim, although 'not a specific rule or principle of law', is none the less 'a summary statement of a broad theme which underlies equitable concepts and principles.' The entire field of proprietary concepts has accordingly been infiltrated by such value-laden precepts as those which proclaim that 'equity will not assist a volunteer' or that 'equality is equity' or that 'equity looks on that as done which ought to be done.'

In other contexts courts have frequently invoked supra-statutory declarations of social philosophy as the *Leitmotiv*²⁶⁰ controlling the operation of particular legislative schemes.²⁶¹ Thus, for many years, Rent Act legislation was construed, sometimes grudgingly,²⁶² under the shadow of an overriding policy consensus which favoured the 'redress of the balance of advantage enjoyed in a world of housing shortage by the landlord over those who have to rent their homes.'²⁶³ The axiomatic implications of conventional land law rules were rapidly pushed to one side if they threatened to subvert the perceived meta-principle of enhanced residential protection for the indigent tenant.²⁶⁴ Nowadays, moreover, there is a growing tendency for meta-principles of an aspirational character, having once attained consensus support within the relevant interpretive

²⁵⁷ See eg *Midland Bank plc v Cooke* [1995] 4 All ER 562 at 575d-j per Waite LJ (applying a meta-principle of sexual equality).

²⁵⁸ See eg *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1982] QB 133 (Note) at 147B per Oliver J (applying a meta-principle of conscionable dealing).

²⁵⁹ *Corin v Patton* (1990) 169 CLR 540 at 557.

²⁶⁰ See eg *Feyereisel v Turnidge* [1952] 2 QB 29 at 37 per Denning LJ (the 'guiding light through the darkness of the Rent Acts is to remember that they confer personal security on a tenant in respect of his home'). See also *Haskins v Lewis* [1931] 2 KB 1 at 18 per Romer LJ; *Skinner v Geary* [1931] 2 KB 546 at 560 per Scrutton LJ.

²⁶¹ In this respect the assimilation of the standards proclaimed in the European Convention for the Protection of Human Rights and Fundamental Freedoms is bound to have an incalculable long-term effect.

²⁶² See eg *Wilkes v Goodwin* [1923] 2 KB 86 at 92-93 per Bankes LJ; *Marcroft Wagons Ltd v Smith* [1951] 2 KB 496 at 501 per Evershed MR; *Aldrington Garages Ltd v Fielder* (1978) 37 P & CR 461 at 468, 471 per Geoffrey Lane LJ.

²⁶³ *Horford Investments Ltd v Lambert* [1976] Ch 39 at 52D-E per Scarman LJ. As Scarman LJ made clear, the dominant ethos of enhanced residential security was not aimed at 'the protection of an entrepreneur ... whose interest is exclusively commercial.'

²⁶⁴ See eg *Lloyd v Sadler* [1978] QB 774 at 789A per Lawton LJ (the Rent Act 'gives protection to persons, not to legal concepts such as joint tenants'). See also *Powell v Cleland* [1948] 1 KB 262 at 273.

community, to become explicitly entrenched in the novel form of a 'normative canon' of statutory interpretation. Thus, for example, the Family Law Act 1996 seeks to infuse certain 'general principles' into the implementation of the property-related provisions of the Act.²⁶⁵ Other family property enactments across the common law world similarly demarcate certain overriding or first-order principles -- of a most idealistic and hortatory kind -- as interpretive directives designed to control the operation of the entirety of the relevant statute.²⁶⁶

It is also inferable that the land law of the future will be increasingly influenced by a meta-principle of environmental conservation.²⁶⁷ It seems almost inevitable that emerging concerns for the protection of ecological value will begin to comprise a new form of overriding natural law,²⁶⁸ modifying the operation of conventional legal premises through the application of a heavily prudential logic based on imperatives of survival and self-preservation.²⁶⁹ In this way the self-renewing energy of the common law tradition may well generate a revitalised 'equity' in property relations which effectively recognises that the obligation to promote environmental integrity constitutes an ever present qualification upon titles to land.²⁷⁰ And, in an echo of all developments of equitable principle, a new moral order will have been silently engrafted on to a pre-existing structure of normative precept.

²⁶⁵ Thus courts must have regard to such prescriptions as that 'the institution of marriage is to be supported' (s 1(a)); that parties 'are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage' (s 1(b)); and that 'a marriage which has irretrievably broken down and is being brought to an end should be brought to an end with minimum distress to the parties and to the children affected' (s 1(c)(i)). Moreover, under the Family Law Act 1996, all questions must be dealt with 'in a manner designed to promote as good a continuing relationship between the parties and any children affected as is possible in the circumstances', without costs being 'unreasonably incurred', and on terms that any risk of personal violence 'should, so far as reasonably practicable, be removed or diminished' (s 1(c)(ii), (iii), (d)).

²⁶⁶ See eg New Zealand's Property (Relationships) Act 1976 (effective 1 February 2002), s 1N, which announces certain overarching precepts relating to the equal status of men and women, just division of resources and speedy and inexpensive justice, as 'principles to guide the achievement of the purpose of this Act'. See, similarly, the explanatory prologue to Part 2 of the Civil Partnerships Bill 2002, which sought to lay down an aspirational blueprint or 'framework for the mutual care and support of the partners to a civil partnership' (clause 8). The implementation of such a framework now seems increasingly likely in the aftermath of the Law Commission's deeply regrettable abandonment of the task of formulating a legislative scheme for the property relationships of homesharers (see Law Commission, *Sharing Homes: A Discussion Paper* (18 July 2002), paras 1.27-1.31, 3.100, Part VI).

²⁶⁷ See K J Gray, *Normative Interpretation of Statutes* (Unpublished paper presented at the Cambridge Conference of the Society of Public Teachers of Law, 12 September 1996), pp 15-16 (copy on file, Squire Law Library, University of Cambridge).

²⁶⁸ For an important exploration of this theme, see Jane Holder, *New Age: Rediscovering Natural Law*, (2000) 53 CLP 151.

²⁶⁹ For the notion that the 'general objective of the common law' is the 'preservation and protection of society as a whole', see *Western Australia v Ward* (2002) 191 ALR 1 at 17 [21] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

²⁷⁰ It could just be that, in this rather unexpected form, Hart's prescription of the minimal content of natural law as comprising a shared human aim of survival finally achieves its fullest realisation (see H L A Hart, *The Concept of Law* (Clarendon 1961), pp 187-195).

4. The meta-principles of modern land law

What, then, are today the 'meta-principles' which most affect the shape, direction and intellectual culture of our law of land? This is no easy question, but we believe that it is possible to identify at least three large normative drifts as tacit, but deeply instrumental, catalysts of change. Each represents an unwritten emanation of some consensus reached by the 'interpretive audience' of jurists which concerns itself with the law of realty.²⁷¹ Each of these meta-principles reflects, no less keenly, the evolving social, economic and physical environment in which we live; and each of these overriding imperatives relates to a subtly different context of social or inter-personal relationship.

Our behaviour in respect of the resource of land can be broadly categorised as falling into one or other of three gradations or classes of 'dealing' (using this term in its amplest sense). Each kind of dealing represents a relatively distinct sphere of interface, differentiated by such factors as duration or permanence of contact, the numbers of persons involved, and the psycho-social implications of the encounter. These idealised types of interface are never, of course, wholly discrete. At points they merge or overlap, but they nevertheless serve as working models on which we can build.

In some contexts we deal with each other as *strangers*. This is typically the case of the one-off encounter between two previously unrelated persons (perhaps best exemplified by a sale or mortgage of land). The transaction may have long-term consequences, but normally constitutes the briefest of engagements between parties who have enjoyed no prior contact and will almost certainly not, at least in respect of this precise transaction, deal with each other again. This is usually (or largely) a scenario of executed obligation: the 'deal' has been 'done'; priorities have crystallised. The interface has been isolated, short-term, private, bilateral, and impersonal. This is the world of the archetypal *Gesellschaft*,²⁷² in which relationships are strictly commercial, bargaining is hard-nosed, social bondings are minimal and the value attached to land is primarily, perhaps even exclusively, an 'exchange value'. Altruism is in very short supply; we are talking money. This is an atomistic world of self-determining individuals or entities locked in competition -- a domain populated, in Kamenka and Tay's unforgettable phrase, by 'windowless monads'²⁷³ -- a contract-based society in which

²⁷¹ It is significant that many of the recent movements of English land law have been orchestrated by the Law Commission. By virtue of its programmatic consultation of numerous interest groups, the Commission has been in a superlative position to mediate the views of the wider juristic community (see also Peter Birks, *The academic and the practitioner*, (1998) 18 *Legal Studies* 397 at 399-400).

²⁷² The typology of *Gemeinschaft* and *Gesellschaft* was, of course, immortalised by Ferdinand Tönnies as the cultural opposition between, on the one hand, an organic 'close-knit Community' founded on shared beliefs and mutual obligation and, on the other, a highly competitive 'market-based civil Society' based on rational foresight and selfish calculation (see Tönnies, *Community and Civil Society* (ed by Jose Harris and trans by Jose Harris and Margaret Hollis, Cambridge UP 2001), pp 257-258 (first published in 1887 as *Gemeinschaft und Gesellschaft*: see *Gemeinschaft und Gesellschaft -- Grundbegriffe der reinen Soziologie* (Wissenschaftliche Buchgesellschaft, Darmstadt 1979)). See also Eugene Kamenka, *Gemeinschaft and Gesellschaft*, 16 *Political Science* 3 (1965).

²⁷³ See Eugene Kamenka and Alice E-S Tay, 'Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology', in E Kamenka and R S Neale (ed), *Feudalism, Capitalism and Beyond* (Canberra 1975), p 133.

each strives merely to maximise his or her own material interest. Here the various players owe no overriding obligation to subserve the welfare concerns of any broader community.

Rather different are those contexts in which we deal with each other as *neighbours*. The concept of 'neighbourhood' is, for present purposes, sufficiently extensive to embrace a range of relationships of voluntarily assumed, medium-term proximity. Such relationships characteristically involve parties who have dealt with each other before and who will, in all probability, continue to enjoy some degree of social, commercial or geographical vicinity. Here obligations tend to be executory rather than executed. Constructive collaboration has an extended time scale over which to operate, with the result that neighbours tend to enjoy a longer line of social credit than is possible in random commercial interactions between strangers. A typical setting is that of the local community in which people reach mutual accommodations about restrictive covenants, building rights, garden walls, rights of access, rights of way, riparian rights, and the like. In sharp contrast to the private, bilateral dealings of strangers, the interface between neighbours often involves multilateral dealings which are not isolated in time, but have a on-going, interactive and quasi-public quality. Such contexts frequently have more in common with the world of the archetypal *Gemeinschaft*, in which interpersonal bondings tend to be strong, social relations are more integrative than exploitative, and in which notions of mutuality and community obligation begin to temper the aggressive pursuit of individual self-interest. This is a setting in which the value attached to land is pre-eminently a 'use value' rather than an 'exchange value' and in which one might reasonably, but tentatively, speak of something resembling a 'community spirit' or 'community ethos'.

Different yet again is that other, much wider, world in which we deal with each other as *fellow citizens*. This is a sphere of interface in which our contacts, being hugely impersonal, are transitory yet also timeless. Here our dealings are not merely multilateral, but universal, in quality. The forum is unqualifiedly public. We meet, stripped of personality and identity, on a plane of shared and interchangeable citizenship, united only by the fact that we are carriers of exactly similar civic rights and duties. This is the world we encounter on the subway, in the city street or in the municipal park, the world in which we have to resolve large questions relating to public welfare and public governance, the distribution of the goods of life, and the sustainable development of the environment around us. This is neither *Gesellschaft* nor *Gemeinschaft*, but it is a world in which community awareness and responsibility are clearly recognised social virtues and in which the significance of land resources is measured not in terms of 'exchange' or 'use' values, but rather in terms of 'community' value.

The thesis we will now pursue is that the 'rhetoric' of modern land law has powerfully brought three different sorts of normative influence to bear upon the various spheres of interface outlined above. In respect of our dealings with strangers, the operative meta-principle has elevated an important *norm of rationality*. By contrast, our dealings with neighbours are now suffused by an intensified *norm of reasonableness*. And in our dealings with fellow citizens there is evidence of the increasingly significant influence of a *norm of reciprocity*.

(1) A heightened norm of rationality governing dealings between strangers

It is a recurring formula of the English law of real property that '[i]n matters relating to the title to land, certainty is of prime importance.'²⁷⁴ The mantra-like quality of this assertion²⁷⁵ is easily explained by the significance commonly attached to the security of long-term expectations, to the reliability of investment strategies, and to the rationality of decision-making about future land use. Uncertainty inhibits purchasers, destabilises forward planning, and ultimately stultifies dealings in land.²⁷⁶ Accordingly, as Lord Upjohn famously observed in *National Provincial Bank Ltd v Ainsworth*,²⁷⁷ it has long been 'the policy of the law ... to simplify and facilitate transactions in real property.'²⁷⁸ He added, pointedly, that it is 'of great importance that persons should be able freely and easily to raise money on the security of their property.' The corollary -- indeed the primary import of such observations -- was the need to protect the titles taken by purchasers and mortgagees, particularly (in the case of the latter) lest an unduly unsympathetic stance jeopardise an 'important public interest', namely that the substantial wealth tied up in land should not be rendered 'economically sterile.'²⁷⁹ The views expressed in *Ainsworth* were reflective of an instinctive, if subliminal, bias within the juristic community in favour of enhanced certainty and stability in the commerce of land titles. Lord Upjohn spoke at a time when it was becoming almost conclusive of any issue of land law priority for counsel to declare in court that the matter was essentially a problem of conveyancing.²⁸⁰ Such coded references to one of the animating themes of contemporary property discourse left few in doubt as to what was meant.

²⁷⁴ *Ashburn Anstalt v Arnold* [1989] Ch 1 at 26D per Fox LJ.

²⁷⁵ See eg *London & Blenheim Estates Ltd v Ladbrooke Retail Parks Ltd* [1994] 1 WLR 31 at 37F-G per Peter Gibson LJ; *Wibberley (Alan) Building Ltd v Insley* [1999] 1 WLR 894 at 895G per Lord Hoffmann; *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355 at 370H per Robert Walker LJ; *Lloyd v Dugdale* [2002] 2 P & CR 13 at [52] per Sir Christopher Slade. See also *Wik Peoples v Queensland* (1996) 187 CLR 1 at 221 per Kirby J.

²⁷⁶ See also Carol M Rose, *Property and Expropriation: Themes and Variations in American Law*, (2000) Utah L Rev 1 at 2.

²⁷⁷ [1965] AC 1175 at 1233G-1234A.

²⁷⁸ For more recent advocacy of 'the law's general policy of favouring alienability over inalienability', see *Bettison v Langton* [2000] Ch 54 at 71G-H per Robert Walker LJ (free alienability of property rights 'in practice make[s] it less likely that they will fall into disuse: market forces will tend to bring the rights into the ownership of those who will make best use of them').

²⁷⁹ *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 188G-H per Lord Browne-Wilkinson. See also *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 801B-C [35] per Lord Nicholls of Birkenhead; *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223 at [55] per Arden LJ.

²⁸⁰ See eg *Caunce v Caunce* [1969] 1 WLR 286 at 294A-B per Stamp J ('counsel for the bank [Martin Nourse] in his very clear argument has called attention to the fact that this is a conveyancing question, and I accept the point he makes that in such a matter the practice of conveyancers carries great weight'). See also *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 500D-G per Donald Nicholls QC (arguendo). Compare the characteristically maverick view expressed by Lord Denning MR in *Brikom Investments Ltd v Carr* [1979] QB 467 at 484F ('I prefer to see that justice is done: and let the conveyancers look after themselves').

During the past three decades, however, the imperative of transactional certainty, although always an underlying policy concern, has acquired a dramatically heightened emphasis in the English law of land.²⁸¹ In a number of important ways this period has witnessed a strenuous effort on the part of courts, reformers and legislators to tighten up the concept of title and to infuse a new quality of *rationality* in those dealings in which a title holder treats with strangers.²⁸² These developments are, in part, a response to the sheer volume of land transacted each day, but there is doubtless a more profound explanation. Consistently with the preoccupations of a materialistic and increasingly affluent era,²⁸³ stability of title has become a central focus of social (and therefore legal) concern. Security in the enjoyment of accumulated wealth has become essential to the construction of individualist visions of the good life. The coded message of the juristic community has therefore underlined the need both to consolidate the concept of title and to sharpen up the effects of one-off title dealings between strangers. The outcome, brought to a culmination in the reforms promised by the Land Registration Act 2002, has been to transform the nature of title, to streamline transactions with title, and to reduce potential threats to the title taken by a transferee or mortgagee. These are the ultimate achievements of a rationally regulated, contract-based *Gesellschaft*: the crisper the title, the easier the trade, and the safer the owner. In support of these objectives, the operative meta-principle of rationality has nudged registered titles ever closer towards a concept of *dominium*. The brightlines of ownership are being intensified. A new *in rem* quality is being conferred on estate proprietorship in English law (and particularly on ownership of the fee simple). Brightline rules carry, moreover, the enormous advantage that they tend to eliminate costly and socially disruptive controversy. They also serve to induce or to confirm a certain 'feel good' factor in the minds of those who own estates behind the strengthened legal palisade.

(a) Move from an empirical to a bureaucratic model of estate ownership

The new rationality inherent in matters of title is exemplified by the way in which, with the enactment of the Land Registration Act 2002, English law has finally made a decisive break away from the historic tradition that estate ownership is rooted in behavioural fact.²⁸⁴ For the first time ever, estate ownership will not be regulated

²⁸¹ See, most recently, *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 793F-H [2] per Lord Bingham of Cornhill.

²⁸² Important steps in this direction were taken by the Law of Property (Miscellaneous Provisions) Act 1989, ss 1-2, which abolished the 'mumbo-jumbo' of the seal (see Lord Wilberforce, *Parliamentary Debates, House of Lords, Official Report* (1970-71), Vol 315, Col 1213 (25 February 1971)), introduced a mandatory rule of signed writing for land contracts, and effectively ended the ancient, but pragmatic, process of equitable mortgage by mere deposit of title documents (see *United Bank of Kuwait Plc v Sahib* [1997] Ch 107).

²⁸³ For reference to the 'high proportion of privately owned wealth' nowadays invested in the family home, see *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 188C per Lord Browne-Wilkinson. Similarly, in *Williams & Glyn's Bank Ltd v Boland* [1981] AC 487 at 508G, Lord Wilberforce spoke of the effects of a 'diffusion of wealth and earning capacity' during the 20th century. The Land Registry has estimated that it currently guarantees land assets worth in the order of £2 trillion (see HM Land Registry, *Annual Report and Accounts 1999-2000* (HC 661, July 2000), p 10).

²⁸⁴ The derivation of title from visible physical possession was once defensible as limiting the information costs associated with public perceptions of ownership (see Thomas W Merrill and Henry E Smith, *The Property/Contract Interface*, 101 Col L Rev 773 at 803 (2001)), but this economy becomes irrelevant in the age of the silicon chip and the electronically accessible data base.

(at least in the context of registered land) by effective possession and the mere lapse of time.²⁸⁵ The 2002 Act marks an historic shift in the philosophical base of English land law from *possession* to *title*, from empirically defined fact to state-defined entitlement, from property as a reflection of social actuality to property as a product of state-ordered or political fact. In short, instead of the citizen telling the state who owns land, the state will henceforth tell the citizen.

Under the Land Registration Act 2002 the quaintly medieval notion that factual possession connotes a presumptive ownership in fee is submerged by the idea that ownership is constituted only by the administrative recordation, at HM Land Registry, of a person as 'proprietor' of an abstractly defined 'estate',²⁸⁶ 'interest'²⁸⁷ or 'charge'.²⁸⁸ Property will no longer be primarily a function of undisturbed possession (as normally handed on through a succession of owners), but will emanate instead from the formal registration of rights.²⁸⁹ The messy empiricism of common law title thus gives way to the more crystalline kind of title established by definitive entry in the Land Register.²⁹⁰ Title ceases to be a self-authenticating social phenomenon and becomes instead a rigidly ordered bureaucratic fact.²⁹¹ Indeed, this movement from earthy reality to digitally managed abstraction is symbolically captured in the new statutory definition which prescribes that, for the purposes of the 2002 Act, "registered land" means a registered estate or registered charge.²⁹² Land is no longer officially a thing: it is a conceptual entitlement. It is no longer *physical*, but *cerebral* -- as was perhaps inevitable if realty was to be made fully amenable to the artificial intelligence of the Land Registry computer.

²⁸⁵ See Land Registration Act 2002, s 96(1), (3); Law Com No 271 (July 2001), paras 2.74, 14.5, 14.9. Even the axiom of the crown's allodial ownership, which rests upon the ultimate behavioural fact of sovereign adverse possession dating back to 1066, is now being quietly displaced. It is symptomatic of the post-axiomatic world in which we live that the Land Registration Act 2002 enables the crown, in respect of 'demesne land', to grant itself a freehold estate which is both registrable and disposable (Land Registration Act 2002, ss 79(1), 80(1)).

²⁸⁶ Land Registration Act 2002, ss 11 (freehold), 12 (leasehold), 58(1), 59(1), 97, Sch 6, para 9.

²⁸⁷ Land Registration Act 2002, s 27(4), Sch 2, paras 6-7.

²⁸⁸ Land Registration Act 2002, s 27(4), Sch 2, para 8.

²⁸⁹ The transition has been described in terms of a movement from a 'devolutionary or genealogical model of property' to a system of 'tabular property' (Alain Pottage, *The Originality of Registration*, (1995) 15 OJLS 371 at 383-386).

²⁹⁰ See *Breskvar v Wall* (1971) 126 CLR 376 at 385 per Barwick CJ ('not a system of registration of title but a system of title by registration'); *Duncan v McDonald* [1997] 3 NZLR 669 at 681.

²⁹¹ The term 'title' takes on a significantly different connotation. Whereas the term was more commonly used in the past to indicate the 'entitlement' (unless extinguished) of an estate owner to assert his or her estate against third parties, nowadays 'title' is no more and no less than the register entry which records proprietorship of the relevant estate -- or, more accurately, the digital memory of such entry stored on a collection of hard disks housed at HM Land Registry (see eg Draft Land Registration Rules 2003, r 215(1) (definition of 'registered title')).

²⁹² Land Registration Act 2002, s 132(1).

(b) Advent of comprehensive registration and electronic transactions

The drift towards a neat system of comprehensive registration of land titles has, of course, been underway for some time.²⁹³ But a fresh impetus has now been given to the 'fundamental principle of a conclusive register'²⁹⁴ by the increasingly pervasive influence of a so-called 'culture of registration'²⁹⁵ and by the need to facilitate on-line investigations of title and subsequent electronic dealings.²⁹⁶ Under the Land Registration Act 2002 all freehold and leasehold estates (other than terms not exceeding seven years) are brought within the ambit of registrable title,²⁹⁷ the 'triggers' for first registration are extended,²⁹⁸ and it will become difficult to create or dispose of land interests 'off the register'.²⁹⁹ Entry in the Land Register becomes integral to the very process of creating interests in registered land. Indeed, the Act of 2002 envisages that registration will operate as the *sole* constitutive source of almost all expressly created rights in registered land³⁰⁰ and that, under the proposed scheme of electronic conveyancing, the movements of estates, interests and charges in registered land will be synchronous with (because dependent upon) the electronic manipulation of the register record.³⁰¹ In this way the Land Register will come to reflect a conclusive 'real time' mirror image of interests in English realty, not least because most interests will actually have no existence *outside* the register.

The overall effect of the Land Registration Act 2002 is the maximisation of order, symbolised by a definitive register of virtually indefeasible titles, transactable by automated dealings³⁰² and guaranteed by the state.³⁰³

²⁹³ See the steady extension of the 'triggers' for compulsory first registration (Land Registration, England and Wales: The Registration of Title Order 1989 (SI 1989/1347) (effective 1 December 1990); Land Registration Act 1925, ss 123(1), 123A (effective 1 April 1998)).

²⁹⁴ Law Com No 271 (July 2001), para 1.10.

²⁹⁵ Law Com No 254 (September 1998), para 1.14. The Law Commission and the Land Registry later recorded their joint perception that it is right to 'lay to rest the notion ... that it is somehow unreasonable to expect those who have rights over registered land to register them' (Law Com No 271 (July 2001), para 8.58).

²⁹⁶ See *Land Registration Rules 2003 -- A Land Registry Consultation* (2002), para 3.4 (p 27). The 'fundamental' objective of the Land Registration Act 2002 is to render the register a 'complete and accurate reflection of the state of the title to land at any given time, so that it is possible to investigate title on line, with the absolute minimum of additional enquiries and inspections' (Law Com No 271 (July 2001), para 1.5).

²⁹⁷ Land Registration Act 2002, ss 4(1)-(2), 27(2)(b). Leasehold estates granted for a term greater than three years, but not exceeding seven years, may be *noted* in the Land Register (s 33(b)) and may, in time, trigger a requirement of substantive registration (s 118(1)).

²⁹⁸ Land Registration Act 2002, s 4(1)-(2).

²⁹⁹ See Law Com No 271 (July 2001), paras 8.2, 8.53, 8.74.

³⁰⁰ Law Com No 271 (July 2001), para 5.3.

³⁰¹ See Land Registration Act 2002, s 93(1)-(3).

³⁰² See the new standard forms of transfer, lease and charge of a registered estate proposed in Draft Land Registration Rules 2003, rr 56-59, Sch 1 (*Land Registration Rules 2003 -- A Land Registry Consultation* (2002), paras 1.21-1.31 (pp 14-15)).

³⁰³ It has been pointed out that, even under the 2002 Act, there will inevitably remain certain exceptions to the requirement of electronic entry of interests in land (see Roger Smith, 'The role of registration in modern land law', in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), pp 41-42).

The long-term drive towards registration, now fuelled by dramatic advances in the operative technology of the register, has culminated in the emergence of a new and much more robust form of title. As Harold Potter predicted so long ago,³⁰⁴ the registered proprietor is now a 'statutory person' with a 'statutory title' to a 'statutory thing' in respect of which he is statutorily armed with 'owner's powers' of disposition and charge.³⁰⁵ But this more rigorous ordering of estates and interests in registered land entails further jettisoning of the historic residue of English realty. In an age of paperless transactions, for instance, the 'deed' becomes a mere fiction of statute.³⁰⁶ Nor is there any place for the axiomatic principle of *nemo dat*³⁰⁷ since, in the absence of any 'alteration' of the register,³⁰⁸ the 'entry of a person ... as the proprietor of a legal estate' is deemed conclusive of the vesting of that estate notwithstanding that the legal estate 'would not otherwise be vested in him.'³⁰⁹ Even the distinction between *legal* and *equitable* entitlement becomes measurably less important in the general march towards comprehensive registration of land rights. Just as striking is the greatly diminished vigour of the *numerus clausus*. An almost universal process of recordation in a publicly accessible register³¹⁰ dramatically limits the information costs involved in ascertaining entitlements, thus making it far less necessary to constrict the menu of rights deemed capable of proprietary status. It is not insignificant that, after much judicial uncertainty, the Land Registration Act 2002 explicitly recognises that a right of pre-emption, an 'equity by estoppel' and a 'mere equity' rank from the moment of their origin as interests 'capable of binding successors in title' in registered land.³¹¹

(c) *Diminished role of adverse possession*

Consistently with the demise of possession as the fundamental operative concept of English land law, the Land Registration Act 2002 severely curtails the role of adverse possession in registered land.³¹² In the regime inaugurated by the 2002 Act, adverse possession merely entitles the squatter to *apply* to the Land Registry to be registered as the proprietor of a registered estate.³¹³ Such applications will normally be

³⁰⁴ Potter, *Covenants for Title and Overriding Interests*, (1942) 58 LQR 356 at 367.

³⁰⁵ Land Registration Act 2002, ss 23(1)-(2), 24.

³⁰⁶ See Land Registration Act 2002, s 91(5).

³⁰⁷ See also *Argyle Building Society v Hammond* (1984) 49 P & CR 148 at 156 per Slade LJ.

³⁰⁸ See Land Registration Act 2002, s 65, Sch 4.

³⁰⁹ Land Registration Act 2002, s 58(1).

³¹⁰ See Land Registration Act 2002, s 66(1).

³¹¹ Land Registration Act 2002, ss 115(1), 116.

³¹² The 'much watered-down version of adverse possession' contained in the 2002 Act has been described as 'undoubtedly one of the most fundamental changes to property law in the past century' (Roger Smith, 'The role of registration in modern land law', in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), p 55).

³¹³ Land Registration Act 2002, s 97, Sch 6, para 1(1).

defeated -- and defeated conclusively -- by simple objection on the part of the currently registered proprietor.³¹⁴ The Act therefore greatly strengthens the position of registered proprietors against the claims of squatters³¹⁵ -- a feature which not only reflects a deepening public perception that adverse possession often effects a form of land theft,³¹⁶ but also affords a powerful new (and presumably quite intentional) incentive towards voluntary first registration of titles. Yet again, the Land Registration Act 2002 confirms that the title derived from registration has a resilience which equips its proprietor with carapace-like protection against strangers. Significantly, one of the few exceptions to the registered proprietor's right of arbitrary challenge to a squatter's claims arises where the parties are not strangers but neighbours, as for example where disputed land borders upon land belonging to the applicant for registration, the exact boundary line never having been fixed, and was 'reasonably believed' by the applicant over at least the preceding 10-year period to have belonged to himself.³¹⁷ This proviso neatly demonstrates an emerging pattern of modern land law in which the increasingly rigid protection thrown around estate ownership yields to considerations of 'reasonableness' when the relevant context shades away from one involving *strangers* towards one involving *neighbours*.

(d) Minimising potential threats to title

A truly rational system of land dealings calls for a heightened degree of transparency in relation to the benefits and burdens associated with title. Clear-sighted transacting with land requires that the donee of title should be able, as a self-determining actor, to make accurate ex ante assessments of the risks surrounding any title which he may propose to acquire. The Land Registration Act 2002 greatly assists this process of rational calculation. Not only does the legislation maximise order within a virtually comprehensive register of land interests. It also seeks to minimise the range of matters which potentially trammel the title taken by a newly registered proprietor.³¹⁸ A primary aim of the statute is to prevent donees from being trapped by

³¹⁴ Land Registration Act 2002, s 97, Sch 6, paras 3, 5; Draft Land Registration Rules 2003, rr 187-188. Even if it turns out to be 'unconscionable', by reason of some 'equity by estoppel', for the registered proprietor simply to seek to dispossess the applicant, the Adjudicator to HM Land Registry will have discretion to satisfy the applicant's equity by means of an order falling short of his or her registration as proprietor of the land in dispute (Land Registration Act 2002, s 110(4)).

³¹⁵ See *J A Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221 at 225A [2] per Lord Bingham of Cornhill, 245B [73] per Lord Hope of Craighead.

³¹⁶ See Law Com No 271 (July 2001), paras 2.70-2.71, 14.1-14.4 (referring a general perception that it had become 'too easy for squatters to acquire title'). Carol Rose has spoken similarly, in the American context, of a 'widely shared intuition against purposeful market bypass' (see Rose, *Property and Expropriation: Themes and Variations in American Law*, (2000) Utah L Rev 1 at 9).

³¹⁷ Land Registration Act 2002, s 97, Sch 6, para 5(1), (4).

³¹⁸ See *Secretary of State for the Environment, Transport and the Regions v Baylis (Gloucester) Ltd and Bennett Construction (UK) Ltd* (2000) 80 P & CR 324 at 338 per Deputy Judge Kim Lewison QC. Many protections for purchasers were built into the 1925 legislation and confirmed by later legislation (see eg Trusts of Land and Appointment of Trustees Act 1996, s 10(1)). See also, specifically in relation to unregistered land, Trusts of Land and Appointment of Trustees Act 1996, s 16.

adventitious, unforeseen or effectively undiscoverable flaws in their title -- in short, to minimise derogations from the absoluteness of the land titles acquired by strangers.³¹⁹

It has long been perceived that the traditional categories of 'overriding interest', by diminishing the reliability of the register, represent a 'major obstacle' to the achievement of the 'ultimate goal of total registration' of land rights.³²⁰ Accordingly the Land Registration Act 2002 effects a substantial removal of avoidable impediments to title by sharply limiting the range of unregistered interests which automatically override either a first registration of title³²¹ or subsequent registered dispositions.³²² Various classes of overriding interest are either abolished altogether,³²³ subsumed under other heads of overriding interest,³²⁴ or designated to be phased out over relatively short time-scales.³²⁵ The Act provides mechanisms for ensuring that, wherever possible, existing overriding interests are brought quite discernibly on to the register,³²⁶ thereby of course ceasing to rank as 'overriding interests'.³²⁷ The 'guiding principle' underlying these moves is the proposition that interests should have overriding status *only* 'where protection against buyers is needed, but where it is neither reasonable to expect nor sensible to require any entry on the register.'³²⁸ Even those categories of overriding interest which remain enforceable are curtailed by reference to their visibility to an intending disponee of the

³¹⁹ A good demonstration is found in Land Registration Act 2002, s 26(1)-(2), which protects the purchaser of registered land from any non-statutory limitation on the powers of his vendor which is not reflected on the face of the relevant register of title. See Louise Tee, 'Co-ownership and Trusts', in Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), p 151.

³²⁰ Law Com No 271 (July 2001), paras 2.24, 3.16, 3.58, 8.1. See also *Kling v Keston Properties Ltd* (1983) 49 P & CR 212 at 222, where Vinelott J confessed it to be 'disquieting' that overriding interests could arise 'notwithstanding that there is no person other than the vendor in apparent occupation of the property and that careful inspection and enquiry has failed to reveal anything which might give the purchaser any reason to suspect that someone other than the vendor had any interests in or rights over the property').

³²¹ See Land Registration Act 2002, ss 11(4)(b), 12(4)(c), Sch 1.

³²² See Land Registration Act 2002, s 29(2)(a)(ii), Sch 3. The introduction of electronic conveyancing will also cut back the potential for overriding interests and eliminate the possibility of any 'registration gap' between the creation and recordation of expressly created interests (Law Com No 271 (July 2001), paras 2.1(2), 2.56).

³²³ See eg Land Registration Act 2002, Sch 1, paras 2-3, Sch 3, paras 2-3 (rights of non-resident landlords; equitable easements and profits à *prendre*; chancel repair liability).

³²⁴ See Law Com No 271 (July 2001), paras 8.78, 9.20 (rights of squatters as formerly protected pursuant to Land Registration Act 1925, s 70(1)(f)).

³²⁵ Land Registration Act 2002, s 117(1), Sch 1, paras 10-14, Sch 3, paras 10-14 (10-year sunset clause in respect of franchises, manorial rights, certain crown rents, non-statutory rights relating to embankments or sea or river walls, and rights to payment in lieu of tithe).

³²⁶ See eg Land Registration Act 2002, ss 37 (registrar's power to note potentially overriding interests), 71 (duty on applicant for registration to disclose unregistered interests). See Law Com No 271 (July 2001), paras 8.90-8.95; Draft Land Registration Rules 2003, rr 27, 32, 55, 90.

³²⁷ Land Registration Act 2002, ss 29(3), 30(3).

³²⁸ Law Com No 271 (July 2001), para 8.87 (see also paras 2.25, 8.6).

land concerned.³²⁹ Thus, on a registered disposition, no overriding status attaches to the undetected interests of persons 'in actual occupation' of land unless the occupation of such persons would have been 'obvious on a reasonably careful inspection of the land at the time of the disposition.'³³⁰ Likewise no overriding protection avails a legal easement or profit *à prendre* which would not have been 'obvious on a reasonably careful inspection of the land over which the easement or profit is exercisable.'³³¹

This statutory trend towards cleaning up the titles taken by registered transferees and chargees is merely the culmination of a steady drive over the last two or three decades towards the rationalisation of land dealings. Obstacles to the reception of a clear title have been relentlessly stripped away in the context of dealings between strangers. Thus, for example, the statutory overreaching of beneficial trust interests has been progressively reinforced. The courts have striven mightily to ensure that otherwise overriding interests are swept away on the payment of capital proceeds to two or more trustees³³² or even where, as with the provision of a secured overdraft facility, no capital money at all arises contemporaneously with the relevant registered charge.³³³ More recently it has been suggested that, in view of the substantial congruence of concepts of constructive trust and equitable estoppel, interests arising under the latter head are equally 'affected ... by the statutory mechanism of overreaching.'³³⁴

³²⁹ Already, in *Abbey National Building Society v Cann* [1991] 1 AC 56 at 88C-H, 105A-B, 106C-D, the House of Lords had indicated that the 'actual occupation' required in support of an overriding interest under the old Land Registration Act 1925, s 70(1)(g) must exist at the completion (rather than registration) of the relevant transaction, since the statutory reference to inquiry and failure to disclose could make sense only if 'related to a period in which such inquiry could be other than otiose.' See also *Lloyds Bank Plc v Rosset* [1989] Ch 350 at 374A-C per Nicholls LJ, 397A-B, 398E per Mustill LJ.

³³⁰ Land Registration Act 2002, Sch 3, para 2(c)(i). The donee is, however, bound by any interest of which he had 'actual knowledge' at the date of the disposition (Sch 3, para 2(c)(ii)), although the protection accorded unregistered interests is, in all cases, restricted to rights relating to the area of actual physical occupation (thereby reversing the ruling of the Court of Appeal in *Ferrishurst Ltd v Wallcite Ltd* [1999] Ch 355).

³³¹ Land Registration Act 2002, Sch 3, para 3(1)(b). An exception is made for rights demonstrably exercised within the year immediately preceding the date of disposition (Sch 3, para 3(2)); and the donee is, again, always bound by any interest of which he had 'actual knowledge' at the date of the disposition (Sch 3, para 3(1)(a)).

³³² *City of London Building Society v Flegg* [1988] AC 54 at 73E-F per Lord Templeman, 91A-G per Lord Oliver of Aylmerton. *Flegg* provides an excellent example of a case whose outcome was inexorably driven by a judicial instinct in favour of overreaching, even in the teeth of apparently compelling statutory wording (Land Registration Act 1925, s 70(1)(g)), a perfectly logical contrary argument (see [1988] Conv 141 (P. Sparkes)), and the firm conviction of the Court of Appeal (see *City of London Building Society v Flegg* [1986] Ch 605 at 616H-617D). The Court of Appeal has since been at pains to confirm that the House of Lords' ruling in *Flegg* remains effective notwithstanding certain dubious formulae contained in the Trusts of Land and Appointment of Trustees Act 1996 (see *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256 at 263 [31] per Robert Walker LJ).

³³³ *State Bank of India v Sood* [1997] Ch 276 at 288B per Peter Gibson LJ, 291D-E per Pill LJ. See Louise Tee, 'Co-ownership and Trusts', in Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), pp 149-151.

³³⁴ *Birmingham Midshires Mortgage Services Ltd v Sabherwal* (2000) 80 P & CR 256 at 263 [31] per Robert Walker LJ.

Even where a title is held on trust by a sole trustee (and statutory overreaching is therefore unavailable³³⁵), the solicitude initially demonstrated towards trust beneficiaries by the decision in *Williams & Glyn's Bank Ltd v Boland*³³⁶ has since been eroded -- almost to the point of extinction -- by a series of decisions which minimise the hazards for disponees posed by undisclosed co-ownership interests.³³⁷ Thus the *Boland* ruling no longer holds any threat for the lender under an 'acquisition mortgage'.³³⁸ Nor can a trust interest affect a transferee or chargee if the relevant beneficial owner is deemed to enjoy only a 'shadow' form of occupation (as in the case of a minor child³³⁹) or had actual or constructive contemporary knowledge of the disposition and is therefore taken impliedly to have waived his or her priority over the disponee.³⁴⁰ Moreover, where a trust beneficiary actually has an overriding interest, this does not necessarily impair the title taken by a registered chargee so as to prevent the latter from forcing a sale (as distinct from suing for possession) of the co-owned land.³⁴¹ Even the sympathetic understanding of intra-family dynamics recently evident in *Royal Bank of Scotland plc v Etridge (No 2)*³⁴² marks a strengthening, not of the interests of family members, but rather of the titles taken by institutional lenders. The approach adopted by the House of Lords in *Etridge (No 2)* ultimately does no more than establish a protocol which, if faithfully observed in surety transactions, will conclusively ensure that a vulnerable co-owner of the family home is no longer 'able to dispute she is legally bound by the documents once she has signed them'³⁴³ but is instead relegated to a fairly grim battle against the solicitor who advised her.³⁴⁴

³³⁵ Law of Property Act 1925, ss 2(1)(ii), 27(2).

³³⁶ [1981] AC 487.

³³⁷ In effect the retreat from the doctrinal high-point of *Boland* marks a steadily increasing deference to the special vulnerability of informationally disadvantaged third parties (see Thomas W Merrill and Henry E Smith, *The Property/Contract Interface*, 101 Col L Rev 773 at 846-847 (2001)).

³³⁸ *Abbey National Building Society v Cann* [1991] 1 AC 56.

³³⁹ *Bird v Syme-Thomson* [1979] 1 WLR 440 at 444D per Templeman J; *Hypo-Mortgage Services Ltd v Robinson* [1997] 2 FLR 71 at 72G per Nourse LJ.

³⁴⁰ *Abbey National Building Society v Cann* [1991] 1 AC 56 at 82F-G, 89B, 94B-G per Lord Oliver of Aylmerton. See also *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244 at 247; *Bristol and West Building Society v Henning* [1985] 1 WLR 778 at 782F-G, 783C; *Equity & Law Home Loans Ltd v Prestidge* [1992] 1 WLR 137 at 143G-H; *Nightingale Mayfair Ltd v Mehta* (Unreported, Chancery Division, 21 December 1999).

³⁴¹ *Bank of Baroda v Dhillon* [1998] 1 FLR 524 at 531C-D. See also *Alliance & Leicester plc v Slayford* [2001] 1 All ER (Comm) 1 at 11f-g [28].

³⁴² [2002] 2 AC 773.

³⁴³ [2002] 2 AC 773 at 811E [79(1)] per Lord Nicholls of Birkenhead. As Lord Nicholls observed, '[i]f the freedom of home-owners to make economic use of their homes is not to be frustrated, a bank must be able to have confidence that a wife's signature of the necessary guarantee and charge will be as binding upon her as is the signature of anyone else on documents which he or she may sign' (*Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 at 801B [35]).

³⁴⁴ [2002] 2 AC 773 at 829A [122] per Lord Hobhouse of Woodborough.

Unifying these developments has been a new sense of realism about the effects of title dealings between strangers. The courts have increasingly taken an overall or purposive view of transactions with land. Thus, for instance, overriding interests cannot be claimed on behalf of minors precisely because, as Nourse LJ pointed out,³⁴⁵ a conveyancing system dependent on processes of inquiry 'could always be frustrated by simple devices.' Likewise, over the past 20 or 30 years, the courts have held that the complicity of trust beneficiaries in particular transactional strategies debars potentially adverse equities from clogging the title taken by an innocent stranger. On this basis, therefore, no priority can be claimed by a beneficiary who, standing by silently, impliedly authorises the title holder/trustee to raise money on the security of the trust property, since any other conclusion 'would go near to saying that our system of conveyancing permits a mortgagor to obtain money under a false pretence.'³⁴⁶ As Browne-Wilkinson LJ observed on one occasion,³⁴⁷ there is a 'risk that the common sense answer ... may get lost in the many different technicalities' of the case. In the circumstances before him, he declared, the 'basic fact' was that the relevant mortgage had been granted 'with the full knowledge and approval' of the trust beneficiary.³⁴⁸

In *Abbey National Building Society v Cann*³⁴⁹ exactly the same focus on the commercial 'realities of the situation'³⁵⁰ finally caused the House of Lords to abandon the doctrine of the *scintilla temporis*.³⁵¹ This doctrine, by endorsing a 'successive steps' analysis³⁵² of the process of mortgage-assisted purchase, had seemed to interpose a fragment of time immediately following the vesting of a newly acquired estate during which equities belonging to other money contributors to the purchase could be engrafted, by way of implied trust, upon the purchaser's title with priority over the mortgage charge which had actually made the acquisition possible. As Lord Oliver of Aylmerton conceded in *Cann*'s case,³⁵³ there appeared to be 'an attractive legal logic' in the proposition that 'a person cannot charge a legal estate that he does not have.' Nevertheless in *Cann* the House of Lords flatly repudiated the *scintilla temporis* theory as one which 'flies in the face of reality' and is 'no more than a legal artifice'.³⁵⁴ In a purchase dependent on mortgage funding, declared Lord Oliver,

³⁴⁵ *Hypo-Mortgage Services Ltd v Robinson* [1997] 2 FLR 71 at 72H.

³⁴⁶ *Knightly v Sun Life Assurance Society Ltd* (1981) Times, 23 July per Nourse J. See also *Ulster Bank Ltd v Shanks* [1982] NI 143 at 150D per Murray J; *Bristol and West Building Society v Henning* [1985] 1 WLR 778 at 782G per Browne-Wilkinson LJ.

³⁴⁷ *Bristol and West Building Society v Henning* [1985] 1 WLR 778 at 781G-782A.

³⁴⁸ See likewise *Paddington Building Society v Mendelsohn* (1985) 50 P & CR 244 at 247.

³⁴⁹ [1991] 1 AC 56.

³⁵⁰ [1991] 1 AC 56 at 101H per Lord Jauncey of Tullichettle.

³⁵¹ See *Church of England Building Society v Piskor* [1954] Ch 553 at 564-565.

³⁵² See *Lloyds Bank Plc v Rosset* [1989] Ch 350 at 384E per Nicholls LJ.

³⁵³ [1991] 1 AC 56 at 92E.

³⁵⁴ [1991] 1 AC 56 at 92F, 93B per Lord Oliver of Aylmerton. The language of realism plays a forceful role in the speeches in *Cann* (see [1991] 1 AC 56 at 90H per Lord Oliver, 101D-H, 102A per Lord Jauncey of Tullichettle). See also *Ingram v IRC* [2000] 1 AC 293 at 303F-G per Lord Hoffmann ('I do not think that a theory based upon the notion of a *scintilla temporis* can have a very powerful grasp on reality').

'the transactions of acquiring the legal estate and granting the charge are, in law as in reality, one indivisible transaction.'³⁵⁵ The two events being 'in the vast majority of cases ... not only precisely simultaneous but indissolubly bound together',³⁵⁶ it followed that, 'in reality',³⁵⁷ the mortgage-assisted purchaser never acquires, even momentarily, an uncharged estate to which trust equities may attach and therefore that such equities are inevitably subordinated to the title taken by the mortgagee or chargee.³⁵⁸

The effect of *Cann's* case was to infuse yet more brutal commonsense reality into the business of title dealings between strangers. The House of Lords had no compunction at all in sacrificing the strict logic of *nemo dat* to the perceived need to protect disponees (and particularly mortgagees or chargees) against unrealistically technical assaults upon the titles purchased by them. This need seems even more pressing where, as in *Cann*, mortgage finance is in truth the *sine qua non* of the very transaction which supposedly generates the adverse rights which threaten the mortgagee's security. According to the newly accentuated 'no nonsense' approach embraced by the courts, the parties involved in such dealings cannot be heard to disavow the basic implications which flow from their own voluntarily determined transactional strategies. The *Zeitgeist* has turned decisively against overly scrupulous legal scholasticism which derogates from the security so important to disponees of title.³⁵⁹ Indeed, there is, for the moment, no sign that the commercialist ethos of the current juristic consensus will soon abate. Quite the reverse may turn out to be true as Thatcher's children begin to reach positions of eminence and power.

(2) An intensified norm of reasonableness in dealings between neighbours

The second large motivational drift described in this paper relates to the emergence of a new emphasis on factors of *reasonableness* in the governance of dealings between *neighbours*. Title dealings between strangers are, of course, dominated by considerations of 'exchange value' -- by the 'solid tug of money'³⁶⁰ -- and, in respect of such short-term dealings, notions of 'neighbourhood' have little or no role to play.³⁶¹ But

³⁵⁵ [1991] 1 AC 56 at 92D. See likewise *Equity & Law Home Loans Ltd v Prestidge* [1992] 1 WLR 137 at 144F-G per Mustill LJ ('the purchase could not have taken place at all without some encumbrance').

³⁵⁶ [1991] 1 AC 56 at 92F per Lord Oliver of Aylmerton.

³⁵⁷ [1991] 1 AC 56 at 102A per Lord Jauncey of Tullichettle.

³⁵⁸ [1991] 1 AC 56 at 93A-B per Lord Oliver of Aylmerton, 102B per Lord Jauncey of Tullichettle.

³⁵⁹ See eg *Buhr v Barclays Bank plc* [2001] EWCA Civ 1223 at [54]-[55], where Arden LJ, concurring with leading counsel's plea for a 'sensible system of property law', expressed herself 'loathe to reach a conclusion which would have exposed a significant technical gap in the protection given to mortgagees. It would ... be contrary to expectation and common sense.'

³⁶⁰ *Hofman v Hofman* [1965] NZLR 795 at 800 per Woodhouse J. See also *Reid v Reid* [1979] 1 NZLR 572 at 581 per Woodhouse J (referring to 'the hypnotic influence of money').

³⁶¹ For a rare articulation of Atkinian ideals of neighbourhood within a commercialist context, see *Williams & Glyn's Bank Ltd v Boland* [1979] Ch 312 at 332H-333A per Lord Denning MR ('If a bank is to do its duty, in the society in which we live, it should recognise the integrity of the matrimonial home. It should not destroy it by disregarding the wife's interest in it -- simply to ensure that it is paid the husband's debt in full -- with the high interest rate now prevailing').

things are rather different in the context of the mutual dealings engaged in by those who volunteer to co-exist in medium-term relationships of proximity or community. Here the obligations of neighbourhood begin to mollify or refashion the nature of strict entitlements; the virtue of reasonableness between neighbours starts to exert an idealistic impact on the allocation of the 'use values' associated with land. Accordingly, recent years have seen the emanation, from deep within the interpretive juristic community, of a meta-principle which elevates a distinct ethos of *social co-operation* as the aspirational focus for the regulation of the dealings of neighbours inter se.

Notions of 'reasonableness' have long left their imprint on the law relating to land. The case law spawned by England's industrial revolution insisted, for example, that all riparian owners had a natural right to share with other riparian owners the 'reasonable enjoyment'³⁶² of water flowing within a defined channel through or past their land. Likewise the law of nuisance has been animated for more than 150 years by the 'principle of reasonable user -- the principle of give and take as between neighbouring occupiers of land.'³⁶³ The law relating to easements is similarly permeated by ideas of 'reasonableness'.³⁶⁴ The conceptual parameters of the easement are defined by a requirement that easements must not exhaust all 'reasonable use' of servient land, thereby rendering the servient owner's rights 'illusory'.³⁶⁵ The operational intensity of all easements is confined to a 'reasonable use' of the facility granted,³⁶⁶ although the scope of these rights is supplemented by such ancillary rights as are 'reasonably necessary' for their effective enjoyment.³⁶⁷ No less in the law of easements there is a constant refrain that 'between neighbours there must be give as well as take.'³⁶⁸ Thus, for instance, prescriptive rights are seldom generated by mere acts of neighbourly forbearance,³⁶⁹ lest the

³⁶² *Embrey v Owen* (1851) 6 Ex 353 at 369, 155 ER 579 at 586 per Parke V-C. See also *John Young & Co v Bankier Distillery Co* [1893] AC 691 at 698 per Lord Macnaghten.

³⁶³ *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264 at 299D per Lord Goff of Chieveley, citing *Bamford v Turnley* (1862) 3 B & S 62 at 84, 122 ER 27 at 33 per Bramwell B ('live and let live'). See also *Sedleigh-Denfield v O'Callaghan* [1940] AC 880 at 903 per Lord Wright.

³⁶⁴ For instance, the easements impliedly conferred by the rule in *Wheeldon v Burrows* (1879) 12 Ch D 31 are defined, in part, by reference to those rights which are 'necessary to the reasonable enjoyment of the property granted.'

³⁶⁵ *Batchelor v Marlow* (2001) 82 P & CR 459 at 461 [8]-[9], 462 [18] per Tuckey LJ. See also *London & Blenheim Estates Ltd v Ladbroke Retail Parks Ltd* [1992] 1 WLR 1278 at 1288C per Deputy Judge Paul Baker QC.

³⁶⁶ *Wood v Saunders* (1875) 10 Ch App 582 at 585 per Hall V-C; *Gardner v Davis* (Unreported, Court of Appeal, 15 July 1998) per Mummery LJ. Excessive user (ie a user 'so extensive as to be outside the reasonable contemplation of the parties at the time the grant was made') constitutes a trespass (*Jelbert v Davis* [1968] 1 WLR 589 at 596A, F). See also *Hamble PC v Haggard* [1992] 1 WLR 122 at 133E-134E.

³⁶⁷ *Newcomen v Coulson* (1877) 5 Ch D 133 at 143 per Jessel MR; *Jones v Pritchard* [1908] 1 Ch 630 at 638; *V T Engineering Ltd v Richard Barland & Co Ltd* (1968) 19 P & CR 890 at 896; *Duke of Westminster v Guild* [1985] QB 688 at 700E; *Mills v Silver* [1991] Ch 271 at 286H-287A per Dillon LJ.

³⁶⁸ See *Costagliola v English* (1969) 210 EG 1425 at 1431 per Megarry J. An analogue in the law of covenants is provided by the doctrine of 'mutual benefit and burden' (see *Tito v Waddell (No 2)* [1977] Ch 106 at 289F-G, 292C-D, 305H per Megarry V-C).

³⁶⁹ See *Bridle v Ruby* [1989] QB 169 at 177G; *Mills v Silver* [1991] Ch 271 at 284D-E; *Ramsay v Cooke* [1984] 2 NZLR 680 at 685-686. Likewise, 'good neighbourliness' in the form of temporary abstention from the

maturation of casually tolerated users into cast-iron entitlements should stifle the altruistic impulse.³⁷⁰ Again, in some fundamental sense, most restrictive covenants today depend for their survival on a criterion of continuing reasonableness. The Lands Tribunal is statutorily empowered, in appropriate circumstances, to discharge or modify restrictive covenants which have come to 'impede some reasonable user of the land for public or private purposes'.³⁷¹

Notwithstanding this steady undercurrent of reference to reasonable user in the law of land, the last 20 or 30 years have witnessed an intensified appeal to a norm of reasonableness as the overriding principle governing the dealings of neighbours. As never before, mutual forbearance, co-operation and socially motivated foresight have been elevated as standards for the governance of neighbourhood relationships. Several reasons conduce to this modern concern with the harmonious accommodation of local interests. As Holmes once said, although all rights 'tend to declare themselves absolute to their logical extreme', they are in fact 'limited by ... principles of policy'.³⁷² In recent years informed juristic perceptions of permissible land use have therefore swung quite dramatically from the viewpoint of the 'property absolutist' towards that of the 'property relativist'.³⁷³ In the words of one American commentator, property law may soon come to be based 'as much on responsibilities as on rights, on human connectedness rather than on personal autonomy'.³⁷⁴ This conceptual shift is aptly illustrated in the English law regulating the transactions of neighbours, where today the arrogance of right is rapidly being displaced by an awareness of the consonance of duty.

This transformation of outlook has doubtless been promoted, in part, by the exigencies of crowded urban life. Modern patterns of high density land use have necessarily placed a premium on neighbourly co-operation and the avoidance of foreseeable harm to adjacent occupiers. In the urban landscape of today, as one of the common law world's more innovative courts recently pointed out,³⁷⁵ the law 'must ... take root in the terra firma

exercise of rights does not readily extinguish existing rights of easement or profit (see *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259 at 262C-E per Stuart-Smith LJ).

³⁷⁰ *Henderson v Volk* (1982) 35 OR (2d) 379 at 384. See also *Blount v Layard* [1891] 2 Ch 681n at 691 per Bowen LJ; *R v Oxfordshire CC, ex parte Sunningwell PC* [2000] 1 AC 335 at 359B-C per Lord Hoffmann.

³⁷¹ Law of Property Act 1925, s 84(1)(aa).

³⁷² *Hudson County Water Co v McCarter*, 209 US 349 at 355, 52 L Ed 828 at 832 (1908). A topical illustration of the constraining influence of policy is found in the courts' recent insistence that an occupier cannot, for instance, 'treat a burglar as an outlaw' (*Revell v Newbery* [1996] QB 567 at 577D per Neill LJ). See also *Revell v Newbery*, at 580C-D per Millett LJ; *R v Martin (Anthony)* [2002] 2 WLR 1 at 19A-B [80]-[81]; and compare *R v Hussey* (1924) 18 Cr App R 160 at 161 per Lord Hewart CJ.

³⁷³ K J Gray, 'Land Law and Human Rights', in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), pp 222-223. See *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1437D [156] per Lord Clyde ('the right to use land is not an absolute right').

³⁷⁴ Eric Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan L Rev 1529 at 1530-1531 (1988-89). See also Freyfogle, *Ethics, Community, and Private Land*, 23 Ecol LQ 631 (1996); Lynda L Butler, *The Pathology of Property Norms: Living within Nature's Boundaries*, 73 S Cal L Rev 927 at 984-986 (2000).

³⁷⁵ *Xpress Print Pte Ltd v Monocrafts Pte Ltd* [2000] 3 SLR 545 at 561H per Yong Pung How CJ (Singaporean Court of Appeal).

of the principles of reciprocity and mutual respect for each other's property.³⁷⁶ Nor could it be expected that the law of neighbourhood relations would fail to absorb the subliminal theme struck by those large common law initiatives of 20th century jurisprudence, the articulation of a notion of reasonable care owed to the moral neighbourhood and its public law analogue, the proliferation of the standard of *Wednesbury* reasonableness. Indeed, with the waning influence of conventional sources of support for altruistic endeavour, it may not be surprising that the semiotic idioms of the law are now being used to reinforce aspirational ideals which have run out of more traditional avenues of expression.

Almost unnoticed, yet another potent influence has intervened to accentuate the importance of 'reasonableness' and of the pragmatic accommodation of conflicting neighbourhood interests. Social friction is a luxury we can no longer afford. Controversy is costly. Amidst the 'acute public concern about the costs of civil litigation', it has become an important judicial aim in the context of neighbour disputes to 'encourage' -- indeed to 'bring about' -- a 'co-operative culture' in which a 'sensible compromise' of divergent objectives is reached by the 'exercise of goodwill and reason.'³⁷⁷ Hence arises much of the contemporary pressure towards ensuring that practical solutions of the problems of neighbourhood are arbitrated by considerations of reasonableness. Unlike dealings between strangers, where the stance of the parties is straightforwardly commercialist and oppositional, dealings between neighbours are today dominated by a rather different juristic imperative, namely a meta-principle of social co-operation. Paradoxically, the altruism which is altogether absent from transactions between strangers is exactly the social virtue now most keenly promoted within the forum of the neighbourhood.

(a) The ideal of 'good neighbourliness'

As the modern torts relating to the use of land collapse into a composite test of reasonableness,³⁷⁸ it is quite evident that the criterion of 'reasonableness' is increasingly construed as synonymous with an ethic of good neighbourliness. The connotation of reasonable user as involving 'give and take between neighbouring owners' finds a constant repetition in recent case law.³⁷⁹ The 'key to the solution of problems' in the law of

³⁷⁶ See Prakash Pillai, *The Primacy of the Principle of Reciprocity in the Singapore Land Regime*, (2001) 13 SAclJ 198; Tang Hang Wu, *The Right of Lateral Support of Buildings from the Adjoining Land*, [2002] Conv 237 at 240, 248-249.

³⁷⁷ *Gardner v Davis* (Unreported, Court of Appeal, 15 July 1998) per Mummery and May LJ. See eg *Stonebridge v Bygrave* (Chancery Division, 25 October 2001), where, in a dispute over parking rights, Neuberger J sought to 'adopt a practical attitude which ... will minimise unfairness to both parties, reduce future costs, and serve to bang their heads together so that they can sort matters out between them in the future, rather than taking up further court time, to the detriment of other litigants who have more serious matters to litigate.'

³⁷⁸ With the gradual coalescence of the torts of nuisance and negligence, it becomes even clearer that 'ownership of land carries with it a duty to do whatever is reasonable in all the circumstances to prevent hazards on the land ... from causing damage to a neighbour' (*Marcic v Thames Water Utilities Ltd* [2002] QB 929 at 986H [55] per Lord Phillips of Worth Matravers).

³⁷⁹ See eg *Hunter v Canary Wharf Ltd* [1997] AC 655 at 711F per Lord Cooke of Thorndon; *Earle and Earle v East Riding of Yorkshire Council* [1999] RVR 200 at 218; *Jan de Nul (UK) Ltd v NV Royale Belge*

nuisance, it has been said, resides in the notion of 'reasonableness between neighbours.'³⁸⁰ Some have even pointed to the emergence of a 'law of neighbourhood' which is 'closely linked with the law of property.'³⁸¹

Towards this end the courts are obviously engaged in the affirmation of a new social morality of neighbourhood. Here, as Lord Millett explained in *Southwark LBC v Mills*,³⁸² the 'governing principle' -- he did not *quite* say 'meta-principle' -- is the mandate of 'good neighbourliness'. This precept comprises a norm of 'reciprocity', that is, the idea that a landowner 'must show the same consideration for his neighbour as he would expect his neighbour to show for him.' Thus, in *Southwark LBC v Mills*,³⁸³ the House of Lords held that no actionable nuisance arose from noise-generating activities in residential premises where such activities involved no more than the 'normal' or 'ordinary' use of those premises. It would be 'absurd', said Lord Hoffmann, if nuisance were constituted by the conduct of persons 'behaving normally and reasonably.'³⁸⁴ No civil liability is brought about by the user of land 'in a way which shows as much consideration for the neighbours as can reasonably be expected.'³⁸⁵ But, by the same token, nuisance may well result from 'unreasonable' behaviour as, for example, where in a poorly sound-proofed block of flats one occupier installs a television or washing machine 'hard up against a party wall so that noise and vibrations are unnecessarily transmitted to the neighbour's premises.'³⁸⁶

The normative force of 'good neighbourliness' is beginning to gather momentum. In *Delaware Mansions Ltd v Westminster CC*³⁸⁷ the House of Lords again invoked the concepts of 'reasonableness between neighbours' and 'reasonable foreseeability' to uphold a finding of nuisance liability where spreading tree roots had weakened the foundations of buildings on a neighbour's land. Nor is the elaboration of a modern ethic of good neighbourliness an exclusively judicial concern.³⁸⁸ Prominent in the planning policy guidance nowadays disseminated by central government is the proposition that 'good neighbourliness' ranks as one of the

[2000] 2 Lloyd's Rep 700 at 712 [34]; *Stockport MBC v British Gas Plc* (Unreported, Court of Appeal, 16 February 2001); *Southwark LBC v Mills* [2001] 1 AC 1 at 15G-H per Lord Hoffmann, 20G per Lord Millett. See also *Wildtree Hotels Ltd v Harrow LBC* [2001] 2 AC 1 at 10A-B per Lord Hoffmann.

³⁸⁰ *Delaware Mansions Ltd v Westminster CC* [2002] 1 AC 321 at 334 [34] per Lord Cooke of Thorndon.

³⁸¹ *Hunter v Canary Wharf Ltd* [1997] AC 655 at 723D per Lord Hope of Craighead. See also *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 at 513, where Evatt J described the law of nuisance as 'an extension of the idea of trespass into the field that fringes property.'

³⁸² [2001] 1 AC 1 at 20D-E.

³⁸³ [2001] 1 AC 1 at 15F, 16D per Lord Hoffmann, 21F per Lord Millett.

³⁸⁴ [2001] 1 AC 1 at 15F.

³⁸⁵ [2001] 1 AC 1 at 16D.

³⁸⁶ [2001] 1 AC 1 at 16A per Lord Hoffmann.

³⁸⁷ [2002] 1 AC 321 at 332E [29], 334D [34] per Lord Cooke of Thorndon.

³⁸⁸ See, for instance, the balance of good neighbourliness struck by Party Wall etc Act 1996, ss 2(3)-(6), 4(1)-(3), 6(3), 7(1).

'yardsticks' relevant to the consideration of proposals for building development.³⁸⁹ This benchmark of 'good neighbourliness' articulates a standard of civilised interaction within the local community³⁹⁰ and the importance attached to it can often outweigh the value of even those development proposals which are based on pressing social needs. In *Khan v Secretary of State for the Environment*,³⁹¹ for example, a proposed extension required for a severely disabled child was refused planning consent on the ground that the development would have caused a 'significant overshadowing' of adjoining property and would therefore have breached the precept of 'good neighbourliness'.

(b) Limited vindication of proprietary rights between neighbours

Consistently with the modern theme of social accommodation, the courts have begun to make it clear that, as between neighbours, proprietary rights may not always be capable of vindication in an absolute form.³⁹² The issue arises most acutely in the context of continuing acts of trespass and breaches of restrictive covenant. In both areas the courts have an undoubted discretion to issue an injunction restraining or even reversing unlawful conduct,³⁹³ but recent case law indicates that injunctive relief is far from an automatic judicial response.³⁹⁴ Instead damages (possibly inclusive of a 'once and for all' award in respect of future wrongs³⁹⁵)

³⁸⁹ Department for Transport, Local Government and the Regions, *Planning Policy Guidance Note 1: General Policy and Principles* (PPG1 published 22 August 2001), para 64. See *Aslam v South Bedfordshire DC* [2000] RVR 121 at 158; *McGowan v Secretary of State for Transport, Local Government and the Regions* [2002] EWHC Admin 547 at [19].

³⁹⁰ Explicitly observing that 'the proposals fail to demonstrate good neighbourliness', Cambridge City Council recently rejected a planning application for the construction of a private family mausoleum accommodating up to ten coffins in the back garden of a suburban terraced house (see Reason 1 for refusal of planning permission, Ref C/02/0514/FP, in the decision letter issued by the City's Director of Environment and Planning, 12 July 2002).

³⁹¹ Unreported, Queen's Bench Division, 31 July 1997.

³⁹² See eg *West v Sharp* (2000) 79 P & CR 327, where the Court of Appeal declined to vindicate the proprietary entitlement of the owner of a right of way by either an injunction or damages. As Mummery LJ indicated (at 332), the 'substantial interference' test for violation of rights of easement has the consequence that '[n]ot every interference ... is actionable.' Particularly in a context of 'bad feeling between ... neighbours', judicial intervention is justified only in circumstances of 'unreasonable interference with the right of way' (at 336 per Colman J). Mummery LJ expressed the view (at 334) that the matter was far more appropriate for some form of alternative dispute resolution. See also *Keefe v Amor* [1965] 1 QB 334 at 346G; *Celsteel Ltd v Alton House Holdings Ltd* [1985] 1 WLR 204 at 217B per Scott J.

³⁹³ See *Shelfer v City of London Electric Lighting Co* [1895] 1 Ch 287 at 322-323 per A L Smith LJ, for the classic guidelines which constrain the choice between injunctive and compensatory relief. Ultimately the question is whether the granting of injunctive relief would be 'oppressive' (see *Jaggard v Sawyer* [1995] 1 WLR 269 at 288B).

³⁹⁴ For evidence of an increasing trend towards damages awards rather than injunctive relief, see, in the context of restrictive covenants, *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361; *Gafford v Graham* (1998) 77 P & CR 73. In respect of trespass, see *Griffiths v Kingsley-Stubbs* [1987] CLY 1227; *Barker v O'Mahony* (Unreported, Court of Appeal, 12 July 1990); *Snell & Prideaux Ltd v Dutton Mirrors Ltd* [1995] 1 EGLR 259; *Ketley v Gooden* (1996) 73 P & CR 305; *Greenwich Healthcare National Health Service Trust v London and Quadrant Housing Trust* (1999) 77 P & CR 133 at 139. See also *Das v Linden Mews Ltd* [2002] 28 EG 130 at 134-135 [29]-[33]. In cases of merely technical interference with proprietary rights, a declaration alone may be deemed sufficient (see eg *Stonebridge v Bygrave* (Chancery Division, 25 October

are often thought to represent the more appropriate remedy even though the withholding of injunctive relief causes the court, in effect, to 'authorise the continuance of an unlawful state of affairs.'³⁹⁶ As Millett LJ observed in *Jaggard v Sawyer*,³⁹⁷ '[m]any proprietary rights cannot be protected at all by the common law', with the result that the aggrieved owner 'must submit to unlawful interference with his rights and be content with damages.'³⁹⁸ Thus, in *Jaggard v Sawyer*, the Court of Appeal declined to award an injunction restraining a neighbour's building development which involved both continuing trespass and a clear breach of restrictive covenant. In similar circumstances in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd*,³⁹⁹ Brightman J refused to order the demolition of houses which were 'now the homes of people',⁴⁰⁰ although damages were set at a level which reflected the likely settlement figure for release from the covenants in question. Again in *Burton v Winters*,⁴⁰¹ an owner, far from being able to insist on the removal of a neighbour's encroaching garage wall, found herself relegated to a claim for damages in respect of the trespass (and was later sentenced to two years' imprisonment for contempt when she continued to inflict physical damage on the offending wall and garage⁴⁰²).

The judicial preference for damages rather than an injunction is usually prompted by such factors as the low level of impact on the amenity enjoyed by the claimant and the adequacy of money compensation for the relevant wrong.⁴⁰³ But, in many cases, it is clear that the availability of a money remedy effectively allows wrongdoing neighbours to purchase immunity from further enforcement of proprietary rights.⁴⁰⁴ The courts are increasingly claiming the power to license, on payment of compensation, a broadly acceptable

2001)) -- a judicial preference which can be traced back to early cases such as *Behrens v Richards* [1905] 2 Ch 614 at 621-624 per Buckley J.

³⁹⁵ See *Jaggard v Sawyer* [1995] 1 WLR 269 at 281H-282A per Sir Thomas Bingham MR, 286A, 292C-D per Millett LJ.

³⁹⁶ *Jaggard v Sawyer* [1995] 1 WLR 269 at 286B per Millett LJ.

³⁹⁷ [1995] 1 WLR 269 at 287C.

³⁹⁸ If the discretionary relief of an injunction is refused, the wrongdoer, even though he 'may have no right to act in the manner complained of ... cannot be prevented from doing so' ([1995] 1 WLR 269 at 286A per Millett LJ).

³⁹⁹ [1974] 1 WLR 798 at 811A.

⁴⁰⁰ 'It would ... be an unpardonable waste of much needed houses to direct that they now be pulled down' ([1974] 1 WLR 798 at 811B).

⁴⁰¹ Unreported, Court of Appeal, 18 July 1991.

⁴⁰² *Burton v Winters* [1993] 1 WLR 1077. See also *Chamberlain v Lindon* [1998] 1 WLR 1252 at 1260G-1261H.

⁴⁰³ See eg *Burton v Winters* (Unreported, Court of Appeal, 18 July 1991), where Balcombe LJ pointed to the 'minimal' nature of the encroachment (4½ inches) and its lack of impact on the claimant's enjoyment of her own land. In trespass cases injunctions tend to be appropriate only where there has been something in the nature of a flagrant and permanent expropriation of the victim's land (see eg *Harrow LBC v Donohue* [1995] 1 EGLR 257 at 259F-H; *Daniells v Mendonca* (1999) 78 P & CR 401 at 408).

⁴⁰⁴ An award of merely nominal damages will not, however, justify the withholding of injunctive relief (*Nelson v Nicholson* (Unreported, Court of Appeal, 1 December 2000)).

accommodation or compromise of conflicting neighbourhood interests.⁴⁰⁵ In this way -- quite outside the normal market process -- the courts can engineer socially optimal redistributions of various sorts of utility in land between parties who, as a matter of community imperative, must be enabled to continue living in some kind of co-operative proximity.⁴⁰⁶ In the process it becomes steadily more apparent that the ability of estate proprietors to dictate what shall or shall not be done on their own land is rather more limited than may be generally thought. Today there are relatively severe curbs on the ability of an owner, when troubled by his interactions with neighbours, to assert either the sanctity of contractual obligation or the absolute quality of his own territorial imperative. In the interdependency of neighbourhood, property rules are apt to be commuted into liability rules.⁴⁰⁷ The *dominium* which has been so carefully reinforced for the purpose of title dealings with strangers has been rather suppressed when it comes to dealings with the man on the other side of the garden fence.⁴⁰⁸ But this merely reflects the wider reality that the law of neighbourhood is gradually being infiltrated by an overriding proviso of reasonableness.

(c) *Rights of reasonable access or entry*

The shift towards a norm of social co-operation as the keynote of neighbourhood relations is further evidenced in the emergence of various entitlements of reasonable access to land. An occupier armed with exclusive possession has long been assumed to have an uncontrollable discretion to exclude unwanted strangers from trespassing on his land.⁴⁰⁹ A century ago Lord Russell of Killowen CJ was able to declare that freeholders 'have the right to forbid anybody coming on their land or in any way interfering with it.'⁴¹⁰ In modern times this

⁴⁰⁵ See eg *Greenwich Healthcare National Health Service Trust v London and Quadrant Housing Trust* (1999) 77 P & CR 133 at 139, where Lightman J pointed out that 'no reasonable objection' could be made to the unconsented realignment of an easement which was, moreover, 'necessary to achieve an object of substantial public and local importance and value.'

⁴⁰⁶ '[T]he courts have identified overriding concerns which might be taken to qualify the extent to which property rights ought to be protected ... This subtlety of remedial choice ... permits the courts to vindicate rights but at the same time control their socially harmful exploitation' (Robert J Sharpe, *Injunctions and Specific Performance* (Canada Law Book Co, Toronto 1983), p 216 [433]). As Carol Rose has pointed out, 'damage remedies have received excellent press in law-and-economic circles, in part because they suppress unneighborly behavior ... -- that is, the so-called "rent-seeking" in which an owner hold outs for no reason except to make claims on another' (see Rose, *Property and Expropriation: Themes and Variations in American Law*, (2000) Utah L Rev 1 at 10). See also Craig Rotherham, *Proprietary Remedies in Context* (Hart Publishing 2002), p 343.

⁴⁰⁷ See Guido Calabresi and A Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv L Rev 1089 (1971-72).

⁴⁰⁸ See, however, *Jaggard v Sawyer* [1995] 1 WLR 269 at 287B per Millett LJ ('references to the "expropriation" of the plaintiff's property are somewhat overdone').

⁴⁰⁹ For a review of the common law jurisprudence on the subject, see K J Gray and S F Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, (1999) 4 EHRLR 46 at 52-55.

⁴¹⁰ *South Staffordshire Water Co v Sharman* [1896] 2 QB 44 at 46. See also *Anchor Brewhouse Developments Ltd v Berkley House (Docklands Developments) Ltd* (1987) 38 BLR 82 at 96 per Scott J.

proposition has been amply falsified, not least by various statutory initiatives which push the law significantly beyond the bounds of conventionally accepted neighbourly sufferance.

For example, under the Access to Neighbouring Land Act 1992 the court is now invested with a novel discretion to make an 'access order' authorising unconsented entry upon adjoining or adjacent land for the purpose of facilitating works of preservation or incidental improvement or alteration on the entrant's own land.⁴¹¹ The court *must* make an access order if satisfied that the works are 'reasonably necessary' and would, absent a right of entry, be at least 'substantially more difficult to carry out.'⁴¹² Equally the court *must not* make an order where to do so would be 'unreasonable', having regard to the degree of interference with, or disturbance of, or hardship caused to, the servient owner.⁴¹³ The legislative scheme is manifestly underpinned by a concept of reasonableness between neighbours, as is reinforced by the fact that, in the opening section of the Act alone, the statutory operation is qualified by the word 'reasonable' (or some derivative thereof) on no fewer than 14 occasions.

Even more dramatically intrusive is the (curiously named) Party Wall etc Act 1996,⁴¹⁴ which confers certain important rights directly without the interposition of any court order. The 1996 Act entitles a building owner, subject to the service of a notice and possible payment of compensation for damage, to insert such footings or foundations below the surface of his *neighbour's* land as are necessary for the construction on his *own* land of a wall immediately inside the boundary line between them.⁴¹⁵ A building owner has similarly conditioned statutory rights to alter, repair or rebuild party structures and even to cut into the wall of an adjoining owner's building for purposes such as weather-proofing.⁴¹⁶ Perhaps most significant, the 1996 Act confirms -- subject only to the giving of notice -- an extraordinary entitlement for a building owner, his servants, agents, workmen and surveyors, 'during usual working hours [to] enter and remain on any land or premises' for the purpose of executing works in pursuance of the Act.⁴¹⁷ Similarly the Countryside and Rights of Way Act 2000⁴¹⁸ makes

⁴¹¹ An access order may require the payment of compensation for any loss, damage, injury, or 'substantial loss of privacy or other substantial inconvenience' (Access to Neighbouring Land Act 1992, s 2(4)).

⁴¹² Access to Neighbouring Land Act 1992, s 1(2). Even more extensive powers are enjoyed by courts in Australia, Canada and New Zealand to impose easements which are reasonably necessary for the effective use or development of land or to modify or extinguish easements as obstructive of the reasonable user of land (see eg Conveyancing Act 1919 (New South Wales), s 88K(1)-(2); Property Law Act 1952 (New Zealand), s 127; Property Law Act 1974 (Queensland), s 180(1)-(3); Property Law Act (British Columbia) (RSBC 1979, c 340), s 32).

⁴¹³ Access to Neighbouring Land Act 1992, s 1(3).

⁴¹⁴ Compare *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 372 per Eve J (a 'novelty in Parliamentary nomenclature'). The Party Wall etc Act 1996 extends the localised measures provided by the old London Buildings Acts (see eg London Building (Amendment) Act 1939).

⁴¹⁵ Party Wall etc Act 1996, ss 1(4)-(7), 7(2).

⁴¹⁶ Party Wall etc Act 1996, s 2(1)-(2).

⁴¹⁷ Party Wall etc Act 1996, s 8(1), (5). Furniture and fittings may be removed (s 8(1)) and, if premises are closed, fences and doors may be broken open for the purpose of entry (s 8(2)). It is a criminal offence for an occupier to refuse to permit, or to obstruct, the exercise of these statutory rights (s 16(1)-(2)). Disputes

provision for a statutory easement scheme under which certain owners may apply to a neighbouring landowner for the compulsory grant of rights of vehicular access over privately held common land in return for tiered rates of modest compensation proportioned to the age of the premises benefited by the grant. The scheme is aimed at reversing the exorbitant holdout strategies exposed in recent case law,⁴¹⁹ and is intended to 'strike a fair balance' between neighbours in consequence of which, in exchange for the creation of permanent rights over their land, the owners of common land may receive 'reasonable compensation'.⁴²⁰

This thematic concern with rights of reasonable, but unconsented, access is carried even further in other provisions of the Countryside and Rights of Way Act 2000, which create an unprecedented public entitlement 'to enter and remain ... for the purposes of open-air recreation' on any 'access land' as defined by the Act.⁴²¹ The so-called 'right to roam' legislation is avowedly aimed at 'improving public health and reducing social divisions'⁴²² and at securing a measure of 'social equity'.⁴²³ The statute is clearly premised on notions of reasonable user of open country.⁴²⁴ Those exercising the new access entitlement are bound to observe a number of general restrictions laid down in the Act,⁴²⁵ which effectively define a code of responsible user of

under the Act are remitted to a compulsory process of arbitration by a panel of surveyors, for the cost of which the unwilling adjacent owner may be rendered liable in whole or part (s 10).

⁴¹⁸ See Countryside and Rights of Way Act 2000, s 68(1)-(3); Vehicular Access Across Common and Other Land (England) Regulations 2002 (SI 2002/1711), regs 3(1), 11(1)-(3) (effective 4 July 2002).

⁴¹⁹ See eg *Newbury DC v Russell* (1997) 95 LGR 705 at 715-716.

⁴²⁰ Department for Environment, Food and Rural Affairs, *Countryside and Rights of Way Act 2000: A Regulatory Impact Assessment in respect of The Vehicular Access Across Common and Other Land (England) Regulations 2002* (11 May 2002), para 10.

⁴²¹ Countryside and Rights of Way Act 2000, s 2(1).

⁴²² *Access to the Open Countryside in England and Wales: A Consultation Paper* (DETR, February 1998), para 3.50. There is, in this reference to the social hygiene aspects of open air access, a powerful echo of the idea that certain socially valued commodities which are 'indispensable for the preservation of the public health' are covered by a common law doctrine of 'prime necessity' and are therefore held on trust 'for the benefit of the general public' (see *Attorney General of Canada v Toronto* (1893) 23 SCR 514 at 520 per Strong CJ). Under this doctrine, monopoly suppliers of essential commodities are obligated to make such commodities available to the general public on terms which are 'fair and reasonable' (see *Minister of Justice for the Dominion of Canada v City of Lévis* [1919] AC 505 at 513 per Lord Parmoor; *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 at 660-663 [35]-[51] per Richardson P, Gault, Blanchard and Tipping JJ, 669 [77] per Thomas J). On the links between the doctrine of 'prime necessity' and the ancient concepts of 'common callings' and 'land affected with a public interest', see K J Gray and S F Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, (1999) 4 EHRLR 46 at 83-86.

⁴²³ *Access to the Open Countryside in England and Wales: A Consultation Paper* (DETR, February 1998), para 3.67. On the humanising and socialising qualities of exposure to wild country, see K J Gray, *Equitable Property*, (1994) 47(2) CLP 157 at 199-202. It is noteworthy that the access provisions of the recently enacted Land Reform (Scotland) Act 2003 are explicitly intended 'to promote social inclusion by improving people's health and their quality of life' (see Scottish Executive, *Draft Land Reform (Scotland) Bill: Consultation Paper* (February 2001), para 1.5).

⁴²⁴ For the roots of this theme of licensed enjoyment of scenic spaces 'in an orderly and reasonable manner', see *Behrens v Richards* [1905] 2 Ch 614 at 622 per Buckley J.

⁴²⁵ Countryside and Rights of Way Act 2000, s 2(1), Sch 2.

the countryside and 'respect' for the 'living, working landscape in which they find themselves.'⁴²⁶ In effect, the Countryside and Rights of Way Act 2000 is intended to pioneer a new and extended concept of social 'neighbourhood', in which 'greater access' to wild or open country is intended both to generate 'more understanding and appreciation of [the] environment' and to promote 'understanding between town and country.'⁴²⁷ The Act is directed, in large measure, towards making 'townspeople more aware of the needs and concerns of rural dwellers' and causing 'more of those who live in the country ... to see their urban counterparts as a force to protect their way of life, not to threaten it.'⁴²⁸

This more expansive notion of neighbourhood is beginning to infiltrate the common law in other ways. Contrary to the standard assumption that the common law equips *all* landowners with an arbitrary and wholly unaccountable power to exclude strangers -- a premise refuted, in any event, by the historic doctrine of the 'common callings'⁴²⁹ -- it is nowadays somewhat clearer that public access to *certain* kinds of land is governed by an overriding rule of reasonableness.⁴³⁰ Although the landowner's absolute exclusionary prerogative still pertains in respect of the domestic curtilage and other areas where there has been no obvious or necessary waiver of private autonomous control,⁴³¹ the assertion of unfettered exclusionary power seems inappropriate in relation to 'quasi-public' space, ie land which has objectively been made the subject of an unrestricted invitation to all comers.⁴³² Such land typically embraces areas of 'civic common',⁴³³ designed as attractive

⁴²⁶ *DETR Consultation Paper* (1998), para 3.32. The Land Reform (Scotland) Act 2003, which creates even more extensive 'access rights' over land for recreational and other purposes, explicitly conditions such rights on a requirement that they be 'exercised responsibly' (s 2(1)). Under the new Scottish legislation, however, the concept of 'responsible' user is reciprocal. Affected landowners are equally obligated to 'conduct the ownership' of their land 'in a way which, as respects [access] rights, is responsible', ie causes no 'unreasonable interference' with such rights (s 3(1)-(2)). Moreover, the notion of 'responsible' behaviour is, in either case, defined in terms of user which is 'lawful and reasonable and takes proper account of the interests' of all relevant parties (ss 2(3), 3(3)). Rules of 'responsible conduct' are to be set out in a 'Scottish Outdoor Access Code' (s 10).

⁴²⁷ *DETR Consultation Paper* (1998), paras 3.65, 3.67.

⁴²⁸ At this point 'neighbourhood' rights and obligations begin to coalesce with more general civic rights and obligations, a trend which may well become one of the formative influences operating on the land law of the 21st century. See also Scottish Executive, *Draft Land Reform (Scotland) Bill: Consultation Paper* (February 2001), paras 1.5, 3.12.

⁴²⁹ In view of their virtual monopoly position, those who pursued the 'common callings' (eg the common innkeeper, the carrier, the ferryman and the farrier) were prohibited from denying access to their premises and their services except on grounds which were demonstrably 'reasonable' (see K J Gray and S F Gray, (1999) 4 EHRLR 46 at 83-84).

⁴³⁰ See eg *DPP v Jones* [1999] 2 AC 240 at 256B-C, where Lord Irvine of Lairg LC led a majority of the House of Lords to a holding that legitimate user of the public highway is governed by a 'test of reasonableness.'

⁴³¹ Even here the law is beginning to be invaded by considerations of reasonableness. The private wheel-clamper, for example, has no entitlement to exact an unreasonable or extortionate charge for release (see *Arthur v Anker* [1997] QB 564 at 573B).

⁴³² See K J Gray and S F Gray, (1999) 4 EHRLR 46 at 89-96. For reference to 'the common lawyer's one-dimensional view of property as control over access', see *Western Australia v Ward* (2002) 191 ALR 1 at 40 [95] per Gleeson CJ, Gaudron, Gummow and Hayne JJ.

venues for a range of recreational, educational and associational uses. Examples include vast shopping precincts, community leisure areas, municipal libraries, museums and art complexes, transport facilities, airport concourses and various other fora devoted to activities of recreation or entertainment.⁴³⁴

In recent times the argument has gathered force that, where land has been the subject of apparent dedication to public use, the landowner 'should not defeat the reasonable expectation of an individual who wishes to accept the invitation by excluding him quite arbitrarily and capriciously.'⁴³⁵ The general invitation, particularly if emanating from a monopoly supplier of some social, commercial or environmental utility, effectively initiates a form of proximity which attracts 'neighbourhood' consequences.⁴³⁶ Open-armed engagement with the public, particularly in furtherance of one's own economic interests, generates something like an Atkinian duty to act reasonably. Private power, as it shades into public power,⁴³⁷ must be exercised 'bona fide ... and with due regard to the persons affected by its exercise'.⁴³⁸ The liberality of the landowner's outreach infuses a self-induced element of 'neighbourhood' obligation into dealings with invitees, with the result that the latter cannot be denied entry to, or excluded from, quasi-public areas except on grounds which are objectively and communicably *reasonable*.

The idea that voluntarily assumed neighbourhood imports a rule of reasonableness is, of course, wholly consonant with the modern distaste for irrational decision-making and abuse of monopolistic power.⁴³⁹ It is

⁴³³ See Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U Chi L Rev 57 at 61 (1997). Environmental criminologists have coined the term 'mass private property' in recognition of the fact that 'more and more public life now takes place on property which is privately owned' (see Clifford D Shearing and Philip C Stenning, *Private Security: Implications for Social Control*, 30 Social Problems 493 at 496 (1982-83); K J Gray and S F Gray, (1999) 4 EHRLR 46 at 50-51; Alison Wakefield, 'Situational Crime Prevention in Mass Private Property', in Andrew von Hirsch, David Garland and Alison Wakefield (ed), *Ethical and Social Perspectives on Situational Crime Prevention* (Hart Publishing 2000), p 125).

⁴³⁴ It takes little imagination to extend the logic of reasonable quasi-public access rights to the recreational user of wild or open country. For the roots of this approach in Anglo-American jurisprudence, see *McKee v Gratz*, 260 US 127 at 136, 67 L Ed 167 at 170 (1922), where in the United States Supreme Court Justice Holmes opined that '[t]he strict rule of English common law as to entry upon a close must be taken to be mitigated by common understanding with regard to the large expanses of uninclosed and uncultivated land in many parts, at least, of this country ... A licence may be implied from the habits of the country.' See also *Marsh v Colby*, 39 Mich 626 at 627 (1878) (Supreme Court of Michigan).

⁴³⁵ *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 269 per Gibbs CJ.

⁴³⁶ The element of 'neighbourhood' is, of course, intensified where, in a context of down-town rejuvenation, the public provision of fiscal incentives for private enterprise engenders such a degree of interdependence or symbiosis between community and private interests that nominally private urban developments inevitably take on the character of land 'affected with a public interest' (see K J Gray and S F Gray, (1999) 4 EHRLR 46 at 94-96).

⁴³⁷ See *Gerhardy v Brown* (1985) 159 CLR 70 at 107 per Murphy J.

⁴³⁸ *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 at 275 per Murphy J.

⁴³⁹ See eg *Vector Ltd v Transpower New Zealand Ltd* [1999] 3 NZLR 646 at 669 [77], where, in the New Zealand Court of Appeal, Thomas J referred to the doctrine of 'prime necessity' (ante, footnote 422) as 'essentially directed at curbing the exploitation or abuse of monopoly power.' The doctrine of 'prime necessity' has since been acknowledged as 'a strand of the broader principle which ... is adaptable to meet new legal and social situations' (*Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 at 630 [25]-[26] per Blanchard and

also consistent with the rejuvenation of concern for human rights and, in particular, with an intensified concern for the freedoms of speech, association, assembly and movement. Certain American jurisdictions have led the way in holding, as a matter of common law,⁴⁴⁰ that ‘when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably.’ On the contrary, ‘they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises.’⁴⁴¹ Exactly this formula has recently been adopted as authoritative in New Zealand⁴⁴² and English courts, although initially hostile to a ‘reasonable access’ rule in respect of quasi-public places,⁴⁴³ are now beginning to admit the possibility of an ‘incremental development of the common law’⁴⁴⁴ towards recognition of similar access rights, subject only to a requirement of ‘reasonable conduct’ by those entitled to their exercise. It has already been accepted, in the light of public law standards of procedural fairness, that an ‘arbitrary exclusion’ rule no longer applies to such locations as airports,⁴⁴⁵ schools⁴⁴⁶ or council-owned recreation areas.⁴⁴⁷ In *Porter v Commissioner of Police of the Metropolis*,⁴⁴⁸ Sedley LJ even suggested that an

Anderson JJ). See also Michael B Taggart, ‘Public Utilities and Public Law’, in P A Joseph (ed), *Essays on the Constitution* (Brooker’s, Wellington 1995), p 214.

⁴⁴⁰ For explicit emphasis that this ‘reasonable access’ rule is a matter of common law and not the product of any state or federal constitutional guarantee, see eg *Uston v Resorts International Hotel Inc*, 445 A2d 370 at 373 (NJ 1982); *Marzocca v Ferrone* 461 A2d 1133 at 1137 (NJ 1983); *Hoagburg v Harrah’s Marina Hotel Casino*, 585 F Supp 1167 at 1173 (1984). See also *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 at 632 [33] per Blanchard and Anderson JJ.

⁴⁴¹ *Uston v Resorts International Hotel Inc*, 445 A2d 370 at 375 (NJ 1982) per Pashman J. See also *Marsh v Alabama*, 326 US 501 at 506, 90 L ed 265 at 268 (1946) per Justice Black.

⁴⁴² See *Wu v Sky City Auckland Ltd* [2002] NZAR 441 at 445-447 [16]-[20], where Chambers J founded the landowner’s duty expressly on its ‘holding itself out to the public as being willing to serve all.’ *Wu* concerned the exclusion of an all-too-successful gambler from Auckland’s only casino. Chambers J’s ruling in the gambler’s favour was reversed on appeal by reference to legislation relating specifically to casino premises. A majority in the New Zealand Court of Appeal nevertheless expressed its provisional preference for the view that at common law, in respect of a ‘business affected by a public interest in circumstances where the operator enjoys a monopoly ... the operator’s right to exclude members of the public may be qualified by an obligation to do so only for an articulated good reason’ (*Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 at 632 [34] per Blanchard and Anderson JJ). The casino subsequently re-admitted the gambler on condition that he agreed not to appeal to the Judicial Committee of the Privy Council (personal communication from Professor Michael Taggart, 19 August 2002).

⁴⁴³ See eg *CIN Properties Ltd v Rawlins* [1995] 2 EGLR 130 (shopping mall).

⁴⁴⁴ *Porter v Commissioner of Police of the Metropolis* [1999] All ER (D) 1129 per May and Sedley LJJ. To the question whether rights of access were always arbitrarily terminable by the landowner, Sedley LJ was ‘prepared to accept that the answer may no longer be a cursory “Of course”.’ See also *Sky City Auckland Ltd v Wu* [2002] 3 NZLR 621 at 632 [33] per Blanchard and Anderson JJ.

⁴⁴⁵ *Cinnamond v British Airports Authority* [1980] 1 WLR 582 at 588A-E per Lord Denning MR. See also *British Airports Authority v Ashton* [1983] 1 WLR 1079 at 1089F per Mann J; *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385 (Supreme Court of Canada).

⁴⁴⁶ *Wandsworth LBC v A* [2000] 1 WLR 1246 at 1253C-G. See also *R v London Borough of Brent, ex parte Assegai* (1987) Times, 18 June.

⁴⁴⁷ *R v London Borough of Brent, ex parte Assegai* (1987) Times, 18 June, per Woolf LJ.

⁴⁴⁸ [1999] All ER (D) 1129.

electricity board showroom could not 'arbitrarily or improperly exclude or expel members of the public' in view of the fact that the relevant landowner was 'a statutory undertaker providing a service essential to most people's lives' and also because 'its shop premises, when open, constitute an invitation to the public to enter and remain there for proper purposes.' Thus even artificial or self-defining forms of 'neighbourhood' increasingly engender obligations of social compromise -- a co-operative quid pro quo -- in which certain rights of reasonable access to privately held land are conditioned upon the observance of standards of reasonable conduct on the part of those who exercise the rights.⁴⁴⁹

(3) An increasingly significant norm of reciprocity in dealings with fellow citizens

In recent years a third overriding thematic concern or meta-principle has emerged from the discourse of the interpretive community of jurists engaged with the law of land. This meta-principle gives a new and heightened significance to a norm of *reciprocity* as the governing consideration in those contexts in which we deal with each other as fellow citizens. This wider sphere of interface provides a forum, not for one-off title dealings between strangers or for medium-term user dealings (of one sort or another) between neighbours, but rather for the settlement of those large public issues which relate to the environmental quality of the life we enjoy, inevitably in common, with our fellow citizens. The social and economic infrastructure of our co-existence requires a constant readjustment, in the interests of the general good, of the various benefits and burdens associated with land. Transport, utility and communications services must be upgraded; schools, houses and hospitals must be built; clean water must be channelled to the consumer. Meanwhile, green belts must also be protected; the architectural heritage must be conserved; wildlife habitats and areas of natural beauty must be safeguarded; and so forth. In all these respects (and many more), the significance of land lies ultimately not in the 'exchange value' which is bargained over by strangers or in the 'use value' which is arbitrated between neighbours, but rather in the 'community value' which land represents for the citizenry in general. And so substantial are the public interests at stake that some degree of mandatory governmental intervention is virtually inevitable.⁴⁵⁰

It is here that the first two meta-principles discussed in this paper tend most obviously to come into collision. Compelling community requirements may, on occasion, necessitate that one citizen's land be compulsorily acquired for the construction of a road, a school or a reservoir. Alternatively, planning controls and heritage or nature conservation measures may withhold from the citizen a much needed opportunity to extend his own home, start a new business or plough his own field. In such instances the plenary quality of title so robustly affirmed by our first meta-principle seems to argue against even slight derogations from the proprietary sovereignty supposedly inherent in land ownership. On the other hand, the imperative of social co-operation mandated by our second meta-principle counsels, in a wholly opposite direction, towards a neighbourly

⁴⁴⁹ See eg Land Reform (Scotland) Act 2003, ss 2-3.

⁴⁵⁰ This is not to say that privately bargained covenants between citizens cannot also operate to protect community-spirited, conservationist concerns, thereby safeguarding a range of environmental amenities not necessarily secured by the relevant local planning authority (see K J Gray and S F Gray, *The Future of Real Burdens in Scots Law*, (1999) 3 Edinburgh Law Rev 229 at 232-235).

compromise of conflicting land use strategies. But neither meta-principle can be decisive within a context which is far more complex, far more contingent and ultimately far more important than the relatively limited engagements involved in title transactions and neighbour disputes.⁴⁵¹

At this point a third normative force intervenes to mediate the potentially damaging confrontation between public and private interests -- namely an overriding principle of *reciprocity* -- the idea that another's action or forbearance morally requires an exact equivalence of response. In the present context the normative influence of reciprocity ensures that the 'community value' inherent in the resource of land is apportioned or reallocated so as to maximise a virtue which may most conveniently be termed *civic equity*. Indeed it is the (largely tacit) premise of reciprocity between citizens -- the all-important element of guaranteed mutuality in the achievement of a common purpose -- which reconciles the compulsory regulation of land use with the foundational principles of liberal democracy. All citizens are exposed, on precisely similar terms, to the risk that overriding public necessity may demand the sacrifice of some advantage associated with land; all are equally obliged to conserve and promote the quality of the natural or man-made environment.⁴⁵² When, however, this obligation is actualised, responsibility and reward are broadly correlative. In return for contributing to his fellow citizens' environmental welfare, each owner or occupier receives compensation either through the provision of publicly funded compensation or through his equal participation in the enhanced communal benefits generated by his own contribution. It is by such means that cherished values relating to stability of title and 'peaceful enjoyment', which counted for so much in the context of other sorts of dealings, are compromised where the relevant dealing involves the state as representative of the social or communal interest.

(a) A general rule of compensation for expropriations of title

Any alteration of the benefits and burdens of land ownership in promotion of the common good traditionally brings into play an important 'rule of political ethics'⁴⁵³ which operates equally or indifferently between all citizens. A profound common law bias against uncompensated expropriation stretches back to Magna Carta⁴⁵⁴ and prescribes 'as a principle of our constitutional law that no citizen is to be deprived of his land by any public authority against his will.'⁴⁵⁵ Privately held land may be compulsorily taken by the state only if 'the public

⁴⁵¹ See *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1410H-1411A [68], where Lord Hoffmann pointed out that the planning of land use raises 'questions of general welfare ... which transcend the interests of any particular individual.'

⁴⁵² 'Each member of the majority has a right only to a fair impact on his environment -- the same impact as any other single individual' (Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard UP, Cambridge, Mass 2000), p 214).

⁴⁵³ *Minister of State for the Army v Dalziel* (1944) 68 CLR 261 at 294-295 per McTiernan J.

⁴⁵⁴ See K J Gray, 'Land Law and Human Rights', in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), p 216.

⁴⁵⁵ *Prest v Secretary of State for Wales* (1983) 81 LGR 193 at 198 per Lord Denning MR.

interest decisively so demands: and then only on the condition that proper compensation is paid.⁴⁵⁶ Indeed recent years have seen a cranking up of judicial concern to protect the 'fundamental' or 'constitutional' rights of property owners from interference by administrative decisions of the state,⁴⁵⁷ with the result that these decisions are now measured against even more stringent standards of *Wednesbury* reasonableness.⁴⁵⁸ But when the landowner's rights are eventually outweighed by 'a substantial public interest',⁴⁵⁹ a consensus throughout the common law world holds that the economic impact of the dislocation of private interests must not be 'disproportionately concentrated on a few persons.'⁴⁶⁰ On any taking of property from the citizen for the benefit of the wider community, as Lord Hoffmann emphasised in *Grape Bay Ltd v Attorney-General of Bermuda*,⁴⁶¹ 'the loss should not fall upon the individual whose property has been taken but should be borne by the public as a whole.'⁴⁶² It would be wrong, in effect, that an individual citizen should be 'singled out to bear a burden which ought to be paid for by society as a whole.'⁴⁶³

Such a philosophy is wholly consistent with the approach adopted by the European Court of Human Rights in relation to the Convention guarantee of 'peaceful enjoyment' of possessions.⁴⁶⁴ In determining whether any particular state intervention in respect of land has violated this guarantee, the Court has consistently set itself the task of examining whether a 'fair balance' has been struck between 'the demands of the general interest of the community and the requirements of the protection of the individual's fundamental rights.'⁴⁶⁵ The 'fair

⁴⁵⁶ Ibid. See also *Belfast Corp'n v O D Cars Ltd* [1960] AC 490 at 517-518 per Viscount Simonds, 523 per Lord Radcliffe; *Burmah Oil Co Ltd v Lord Advocate* [1965] AC 75 at 112-113 per Lord Reid, 162-163 per Lord Pearce, 169-170 per Lord Upjohn; *Westminster Bank Ltd v Beverley BC* [1971] AC 508 at 535B per Viscount Dilhorne.

⁴⁵⁷ *Chesterfield Properties plc v Secretary of State for the Environment* (1998) 76 P & CR 117 at 129-131 per Laws J; *Bexley LBC v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 at [32] per Harrison J.

⁴⁵⁸ See *R v Ministry of Defence, ex p Smith* [1996] QB 517 at 554D-G per Sir Thomas Bingham MR; *Chesterfield Properties plc v Secretary of State for the Environment* (1998) 76 P & CR 117 at 129 per Laws J.

⁴⁵⁹ *Chesterfield Properties plc v Secretary of State for the Environment* (1998) 76 P & CR 117 at 131 per Laws J.

⁴⁶⁰ *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978) per Justice Brennan.

⁴⁶¹ [2000] 1 WLR 574 at 583D.

⁴⁶² Lord Hoffmann's formulation closely followed the classic rationale of the 'Takings Clause' enshrined in the Fifth Amendment of the United States Constitution, which directs that private property shall not 'be taken for public use, without just compensation.' See eg *Armstrong v United States*, 364 US 40 at 49, 4 L Ed 2d 1554 at 1561 (1960), where Justice Black saw the Fifth Amendment as barring government 'from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'

⁴⁶³ *Florida Rock Industries, Inc v United States* (1999) 45 Fed Cl 21 at 23 per Smith CJ.

⁴⁶⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Protocol No 1, Art 1.

⁴⁶⁵ *Sporrong and Lönnroth v Sweden*, Series A No 52, para 69 (1982); *James v United Kingdom*, Series A No 98, para 50 (1986); *Fredin v Sweden*, Series A No 192, para 51 (1991); *Holy Monasteries v Greece*,

balance' test thus seeks to weigh the private interest of one citizen against the collective interest of all, and the test is failed only where one landowner has been singled out to bear an 'individual and excessive burden' in relation to some community-directed obligation or sacrifice which should have been shared more broadly.⁴⁶⁶ Indeed, any excessively 'individualised' targeting of state action in respect of land begins to smack of a 'bill of attainder'⁴⁶⁷ and tends, simply by virtue of its arbitrary or random character, to fall foul of the guarantee of equal protection under the law.⁴⁶⁸ State intervention, in order to comply with the Convention guarantee of 'peaceful enjoyment', must also display a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised.'⁴⁶⁹ A significant component of the 'fair balance' test thus turns on the availability of state-funded compensation for those affected by state-directed interference with rights of property. It is generally agreed in European jurisprudence that the required 'fair balance' -- the achievement of *civic equity* -- is almost inevitably lacking unless the exercise of eminent domain (ie the compulsory acquisition of title by the state) is accompanied by the provision of state indemnity for the expropriated landowner.⁴⁷⁰

(b) A general rule of non-compensation for regulatory control of land use

More difficult by far is the application of the 'fair balance' test to those regulatory controls or other state exactions which leave title *intact* in a landowner's hands, but simultaneously curtail or redefine the uses which may be made of his or her land. Such intervention is typified by the many restrictions and requirements imposed through the modern law of planning and environmental protection. Here, in sharp contrast to its approach to outright *deprivations* of ownership, European jurisprudence expressly preserves the right of the state to 'enforce such laws as it deems necessary to control the use of property in accordance with the

Series A No 301, para 70 (1994); *Air Canada v United Kingdom*, Series A No 316-A, para 36 (1995); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 592 [106]. See also *Former King of Greece v Greece* (2001) 33 EHRR 21 at [89].

⁴⁶⁶ *Sporrong and Lönnroth v Sweden*, Series A No 52, para 73 (1982); *James v United Kingdom*, Series A No 98, para 50 (1986); *Håkansson and Sturesson v Sweden*, Series A No 121, para 51 (1990).

⁴⁶⁷ *An Blascaod Mór Teoranta v Commissioners of Public Works in Ireland* (High Court, 27 February 1998), per Budd J (affd *An Blascaod Mór Teoranta v Minister for Arts* [2000] 1 ILRM 401 at 409). See Lon L Fuller, *The Morality of Law* (Yale UP, New Haven and London 1964), pp 46-49 (referring to the 'requirement of generality' as an intrinsic component of the inner morality of law).

⁴⁶⁸ See eg *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2002] Ch 51 at 66B-C [45], 68B-D [51]-[53], where the Court of Appeal struck down, as non-compliant with the European Convention on Human Rights, a chancel repair liability which had improperly 'singled out' certain landowners for an archaic, arbitrary and unjustifiably discriminatory form of local taxation.

⁴⁶⁹ *James v United Kingdom*, Series A No 98, para 50 (1986); *Allan Jacobsson v Sweden*, Series A No 163, para 55 (1989). See also *Banér v Sweden* (1989) 60 DR 128 at 141-142; *Mellacher v Austria*, Series A No 169, paras 48, 57 (1989); *Fredin v Sweden*, Series A No 192, para 51 (1991). The United States Supreme Court has likewise confirmed that 'in a general sense concerns for proportionality animate the Takings Clause' (*City of Monterey v Del Monte Dunes*, 526 US 687, 143 L Ed 2d 882 at 900 (1999)).

⁴⁷⁰ *James v United Kingdom*, Series A No 98, para 54 (1986); *Lithgow v United Kingdom*, Series A, No 102, para 122 (1986); *Banér v Sweden* (1989) 60 DR 128 at 142; *The Holy Monasteries v Greece*, Series A No 301, para 71 (1994).

general interest.⁴⁷¹ Mere regulatory interference with the enjoyment of land carries no 'inherent' right to compensation for the affected landowner,⁴⁷² except in those extreme cases where, once again, it can be said that no 'fair balance' has been achieved as between the 'general interest of the community' and the 'fundamental rights' of the individual citizen.⁴⁷³ Such circumstances tend to arise only where the regulatory impact on a landowner's rights has been especially invasive, enduring or debilitating.⁴⁷⁴ The precise borderline between regulation and confiscation is, of course, notoriously elusive,⁴⁷⁵ but underlying the law of regulatory intervention is the widely acknowledged fear that extensive state intervention may allow government to 'do by regulation what it cannot do through eminent domain -- ie, take private property without paying for it.'⁴⁷⁶ At

⁴⁷¹ European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Protocol No 1, Art 1. The European Court has frequently confirmed that the 'control of use' proviso covers, in principle at least, most measures of urban planning (see *Sporrong and Lönnroth v Sweden*, Series A No 52, para 64 (1982); *Allan Jacobsson v Sweden*, Series A No 163, paras 54, 57 (1989); *Pine Valley Developments Ltd v Ireland*, Series A No 222, paras 59-60 (1991); *Katte Klitsche de la Grange v Italy*, Series A No 293-B, paras 47-48 (1994)) and environmental conservation (see eg *Denev v Sweden* (1989) 59 DR 127 at 130; *Banér v Sweden* (1989) 60 DR 128 at 140; *Fredin v Sweden*, Series A No 192, paras 47-48 (1991); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 600-601 [85]).

⁴⁷² See *Banér v Sweden* (1989) 60 DR 128 at 142. It has been conceded that some forms of land use regulation may constitute 'de facto expropriation' (see *Banér v Sweden*, supra at 139-140, citing *Sporrong and Lönnroth v Sweden*, Series A No 52, para 63 (1982); *Fredin v Sweden*, Series A No 192, paras 42-45 (1991); *Papamichalopoulos v Greece*, Series A No 260-B, paras 41-46 (1993)). See similarly *Davies v Crawley BC* [2001] EWHC Admin 854 at [131] per Goldring J.

⁴⁷³ See *Tesco Stores Ltd v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P & CR 427 at 429 per Sullivan J; *Marcic v Thames Water Utilities Ltd* [2002] QB 929 at 1002A [117]. See also *Booker Aquaculture Ltd v Secretary of State for Scotland* (1998) Times, 24 September; Court of Session: Inner House (Unreported, 12 August 1999). An interference with land rights which lacks 'proportionality' cannot, of course, be deemed 'necessary' in terms of Art 1 of Protocol No 1 or said to subserve the 'general interest' (*Banér v Sweden* (1989) 60 DR 128 at 141).

⁴⁷⁴ See *Allan Jacobsson v Sweden*, Series A No 163, para 55 (1989); *Air Canada v United Kingdom*, Series A No 316-A, para 36 (1995); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 599-602 [78]-[93]; *Chassagnou v France* (2000) 29 EHRR 615 at 674-675 [75]; *Pialopoulos v Greece* (2001) 33 EHRR 39 at [56]-[62]; *GL v Italy* (2002) 34 EHRR 41 at [20]-[26].

⁴⁷⁵ The search for this borderline has been likened to the 'lawyer's equivalent of the physicist's hunt for the quark' (*Williamson County Regional Planning Commn v Hamilton Bank of Johnson City*, 473 US 172 at 199, 87 L Ed 2d 126 at 147 (1985) per Justice Blackmun, quoting Charles M Haar, *Land-Use Planning* (3rd edn, Little, Brown & Co, Boston 1976), p 766). Nevertheless it has long been recognised that 'if regulation goes too far it will be recognised as a taking' (*Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 at 326 (1922) per Justice Holmes). See also *Belfast Corp v O D Cars Ltd* [1960] AC 490 at 519-520 per Viscount Simonds, 525 per Lord Radcliffe; *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583G per Lord Hoffmann.

⁴⁷⁶ *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 228 F3d 998 at 999 (2000) per Kozinski J. For evidence of increasing receptivity to the idea that certain forms of regulatory intervention may violate the 'peaceful enjoyment' clause of the European Convention on Human Rights, see *Allan Jacobsson v Sweden*, Series A No 163, para 55 (1989); *Air Canada v United Kingdom*, Series A No 316-A, para 36 (1995); *Matos e Silva, LDA and others v Portugal* (1997) 24 EHRR 573 at 600-602 [85]-[93]; *Chassagnou v France* (2000) 29 EHRR 615 at 674-675 [75]; *Pialopoulos v Greece* (2001) 33 EHRR 39 at [56]-[62]; *GL v Italy* (2002) 34 EHRR 41 at [20]-[26].

stake, as a Canadian court has pointed out, is the 'policy issue of how minutely government may control land without buying it.'⁴⁷⁷

Unlike the equivalent 'takings' law of the United States,⁴⁷⁸ European law -- here a term inclusive of English law -- has tended to be generally more receptive to the idea of non-compensable community-oriented constraints on land use.⁴⁷⁹ Even far-reaching forms of regulatory interference with the enjoyment or exploitation of land are broadly perceived as *undeserving* of publicly funded cash indemnity.⁴⁸⁰ In England, for instance, only limited rights to compensation are available where an existing planning permission is revoked or modified to the prejudice of the landowner⁴⁸¹ or where an existing use or development of land is ordered to be discontinued.⁴⁸² In itself, the refusal of planning permission carries no right to compensation for the disappointed applicant.⁴⁸³ Likewise the listing of a building as a site of 'special architectural or historic interest',⁴⁸⁴ although severely restrictive of the future alteration or development of the land, entitles the affected owner to no compensation from the public purse. The philosophy underlying modern planning legislation was, after all, that the 'development value of land, over and above the value attributable to an artificially defined "existing use" of the land, should be taken into public ownership.'⁴⁸⁵ Thereafter, for the

⁴⁷⁷ *Mariner Real Estate Ltd v Nova Scotia (Attorney General)* (1999) 177 DLR (4th) 696 at 699 per Cromwell JA (Court of Appeal of Nova Scotia).

⁴⁷⁸ For a brief, but excellent, survey of American takings law, see David L Callies, *Takings: An Introduction and Overview*, 24 Univ of Hawaii L Rev 441 (2002).

⁴⁷⁹ See *Belfast Corp v O D Cars Ltd* [1960] AC 490 at 517-8 per Viscount Simonds, 523-524 per Lord Radcliffe; *Grape Bay Ltd v Attorney-General of Bermuda* [2000] 1 WLR 574 at 583B-F per Lord Hoffmann; *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1411H-1412A [72] per Lord Hoffmann; *Davies v Crawley BC* [2001] EWHC Admin 854 at [115]-[117]. See also *Commonwealth of Australia v State of Tasmania* (1983) 158 CLR 1 at 283 per Deane J; *Cockburn v Minister of Works and Development* [1984] 2 NZLR 466 at 477 per McMullin J; *Luoni v Minister of Works and Development* [1989] 1 NZLR 62 at 65 per Cooke P; *R v Land Use Planning Review Panel, ex p MF Cas Pty Ltd* (Unreported, Supreme Court of Tasmania, 23 October 1998).

⁴⁸⁰ See eg Planning and Compensation Act 1991, s 31.

⁴⁸¹ Town and Country Planning Act 1990, ss 107(1), 108(1). Such compensation does not necessarily prevent owners from suffering 'hardship in being deprived of a substantial part of the value represented by the revoked permission' (*Canterbury CC v Colley* [1993] AC 401 at 406F per Lord Oliver of Aylmerton).

⁴⁸² Town and Country Planning Act 1990, ss 102(1), 115. See *Aslam v South Bedfordshire DC* [2000] RVR 121. See also Planning (Hazardous Substances) Act 1990, s 16(1)-(2) (revocation of hazardous substances consent); Wildlife and Countryside Act 1981, s 28M(1), as substituted by Countryside and Rights of Way Act 2000, s 75(1), Sch 9, para 1 (modification or withdrawal of consent to operations on a site of special scientific interest). Compensation is more readily provided where regulatory activity takes the form of a continuous physical invasion of land, eg through the installation of electricity transmission lines or pylons (see Electricity Act 1989, Sch 4, para 7).

⁴⁸³ *Westminster Bank Ltd v Beverley BC* [1971] AC 508 at 529E per Lord Reid, 535C per Viscount Dilhorne.

⁴⁸⁴ Planning (Listed Buildings and Conservation Areas) Act 1990, ss 1, 7-8.

⁴⁸⁵ *Canterbury CC v Colley* [1993] AC 401 at 407B per Lord Oliver of Aylmerton.

individual citizen, the development of land becomes 'not in general a matter of right',⁴⁸⁶ but merely a privilege granted at the discretion of the state in accordance with socially determined strategies of communally beneficial land use.⁴⁸⁷ It is true that, in certain rare (and restrictively defined⁴⁸⁸) circumstances of land use control, the landowner can require his local authority to purchase his interest in any land which has been rendered 'incapable of reasonably beneficial use in its existing state',⁴⁸⁹ but the courts have shown themselves remarkably slow to find that relevant land has been wholly sterilised by adverse planning outcomes.⁴⁹⁰ As Schiemann LJ pointed out in *Colley v Secretary of State for the Environment and Canterbury CC*,⁴⁹¹ the country 'is full of land which does not yield any or any significant immediate return to its owner ... [and] ... there is no reason to suppose that Parliament desired local authorities to act as estate agents for land which they did not wish to hold ... [or] ... hold huge landbanks of unmarketable land.'

This bias against publicly funded compensation may appear initially inconsistent with the historic concern of Magna Carta to protect citizens against arbitrary interference by the state. In the present context, however, the key lies in a generally unarticulated, but nevertheless fundamental, premise of reciprocity. In *Westminster Bank Ltd v Beverley BC*,⁴⁹² the House of Lords pointed out how the withholding of compensation for refusals of planning permission leaves all citizens equally positioned on a plane of mutual vulnerability to overriding community needs. Viscount Dilhorne emphasised that the disappointed landowner's only injury was to 'have lost in common with other landowners ... the right to develop their land as they wish.'⁴⁹³ Lord Reid added, with lugubrious even-handedness, that 'the unsuccessful applicant is in exactly the same position as other applicants whose applications are refused on other grounds. None of them gets any compensation.'⁴⁹⁴ At the

⁴⁸⁶ *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1437D [156] per Lord Clyde.

⁴⁸⁷ In the words of one American court, the development potential of land, although part of 'the bundle of rights which property lawyers understand to constitute property', may nevertheless be 'reserved to the state' (*Loveladies Harbor, Inc v United States*, 28 F3d 1171 at 1179 (Fed Cir 1994)).

⁴⁸⁸ See eg *R v Minister of Housing and Local Government, ex p Chichester RDC* [1960] 1 WLR 587 at 589; *Wain v Secretary of State for the Environment* (1981) 44 P & CR 289 at 300; *Cook and Woodham v Winchester CC* (1994) 69 P & CR 99 at 106-107; *R v North West Leicestershire DC and East Midlands International Airport Ltd, ex p Moses* [2000] JPL 1287 at 1299; *Davies v Crawley BC* [2001] EWHC Admin 854 at [99]; *Waltham Forest LBC v Secretary of State for Transport, Local Government and the Regions* [2002] EWCA Civ 330 at [14].

⁴⁸⁹ Town and Country Planning Act 1990, s 137(1)-(4). See eg *Gavaghan v Secretary of State for the Environment* (1989) 60 P & CR 515; *Douglas v Berwick-upon-Tweed BC* (Lands Tribunal, 30 July 1985). See also Planning (Listed Buildings and Conservation Areas) Act 1990, s 32(1)-(4); Highways Act 1980, s 246 (but note the restrictive construction in *Owen v Secretary of State for Transport* (Unreported, Court of Appeal, 14 October 1996)).

⁴⁹⁰ See the alternative uses found in *Whiston v Secretary of State for the Environment* [1989] JPL 178 at 179-180 (extended garden); *Colley v Secretary of State for the Environment and Canterbury CC* (1998) 77 P & CR 190 at 198 (woodland).

⁴⁹¹ (1998) 77 P & CR 190 at 197-198.

⁴⁹² [1971] AC 508.

⁴⁹³ [1971] AC 508 at 535B.

⁴⁹⁴ [1971] AC 508 at 529F.

root of the common law approach there is also a sense that the very *commonality* of citizenship normally excludes the possibility of public compensation for the adverse impact of socially directed land use policy.⁴⁹⁵ Speaking of one of the early urban planning statutes,⁴⁹⁶ Scrutton LJ surmised many years ago that 'Parliament may have taken a view that a landowner in a community has duties as well as rights, and cannot claim compensation for refraining from using his land where they think that it is his duty so to refrain.'⁴⁹⁷

In these circumstances there is little point in the affected landowner invoking the protective force of Magna Carta, not least since there is an increasingly stern reluctance today to view Magna Carta 'as some early Public Works Act compensation statute.'⁴⁹⁸ Indeed the law of environmental regulation -- at least on this side of the Atlantic -- resonates with the idea that the privileges of ownership are intrinsically delimited by community-directed obligation,⁴⁹⁹ with the consequence that regulatory intrusions which merely curtail improper or socially undesirable uses of land involve no *taking* of property, let alone any *compensable* taking.⁵⁰⁰ Deep at the heart of the concept of property is a fusion of the ideas of right and responsibility.⁵⁰¹ As Justice Frankfurter once said,⁵⁰² the regulatory control of land use, when viewed from this perspective, simply represents 'part of the burden of common citizenship.'⁵⁰³ The point has been richly illustrated somewhat closer to home. In *O'Callaghan v Commissioners of Public Works in Ireland and the Attorney General*⁵⁰⁴ the Supreme Court of Ireland flatly rejected the suggestion that public compensation was necessary in respect of

⁴⁹⁵ For advocacy of the concept of the 'citizen landowner', see Lynda L Butler, *The Pathology of Property Norms: Living within Nature's Boundaries*, 73 S Cal L Rev 927 at 990 (2000).

⁴⁹⁶ Housing, Town Planning, &c, Act 1909, s 59(2).

⁴⁹⁷ *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 372.

⁴⁹⁸ *Westco Lagan Ltd v Attorney-General* [2001] 1 NZLR 40 at 52 [42] per McGechan J. See also *Belfast Corp v O D Cars Ltd* [1960] AC 490 at 519 per Viscount Simonds.

⁴⁹⁹ Even in the United States there is some awareness that 'the purchase of a "bundle of rights" necessarily includes the acquisition of a bundle of limitations' (*Gazza v New York State Department of Environmental Conservation*, 679 NE2d 1035 at 1039 (NY 1997)). See eg *Esplanade Properties, LLC v City of Seattle*, 307 F3d 978 at 985-987 (2002) (where a United States Federal Court of Appeals held that the 'public trust' doctrine unquestionably burdened a plaintiff developer's shoreline tract and ensured that his 'claimed property right [to build] never existed').

⁵⁰⁰ See K J Gray, 'Land Law and Human Rights', in Louise Tee (ed), *Land Law: Issues, Debates, Policy* (Willan Publishing 2002), pp 237-243.

⁵⁰¹ See K J Gray, *Equitable Property*, (1994) 47(2) CLP 157 at 188-189. For a recent, and powerful, elaboration of this theme, see Joseph W Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, Boston 2000). See also Singer, *Entitlement: The Paradoxes of Property* (Yale UP 2000).

⁵⁰² *Kimball Laundry Co v United States*, 338 US 1 at 5, 93 L Ed 1765 at 1772 (1949). See also *Kim v City of New York*, 659 NYS2d 145 at 152 (Ct App 1997).

⁵⁰³ The citizen may also be expected to shoulder his or her share of the burden of the state's compliance with international obligations (see eg *Keane and Naughton v An Bord Pleanála* [1998] 2 ILRM 241 at 260-262 (construction of radio mast as navigational aid for international shipping)).

⁵⁰⁴ [1985] ILRM 364 at 367-368.

the compulsory preservation of a neolithic fort situated on farm land. Even though the relevant preservation order inhibited the farmer's gainful activity on the land concerned, O'Higgins CJ indicated that 'the common good requires that national monuments which are the prized relics of the past should be preserved as part of the history of our people.' The preservation of the fort was therefore 'a requirement of what should be regarded as the common duty of all citizens.'⁵⁰⁵

It is no accident that the English law of environmental control heavily endorses the philosophy that ownership is permeated by a civic duty to promote the common good.⁵⁰⁶ Thus, for instance, the planning policy guidance issued by central government urges, as the linchpin of heritage conservation, that 'the responsibility of stewardship is shared by everyone', not least by 'individual citizens as owners, users and visitors of historic buildings.'⁵⁰⁷ Likewise, where a site of special scientific interest is in private ownership, there is an insistence that individual owners and occupiers 'have been and will continue to be responsible for maintaining the conservation interest.'⁵⁰⁸ The government, whilst conceding the importance of securing and enhancing the conservation value of wildlife and earth heritage sites,⁵⁰⁹ is 'not prepared that public money should be paid out simply to prevent owners and occupiers from carrying out new operations which could destroy or damage these national assets.'⁵¹⁰ Where, for example, English Nature formulates a 'management scheme' for a site of special scientific interest, it may make payments to the affected landowner in respect of costs incurred and income forgone,⁵¹¹ but such payments are calculated on the assumption that the landowner is already complying with 'verifiable standards of good farming practice laid down in ... the England Rural Development Plan.'⁵¹² Moreover, during the currency of any 'management agreement' with English Nature, the owner or

⁵⁰⁵ Likewise, in the United States, heritage preservation has generally been declared non-compensable as 'fostering ends the community deems worthy' (*Maher v City of New Orleans*, 516 F2d 1051 at 1060 (1975)). See David L Callies, *Historic Preservation Law in the United States*, 32 ELR 10348 (2002). See also *Harvard Investments Ltd v City of Winnipeg* (1995) 129 DLR (4th) 557 at 561-565 per Philp JA; *Lumber Specialties Ltd v Hodgson* [2000] 2 NZLR 347 at 371 [148] per Hammond J.

⁵⁰⁶ For an insightful exploration of the preservation of ecological value as a new form of natural law, see Jane Holder, *New Age: Rediscovering Natural Law*, (2000) 53 CLP 151.

⁵⁰⁷ Department of the Environment, *Planning Policy Guidance Note 15: Planning and the Historic Environment* (PPG15 published September 1994), para 1.7.

⁵⁰⁸ Department for Environment, Food and Rural Affairs, *Sites of Special Scientific Interest: Encouraging Positive Partnerships: Public Consultation Paper on Code of Guidance* (1 September 2000), para 84.

⁵⁰⁹ See Department for Environment, Food and Rural Affairs, *Sites of Special Scientific Interest: Encouraging Positive Partnerships: Public Consultation Paper on Code of Guidance* (1 September 2000), paras 1-2; Office of the Deputy Prime Minister, *Planning Policy Guidance Note 9: Nature Conservation* (PPG9 published 18 February 2002), para 3.

⁵¹⁰ Department for Environment, Food and Rural Affairs, *Guidelines on Management Agreement Payments: Consultation Paper* (26 July 2000), para 8.

⁵¹¹ Wildlife and Countryside Act 1981, s 28M(2)-(3), as substituted by Countryside and Rights of Way Act 2000, s 75(1), Sch 9, para 1. See Department for Environment, Food and Rural Affairs, *Sites of Special Scientific Interest: Encouraging Positive Partnerships: Public Consultation Paper on Code of Guidance* (1 September 2000), para 27.

⁵¹² Department for Environment, Food and Rural Affairs, *Guidelines on Management Agreement Payments: Consultation Paper* (26 July 2000), para 10.

occupier of farm land is required to 'keep to at least the standard of usual good farming practice throughout the farm' and, in respect of non-agricultural land, the owner or occupier must 'keep to at least the standard of usual good land management practice throughout the holding'.⁵¹³ Such obligations merely reflect an instinctive sense that the community is already entitled to a public interest forbearance on the part of landowners as an indelible (and non-compensable) component of the privilege of proprietorship.

In these (and many other) ways both English common law and Convention case law place an implicit emphasis on obligations of civic cohesion -- on an interlinked network of socialised duty -- as underpinning the reality of land ownership amidst the complex interdependency of modern life.⁵¹⁴ As Lord Hoffmann put it in *Grape Bay Ltd v Attorney-General of Bermuda*,⁵¹⁵ '[t]he give and take of civil society frequently requires that the exercise of private rights should be restricted in the general public interest'.⁵¹⁶ If government were required to indemnify every regulatory intervention in the life of the citizenry, the power to legislate for peace, order and good government 'would be abridged to an unthinkable degree'.⁵¹⁷ Once again, we find ourselves drawn to the classic dictum of Oliver Wendell Holmes that government 'could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law'.⁵¹⁸ In the equally sage words of Lord MacDermott LCJ more than a generation later, some uncompensated regulation of private rights for the public benefit is quite 'inevitable' in any 'community ordered by law'.⁵¹⁹

There are, of course, more pragmatic reasons why the regulatory activity of the state cannot give rise to general rights of compensation from public funds. Our own Lands Tribunal has recently noted, for example, that if everyone adversely affected by the implementation of a new road scheme were entitled to compensation, 'the consequences would be enormous'.⁵²⁰ Even American courts have realised that to regard all regulatory impositions as compensable 'takings' would 'transform government regulation into a luxury few

⁵¹³ Ibid, para 13.

⁵¹⁴ For a perceptive account of the idea of property as 'propriety' -- of property as intimately connected with civic virtue and therefore a 'private basis for the public good' -- see Gregory S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought 1776 - 1970* (Univ of Chicago Press 1997).

⁵¹⁵ [2000] 1 WLR 574 at 583C. See also *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1411F [71] per Lord Hoffmann.

⁵¹⁶ See *Davies v Crawley BC* [2001] EWHC Admin 854 at [140] per Goldring J on the materiality of Lord Hoffmann's analysis to the European Convention on Human Rights.

⁵¹⁷ *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 87 per Lord MacDermott LCJ. See also *Slattery v Naylor* (1888) 13 App Cas 446 at 449-50 per Lord Hobhouse.

⁵¹⁸ *Pennsylvania Coal Co v Mahon* 260 US 393 at 413, 67 L Ed 322 at 325 (1922).

⁵¹⁹ *O D Cars Ltd v Belfast Corporation* [1959] NI 62 at 87-88.

⁵²⁰ *Wagstaff v Department of the Environment, Transport and the Regions* [1999] 2 EGLR 108 at 116G-K.

governments could afford.⁵²¹ The costs of social and economic organisation would become wholly prohibitive. In one of the latest ‘takings’ cases in the United States Supreme Court, Justice Stevens pointed, moreover, to the spectre of a ‘tremendous -- and tremendously capricious -- one-time transfer of wealth from society at large to those individuals who happen to hold title to large tracts of land’ in environmentally sensitive locations.⁵²²

(c) The ‘environmental contract’

The assurance of reciprocity between citizens is also heavily reinforced by the ‘plan-led’ system of development control which prevails throughout the United Kingdom.⁵²³ The planning process is dominated by a hierarchy of structure and local development plans⁵²⁴ which are intended to provide a ‘framework for rational and consistent decision making.’⁵²⁵ Planning authorities are required to ‘have regard to the provisions of the development plan, so far as material to the application, and to any other material considerations.’⁵²⁶ Where an adopted or approved development plan contains relevant policies, applications for planning permission must be determined ‘in accordance with the plan unless material considerations indicate otherwise.’⁵²⁷ Although the development plan possesses no ‘absolute authority’,⁵²⁸ there is a strong ‘presumption that the development plan is to govern the decision on an application for planning permission.’⁵²⁹

⁵²¹ *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302 at 324, 152 L Ed 2d 517 at 541 (2002) per Justice Stevens. See also *Belfast Corp v O D Cars Ltd* [1960] AC 490 at 518 per Viscount Simonds; *Florida Rock Industries, Inc v United States* (1999) 45 Fed Cl 21 at 23 per Smith CJ.

⁵²² *Palazzolo v Rhode Island*, 533 US 606 at 645, 150 L Ed 2d 592 at 624-625 (2001).

⁵²³ Department for Transport, Local Government and the Regions, *Planning Policy Guidance Note 1: General Policy and Principles* (PPG1 published 22 August 2001), para 40. See also *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1457B-C per Lord Clyde; *House Builders Federation Ltd v Stockport MBC* [2000] JPL 616 at 618 per Forbes J.

⁵²⁴ The Planning and Compulsory Purchase Bill 2002 (introduced on 4 December 2002) proposes, in relation to England, to consolidate the existing hierarchy of plans in a unitary system of ‘local development documents’ (clauses 14, 16).

⁵²⁵ Office of the Deputy Prime Minister, *Planning Policy Guidance Note 12: Development Plans* (PPG12 published 18 January 2000), para 1.1. See eg *Bradford City MC v Secretary of State for the Environment* (1986) 53 P & CR 55 at 65, where Lloyd LJ stressed the ‘public interest in securing the fair imposition of planning control as between one developer and another.’

⁵²⁶ Town and Country Planning Act 1990, s 70(2).

⁵²⁷ Town and Country Planning Act 1990, s 54A. For reference to the increased importance of the development plan following the introduction of section 54A by Planning and Compensation Act 1991, s 26, see *R v Canterbury CC, ex p Springimage Ltd* (1993) 68 P & CR 171 at 177.

⁵²⁸ *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1450B-C per Lord Hope of Craighead. See also *Simpson v Edinburgh Corp*, 1960 SC 313 at 318-319 per Lord Guest. For a recent instance of departure from the development plan, see *Bexley LBC v Secretary of State for the Environment, Transport and the Regions* [2001] EWHC Admin 323 at [97].

⁵²⁹ *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1458C-D per Lord Clyde. See also *Westminster CC v Great Portland Estates Plc* [1985] AC 661 at 670A per Lord Scarman; *R v Leominster DC, ex p Potheary* (1997) 76 P & CR 346 at 354 per Schiemann LJ.

The 'priority'⁵³⁰ so clearly accorded the development plan goes a long way towards achieving what the Supreme Court of Ireland has described as an 'environmental contract between the planning authority, the Council, and the community.'⁵³¹ This 'environmental contract' embodies a promise that private development will be regulated 'in a manner consistent with the objectives stated in the plan and, further, that the Council itself shall not effect any development which contravenes the plan materially.' As McCarthy J indicated in *Attorney General (McGarry) v Sligo CC*,⁵³² 'the private citizen, refused permission for development on such grounds based upon such objectives, may console himself that it will be the same for others during the currency of the plan, and that the Council will not shirk from enforcing these objectives on itself.' This theme of parity of treatment pervades the field of environmental control. Thus, for example, one of the 'principal objectives' of the government's proposed guidelines on the management of sites of special scientific interest is the achievement of 'equality of treatment for all owners/occupiers of designated sites.'⁵³³ This imperative not only places a premium on the application of 'common standards' for the identification of nationally important wildlife and earth science areas.⁵³⁴ It also has the consequence that 'disparity of treatment of owners and occupiers, with regard to payments and incentives for the maintenance and enhancement of land and property with a special interest, is no longer sustainable and should be substantially harmonised.'⁵³⁵

The element of civic equity implicit in environmental regulation is further intensified by the way in which public planning objectives are underpinned by at least some crude version of participatory democracy.⁵³⁶ The planned character of the regulatory process, with its associated practices of consultation, notification and public inquiry, provides 'a system which enables the whole community ... to be fully involved in the shaping of planning policies for their area.'⁵³⁷ An increasingly important emphasis is nowadays placed on the

⁵³⁰ *City of Edinburgh Council v Secretary of State for Scotland* [1997] 1 WLR 1447 at 1458B, G per Lord Clyde.

⁵³¹ *Attorney General (McGarry) v Sligo CC* [1991] 1 IR 99 at 113 per McCarthy J. The terminology of 'environmental contract' has been widely adopted in Irish planning jurisprudence (see eg *Blessington & District Community Council Ltd v Wicklow CC* [1997] 1 IR 273 at 288 per Kelly J; *Coonagh v An Bord Pleanála* (Irish High Court, 26 February 1998); *Duffy v Mayor, Aldermen and Burgesses of the City of Waterford* (Irish High Court, 21 July 1999)).

⁵³² [1991] 1 IR 99 at 113.

⁵³³ Department for Environment, Food and Rural Affairs, *Guidelines on Management Agreement Payments: Consultation Paper* (26 July 2000).

⁵³⁴ Department for Environment, Food and Rural Affairs, *Sites of Special Scientific Interest: Encouraging Positive Partnerships: Public Consultation Paper on Code of Guidance* (1 September 2000), para 12.

⁵³⁵ Department for Environment, Food and Rural Affairs, *Guidelines on Management Agreement Payments: Consultation Paper* (26 July 2000).

⁵³⁶ See *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1412A [72] per Lord Hoffmann.

⁵³⁷ Office of the Deputy Prime Minister, *Planning Policy Guidance Note 12: Development Plans* (PPG12 published 18 January 2000), para 1.1.

communication and explication of environmental strategies.⁵³⁸ In consequence there is an overriding sense that the individual citizen has already participated in the determination of collective environmental priorities.⁵³⁹ Accordingly, the citizen is both obligated to share the burdens entailed by these priorities and entitled to vindicate the general public interest in the preservation of environmental welfare. Indeed, the validity of the citizen's interest in the environment is amply demonstrated by the recent liberalisation of locus standi rules on behalf of those who wish to promote or defend environmental amenity⁵⁴⁰ and by the acknowledgement that rights to 'use' and 'enjoy' land comprise 'civil rights' falling within the ambit of the entitlement to a 'fair and public hearing' guaranteed by Art 6(1) of the European Convention on Human Rights.⁵⁴¹ Environmental issues 'by their very nature affect the community as a whole in a way a breach of an individual personal right does not'⁵⁴² and there is, accordingly, an increasing recognition of 'the huge stake the public at large have' in relation to the preservation and protection of environmental value.⁵⁴³

(d) Average reciprocity of advantage

The meta-principle of civic reciprocity plays one further, and quite vital, role in supplementing the logic of non-compensable regulation of land use. It has long been recognised that the diffusion of the local or public benefits generated by the state's regulatory activity frequently produces an 'average reciprocity of advantage'

⁵³⁸ For example, the notification of sites of special scientific interest must be accompanied by an explanation of the significance of the site and a 'short but clear statement of the management requirements for the site' (Department for Environment, Food and Rural Affairs, *Sites of Special Scientific Interest: Encouraging Positive Partnerships: Public Consultation Paper on Code of Guidance* (1 September 2000), paras 14-15).

⁵³⁹ See *Banér v Sweden* (1989) 60 DR 128 at 141-143; *Aston Cantlow and Wilmcote with Billesley PCC v Wallbank* [2002] Ch 51 at 66D [46]. It is this sense of individual complicity with government in the business of sensible environmental regulation which is most deeply threatened by the recent proposal that certain aspects of strategic planning be removed from the purview of democratically elected organs of local government and, in the supposed interests of more efficient and better co-ordinated planning, determined instead by centrally appointed regional planning bodies (see Planning and Compulsory Purchase Bill 2002, clauses 2-3). The Bill provides, by way of counter-balance, that every local planning authority must prepare, and comply with, a 'statement of community involvement', ie a statement of the authority's 'policy as to the involvement ... of persons who appear to the authority to have an interest in matters relating to development in their area' (clauses 17(1)-(2), 18(3)).

⁵⁴⁰ See eg *R v Canterbury CC, ex p Springimage Ltd* (1993) 68 P & CR 171 at 176; *R v Inspectorate of Pollution, ex p Greenpeace Ltd (No 2)* (Unreported, Queen's Bench Division, 29 September 1993) per Otton J (see also [1994] 4 All ER 329).

⁵⁴¹ *R (Alconbury Developments Ltd and others) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1399G [28] per Lord Slynn of Hadley, 1434D [148] per Lord Clyde, 1445F [182] per Lord Hutton. See also *Oerlemans v The Netherlands* (1991) 15 EHRR 561 at 581 [46]-[49]; *R v English Nature, ex p Aggregate Industries UK Ltd* [2002] EWHC Admin 908 at [73] per Forbes J; *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 at 2524B-C [14].

⁵⁴² *Lancefort Ltd v An Bord Pleanála (No 2)* [1999] 2 IR 270 at 292 per Denham J.

⁵⁴³ *Murphy v Wicklow CC* (Irish High Court, 19 March 1999) per Kearns J.

for all concerned.⁵⁴⁴ In so far as regulatory intervention enhances the quality of life for all in a neighbourhood or protects our common heritage, wildlife or landscape, the individual citizen's proprietary rights can be seen as having been curtailed in exchange for improved civic rights to environmental welfare.⁵⁴⁵ Cities are thereby rendered more attractive and efficient; the beauty of the countryside and the stark grandeur of wild places are preserved on behalf of us all.⁵⁴⁶ As Justice Stevens remarked in the United States Supreme Court, '[w]hile each of us is burdened somewhat by [environmental] restrictions, we, in turn, benefit greatly from the restrictions that are placed on others.'⁵⁴⁷ The broad mutuality of benefit and burden means, in effect, that a dimension of compensation is already inherent in the very mechanism of regulation.⁵⁴⁸

Guaranteed participation in the general regulatory dividend goes some substantial distance towards securing the civic equity essential to harmonious co-existence in today's mass society. It was Justice Brandeis who pointed out, many years ago, that the ultimate benefit of an elevated norm of reciprocity is precisely 'the advantage of living and doing business in a civilized community.'⁵⁴⁹ As the Supreme Court of California explained more recently in *San Remo Hotel LP v City and County of San Francisco*,⁵⁵⁰ 'the necessary reciprocity of advantage lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners.'⁵⁵¹ Instead, said Werdegar J, the essence of the reciprocity principle lies in 'the interlocking system of benefits, economic and noneconomic,

⁵⁴⁴ The phrase is, predictably, that of Justice Holmes (see *Pennsylvania Coal Co v Mahon*, 260 US 393 at 415, 67 L Ed 322 at 326 (1922)). There is, however, evidence that Holmes kept abreast of contemporary English case law and would have been aware of Scrutton LJ's observation in *Re Ellis and Ruislip-Northwood UDC* [1920] 1 KB 343 at 370 that Parliament had 'sacrificed the individual to the welfare of the area possibly thinking that the increased value of the rest of the land would compensate him for the fetter imposed on part of the land.'

⁵⁴⁵ The affected landowner 'has in a sense been compensated by the public program "adjusting the benefits and burdens of economic life to promote the common good"' (*Florida Rock Industries, Inc v United States*, 18 F3d 1560 at 1570 (Fed Cir 1994), quoting *Penn Central Transportation Co v New York City*, 438 US 104 at 124, 57 L Ed 2d 631 at 648 (1978) per Justice Brennan). See also *Hendler v United States*, 36 Fed Cl 574 at 588 (1996); *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1 at 283 per Deane J (referring to 'the adjustment of competing claims between citizens in a field which needs to be regulated in the common interest').

⁵⁴⁶ For a classic description of the beneficial effects of regulation, see *Berman v Parker*, 348 US 26 at 33, 99 L Ed 27 at 37-38 (1954) per Justice Douglas.

⁵⁴⁷ *Keystone Bituminous Coal Association v DeBenedictis*, 480 US 470 at 491, 94 L Ed 2d 472 at 492 (1987) per Justice Stevens. See also *Tahoe-Sierra Preservation Council, Inc v Tahoe Regional Planning Agency*, 535 US 302 at 324, 152 L Ed 2d 517 at 552 (2002) per Justice Stevens.

⁵⁴⁸ See *Florida Rock Industries, Inc v United States* (1999) 45 Fed Cl 21 at 36-37 per Smith CJ. Likewise Australian courts tend to withhold publicly funded compensation where the only identifiable benefit derived from the regulatory process is 'one generally enjoyed by the whole community in the public interest' (see *Chapman v Luminis Pty Ltd (No 5)* [2001] FCA 1106).

⁵⁴⁹ *Pennsylvania Coal Co v Mahon*, 260 US 393 at 422, 67 L Ed 322 at 329 (1922).

⁵⁵⁰ 41 P3d 87 at 109 (2002).

⁵⁵¹ For a recent and critical exploration of the idea of reciprocal advantage, see Hanoch Dagan, *Takings and Distributive Justice*, 85 Va L Rev 741 (1999); Dagan, *Just Compensation, Incentives and Social Meanings*, 99 Mich L Rev 134 (2000).

that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.' In this way, as Frank Michelman once wrote, 'we can arrive at an acceptable level of assurance that *over time* the burdens associated with collectively determined improvements will have been distributed "equally" enough so that everyone will be a net gainer.'⁵⁵² Social control of land use emerges, on this basis, as a highly successful Pareto-optimal device of environmental regulation.

5. The task of rationalisation

This essay has been devoted to an exploration of the various forms of reasoning displayed in our law of land. But so much for overriding norms of rationality, reasonableness and reciprocity. We have, so far, said nothing of the task of *rationalisation* -- and without rationalisation there can be no 'law' at all. To be sure, we would be left with myriad passages of judicial utterance; there would be the deadweight of many thousands of pages of statutory prescription. Yet, in the absence of any systematic exposition of the 'law', there would be no connecting narrative, no orderly collocation of ideas and principles, no navigational aid to guide either lawyer or lay person through the otherwise impenetrable labyrinth.⁵⁵³ We would be faced with an unmanageable heap of information and no effective index, in much the same way that pre-Blackstonian land law was reputed, for want of any authoritative elucidation, to be an 'incomprehensible mystery' for almost all observers.⁵⁵⁴ The process of rationalisation -- the weaving together of the frail and sometimes ragged strands of legal formulae -- is indeed an indispensable, and little remarked, precondition of the intelligibility of law. Even though no grand claim be made that the law exhibits any form of immanent rationality or overall doctrinal cohesion, the systematic identification, co-ordination and reconciliation of relevant principles are essential precursors to any genuine public or professional understanding of legal phenomena. Orderly exposition performs, moreover, a constitutional role of some importance. The reasoned communication of legal rules can properly be seen as a vital foundation of the inner morality of law⁵⁵⁵ and ultimately as a *sine qua non* of democratic governance in a free and informed society.

Many years ago the House of Lords, acting in its judicial capacity, grandly disclaimed any general obligation 'to rationalise the law of England',⁵⁵⁶ perceiving its mandate as merely that of doing justice to individual

⁵⁵² Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law*, 80 Harv L Rev 1165 at 1225 (1966-67). See also Michelman, *Testimony before the Senate Committee on Environment and Public Works*, June 27, 1995, 49 Wash U J Urb & Contemp L 1 at 11 (1996).

⁵⁵³ As Max Radin said, the 'accumulation and rationalization of [the lawyer's] decisions *is the law*' (*The Permanent Problems of the Law*, 15 Cornell LQ 1 (1929-30) (emphasis added)).

⁵⁵⁴ See A W B Simpson, *A History of the Land Law* (2nd edn, Clarendon 1986), p 272.

⁵⁵⁵ See Lon L Fuller, *The Morality of Law* (Yale UP, New Haven and London 1964), pp 49-51, 93, 185-186.

⁵⁵⁶ *Read v J Lyons & Co Ltd* [1947] AC 156 at 175 per Lord Macmillan.

litigants according to the law.⁵⁵⁷ This self-abnegation may perhaps be less marked today,⁵⁵⁸ but even the more modest objective of particularised justice would frequently have proved unattainable, especially in highly complex or rapidly changing sectors of the law, without the assistance of an expository literature of unusual intellectual insight and vigour.⁵⁵⁹ In recent years the task of rationalising the law in this jurisdiction -- certainly the law relating to real property -- has been left very largely to the jurist (and particularly to the university-based jurist). Courts and professional lawyers have tended to concentrate their labour on areas of purely localised or interstitial development,⁵⁶⁰ and it has fallen instead to the textbook writer to contextualise and orientate the propositional knowledge of land law. The role is essentially that of secular theologian. Unseen by the reader, the textbook writer fights a thousand lonely battles in the attempt to make sense out of dislocated shards of legal logic. It is he or she who co-ordinates a conspectus, not of isolated corners of real property expertise, but of the broader framework of the law of realty; it is he or she who arranges a plausibly harmonious taxonomy of concepts, doctrines and outcomes; it is he or she who mediates the collective instincts and perceptions emanating from within the law's interpretive community.⁵⁶¹ In many instances it is, effectively, the textbook writer who *legislates*. The judge remains, in some sense, the kadi under the palm tree, listening intently to counsel's submissions as framed against the background of scholarly accounts of the law. The task of the writer has become that of fashioning a communicable narrative of reasoned and reasonable conclusions from what might otherwise have appeared to be a stream of adventitious judicial opinion. To the extent that either courts or professional lawyers demonstrate any structured consistency in the discharge of their duties, their achievement is attributable, in no small measure, to the fact that they have read and internalised, even if they do not always cite, the textbooks of the law.⁵⁶² It is the jurist -- the scholarly writer -- who has silently borne a large part of the burden of imposing an intelligible order upon the chaos of social and legal fact.

During the past three decades the doyen of the interpretive community of property lawyers in this country has been, unquestionably, Professor Edward Burn. Indeed the period of particular analysis in this essay -- the last 30 years of juristic endeavour -- has coincided almost exactly with Edward Burn's magisterial authorship of successive editions of Cheshire and Burn's *Modern Law of Real Property* and his many other works on property and trusts. With quiet dignity and authority Professor Burn has dedicated a lifetime to the rationalisation of the law. In the discharge of this formative role he has left many generations of students --

⁵⁵⁷ See also Pierre Legrand, 'Alterity: About Rules, For Example', in Peter Birks and Arianna Pretto (ed), *Themes in Comparative Law In Honour of Bernard Rudden* (Oxford UP 2002), pp 23-24.

⁵⁵⁸ See, however, *J A Pye (Oxford) Ltd v Graham* [2002] 3 WLR 221.

⁵⁵⁹ See eg Peter Birks, *Adjudication and interpretation in the common law: a century of change*, (1994) 14 *Legal Studies* 156 (referring to university law schools as 'the guardians of the law's rationality').

⁵⁶⁰ See K J Gray, 'Property in Common Law Systems', in G E van Maanen and A J van der Walt (ed), *Property Law on the Threshold of the 21st Century* (MAKLU, Antwerp, 1996), p 279.

⁵⁶¹ On some of the difficulties inherent in this task, see K J Gray (2002) 37 *Irish Jurist* (NS) 325.

⁵⁶² See Robert Goff, *Judge, Jurist and Legislature*, [1987] *Denning LJ* 79 at 92 ('It is the textbook which provides the framework of principle within which we work ... I find it difficult to imagine how I would carry on my work without modern legal textbooks'). See also Neil Duxbury, *Jurists and Judges: An Essay on Influence* (Hart Publishing 2001), p 105.

and we are *always* students -- peculiarly in his debt. His achievement is monumental -- were it not for his incisive analyses of the law, we should have lived through another Dark Age of property jurisprudence. Instead, Edward Burn has illuminated the way to a vastly enhanced understanding of modern property law, a task which he continues to perform with elegance, humanity and good humour. His writings combine, in rare fashion, the art of pellucid communication and the product of a deeply reasoning and superbly organised mind. His life's work has greatly enriched both the discipline in which he has laboured and the intellectual experience of all who have followed in his shadow. It is therefore with affection and respect that we salute him and dedicate to him our contribution to this celebratory volume.