



Equity, Imagination and Contested Narratives

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Abstract

Justice and the idea of the moral good pervade legal philosophy and underlie much of legal practice in different contexts. They are particularly resonant in the law of equity and the remedies it makes available. This article uses equity and conceptions of justice explores the role of narratives, fairness and values through the lens of the constructive trust, science fiction, temporality, the counterfactual imagination and creativity. This special edition's theme of intersectionalities within law is a central analytical thread. Power dynamics and the place of equity in social dialogues around justice and fairness are set alongside socioeconomic vulnerability and othering in understanding how the law succeeds and fails in managing emerging inequalities. A lack of autonomy and voicelessness is often revealed through constrained access to law and legal services, as well as a more vulnerable relationship with time. Engaging the constructive trust provides interesting opportunities to examine the role of the trust within law, and through that explore wider discussions about the nature of legal systems and the remedies they may give rise to. Science fiction has always provided opportunities to create counterfactual worlds and engage hypothetical questions, many of which might illuminate contemporary debates or resonate forward to emerging concerns. Imagination is a central tenet of these worlds, as well as, increasingly, within law when faced with emerging technologies and the issues they present. The article concludes with an acknowledgement that such narratives and opportunities to question social norms can be a valuable tool in grounding societal change.

Keywords Equity · Imagination · Narratives · Justice · Constructive trust

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Introduction

Equitable principles pervade the discipline and practice of law. Even when they do not bear on judgements or legal arguments within individual cases, they inform universal philosophical questions about what the social role of law, and what it should seek to do.¹ Such issues affect legislators and those practicing and informing the law as well as the interface between the human and, increasingly, non-human elements of the legal system. The interactions between component parts produce intersectional moments where the law, social norms, justice and fairness converge. These outcomes materially impact how those served or affected by the law understand its social position as well as their place within and without it, discussed by Joe Tomlinson among others in relation to law and technology.²

After setting out core themes, this article explores equity's place within social dialogues around justice and fairness through the remedies it makes uniquely available, specifically the constructive trust. It then explores the role of stories in both feeding into and being informed by a cultural understanding of law and the wider moral good, with focus on the writing of Mary Shelly and Isaac Asimov. Narratives and societal dialogues pervade and characterise law, even, as Thomas Joo emphasises, the concrete and quantitative world of corporate law.³

An exploration of law's relationship with time follows, through conceptions of what the world might or can be, engaging practical elements of the law, legal terminology and temporality.⁴ Using an idea from H.G. Wells it draws out themes of the law as a gatekeeper of social time, and socioeconomic vulnerability through discussion of time and technology.⁵ The final section explores how the imaginative underpinnings of counterfactual and hypothetical worlds, essential in narrative creation, also play an important role in common law and in equity.⁶ With the arrival of increasingly potent artificial intelligence technologies in the legal space, the law's relationship with time, creativity and probability is changing significantly.⁷

¹ Schepple draws out the value in asking the normative questions of 'is' or 'ought' within law, articulating it as 'a moral mythology' (Kim Schepple, '*Legal Secrets: Equality and Efficiency in the Common Law*' (1998) UCP 4).

² Whether, and when, people may safely rely on the law, and trust it to protect them. Tomlinson has written extensively on this issue, specifically with regard to 'digital justice', discussed below (see recently P Daly and colleagues, '*Administrative law in the digital world*' in Carol Harlow ed., *Research Handbook on Administrative Law* (Edward Elgar 2021).

³ '*Narrative, Myth, and Morality in Corporate Legal Theory*' (2009) MSLR 1091.

⁴ Perspectives from Wistrich and Greenhouse are instrumental to this engagement: Carol Greenhouse, '*Just in Time: Temporality and the Cultural Legitimation of Law*' (1989) 98 YLJ; Andrew Wistrich, '*The Evolving Temporality of Lawmaking*' (2012) 44 CLR 3.

⁵ A concept discussed later, H.G. Wells, *The Time Machine* (Heinemann 1895).

⁶ As underlined by: Mitchell Travis, '*Making Space: Law and Science Fiction*' (2011) 23 LL 2; Kieran Tranter, '*The speculative speculative jurisdiction: The science fictionality of law and technology*' (2011) 20 GLR 4 and Jennifer Zedalis, '*The Time-traveling Lawyer: Using Time Travel Stories and Science Fiction in Legal Education*' (2022) 11 BJALS 2.

⁷ See Anthony Casey and Anthony Niblett, '*Problems with Probability*' (2023) UTLR (forthcoming) <<https://muse.jhu.edu/article/900449/pdf>> Accessed 01.07.23.

Core Themes and Relevance

It is argued by many legal practitioners that before the law is anything else, it must be clear and comprehensible. In his 2011 Shrieval lecture, Lord Manse brings the problem of legal certainty into sharp focus; in opening he quotes Lord Bingham, who argues for the qualities of legal intelligibility, clarity and predictability alongside the paramount requirement of accessibility.⁸ This argument focuses on the ideal of the book's title, the Rule of Law, and gives rise to an interesting question.⁹ Considering counterfactuals, and a social justice-focussed investigation, what else might accessibility mean for law?¹⁰ Pertinently here, how does it connect to emerging vulnerabilities in a time of increasing and multifaceted austerity?

If a healthcare service is described as 'accessible', that is not only to say that one should know how to access it, but that one should be able to. In his exploration of healthcare through speculative dystopias, Phillip Barish stresses the importance of 'narrative medicine'.¹¹ As articulated cogently by Jennifer Zedalis, narratives shape our shared human experience and provide a springboard for the critical imagination, with implications beyond entertainment.¹² If individuals in need cannot access the law or legal services, a world-renowned system is not enough. It matters fundamentally that it is accessible. The change in healthcare access in the UK over recent years could scarcely emphasise this more firmly.¹³

The ongoing crisis with legal aid, while not generating the same headlines, exemplifies this problem of access within law.¹⁴ Asking 'what if' and questioning prevailing narratives of accessibility and fairness reaches beyond law and outlines

⁸ Lord Mance, 'Should the law be certain?' (The Oxford Shrieval lecture, 2011) p2; Lord Bingham, *The Rule of Law*, (Penguin 2011) 37, see also *Deutsche Milchkontor GmbH v Germany* (Joined Cases 205–215/82) [30] for the importance of assurance of certainty within the EU legal system, but also that it be balanced against associated costs.

⁹ Bingham (n 8), this is not meant as a criticism of the book, but as an opportunity to explore alternative meanings of the accessibility of law.

¹⁰ The role of science fiction in probing the causes and future implications of social inequality is developed by Ellie Campbell and Antonia Eliason, 'Teaching Law and Science Fiction at the University of Mississippi' (2021) 52 SFRA Review 1, 165–171, Mitchell Travis (n 6) and others.

¹¹ A separate but relevant area of dystopian narrative as societal critique is healthcare: Philip Barish, 'Health Policy in Dystopia' (2016) 34 LM 1. This piece explores the consequences of emerging social vulnerabilities taken to a hypothetical extreme in discussion of the film *Elysium*; it is not difficult to imagine this applying in the same way to a future legal framework with public services becoming increasingly stressed.

¹² Zedalis (n 6).

¹³ House of Lord Public Services Committee, *Emergency Healthcare: a national emergency*, HL Paper 130, 19 January 2023 <<https://committees.parliament.uk/publications/33569/documents/187215/default/>> Accessed 26.05.23.

¹⁴ Law Society of Northern Ireland, 'Publicly funded legal services cuts will disadvantage vulnerable' <<https://www.lawsoc-ni.org/publicly-funded-legal-services-cuts-will-disadvantage-vulnerable>> Accessed 20.06.23; Lord Bellamy's review of independent legal aid—Ministry of Justice, *The Independent Review of Criminal Legal Aid*, 29 November 2021, <<https://www.gov.uk/government/consultations/independent-review-of-criminal-legal-aid>> Accessed 23.05.23.

the centrality of legally recognised rights to maintaining other social protections.¹⁵ Those without economic and/or social capital may well be without access to both law and healthcare, reinforcing this parallel and a traditional part of science fiction canon.¹⁶ There is a reciprocal element to this emergent multidimensional dystopia: voicelessness, construed as the lack of social or economic autonomy, reinforces the vulnerability of those whose rights have no effective advocate and who are ‘more likely to face barriers’ in accessing services (as Newman and colleagues argue).¹⁷

These issues combine many of this special edition’s key themes: dystopia, intersectionalities of rights and normative values, critiques of power and its structures, vulnerabilities in austerity and voicelessness. Such concerns may be meaningfully interpreted through the prism of access to time or ‘temporal discourse’, and through the law’s relationship with time more broadly.¹⁸ Discussion about the balance between certainty and freedom, predictability and the scope for change cuts through both practical and abstract legal concerns. This principle is complicated by the variance and discretion of equity, as well as how this conflict is balanced between the responsibilities of legislators and the rights of those they legislate for. This author’s research explores the impact of artificial intelligence upon law; over the last year in particular its applications above and beyond law or basic responses have become clear. Some arguments here are expanded through this lens.

Equitable Principles and Legal Certainty: The Constructive Trust

As Waters underlines in his classic work, the constructive trust (sometimes CT) is an instrument of law where intent is irrelevant and the finding of the existence of the trust is always a ‘creative task’, making it an excellent vehicle to explore the key topics of this piece.¹⁹ At first glance the idea that equity, conceptually pliable and replete with principled maxims, assumes primacy over the ostensible rigidity of the common law appears incoherent. In contract law, certainty dominates, while tort law works through the attribution of blame and the tracing of causal threads. Equity is neither: historically, it sought answers where other legal tools and principles failed to deliver.²⁰ Some would describe these mechanisms as inscrutable, ‘fragmented and unstructured’ (Kahi Liew), leading to an ‘epistemological gap’ in the civil law

¹⁵ Recently articulated by Martha Fineman, ‘Populations, Pandemics and Politics’ (2021) 21 IJDL 3; and also in ‘The Vulnerable Subject: Anchoring Equality in the Human Condition’ (2008) 20 YJLF 1, where she develops vulnerability theory, relevant in several parts of this article; see also Kathryn McNeilly, ‘Are Rights Out of Time? International Human Rights Law, Temporality, and Radical Social Change’ (2019) 28 SLS 6.

¹⁶ A point underscored by Daniel Newman and colleagues, ‘Vulnerability, legal need and technology in England and Wales’ (2021) IJDL 2, 230–253, 237.

¹⁷ Ibid, 237.

¹⁸ Lawrence LeShan, ‘Time Orientation and Social Class’ (1952) JASP 47 in Greenhouse (n 4); see also Sian Beynon-Jones and Emily Grabham, *Law and Time* (1st edn, Glasshouse 2019).

¹⁹ Waters, *The Constructive Trust*, 1964 (The Athlone Press) 1–3.

²⁰ Debruche outlines equity’s opacity as a problem for the court system in expanding on Montesquieu’s concerns that it was merely ‘judicial arbitrariness’, Anne-Francoise Debruche, ‘What is “Equity”? Of Comparative Law, Time Travel and Judicial Cultures’ (2009) 39 RGD 1, 203–228, 208.

tradition, as Wu argues.²¹ The constructive trust arguably creates a similar division within equity itself as that which exists between equity and the common law.

The device of the constructive trust appears to be an administrative fiction, willed into being by the workings of equitable principles described fittingly as ‘equity’s chameleon’.²² Its creation raises important questions of temporality and the law alongside categorical challenges as to whether these creations of the courts can be considered trusts. Constructive trusts sit alongside doctrinally robust and better-defined vehicles, including express and resulting trusts, which act as a direct vector for intent, contrasted with the oblique and ‘creative’ CT.²³ Under this practical distinction lie philosophical concerns about the purpose of law, its accessibility to the ‘othered’ and ethical rights to a remedy, engaged further below.

This section explores legal and jurisprudential methodologies underling the constructive trust, including common intention CTs and remedial CTs, going on to consider how these inform our understanding of the constitution, operation and purpose of the trust within equity. The rhetorical thread follows the idea that a fundamental principle of equity is its flexibility, and that the vehicle of the constructive trust and associated remedies is both reasonable and effective. This draws out critiques of established and formalised networks of power and knowledge within law, as well as the potential for disjuncture between the conventional processes and procedures of law and justice as the delivery of a moral good.

Graham Virgo describes equity as ‘a counterweight to rigid judicial interpretation of the common law’.²⁴ The validity (or otherwise) of this judicial freedom to construe remedial devices such as constructive trusts gives rise to questions that cut to the heart of equity’s societal role and relationship to other areas of law. Equity is articulated as ‘a gloss on the common law’ by Petit, whereas Duncan, among others, questions its general effectiveness as a source of remedial action.²⁵ Such scholarly concerns run in parallel with issues of justice: for whom is equity available, and what constraints are there upon its application in courts? These descriptions reveal equity to be an especially complex, controversial and conditional area of law, an inchoate partner to the robustness of common law. As such, it gives rise to more classificatory issues than contract or tort, and historically always has done: see Hohfeld in the US, Burrows in this jurisdiction, and Aristotle’s discussion of justice in *Ethics* for a theoretical insight.²⁶ The sorts of rigid rules that exist within common law are not mirrored in equity.

²¹ Ying Khai Liew, ‘Rationalising Constructive Trusts’ (Bloomsbury 2017); Ying-Chieh Wu, ‘*Constructive trusts in the civil law tradition*’ (2018) JE 12, 319.

²² Gino Dal Pont, ‘*Equity’s Chameleon – Unmasking the Constructive Trust*’ (1997) 16 ABR 46.

²³ Waters (n 19).

²⁴ Graham Virgo, ‘Conscience in Equity: a new utopia’ (2017) OLR 15 [1].

²⁵ Philip Petit, ‘Equity and The Law of Trusts’ (2012, 12th Ed); Anthony Duggan, ‘Is Equity Efficient’ (1997) LQR 601.

²⁶ Wesley Newcomb Hohfeld, ‘The Relations between Equity and Law’ (1913) 11 MLR 8; Andrew Burrows, ‘We Do This At Common Law But That In Equity’ (2002) 22 OJLS 1; Allan Beever, ‘Aristotle on equity, law and justice’ (2004) LT 10.

In using the constructive trust to understand equity's place within common law, and its relationship with branches of philosophy that engage justice and fairness, they must be considered in the context of what equity is and seeks to do. Other instruments like express trusts are comparatively much more structured: this distinction allow us to engage questions about legal certainty, and the complementary role that both systems can play in theory, even when the practice is often sharply different. This has real implications for available remedies, the accessibility of law and fundamental questions about the legal narrative behind the typologies that structure, or perhaps fragment, the discipline of law.

Set against this context, a single definition of what a trust constitutes is itself something of a fiction, itself historically a platform for 'judicial creativity' (Palowski), and so difficult to define uniformly.²⁷ What is or is not a trust remains contested: the issue is not a matter of settled law, especially when a comparative cross-jurisdictional perspective is assumed.²⁸ Etherton argues that CTs escape a universal definition and implies that in grappling with these conceptions of a trust we give shape to equity in practice by exploring the features of trusts and the remedies they seek to redress.²⁹ This directly informs our understanding of trusts as a general principle of equity: whether CTs are trusts depends on how these ideas are applied.

This is supported by the extent to which equitable principles are applied on a situational, case-by-case basis, especially when CTs are involved. In *Yeoman's Row Management Ltd v Cobbe*, the constructive trust is realised as constituted from a set of factual circumstances that form a case-specific approach to determining its existence.³⁰ In this instance, the need for certainty led to a finding that no promissory estoppel had existed.³¹ Law is a part of our social narrative, and it matters that the law is accessible, both in terms of its comprehensibility and, as discussed, how much it can be relied upon as a remedy.³²

Here, we see public policy considerations and the need for certainty competing with the equitable principle that 'Equity will not suffer a wrong to be without a remedy', as well as the circumstances in which the equitable remedy of a constructive trust will not be available to claimants. In *Carl Zeiss Stiftung v Herbert Smith & Co*, the court explicitly proposes that the vagueness of the CT in English and Welsh and Northern Irish (EW&NI) law is a strategic decision to apply justice to the facts and

²⁷ Mark Palowski 'Is equity past the age of child bearing' (2016) 22 TT 8; this gives rise to discussions about the idea of narrative and fiction within law, discussed later.

²⁸ See Charlie Webb, 'The Myth of the Remedial Constructive Trust' (2016) 69 CLP 1 for discussion of the (often historically staggered and incremental) development of different and sometime incoherent concepts of the constructive trust between common law jurisdictions.

²⁹ Terence Etherton, 'Constructive Trusts: a new model for equity and unjust enrichment' (2008) 67 CLJ 265.

³⁰ *Yeoman's Row Management Ltd v Cobbe* (2008) 1 WLR 1752.

³¹ *Ibid.*

³² This gives rise to a problem discussed later with the idea of equity as a last resort; it would be imprudent for a solicitor to advise their client to rely solely on an equitable remedy, but negligent for them not to outline the possibility if it were reasonable.

the claimant, rather than being limited by restrictive typologies.³³ This consideration raises questions of the relevance of nomenclature: if a constructive trust, trust or other instrument allows equitable principles to prevail, and delivers a remedy, how much does the question of whether a CT is a trust really bear on these issues of jurisprudence and fairness?

We can see in cases including *Halifax Building Society v Thomas* (and more recently *FHR European Ventures LLP v Cedar Capital Partners LLC*) that CTs encompass the subcategory of the institutional CT. This is a more conventional variant than the common intention CT or remedial CT (not ratified in EW, but present in other jurisdictions, as Webb discusses).³⁴ When contrasted with the straightforward parameters used in cases involving express or resulting trusts, with comparatively crystal-clear guidelines as to when they come into existence and how they are to be applied by the courts, the argument that constructive trusts are not trusts must be engaged.

First, it is important to look at the three certainties, as defining criteria and a window into intention, within trusts and in equity more broadly. Without a clear intention from the testator as to the relevant object, subject and intention of a trust, it will fail (see *Knight and Knight*).³⁵ Another maxim sheds light on the problem of intention: ‘equity imputes an intention to fulfil an obligation’. The constructive trust runs against this: it is brought into being by the court to directly effect a movement of property according to equitable principles that would not otherwise be honoured. As such, we again see how CTs fall outside the traditional purview of the trust but serve to offer unique remedies and challenge typologies of these devices in delivering a just outcome.

This is especially true in cases involving family law and fraud, notably in *Grant v Edwards* and *Westdeutsche Landesbank Girozentrale v Islington LBC* respectively, where the court intervenes against an intention to avoid an arguable moral obligation.³⁶ Interestingly, it also conflicts with the maxim of wrongs and remedies, and we see this take precedence in the jurisprudence of the courts to fulfil the foundational principle that ‘equity directs attention to the spirit rather than the letter of the law’.³⁷ In *Westdeutsche*, Lord Browne Wilkinson described the courts’ role in an institutional CT as declaring its existence in the past, whereas a remedial CT was within their discretionary purview.³⁸

Remedial constructive trusts are now defunct in EW&NI, being dismissed by Lord Neuberger in *European Ventures*, but as these instruments and their development spread across the common law, they lose little relevance in this discussion.³⁹ The issue of temporality arises: where equitable property rights have diverged from legal ownership, the act of tracing the movement of resources and land rights

³³ (1969) 2 Ch 276.

³⁴ (1996) Ch 217; (2014) UKSC 45; Webb (n 28).

³⁵ (1840) 49 ER 58.

³⁶ (1986) 3 WLR 114; (1996) UKHL 12.

³⁷ Beever (n 26) [43].

³⁸ (1996) UKHL 12.

³⁹ *FHR European Ventures LLP v Cedar Capital Partners LLC* (2014) UKSC 45.

must reconstruct and, to a certain extent, (re)imagine their passage between various agents, as emphasised (inter-alia) in *Re EVTR; Gilbert and Barber* by LJ Bingham.⁴⁰

This pertains to the law's relationship with time, where equity may be seen as an 'invisible hand', as famously construed by Adam Smith.⁴¹ In this context, the court's creative action in construing the constructive trust gives rise to a trust through an assemblage of past actions where 'none of the participants within the system need intend' to cause their actions to give rise to a structured pattern, as Vermule outlines in his exploration of the jurisprudential applications of invisible hand.⁴² This is an especially fitting description of a vehicle that operates contrary to intent: one that forms part of a wider legal model that remains contested, misunderstood and open to philosophical debate reaching toward the purpose of law. It is also deeply relevant to the networks of social and power relations that the law operates through: in a simple sense, and especially with respect to family law, the CT may reasonably be understood as a legal tool that operates up a power gradient.

The question of whether constructive trusts are trusts seems again less important than the underlying validity of the remedies offered through the orders they make available to the courts. It is arguably secondary too to their upholding and enforcement of what may be considered the moral duties of that paragon of the law, the reasonable honest person, as the court underline in *Neste Oy v Lloyd's Bank*.⁴³ This ties into a cornerstone of legal ideology, that of the central narrative fiction: the reasonable person is a fiction in that they do not exist, but are conjured to mind as a shared mythology of sorts, broadly emerging from normative or positivist models.⁴⁴ Moran describes it fittingly as 'the common law's most enduring fiction', and its prevalence and robustness are both relevant later.⁴⁵

Wright purports one of the most persuasive arguments for CTs as trusts in a compelling cross-jurisdictional analysis of the constructive trust.⁴⁶ A court cannot find a CT without a compelling argument from the plaintiff: as the CT is ultimately a vehicle to deliver a remedy where it would not otherwise be possible, this is its primary function from both a legal and policy perspective.⁴⁷ Thus, it may reasonably be proposed that the question itself is a conceptual misdirection: it matters not what the CT is called, but only how it functions, whether that function as a remedial device

⁴⁰ (1987) BCLC 646.

⁴¹ Adam Smith, 'The Wealth of Nations' (Strachan and Caldwell 1776), a concept which is often misattributed to a staunchly libertarian market perspective (explored in William Grampp, 'What Did Smith Mean by the Invisible Hand?' (2000) 108 JPE 441).

⁴² Adrian Vermeule, 'The Invisible Hand in Legal and Political Theory' (2010) 96 VLR 6 1417–1452, 1423.

⁴³ (1983) 2 Lloyd's Rep 658.

⁴⁴ See Alan Miller & Ronen Perry, 'The Reasonable Person' (2012) 87 NYULR 2.

⁴⁵ Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) LCLR 14.

⁴⁶ David Wright, 'How much of a trust is a constructive trust?' (2012) 3 TT 18.

⁴⁷ Ibid.

provides access to justice, and whether that justice might more reliably or easily be sought elsewhere.

Since the inception of law, distinctions have been drawn between different kinds of justice: Aristotle's ethics refers to the ethics of family, which are well served by CTs.⁴⁸ A preponderance of cases including, prominently, *Stack v Dowden* and *Grant v Edwards* support the effectiveness of the courts' use of CTs to deliver equitable remedies in the form of finding equitable rights to shares in property.⁴⁹ Constructive trusts located property rights for the plaintiffs, and in both cases traced their residual aggregation across time and found a remedy not possible in the common law jurisprudence.

These judgements, and others, offered recognition of the historical cultural devaluation of the non-monetary work carried out by (often but not exclusively) wives in the home, as well as to property outside a domiciled marital relationship (see *Chan Pu Chan v Leung Kam Ho* inter-alia).⁵⁰ This move by the courts provided a redress that did not exist in common law, and a new understanding of the role of CTs more specifically. Without including them in the purview of trust law is to tacitly admit that the trust as a vehicle for legal orders and the imposition of justice through interpretation and application of intention is fundamentally deficient.

Constructive trusts span a broad scope; this approach sacrificed specific case-studies for a wider view that informs the key questions in this special edition. The CT often acts as a redistributive mechanism for aggregated socio-economic capital, and as such counterbalances other areas of law where those with a more influential voice in the legal process may turn it to their ends. It also runs counter to key narratives in law including the primacy of certainty and the prevailing desire for clear typologies.⁵¹

The more disputed the practical and theoretical parameters of an area of law, all things being equal, the more difficult the related processes are to automate. The converse is demonstrated in areas such as document review, contract analysis and compliance: these sections of legal practice are comparatively routine and work according to standard forms amenable both to computation and iterative machine learning.⁵² Skills at the heart of science fiction, imagination and creativity, are also central to areas of law with greater properties of complexity, simply with respect to the predictability of outcomes and the interaction between the elements involved.⁵³

This piece has explored constructive trusts in theoretical and applied contexts, and developed various arguments to support the value and jurisprudential basis of

⁴⁸ Beever (n 26), 34.

⁴⁹ (2007) UKHL 17; (1986) 3 WLR 114.

⁵⁰ (2003) 1 FLR 23.

⁵¹ Lord Manse (n 8).

⁵² See Sean Semmler, and Zeeve Rose, 'Artificial Intelligence: Application today and implications tomorrow' (2017) 16 DLTR 85; Enrico Francesconi and Guido Governatori, 'Legal compliance in a linked open data framework' in Michał Araszkiewicz, Víctor Rodríguez-Doncel (eds) *Legal Knowledge and Information Systems* (IOS Press 2019).

⁵³ Jamie Murray, Thomas Webb and Steven Wheatley, *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Wheatley 2019).

the orders and remedies they give rise to. It must reasonably be concluded that while their classification has some interpretative worth, whether or not they are named as trusts is secondary to their equitable utility. This encapsulates wider social concerns about fairness, and again outlines the problem of accessibility: might it be construed as access to a remedy or understanding of the law?

The origin of trusts as an expression the settlor's intent and not the court's is a valid argument, yet lacking in fundamentals of a contextual view. Wright simply summaries the debate: 'the large term trust is not simply a synonym for express trust', underlined by potentially misleading equitable axioms such as the imputation of intent.⁵⁴ Some legal scholars and students avoid equity, with its more flexible parameters and relative complexity that often require practitioners to interrogate established premises (see *Burbank*).⁵⁵

It may reasonably be proposed that legal actors in this field may develop skills that make their roles more difficult to automate. The tracing and elucidation of contested narrative and temporal threads is a feature of equity, just as an understanding of the same elements of an alternative world are the start of writing any story, especially one within the scope of science fiction. This follows into the sections below exploring law, time, creativity and imagination.

Shelly, Asimov and The Golem: Ghosts in the Machine

Mary Shelley's *Frankenstein* is, arguably, among the foundational works of science fiction: it combines fantastical conceptions of possibility with emerging ideas in anatomy and medicine to give rise to a new understanding of human nature.⁵⁶ It has also been the subject of a substantial amount of academic scholarship, not least within law. Martha Holmes describes the story as a text that informs understandings of disability, Irene Cambra-Badii and colleagues provide just one example of its application to ethical issues in contemporary medicine, and references to Frankenstein's monster are common in legal writing.⁵⁷

The creation of Victor Frankenstein and his creature (sometimes "monster", and never named) has echoed through many disciplines, but it is especially prevalent with reference to emerging artificial intelligence technologies.⁵⁸ The idea of the creation that runs amok, untethered from human control, is a cautionary tale about increasing reliance on increasingly powerful AI that has been in place for decades.⁵⁹ A key part of Shelley's narrative is the moral and philosophical journey of

⁵⁴ Wright (n 46), 272.

⁵⁵ Stephen Burbank, 'The Costs of Complexity' (1987) 85 MLR 5.

⁵⁶ Irene Cambra-Badii, Elena Guardiola, and Josep-E. Baños, 'Frankenstein; or, the modern Prometheus: a classic novel to stimulate the analysis of complex contemporary issues in biomedical sciences' (2021) 22 BME 1.

⁵⁷ Ibid, Martha Holmes, 'Born This Way: Reading Frankenstein with Disability' (2018) 32 LM 2; Rupert Skilbeck, 'Frankenstein's Monster' (2010) 8 JICJ 451.

⁵⁸ William Connell and Megan Hamlin Black, 'Artificial Intelligence and Legal Education' (2019) 35 CIL 5.

⁵⁹ Sam Lehman-Wilzig, 'Frankenstein Unbound, Towards a legal definition of AI' (1981) 13 Futures 6.

the creature from birth to demise through alienation, suffering and loss: we see him reading and understanding *Paradise Lost*, drawing out moral themes and parallels with his own experience.⁶⁰

In this section of the novel themes of othering and societal powerlessness are clear: the creature imagines befriending people, waiting for ‘an interview with them which would decide my fate’.⁶¹ Parallels emerge with the experience of those outside legal time (discussed later), at the apparent whims of a system which they exist outside, particularly in the context of rights to asylum and immigration.⁶² There is a broad scope for exploring hope and aspiration within law: it has implications not only in the rehabilitative ideals of punitive justice, but the delivery of personal justice through a compassionate system and forgiveness and reconciliation alongside many other topics.⁶³ A society without hope may be as good a pithy definition of a dystopia as any.

Riles discusses the status of fiction within law in her analysis of hope’s position in legal philosophy and practice, as well as its relationship with knowledge.⁶⁴ Sir Henry Maine described legal fictions as a mechanism through which the law evolved within society, part of a tripartite model that also included courts of equity and legislatures.⁶⁵ In this, we find a long-standing conceptual thread that ties together law, fiction, imagination and equity, through narrative and shared understanding. Frankenstein stepped across disciplinary and imaginative boundaries to create a new space for thought and imagination, and the creature connects to pervasive questions about artificial minds and framing humanity.

Some scholars, including Klass, have proposed Frankenstein’s monster (creature) as a type of robot, which ties together threads of narrative, science fiction, artificial intelligence and the matter of contested forms.⁶⁶ This problematic space is explored here through the above discussion of trusts alongside certainty and contested temporality engaged below. Othering and its effects is a critical thread throughout Shelley’s story, and it bears upon the depersonalisation of AI technologies. This begs the question: where do we locate humanity in these technologies, and how do these ideas cohere with authorship, responsibility and blame?⁶⁷

⁶⁰ Mary Shelley, *Frankenstein: 1818 text* (Oxford University Press, 2009) p121.

⁶¹ Ibid, 122; Interestingly, these themes are often diminished or written out of cinematic representations in favour of a less ambiguous narrative.

⁶² Joe Tomlinson, Jack Maxwell, and Alice Welsh, ‘*Discrimination in digital immigration status*’ (2022) 42 LS 2.

⁶³ There is some scholarship on this area, which has significant relevance to the themes of othering, voicelessness and dystopias here, and it appears a fruitful area for enquiry; Annelise Riles, ‘Is the Law Hopeful’ in Hirokazu Miyazaki and Richard Swedberg (eds) *The Economy of Hope* (UPP 2017); Kathryn Abrams & Hila Keren, ‘*Law in the Cultivation of Hope*’ (2007) 95 CLR.

⁶⁴ Riles (n 63).

⁶⁵ Henry Maine, ‘*Ancient Law*’ (1864, Charles Scribner).

⁶⁶ Morton Klass, ‘*The Artificial Alien: Transformations of the Robot in Science Fiction*’ (1983) *The Annals of the American Academy of Political and Social Science* 470, Robotics: Future Factories, Future Workers.

⁶⁷ Discussed by Skilbeck (n 57) with respect to criminal law and explicitly by Jennings Byrd and Paige Paquette, ‘*Frankenstein: a creation of artificial intelligence?*’ (2023) AIS 38.

Frankenstein's story is a fine example of developing the project first then asking moral questions (seen later in respect to digital services and public law). This project asks its own questions, querying its provenance and opening up the potential for reflexive moral analyses of the steps in its creation.⁶⁸ It also raises concerns about the responsibility lawyers should take for regulating and being involved in guiding the morality of such technologies, specifically large language models (LLMs) and more contemporary and pervasive forms of AI. These have, arguably, the greatest potential to unintentional catalyse developing socio-economic inequality, a concern raised by Byrd and Paquette in respect to labour utility.⁶⁹

Pertinently, Bruno Latour suggested the creation of monsters has been among the defining features of modernity.⁷⁰ Tranter uses this as a gateway into hybridisation of law and technology, and idea that has a very different form in 2023 than it did at the time of writing in 2007: LLMs and changing perceptions of AI have, in some moments, produced the kinds of fear that the arrival of Frankenstein's monster did in Shelly's work.⁷¹ Equity may be conceived of as a monstrous creation in a similar way, through examining it using the lens of how the constructive trust challenges established categories and certainty, coming about through seemingly unnatural means.

In contrast with Frankenstein, there is limited scholarship on Isaac Asimov's short story 'evidence'.⁷² The narrative emphasises fundamental questions about the rights that may be assumed by and assigned to non-humans.⁷³ For these purposes, the key point in the story is the moment an individual, Stephen Byrely, suspected to be a robot, is found to be wearing a protective shield that prevents the penetration of a scan that would find definitively prove his humanity, or lack thereof.⁷⁴ When challenged, he replies that he wears the shield as part of a principled decision to protect his rights, as well as those of others.⁷⁵

Frankenstein is a story of obligations and responsibilities, as well as negative rights, whereas Evidence develops the idea of human and non-human rights—both offer perspectives from an exploratory and hypothetical lens.⁷⁶ While the idea of AI systems possessing human rights is still an imagined future, ownership of ideas through copyright or allocation of fault and liability are distinctly current, real

⁶⁸ Holmes (n 57).

⁶⁹ Ibid.

⁷⁰ Bruno Latour, *We Have Never Been Modern* (Catherine Porter trans., Harvard University Press 1993).

⁷¹ Tranter (n 6); a prominent area in 2023 has been the real and perceived threat to jobs, engaged alongside moral concerns about AI implementation by Evgeni Aizenberg and Jeroen van den Hoven, 'Designing for human rights in AI' (2020) 7 BDS 2.

⁷² One exception being: Sue Short, 'The measure of a man?: Asimov's bicentennial man, *Star Trek's* data, and being human' (2003) 44 Extrapolation 2.

⁷³ Copyright is one example, as explored by Yuwen Shi, 'On Negativism of Legal Personality of Artificial Intelligence' (2022) 1 JEHS 90–96.

⁷⁴ Isaac Asimov, 'I Robot' (Gnome Press, 1950), p114–131.

⁷⁵ Ibid, 126.

⁷⁶ Irene Cambra-Badii and colleagues (n 56).

concerns.⁷⁷ Technology itself offers a prism through which to examine rights and vulnerabilities that are explored in the next section, along with fundamental concerns about how these issues connect to individual and personal time.

In attempting to understand the field of rights, obligations and responsibilities that exist between and among human and non-human actors, themes of othering and inter-sectionality arise again. This is only part of a field that includes systematic bias, data protection and transparency alongside vulnerability, bias, discrimination and legal personhood, all of which arise in these narratives.⁷⁸ “Evidence” also elegantly illustrates hypothetical dimensions of rights that, as well as being challenged, are enmeshed in possibility. The question of where rights of ownership can be placed, their transference and temporal qualities is explored in equitable property rights and the concept of ‘mere rights’ that also pertains to discussions of hope, and serves as another connecting thread.⁷⁹

Parallels may be drawn between the position of Equity within the wider legal framework and the role of the Golem in Jewish folklore and moral narratives. It symbolises many things at once, with a protean character and complex etymology.⁸⁰ Tene and Polonetsky invoke the concept of the Golem in their discussion of bias built into algorithmic decision-making; this is an application that covers a lot of relevant areas for these purposes.⁸¹ It connects to following discussions of time and powerlessness, as well as biases that compromise and threaten rights, contributing to othering and inter-sectionality of socio-legal power.

Equity gives life to the law by departing from certainty and the crystallisation of interpretation that can be seen in the more rigid interpretation of contract and ‘conventional’ trust law (sitting inside narrow typological boundaries). Fittingly to draw parallels with equity, the golem is described as “A highly mutable metaphor with seemingly limitless symbolism”.⁸² Some dimensions of equity might reasonably be imagined as metaphorical, rather than real, areas of law that only materialise in particular circumstances, not always easily apprehensible in advance.

It is also more subject to the circumstances of the specific court and set of facts than a clearer area of law. This is one reason why the phrase ‘last resort’ often attaches to it, which connects to Rubin’s articulation of it as useless in most cases; equity is often very difficult to engage, and is based within complex rules that are

⁷⁷ Shi (n 73); Sabine Gless, Emily Silverman and Thomas Weigend, ‘If Robots Cause Harm, Who Is to Blame? Self-Driving Cars and Criminal Liability’ (2016) 19 NCLR 412.

⁷⁸ Rowena Rodrigues, ‘Legal and human rights issues of AI: Gaps, challenges and vulnerabilities’ (2020) JRT 4.

⁷⁹ Adam Reilly, ‘Is the ‘Mere Equity’ to Rescind a Legal Power? Unpacking Hohfeld’s Concept of ‘Volitional Control’ (2019) 39 OJLS 4.

⁸⁰ Charles Rubin, ‘The Golem and the Limits of Artifice’ (2013) TNA 39, 56–72, for discussion of the many forms of the Golem in Jewish culture, as well as a useful exploration of our relationship with technology and control; see also Hillel Kieval, ‘Pursuing the Golem of Prague: Jewish Culture and the Invention of a Tradition’ (1997) 17 MJ 1.

⁸¹ Omer Tene and Jules Polonetsky, ‘Taming the Golem: Challenges of Ethical Algorithmic Decision-Making’ (2017) 19 NCJLT 125.

⁸² Marilyn Cooper, ‘Jewish Word – Golem: A Mutable Monster’ <<https://momentmag.com/jewish-word-golem/>> Accessed 10.06.23.

difficult to rely on.⁸³ So too the utopian promise of technological solutions often fails to materialise. The Golem is also described as being brought to life through a magic word or ‘secret name’, known only to certain scholars, and as a creature that is a source of convenience and redemption, but also of danger.⁸⁴ This draws out themes of unpredictability, hidden knowledge and a kind of double-edged sword that captures equity, artificial intelligence and the characteristic of the law to be used both as a source of justice and as a tool for the powerful to obfuscate and manipulate that same justice.

Legal Temporalities and Contested Narratives

The law’s relationship with time is a topic of increasing academic discourse. Beynon-Jones and Grabham have brought recent focus to it in their prominent edited collection; time also been engaged by academics such as Greenhouse from an anthropological perspective and more specifically by McNeilly through the paradigm of human rights.⁸⁵ Narratives and understandings of time within law may be meaningfully employed to address questions of social justice and policy, particularly given the recent developments in AI and prevailing narratives about time saving.⁸⁶

In the opening to H.G. Wells’ ‘The Time Traveller’, the eponymous character describes how any object must possess four, not three, dimensions.⁸⁷ When asked to elaborate by his surprised friends, he replies that without the quality of duration, any object will merely exist for a fragment of time, only to vanish immediately.⁸⁸ All law, too, has a temporal quality, encapsulated by Baade’s words: ‘law changes not only from place to place, but from time to time’.⁸⁹ Temporality may be understood as law’s position within chronological time, from its inception onwards, but also how elements involved in the law, language, narrative and norms, change across time. Greenhouse describes the role of institutions in regulating social change as bound up in temporal narratives, as a part of contested ‘shapes’ of time.⁹⁰ This section examines changes to legal services as battlegrounds for personal, legal and institutional time.

Exploring such areas encourages us to question how the law is understood and engages issues of accessibility. Science fiction requires a step outside the temporal and practical constraints of realism to create an alternative world governed, to

⁸³ Rubin (n 80), 68.

⁸⁴ Kieval (n80), 3–4.

⁸⁵ Beynon-Jones and Grabham (n 17); Greenhouse (n 4); McNeilly (n 14); Wistrich (n 4).

⁸⁶ As demonstrated in a piece by Teo which focuses, in part, on a misalignment of temporalities and unforeseeable threats produced by the increasing prevalence of AI technologies in law: Sue Anne Teo, ‘How Artificial Intelligence Systems Challenge the Conceptual Foundations of the Human Rights Legal Framework’ (2022) 40 NJHR 1.

⁸⁷ Wells (n 5) 1.

⁸⁸ Ibid.

⁸⁹ Hans W. Baade, ‘Time and Meaning: Notes on the Intertemporal Law of Statutory Construction and Constitutional Interpretation’ (1995) AJCL 43.

⁹⁰ Greenhouse (n 4) 1633.

a greater or lesser extent, by alternative laws (physical or social).⁹¹ Both of these provide an opportunity to consider the laws and rules that constrain and influence our own actions that may have been long taken for granted or assumed as the status quo.⁹² To borrow Rumsfeld's famous expression, some of these constitute 'known unknowns' and the others 'unknown unknowns' within which future-focussed regulation and policy changes must navigate.⁹³

UK government policy to move certain legal services online has the potential to remove a great deal of time pressure from a system under substantial stress, but this is not without cost. In changing means of access to those services it risks placing the vulnerable in an atemporal space where they cannot leverage available time into progressing their concerns through the legal system.⁹⁴ When these concerns relate to fundamentals like the right to remain in the country or accessing welfare support, the vulnerable can be imagined as trapped within a slice of time, where other basic concerns are untenable and almost impossible to pursue in the interim.⁹⁵ Tomlinson describes these problems of access as part of a dialogue within government about judicial time costs and time drains in public law more broadly.⁹⁶

He also emphasises that while those with stable internet access at home save a substantial amount of time at little cost, people who need to travel and pay to access an internet connection have a very different engagement with those services (social security or immigration).⁹⁷ In these examples, time is shown to be a property of law and a dimension of our social world; here the government is a gatekeeper of time through which legal services are dispensed. Robert Cover argues that a legal system and its concomitant social structures cannot exist 'apart from the narratives that locate it and give it meaning'.⁹⁸ This illustrates how this narrative and the actions that relate to it disincorporate those already 'othered' through a lack of socio-economic capital.

Singh elegantly outlines the matter in describing time as a resource for rich litigants used to militate toward desired outcomes, while those on the opposite end of the socio-economic spectrum suffer through an often unmet need for 'timely

⁹¹ Tranter (n 6).

⁹² Travis (n 6) 257.

⁹³ Department of Defence, News Briefing 12 February 2002, <<https://archive.ph/20180320091111/http://archive.defense.gov/Transcripts/Transcript.aspx?TranscriptID=2636>> Accessed 02.06.23; this concept has been brought into a range a scholarship, see—Ray Pawson, Geoff Wong and Lesley Owen, 'Known Knowns, Known Unknowns, Unknown Unknowns: The Predicament of Evidence-Based Policy' (2011) 32 AJE 4.

⁹⁴ With regard to social welfare law, accessibility and, specifically, 'hidden population groups' marginalised further by their lack of digital access, see: Daniel Newman and colleagues, 'Vulnerability, legal need and technology in England and Wales' (2021) 21 IJDL 3, 230–253, 240.

⁹⁵ Greenhouse (n 4).

⁹⁶ Joe Tomlinson, *Justice in the Digital State* (Bristol University Press, 1st ed 2019); Ministry of Justice (2012) 'Judicial review consultation', Press release, 13 December <www.gov.uk/government/news/judicial-review-consultation>, Accessed 03.06.23.

⁹⁷ Tomlinson and colleagues (n 62) p58.

⁹⁸ Robert Cover, 'The Supreme Court 1982 Term, Foreword, Nomos and Narrative' (1982) Faculty Scholarship Series. Paper 2705, 4–68.

justice'.⁹⁹ When time is used as part of the justification for large scale changes within administrative law, considerations of the narratives and dialogues we have around time become an important part of an equation of social justice.¹⁰⁰ Tomlinson points out that an appeals process in respect to these new problems of access should be 'carefully designed', though it is important to note that such policy changes are often lacking in an empirical evidence base.¹⁰¹ Sometimes it is a case of policy first, evidence later (if at all), which is problematic from a causative as well as a governance perspective: often political narratives occupy a place that evidence should hold instead.¹⁰²

Research into the movement of immigration services to a digital-only format has found that vulnerable groups face indirect discrimination through this change (especially the elderly and disabled).¹⁰³ Legal scholarship has historically taken insufficient notice of temporality, as French and Tomlinson both stress.¹⁰⁴ In these instances, it can be seen as a meaningful paradigm with which to view the disruption to peoples' lives in more holistic and non-economic terms, highlighting the conflict between personal and institutional temporalities.¹⁰⁵ Understanding how personal time is impacted by legal and policy decisions, perhaps through interdisciplinary work, creates a bridge with the discussions above.

Another important area is the principle, fundamental to the rule of law, that an act must be known to be wrong before it can be punished. On the face of it, the Wireless Telegraph (Validation of Services) Act 1954 seems an arcane statute, but it forms part of a specific and narrow set of laws that take retrospective effect. It is a widely accepted principle across 'most modern legal systems' (as underlined by Lord Kerr), but one that does not enjoy universal applicability.¹⁰⁶ Conceptions of time are not bound to a single legal system, and form part of a collectively understood societal narrative of fairness, enshrined in article 8 of the Human Rights Act.¹⁰⁷

Temporality in law has been productively examined through the lens of human rights, notably by McNeilly, Teo and others.¹⁰⁸ Johns, in particular, has explored how the compression of temporal focus within and outside law has changed the wider engagement with social issues through the focus on immediate term 'real

⁹⁹ Chhatrapati Singh, 'The Concept of Time in Law: Basis of Laws of Limitation and Prescription' (1990) 32 JILI 3, 328–349, 328, relevant to the above discussion about those trapped in a slice of time.

¹⁰⁰ Unequal elements of the equation seen through Singh's useful paradigm – Ibid.

¹⁰¹ Tomlinson (n 60), p59; Pawson and colleagues (n 92); for a more detailed examination of this area through a focus on effectiveness (across federal and national policy) as well as fairness, see Timothy Wilson, 'Redirect: the new science of psychological change' (2011, Little Brown).

¹⁰² Wilson (n 100).

¹⁰³ Tomlinson and colleagues (n 62).

¹⁰⁴ Joe Tomlinson, 'Justice in Automated Administration' (2020) 40 OJLS 708–736, 718, who states that temporality has been 'undeveloped within the legal academic sphere'; Rebecca French, 'Time in Law' (2001) 72 UCLR 3.

¹⁰⁵ Greenhouse (n 4).

¹⁰⁶ Ld Kerr in R v Walker (2017) UKSC 47 [22].

¹⁰⁷ Teo (n 85).

¹⁰⁸ McNeilly (n 14), Teo (n 85); Fleur Johns, 'The temporal rivalries of human rights' (2016) 23 IJGLS 1, 39–60.

time' issues.¹⁰⁹ One example is the focus on 'tiny packets' of human rights issues within the economic and temporal chain of production, a result of legislating in an increasingly globalised world where time-compressing and personally alienating technologies are increasingly prevalent.¹¹⁰

The paradigm of inter-sectionality integrates easily into this model, with individual rights, freedom and autonomy compressed through wider societal forces. It also connects with Tomlinson's focus on those othered by policy and governance changes driven by narratives of temporality and efficiency that use accessibility as a paradigm that is arguably fundamentally myopic.¹¹¹ Austerity feeds into a broader policy narrative for the need to make savings in time and money, often bound together as with the idea of judicial time in narratives around cost-saving through incorporating algorithmic technologies.¹¹²

Wistrich interestingly describes the role of the future in law as being more prominent than generally believed.¹¹³ In doing so he emphasises the role of prediction of court proceedings and judicial interpretations, which combines with contemporary work on the law and probability, where AI inevitably assumes a prominent role in the discussion.¹¹⁴ The language of probability may be described as the language of an imagined future, explicitly underpinning its connection with time. Court backlogs, as well as being a logistical concern, are an issue of the future of law and society, and are often expressed using the language of economic costs.¹¹⁵

Some of the arguments here may appear to be primarily economic, but are inevitably also inextricably linked to the practicalities and narrative elements of temporality. Just as axioms abound within equity, a great many phrases have been coined to explore time within law. Baade's comments about law's changing place within time and Cover's description of law as an imagined future projected onto reality stress the temporal localisation of law.¹¹⁶ We see this drawn out between common and civil law jurisdictions, language and a complex of other factors, as well as the imaginary character and requirements of law making itself.¹¹⁷ The first is fertile ground for research into areas such as how legal systems mediate the phenomenology of time, and the second leads into the next element in this discussion.¹¹⁸

¹⁰⁹ Johns (n 107) 58.

¹¹⁰ Ibid, 51.

¹¹¹ Tomlinson and colleagues (n 62).

¹¹² Dovile Baryse, Roece Sarel, 'Algorithms in the court: does it matter which part of the judicial decision-making is automated?' (2023) AIL 1–30 (forthcoming) <<https://link.springer.com/article/10.1007/s10506-022-09343-6>> Accessed 02.06.23.

¹¹³ Wistrich (n 4), 749.

¹¹⁴ Ibid; Casey and Niblett (n 7).

¹¹⁵ Ibid.

¹¹⁶ Baade (n 88); Cover (n 97); both in Wistrich (n 4).

¹¹⁷ See Greenhouse (n 4), 1640; Wistrich sets out the variety of forms law-making takes, including statutes, constitutions and judicial decisions, with each having 'its own distinctive temporality'—Wistrich (n 4), 750.

¹¹⁸ For a discussion of the former, see: Kieran Tranter, 'Nomology, Ontology and Phenomenology of Law and Technology' (2007) MJLST 8.

With respect to experienced time, a benefit of science fiction and imagination in general is the opening of a window to different perceptions and experiences of time. Tranter argues for the value of an interdisciplinary approach law and technology, drawing out the relations between them rather than reducing law to technology, or vice-versa.¹¹⁹ This discussion has underlined the value of a contextual and holistic approach to temporality, as well as exploring the ideas of imagination and temporality that allow us to examine inter-sectionalities of law and society that generate narratives that risk becoming instrumental in disempowering vulnerable groups.

It is important to situate language change within the temporality of law and individual experience of it. Language alters through time as the meaning and understanding of words develops and evolves; part of the lawyer's role is reading law, and in doing so exercising 'constant judgement and creation'.¹²⁰ Thus, part of the imaginative skill of law is both equity's art of reaching into the past and drawing out the intent of the original legislators and imagining in drafting law and policy how the language used might be construed in the future.

Imagination and Philosophy

Science fiction, as we have seen in examples from Shelly, Asimov and others, involves not only a consideration of the future, but an imaginative engagement with the consequences of inhabiting and interacting with counterfactual worlds.¹²¹ The conceptual tools involved have been a substantial historic component of that required to practice and understand law, drawing out the possible consequences of competing probabilistic threads.¹²² With the changes in the field brought about by the large-scale arrival of artificial intelligence, that epistemological equipment becomes substantially more valuable.¹²³

As Campbell and Ellison argue, the consideration of alternative worlds and parallel paths of development (of laws, ideas and society more broadly) is also a fundamental gateway to understanding the law from the position of social justice and, it could be argued, the Aristotelian concept of 'equity'.¹²⁴ Equity, especially when framed in this way with regard to certainty, challenges the imaginative skills needed by lawyers to engage with certain abstract problems. The equitable maxim "equity

¹¹⁹ Ibid.

¹²⁰ The idea of law and creation connects again to narratives within and outside law, and so to intersectionalities; James White, '*Law as Language: Reading Law and Reading Literature*' (1982) 60 TLR.

¹²¹ As argued by Travis (n 6) and Scott McCracken, *Pulp: Reading Popular Fiction* (Manchester University Press 1998).

¹²² Zedalis (n 6).

¹²³ Campbell and Eliason (n 10).

¹²⁴ Ibid.

will not suffer a wrong to be without a remedy” highlights the role of equity in acting as a counterbalance to the rigidity of the common law.¹²⁵

This is arguably by design, not by accident, and it reflects a proactive philosophical approach that requires a creative engagement with current legal problems. In an engagement with the concept of mercy within equity Nussbaum describes the role of the novel (and implicitly its writer) as carrying moral and legal significance, connecting to the themes of this discussion.¹²⁶ Nolan-Haley discusses the characteristic of equity as applying a narrow focus to specific circumstances, locating justice as a situational rather than universal conception.¹²⁷

Certainty in law and certainty around law may be distinguished conceptually: the first is an operational issue, and the second a philosophical one. While there is certainty around particular legal principles, it is more than reasonable to say that the discipline and practice of law has rarely, if ever, been in such an uncertain state with respect to the changes the next five to ten years might bring.¹²⁸ As such, the skills that allow legal practitioners to navigate uncertain and complex environments are likely to become noticeably more valuable. Some areas of law are much more amenable to certainty than others: one may, for example, place criminal law and contract law on opposing ends of this spectrum.¹²⁹

Jeremy Bentham’s utilitarianism and Immanuel Kant’s categorical moral imperative may usefully be employed to offer an intersecting philosophical axis.¹³⁰ A utilitarian view takes certainty as a prime outcome and objective within the legal process, whereas Kant’s position situates the more nebulous ideal of the moral good at its heart. Zoshack and Dew explore the implications of theoretical frameworks based upon ethics as implemented in ‘artificial moral agents’, and draw upon Kant’s rules-based approach as a contrast to Bentham’s moral calculus.¹³¹

A predominantly utilitarian approach is amenable to certainty, which, as discussed above, is optimal for much of contract and corporate law for commercial reasons, as well as integrating with a broadly libertarian perspective.¹³² Bentham himself was a proponent of legal certainty, as articulated by Portuese and colleagues in respect to expectations of property which is an essential part of many commercial

¹²⁵ As discussed in a historic overview of equity’s place in law – Jacqueline Nolan-Haley, ‘*The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound*’ (2004) 6 CJCR 57–72.

¹²⁶ Martha Nussbaum, ‘*Equity and Mercy*’ (1993) 22 PPA 2, 83–125, 85.

¹²⁷ Nolan-Haley (n 124, 61).

¹²⁸ Adrian Zuckerman, ‘Artificial Intelligence – Implications for the Legal Profession, Adversarial Process and Rule of Law’ (2020) Oxford Legal Studies Research Paper No. 9/2020 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3552131> Accessed 15.06.23.

¹²⁹ This is also true in the extent to which each area is amenable to algorithmic technology; Ibid.

¹³⁰ The contrast in the philosophical positions of both (John Stewart Mill was also a notable proponent of utilitarianism, which was criticised by John Rawls) is also by Ripstein in respect to the political morality—Arthur Ripstein ‘*Private Order and Public Justice: Kant and Rawls*’ (2006) 92 VLR 7, 1391–1438, 1391–3.

¹³¹ John Zoshak and Kristin Dew, ‘*Beyond Kant and Bentham: How Ethical Theories are being used in Artificial Moral Agents*’ (2021) Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems p 1–15.

¹³² Ibid.

transactions.¹³³ Viewed from a perspective of fairness, in some aspects of law legal certainty positions itself along a third axis, one with an either broadly restrictive or broadly open-ended relationship with judicial freedom.

Many science fiction narratives hold uncertain moral questions as a central pivot of the story, including the locus of power. Equity also relies on a concept of morality through a situational sense of what is reasonable rather than the quasi-empirical rationality of the common law. Law relies on these shared imaginative concepts in order to function effectively and coherently, even in areas such as contract and commercial law that deal more often with quantitative issues.¹³⁴ It is important to stress the historical role of creativity in law, and its reliance on imagined concepts shared throughout the discipline.¹³⁵

A parallel can be drawn here with the larger-scale historical analysis of Noah Harari and David Graber, both of whom stress the importance of imagination in the social construction of institutions and money respectively.¹³⁶ It is significant that a number of philosophically or scientifically uncertain concepts within law are taken as a given; not least among these is free will.¹³⁷ The judgment in *R v Kennedy* bears upon that with a quasi-humorous degree of minimalist understatement, 'The criminal law generally assumes the existence of free will'.¹³⁸ While the issue is broad and complex, it is perhaps the strongest example of a broadly uncontested concept at the heart of a substantial and significant element of law that may reasonably be said to have narrative elements.

Conclusion

Equity, science fiction and imagination may seem abstract concepts, often distant from the practical realities of law and policy. This discussion has demonstrated the dimensions in which these areas intersect with both philosophical and procedural concerns within and outside law. It is challenging to strike a balance between a large-scale view and the rigorous detail required in academic debate; the opportunity to explore the concepts of othering, inter-sectionality of power and narrative in an imaginative legal context has provided a distinct conceptual scope. From the philosophical origins of equity to concerns about the future of AI, issues of the moral good and temporality pervade law, even when they are not pragmatic concerns.

¹³³ Aurelien Portuese, Orla Gough & Joseph Tanega 'The principle of legal certainty as a principle of economic efficiency' (2017) EJLE 44.

¹³⁴ Danielle Kie Hart, 'Contract Law Now—Reality Meets Legal Fictions' (2011) 41 UBLR 1.

¹³⁵ Following Hart's (Ibid) discussions, it is notable that relatively little notice in practical and academic law has been taken of developments in behavioural science that underline the problem with existing imaginative models.

¹³⁶ Yuval Noah Harari, 'Sapiens: A brief History of Humankind' (Random House 2011) p28; David Graeber, 'Debt: The First 5000 Years' (Melville House 2011).

¹³⁷ See Kelly Burns and Antoine Bechara, 'Decision making and free will: a neuroscience perspective' (2007) 25 BLL 2; Laurence Tancredi, 'The Neuroscience of "Free Will"' (2007) 25 BLL 2, for discussion of the neuroscientific basis for free will as it is applied to law.

¹³⁸ (2007) UKHL 38 at [12].

Often, in practicing and studying law, there is neither the time nor the space to discuss such issues.

To return to Immanuel Kant, ‘happiness is not an ideal of reason, but of imagination’ – while dystopias require imagination, so too does a prospective movement towards the moral good, however it might be construed.¹³⁹ This can be grounded in practicality by exploring the socio-legal dimensions that produce othering in society, and actively or passively exploit the vulnerable. Through equity’s focus on remedies, science fiction narratives exploring othering and the role of time and imagination in legal narrative, attention has been drawn to the philosophical underpinnings of legal knowledge and practice. One of the most complex questions in law may be phrased with deceptive simplicity: “what is right”? Imagination, as well as being practically relevant to emerging inter-sectionalities of law, technology and language through AI, underpins the understanding, modelling and realisation of these important elements of our world. It gives us the tools to potentially pre-empt dystopian, or at least inequitable, outcomes and protect the interests of the vulnerable and marginalised.

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¹³⁹ Immanuel Kant, *Groundwork of the Metaphysics of Morals* (first published 1785, Cambridge University Press 1998) 29.

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